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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

235, 236, 237, 238 U. S.

BOOK 59,

LAWYERS' EDITION,

CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

THE PUBLISHERS' EDITORIAL STAFF

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY,
ROCHESTER, NEW YORK.
1926.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. EDWARD DOUGLASS WHITE.

ASSOCIATE JUSTICES,

HON. JOSEPH MCKENNA,

HON. OLIVER WENDELL HOLMES,

HON. WILLIAM R. DAY,

HON. CHARLES EVANS HUGHES,

HON. WILLIS VAN DEVANTER,

HON. JOSEPH RUCKER LAMAR,

HON. MAHLON PITNEY.

HON. JAMES CLARK MCREYNOLDS,[1]

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HON. THOMAS WATT GREGORY.[2]

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REPORTER,

HON. CHARLES HENRY BUTLER.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.[3]

FRANK K. GREEN, ESQ.[4]

[1] Appointed to succeed Justice Horace Harmon Lurton, who died July 12, 1914. Commission ordered recorded, October 12, 1914.

[2] Commission ordered recorded, October 12, 1914.

[3] Died January 3, 1915.

[4] Commission ordered recorded, January 5, 1915.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

October 19, 1914.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see *post*, Appendix IV. p. 1529.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1914, 1915.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I., Porto Rico.†	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice CHARLES E. HUGHES, New York.	President Taft.	Second. Vermont, Conn., New York.	1910. (May 2.)	1910. (Oct. 10.)
Associate Justice MAHLON PITNEY, New Jersey.	President Taft.	Third. New Jersey, Pa., Del.	1912. (Mar. 13.)	1912. (Mar. 18.)
Chief Justice EDWARD D. WHITE, Louisiana.	President Taft.	Fourth. Md., Va., N. C., W. Va., S. C.	1910. (Dec. 12.)	1910. (Dec. 19.)
Associate Justice JOSEPH R. LAMAR, Georgia.	President Taft.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1910. (Dec. 17.)	1911. (Jan. 3.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Sixth. Ky., Tenn., Ohio, Mich.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice JAMES C. McREYNOLDS, Tennessee.	President Wilson.	Seventh. Ind., Ill., Wis.	1914. (Aug.)	1914. (Oct. 12.)
Associate Justice WILLIS VAN DEVANTER, Wyoming.	President Taft.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., Oklahoma, New Mex.	1910. (Dec. 16.)	1911. (Jan. 3.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona, Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

* Territories assigned to circuits by order of the Supreme Court.

† Porto Rico added to first circuit by act of Congress of January 28, 1915 (38 Stat. at L. 803, chap. 22).

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AT

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1914.

STATE OF NORTH CAROLINA, Complainant,
v.
STATE OF TENNESSEE.

(See S. C. Reporter's ed. 1-17.)

Boundaries — between states — establishment by compact.

The disputed part of the boundary line between the states of North Carolina and Tennessee, as located by commissions appointed by the respective states in 1821, and ratified, confirmed, and established by each state, follows the Slick Rock creek and the Fodderstack ridge rather than the Hangover ridge and thence follows the main ridge of the Unaka mountain southwesterly, crossing the Tellico river, and such line is decreed to be the true boundary line, to be permanently marked by commissioners appointed for that purpose.

[For other cases, see Boundaries, III. c., in Digest Sup. Ct. 1908.]

[No. 4, Original.]

Argued October 15, 16, 1914. Decided November 9, 1914.

ORIGINAL suit in equity, brought by the State of North Carolina against the State of Tennessee for the judicial establishment of a part of the boundary line between the two states. The true boundary adjudged to follow the Slick Rock creek and Fodderstack ridge and thence to follow the main ridge of the Unaka mountain southwesterly, crossing the Tellico river.

The facts are stated in the opinion.

NOTE.—On judicial settlement of state boundaries—see note to Nebraska v. Iowa, 36 L. ed. U. S. 798.

Mr. Thomas W. Bickett, Attorney General of North Carolina, and Mr. F. A. Sondley argued the cause, and, with Messrs. Theodore F. Davidson and C. B. Matthews, filed a brief for complainant.

Mr. Charles T. Cates, Jr., argued the cause, and, with Mr. Frank M. Thompson, Attorney General of Tennessee, and Messrs. T. E. H. McCroskey and Samuel G. Shields, filed a brief for defendant.

Messrs. John Franklin Shields and William A. Stone filed a brief for the Babcock Lumber & Land Company, as *amici curiæ*.

Messrs. W. D. Spears and L. N. Spears filed a brief for Theodore Cobb et al.

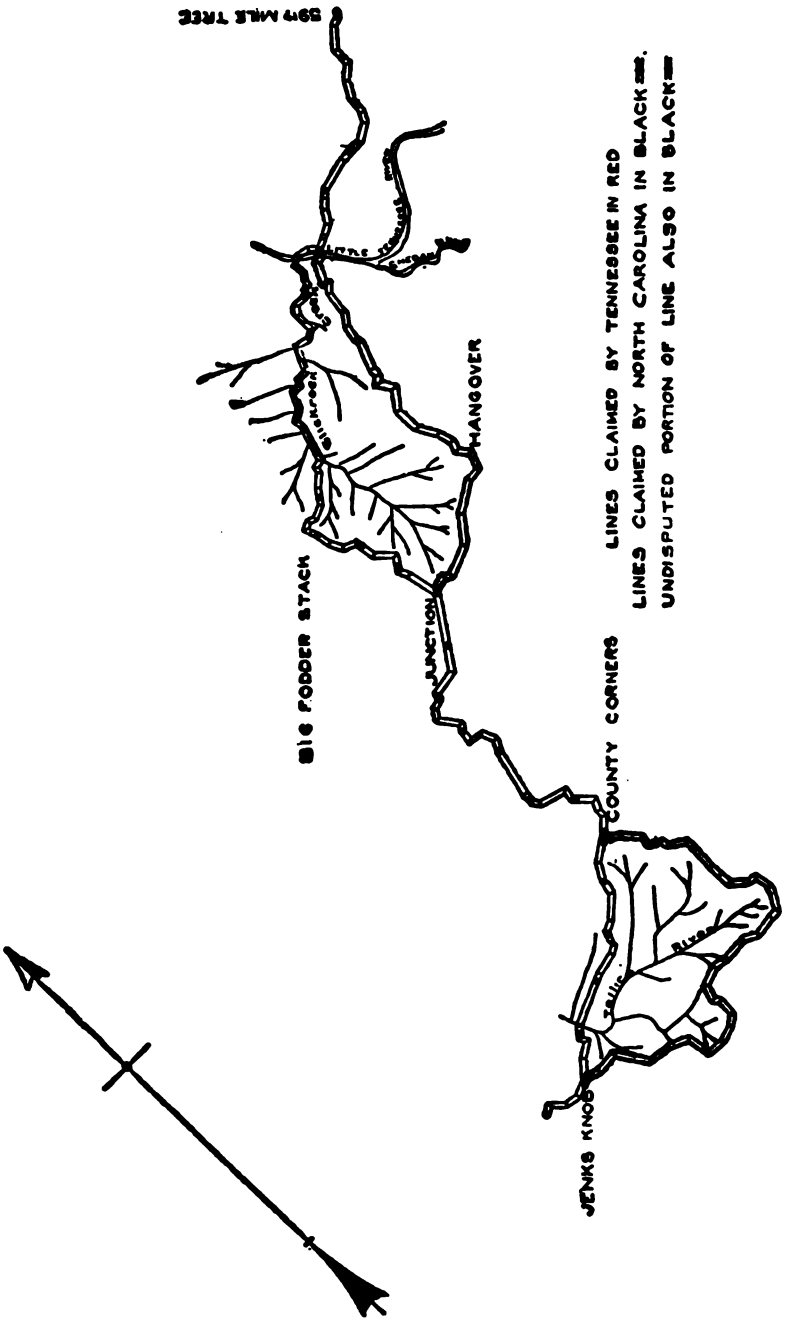
Mr. Justice McKenna delivered the opinion of the court:

Suit in equity instituted by the state of North Carolina, as complainant, against the state of Tennessee, as defendant, for the purpose of having settled and determined the true location of part of the boundary line between the two states.

The pleadings consist of the original bill as amended, answer to the same, cross bill, and replication. Their [3] allegations need not be detailed. They accurately present the controversy between the parties and the relief prayed by each of them.

The controversy concerns only a part of the line between the two states called, respectively, the Slick Rock and Tellico basins or territories. The contentions of the states are exhibited in general outline by the map on the following page.

It is alleged by North Carolina "that dispute and controversy have arisen as to the true location of the state line between the extreme height of the mountain north-


LINES CLAIMED BY TENNESSEE IN RED
LINES CLAIMED BY NORTH CAROLINA IN BLACK
UNDISPUTED PORTION OF LINE ALSO IN BLACK
BIG FODDER STACK
HANGOVER
JUNCTION
COUNTY CORNERS
JENKS KNOB

easterly of Tennessee river and the main ridge thereof southwesterly of the river," and she "has always believed and acted upon the belief, and alleges the fact to be, that the line between these points descends from the extreme height of the mountain northeast of the river to the river, crosses the river to a point in the southwest bank thereof just west of the mouth of the stream known as Slick Rock creek, follows the creek a short distance to a ridge leading up to the main ridge, follows said ridge up to the summit known as Big Fodderstack mountain, and follows the main ridge thence to the junction of the Big Fodderstack and Hangover leads, and thence follows the main ridge of Unaka mountain southwesterly."

Tennessee denies that the line described by North Carolina is the true boundary line, alleges that North Carolina, at the time of filing her original bill, "had not definitely determined how much of said boundary line she would dispute," alleges an extension of "the limits of the disputed zone," that complainant does not allege that the boundary as run and marked by the commissioners in 1821 (their appointment and action will be referred to hereafter) follows other than the extreme height of the mountain, which is agreeably to the cession act of 1789 (given hereafter), and expresses a willingness that the line should be so marked and established in the [5] orders of this court, and denies that it can be established agreeably to the cession act in any other place than along the extreme height of the mountain from the Tennessee river.

Further, Tennessee "denies that there is any uncertainty in regard to that part of the boundary line northeast of the river, and avers that said boundary line northeast of the river runs, and was so marked by the commissioners in 1821, down the crest of the main ridge of the mountain, which gradually lowers as it approaches the river, and on said line near to or on the bank of said river, about a half a mile above the mouth of Slick Rock creek, a pine or hemlock tree was marked as a 'fore and aft tree,' which said tree is still standing, and is recognized as a 'fore and aft' boundary line tree bearing the marks placed thereon by the commissioners in 1821, and described in the North Carolina confirmatory act and the report of said commissioners, hereafter shown." And avers "that said boundary line as described in said cession act of 1789, and run by said commissioners in 1821, crossed directly over the Tennessee river from said 'fore and aft tree' to the crest of the main ridge of the mountain, which is known as the Hangover ridge or lead, and which runs from the Stratton Bald northeasterly to the river, lowering somewhat as it approaches the river, where it ends or terminates in a bluff practically opposite said marked 'fore and aft tree,' thence along the crest of said Hangover ridge or lead to said Stratton Bald and the junction of Hangover with Fodderstack, the Fodderstack ridge, however, being several hundred feet lower than said main or Hangover ridge."

To these contentions the proof is directed, the record of which is voluminous. Besides other evidence, it is replete with the disputes of experts and of opposing deductions from their testimony. These, however, have their determination if not their reconciliation in certain dominating [6] elements upon which our judgment may be rested.

The territory constituting the state of Tennessee was ceded to the United States by North Carolina in 1789. In the act of cession the boundary line was, as described, from the French Broad river westerly as follows: "Thence along the highest ridge of the said mountain [Iron mountain] to the place where it is called Great Iron mountain or Smoky mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of such mountain to the southern boundary of this state." A deed was made by North Carolina, in pursuance of the act of cession, in 1790, which followed the same description, as did also the act of Congress accepting the cession; also the Constitution of the state of Tennessee.

In the year 1796 North Carolina passed an act appointing commissioners to settle the boundary line between the state and the state of Tennessee. The latter state also appointed commissioners with similar authority. In pursuance of the authority the commissioners appointed by the states settled the line from the east to a point on the Great Iron or Smoky mountain west of the Pigeon river, marked by a stone set up on the north side of the Cataloochee Turnpike road, about due north from the present town of Waynesville, in Heywood county, North Carolina, and about 6 miles east of the point where the Tennessee river passes through the mountain range, leaving the line to the southern boundary of the states unmarked.

Subsequently each of the states (North Carolina in 1819, Tennessee in 1820) passed acts appointing commissioners, to meet with commissioners appointed by the other, "and with them to settle, run, and mark the boundary line between" the states "agreeably to the true intent [7] and meaning" of the cession act. In the act of North Carolina it was provided that "this state

will at all times hereafter ratify and confirm all and whatsoever the said commissioners, or the majority of those of each state, shall do, in and touching the premises, and the same shall be binding on this state;" and Tennessee enacted "that whatsoever the said commissioners, or those appointed by each state, shall do in and touching the premises, shall be binding on this state."

Three commissioners were appointed by each state, who met and proceeded to the execution of their duties, and made report thereon to the respective states as follows:

"Having met at the town of New Port in the State of Tennessee on the 16th day of July A. D. 1821, to settle, run and mark the dividing line between the two States, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord 1799, to the Southern Boundary of the said States, Respectfully Report, That we proceeded to ascertain, run and mark the said dividing line as designated in the 11th article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of General Assembly of the State of North Carolina; entitled 'An act for the purpose of ceding to the United States of America certain Western lands' therein described, passed in 1789:—Which said dividing line as run by us, Begins at a stone set upon the north side of the Catalochee Turnpike road, and marked on the West Side of Ten. 1821; and the East side N. C. 1821. running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian Town of Tellassee, crossing Porters gap at the distance of twenty two miles from the beginning; passing Meig's boundary line at [8] thirty one and a half miles:—the Equonettly path at fifty three miles; and crossing Tennessee River at the distance of sixty five miles from the beginning. From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill towns, near the head of the West fork of Tellico River, and at the distance of ninety three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka mountain to the southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up marked Ten. on the West side and N. C. on the East side; and where a Hickory tree is also marked on the South side Ten. 101 m. and on the North side N. C. 101 m. being one hundred and one miles from our beginning. From thence a due course South two miles and two hundred and fifty two poles to a Spruce Pine on the North Bank of Highwassee River, below the mouth of Cane Creek; thence up the said river the same course about one mile, and crossing the same to a Maple marked W. D. and R. A. on the South bank of the River; Thence continuing the same course due south Eleven miles and two hundred and twenty three poles to the Southern Boundary line of the States of Tennessee and North Carolina; making in all one hundred and sixteen miles and two hundred and twenty three poles from our beginning; and striking the Southern Boundary line twenty three poles West of a tree in said line, marked 72 m.—Where we set up a square post marked on the West Side Ten. 1821; on the East Side N. C. 1821: and on the South Side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report. and which plats and [9] Report are certified by us in Duplicate, one for each of said States, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina."

Each state ratified the line located by the commissioners, following in their respective enactments the description of the report of the commissioners, and North Carolina "fully established, ratified, and confirmed" it "as the boundary line between the states of North Carolina and Tennessee forever;" and Tennessee "ratified, confirmed, and established" it "as the true boundary line between this state and the state of North Carolina."

The instructions to the commissioners were "to settle, run, and mark ['remark' are the words of the Tennessee act] the boundary line" between the states. The commissioners executed the duty and reported "that we proceeded to ascertain, run and mark said dividing line." The report gives the beginning and end of the line and the intermediate courses and objects, and concludes as follows: "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report; and which said plats and reports are certified by us in Duplicate, one for each of said States, in the same words, marks, and

figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina."

Each state by its legislature confirmed the report and declared the line as settled and run the boundary line between them, and, it is to be presumed, after due consideration.

The immediate question, therefore, is, Where was the line run? And the answer would necessarily seem to be determined by the monuments, courses, and distances; and, if these in any way conflict, by the line as marked [10] by the commissioners, if it can be ascertained, and the plats which accompanied the report certified in duplicate.

On the report of the commissioners no controversy was raised for years. It seemed to be certain, or rather was accepted as proof of what we may call for convenience the North Carolina contention. Tradition, supported, we think, by preponderating testimony, sustains it; and as early as 1836 it received some recognition from the legislature of Tennessee. In that year the state constituted a land district called the Ocoee district, and provided for laying it out into townships, fractional townships, etc., and also provided for the entry and granting of the lands. The surveyor general of the state, in accordance with the provisions of the legislation, surveyed and platted the lands, and the plat shows that he made Slickrock creek the eastern boundary of the district. North Carolina surveyed the lands in the disputed territory in 1851 and made grants in 1853.

Upon an entry made in 1882 under laws passed by Tennessee and a grant from said state in 1892 the first judicial controversy arose over the boundary line, and the contention of Tennessee was sustained. Belding v. Hebard, 43 C. C. A. 296, 103 Fed. 532.

The opinion in the case was delivered by the late Mr. Justice Lurton, then a judge of the circuit court of appeals, and exhibits the usual care and ability of that learned justice. He enumerates the contentions of the parties, the elements of the contentions, compares and weighs the evidence adduced for their support, and concludes as follows:—

"There has been, on the evidence in this record, no such long and continued recognition or acquiescence in the tentative line on Slick Rock creek as to justify this court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary. The conclusions and findings of the [11] master upon the principal points in the case are not shown to have been so plainly erroneous as to justify us in overturning his conclusions as to the existence of the marked state-line trees on the Hangover, nor as to the fact that the Hangover was palpably the 'main ridge' called for in the commissioners' report and survey.

"The case, on the whole, is one not free from doubts engendered by the existence of the marked line on Slick Rock creek and its apparent recognition by the Tennessee surveyor general as the state line. The result reached by the special master, and confirmed by a most careful and conscientious trial judge, is a result which, on the whole, is most consonant with the calls in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the circuit court. The decree will therefore be affirmed."

The antagonism of the evidence to the North Carolina contention is put with more emphasis in Stevenson v. Fain, 53 C. C. A. 467, 116 Fed. 147, where, considering the controversy as to Tellico territory, Mr. Justice Lurton, again speaking for the court, said:—

"In Belding v. Hebard, supra, we had occasion to ascertain a portion of this dividing line, a few miles northeast of the part now in dispute. In that case we had evidence of two different lines, both probably run and marked by the joint commission. The line called the 'Slick Creek' line was the better marked line, but was a plain departure from the call to follow the 'main ridge.' There was an old marked line on the 'main ridge,' and, though not so well marked, had the great advantage of being supported by the calls for course and the call for the extreme height of the 'main ridge.' Under the evidence we held the latter to be the line 'run and marked' by the commission of 1821, and adopted by the [12] confirmatory acts of both states. In that case, as in this, we were confronted with the fact that the Tennessee Cherokee survey had stopped at the Slick Creek line, and in that way recognized that as the line. But upon the whole case we held that the evidence relied upon to pull the line away from the 'extreme height' of the 'main ridge' was insufficient. The marked difference between that case and this is, first, in the fact that the 'main ridge' called for in the confirmatory acts of 1821 was far more clearly ascertained than in the present case; and, secondly, there was in that case evidence that two lines had been run and marked and old state-line marks shown on both lines. The call for the 'main ridge' was, therefore, supplemented by the existence of artificial monuments, and this turned the scale over the

other, although the more plainly marked line."

The "main ridge" and the "extreme height" thereof were considered by the court as dominant criteria, and that the calls of the cession act and of the confirmatory acts of the state and the line run by the commissioners established Hangover to be the main ridge, and yet it was said, in estimate of opposing evidence, the case was not free from doubt. And in affirming the judgment, deference was expressed to the finding of the special master and circuit court.

We need not pause to weigh the evidence in that case. It is reproduced in this, but here there is further evidence which gives different probative quality to the circumstances which were considered controlling in that case. It may be true—indeed, it is so alleged by complainant—that the boundary line between the two states may be generally described as following the main ridge or watershed of the Allegheny mountain range, but it has many local names and the topography of the country made it far from indubitably clear where the boundary line of the states should be located. Commissioners were hence [13] appointed to locate it, and their appointment and the controversies and the litigation which have arisen demonstrate that there was room for a choice and judgment of location,—to be specific, of ridges. The states, we have seen, agreed to abide by the judgment of the commissioners, and to ascertain their judgment then is, as we have said, the inquiry in the case.

The commissioners reported that they had distinctly marked the dividing line run by them in its whole length "with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report, and which said plats and Report are certified by us in Duplicate, one for each of said States, in the same words, marks and figures." These plats were not in the Hebard Case.

According to the report of the commissioners, the plat was certified in duplicate, one for each state. It may be that the one filed with North Carolina was lost or destroyed when the Capitol building of the state was destroyed in 1832; that filed with Tennessee was discovered in 1903 or 1904 by the state Archivist among papers supposed to be worthless. Its authenticity is not questioned.

In November, 1910, a book purporting to be the field notes of W. Davenport, the surveyor who accompanied the commissioners, was found by his grandson in an old desk or sideboard which belonged to Davenport in his lifetime. The first three pages of the book are in the handwriting of Davenport. Other pages of the book are not in his handwriting, but in that of his wife, who often acted as his amanuensis. However, here and there are corrections by Davenport. The original book was exhibited at the argument and showed the following:

"W. Davenport's Field Book, July 18th 1821.

"July 19th, 1821, began at the Catalucha track to run the line between the State of North Carolina and Tennessee. [14] Marked a rock there on North Carolina side N. C. 1821 and on the other side T. E. N. 1821—and runs with the line that J. McDowell, M. Matthews and D. Vance run in the year 1799, and runs with said line about 2 miles and a half to where they stopped." Then follow the courses and distances, with trees by name of kind and other physical objects.

These documents are variously interpreted by the experts of the parties. To detail and compare these interpretations and the arguments in support of them would be a tedious task, and would have to be very extensive to adequately represent their strength. We have estimated them, but consider that general comment rather than specific review is sufficient. The documents undoubtedly have inaccuracies and fault may be found with them, but, allowing for it, they have a direction and concurrent strength which cannot be resisted when combined with other testimony, and demonstrate that the commissioners did not locate the dividing line on the Hangover ridge, but located it along Slick Rock creek to Fodderstack. Their report agrees with such line and the local topography justified its selection. The dividing line as run by them, they reported, began "a stone set upon the North side of the Catalochee Turnpike road, running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwesterly on the extreme height thereof to where it strikes Tennessee River . . . and crossing Tenessee River at the distance of Sixty-five miles from the beginning." Thus far there is no dispute or uncertainty. "The summit" of the mountain and its "extreme height" should determine the locality of the line and the Tennessee river at a distance of 65 miles from the beginning. The next call has no such certain and conspicuous witness. The river is crossed and thence the line runs "to the main ridge" and then along [15] the "extreme height" of it. The words of the call suppose an interval between the river and the "main

ridge" whose extreme height thereafter is to be followed,—to be definite, a course up Slick Rock creek to Fodderstack. But, granting that it could be literally satisfied without supposing such an interval, that is, connecting immediately with Hangover ridge, we must resort to the evidence to resolve the conflict of suppositions. We find the first established by the evidence which we have referred to and the marks on the trees. And these marks have of themselves great strength of proof,—irresistible strength when combined with the other testimonies. They are the same in character as those on the undisputed part of the line, made, therefore, to define the continuity of the line, and the report explicitly states that the line was so defined in continuity,—marked "in its whole length." We certainly cannot consider that a few trees—two or three only—identified as "State-line trees," marked on Hangover ridge, satisfy this statement, or determine that a line along that ridge was the ultimate one selected and the other but tentative, notwithstanding there were found on it from the river to the Fodderstack twenty-seven marked trees, and from the latter point to the junction about as many more. Conjecture against this we cannot indulge. Imagination is not proof, and, we repeat, whatever might be said of any particular piece of evidence standing by itself, their union and concurrence amount to demonstration. And, we repeat, it must have been supposed by the states when they constituted the commission that judgment would have to be exercised, and, when exercised, should be binding. The contention of North Carolina is therefore sustained by the proof as to Slick Rock basin.

But it is contended by Tennessee that if the commissioners located such line the location was a departure from the cession act and the act of Congress adopting it, and that such line not having received the consent or sanction [16] of Congress is invalid and in conflict with article I., § 10, clause 3 of the Federal Constitution, providing that "no state shall, without the consent of Congress, . . . enter into any agreement or contract with another state," etc. If the fact of such departure could be conceded the conclusion might be disputed. Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728. But the fact cannot be conceded. The cession act is very general and necessarily demanded definition to satisfy the requirements of a boundary line,—a line not only necessary to mark private property, but political jurisdiction. This was realized and commissioners were appointed to run and settle the line exactly. Their work as executed was confirmed by the states.

The considerations which determine decision upon the contentions of the states as to the Slick Rock basin apply to the Tellico territory. Indeed, they make more strongly against the Tennessee contention. Without the newly discovered evidence the judicial judgment was adverse to that contention. Stevenson v. Fain, 53 C. C. A. 467, 116 Fed. 147. The judgment is fortified by the evidence in this case. The comments of the court in that case and the considerations which have been expressed in this are sufficient to disclose the grounds of deciding that North Carolina is also right in its contention as to the Tellico territory and in the relief sought by its bill.

A decree should be entered adjudging that the disputed part of the boundary line between the states of North Carolina and Tennessee which was run by the commissioners appointed by the respective states in 1821, and who made report thereof dated at Knoxville, Tennessee, August 31, 1821, descends from the extreme height of the mountain northeast of the Tennessee river, crosses the river at a distance of 65 miles from the beginning to a point on the southwest bank thereof just west of the mouth of the stream known as Slick Rock creek, follows the creek a short distance to a ridge leading up [17] to the main ridge, follows said ridge up to the summit known as Big Fodderstack mountain, and follows the main ridge thence to the junction of the Big Fodderstack and Hangover leads, and thence follows the main ridge of the Unaka mountain southwesterly, according to the plat exhibited with this opinion. And, further, that commissioners be appointed to permanently mark said line.

The cross bill of the state of Tennessee should be dismissed.

Counsel for the respective states are given forty days from the entry hereof to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the states.

Mr. Justice Day took no part in the consideration and decision of this case.

FRANKLIN K. LANE, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, Appts.,
v.
CORNELIUS C. WATTS, Dabney C. T. Davis, Jr., John Watts and James W. Vroom.

(See S. C. Reporter's ed. 17–23.)

Public lands — reservation from sale or disposal — Mexican land grant.

1. The reservation from sale or other disposal until final action of Congress, made by the act of July 22, 1854 (10 Stat. at L. 308, chap. 103), § 8, in favor of such Mexican or Spanish land claims as should be presented to the surveyor general of New Mexico for his report to Congress, did not prevent the location of the grant made by the act of June 21, 1860 (12 Stat. at L. 71, chap. 167), of vacant lands to be selected in lieu of lands common to two Mexican land grants, upon lands embraced in Mexican land claims which were not disclosed until after such selection and location by the Land Department,—especially where such claims were thereafter judicially declared to be void.

[For other cases, see Public Lands, 670–673, in Digest Sup. Ct. 1908.]

Trial — issues — cloud on title — conflicting Mexican grants.

2. The relative superiority of a claim under a confirmed Mexican land grant and a claim of title based on an approved location under the act of June 21, 1860, 12 Stat. at L. 71, chap. 167, of the grant made by that act of vacant land to be selected in lieu of land common to two Mexican grants, is not open for decision in a suit brought in the District of Columbia courts to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud upon the title under such approved location by proceeding in the matter of certain attempted entries upon the land under the public land laws, to which suit the claimants under the confirmed grant are not parties.

[For other cases, see Trial, II.; Private Land Claims, 473–475, in Digest Sup. Ct. 1908.]

[No. 889, Oct. Term, 1913.]

Decided November 2, 1914.

ON LEAVE to file a petition for rehearing of a decree which affirmed a decree of the Court of Appeals of the District of Columbia, which had in turn affirmed a decree of the Supreme Court of the District, enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public land laws. Leave to file denied.

For original opinion, see 234 U. S. 525, 58 L. ed. 1440, 34 Sup. Ct. Rep. 965.

The facts are stated in the opinion.

Assistant Attorney General West and Mr. C. Edward Wright for the petition.

Messrs. Herbert Noble, G. H. Brevillier, and James W. Vroom opposed.

Mr. Justice McKenna delivered the opinion of the court:

Leave to file an application for rehearing is asked. We see no reason to grant it, but to avoid misunderstanding of the opinion we may add a few words.

The opinion is explicit as to the main elements of decision. It decides that the title to the lands involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in 1864, in pursuance of the act of 1860 (12 Stat. at L. 71, 72, chap. 167). A survey, it was said, was necessary to segregate the land from the public domain, and the condition was satisfied by the Contzen survey. It follows, therefore, that the land was not subject to homestead or other entry under the public land laws, and the asserted jurisdiction of the Land Department over it for that purpose could be restrained.

It is suggested, however, by appellees that appellants urge that certain claimed Mexican grants conflict with the location, and that the opinion leaves uncertain the effect of this, and that therefore it may encourage or require further litigation. Appellants assert that the effect of the claimed Mexican grants is reserved from decision, and yet the Land Department is enjoined from exercising any jurisdiction over the conflicting areas.

[21] A few words of explanation will make certain the extent of our decision. In adjustment of the conflict between the Baca grant and the grant to the town of Las Vegas, the act of 1860 was passed. The quantity and the manner of location were defined. The land was to be located in square bodies and be "vacant land, not mineral, in the territory of New Mexico," and it was made the duty of the surveyor general of New Mexico to survey and locate the lands when selected by the heirs of Baca. There were no other conditions, and these were fulfilled in 1864.

But it is said that portions of the tract as located were then embraced in two claimed Mexican grants; to wit, the Tumacacori and Calabazas grant and the San José de Sonoita grant, and that by virtue of § 8 of the act of July 22, 1854 (10 Stat. at L. 308, chap. 103), the lands covered by such claims were reserved from other disposal and therefore from location under the Baca float. That section made it the duty of the surveyor general of New Mexico, un-

der such instructions as might be given by the Secretary of the Interior, to ascertain the character and extent of claims to such lands under the laws, usages, and customs of Mexico and Spain, and to make full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo of 1848 [9 Stat. at L. 922], and report the same to Congress for its consideration and action. It was provided that "until the final action by Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

Subsequently, by the act of August 4, 1854, the territory acquired under the Gadsden treaty [10 Stat. at L. 1031] was incorporated with the territory of New Mexico and made subject to the laws of that territory (10 Stat. at L. 575, chap. 245). Assuming, not deciding, that this provision made § 8 applicable to lands acquired under the Gadsden treaty, the reservation [22] was statutory and subject to repeal. Lockhart v. Johnson, 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. Rep. 665. And there are grounds for a contention that the act of 1860, making a grant to the Baca heirs, affected a repeal *pro tanto* of the reservation of the act of 1854. But there are answers more directly under § 8 of that act. The mere fact of a claimed Mexican grant did not reserve the lands covered by it. Ibid. It was only after their presentation to the surveyor general of New Mexico for his report thereon that the lands were reserved "until the final action of Congress." There was no reservation except by this statute, and it related only to lands covered by a claim presented to the surveyor general. There is no language in the treaties which implies a reservation. Lockhart v. Johnson, at p. 523.

The Tumacacori and Calabazas grant was not presented to the surveyor general until June 9, 1864, and his report was not laid before Congress until May 24, 1880. A petition for confirmation of the San José de Sonoita grant was not presented to the surveyor general until December, 1879. It will be seen, therefore, that there was no disclosure of these claims until after the selection of the Baca grant and its location by the Land Department, the consummation of which was accomplished by the approval of the location April 9, 1864. Besides, the Tumacacori and Calabazas claim was held untenable and void by this court (Faxon v. United States, 171 U. S. 244, 43 L. ed. 151, 18 Sup. Ct. Rep. 849), and the greater part of the San José de Sonoita claim was rejected in Ely v. United States, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840. And we may say that before the Contzen survey was made § 8 of the act of 1854 had been repealed. Lockhart v. Johnson, supra.

The contention that the lands covered by these claims were reserved by the act of 1854 being untenable, it results that the only conflict with the Baca float as located April 9, 1864, which requires consideration and decision, [23] is the one arising from that part of the San José de Sonoita claim which has been confirmed as against the United States. And in any event the lands in that conflict are not public lands or subject to disposal by the Land Department. They belong either to the owners of the Baca float or to the owners of the confirmed portion of the San José de Sonoita grant. But which is the superior claim we cannot now consider or decide because the Sonoita claimants are not parties to this cause, and because the question will more properly arise in the local courts, and not in a proceeding in the District of Columbia against the Secretary of the Interior.

With this explanation of our former opinion, leave to file the petition for rehearing is denied.

PULLMAN COMPANY, Appt.,
v.
W. V. KNOTT, as Comptroller of the State of Florida. (No. 383.)

PULLMAN COMPANY, Appt.,
v.
W. V. KNOTT, as Comptroller of the State of Florida. (No. 384.)

(See S. C. Reporter's ed. 23-27.)

Statutes — when validity may be assailed — discrimination in tax.

1. The tax on gross receipts of sleeping and parlor car companies imposed by Fla. Laws 1907, chap. 5596, § 47, will not be held invalid as discriminatory because it does not fall upon railroads operating their own sleeping and parlor cars, where it does not appear that any railroad in the state does operate its own sleeping or parlor cars. [For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

NOTE.—On constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. Board State Tax Comrs. 60 L.R.A. 321.

On notice and hearing required generally, to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

Constitutional law — due process of law — hearing.

2. Sleeping and parlor car companies which have failed to make a return for tax purposes of their gross receipts from business done between points within the state, as required by Fla. Laws 1907, chap. 5596, § 47, have no right, under the due process of law clause of U. S. Const., 14th Amend., to a hearing when the state comptroller, conformably to that section, proceeds to estimate the gross receipts and to add 10 per cent of the amount of the taxes as a penalty incurred because of the companies' failure to obey the law.

[For other cases, see Constitutional Law, 725-781, in Digest Sup. Ct. 1908.]

Courts — rules of decision — question not yet decided by state court.

3. The Federal Supreme Court will not adjudge a state tax upon gross receipts of sleeping and parlor car companies to offend against the state Constitution because it is not a license tax, in advance of a decision of that question by the state supreme court, especially where the state court has held other gross earning taxes to be license taxes.

[For other cases, see Courts, VII. c, 1, in Digest Sup. Ct. 1908.]

[Nos. 383, 384.]

Argued October 21, 1914. Decided November 2, 1914.

TWO APPEALS from the District Court of the United States for the Northern District of Florida to review decrees denying injunctive relief against the collection of a tax on gross receipts of sleeping and parlor car companies. Affirmed.

The facts are stated in the opinion.

Mr. Frank B. Kellogg argued the cause, and, with Messrs. Gustavus S. Fernaid and John E. Hartridge, filed a brief for appellant:

Only these forms of taxes can be levied in Florida: an ad valorem tax, a capitation tax, and a tax on licenses. The constitutional provisions relating to these taxes are a limitation upon the authority of the legislature to provide for any other form.

Cheney v. Jones, 14 Fla. 612; Afro-American Industrial & Ben. Asso. v. State, 61 Fla. 89, 54 So. 383.

This is not a capitation tax or a license tax provided for by § 5 of article 9 of the Florida Constitution.

Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 Sup. Ct. Rep. 510; Afro-American Industrial & Ben. Asso. v. State, 61 Fla. 85, 54 So. 383; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265,

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As to state decisions and laws as rules of decision in Federal courts—see notes to Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Mitchell v. Burlington, 18 L. ed. U. S. 351; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380.

Who may raise objection that taxation statute contains an unconstitutional discrimination.

Only those discriminated against or adversely affected by a taxation statute can object that the statute is unconstitutional because discriminatory.

Hence, the objection that a statute regulating the distribution of money for school purposes discriminates against negroes cannot be raised by a white person. Reid v. Eatonton, 80 Ga. 755, 6 S. E. 602; Marshall v. Donovan, 10 Bush, 681; Norman v. Boaz, 85 Ky. 557, 4 S. W. 316; Eakins v. Eakins, 14 Ky. L. Rep. 562, 20 S. W. 285.

And a municipality cannot challenge the validity of a state statute imposing a tax upon fire insurance companies on the ground that it discriminates against foreign insurance companies. The municipality is not within the class discriminated against. Montgomery v. Royal Exchange Assur. Corp. 5 Ala. App. 318, 59 So. 508.

And if the exemption from certain taxation in favor of owners of property in territory newly added to a municipality, which is conferred by Ga. Laws 1909, p. 897, in case the municipality fails upon request to extend water mains, sewers, and electric lines in such territory, is invalid as violative of the uniformity clause of the state Constitution, it would seem not to be so adverse to the inhabitants and owners of the new territory as to furnish any ground of complaint by them. White v. Forsyth, 138 Ga. 753, 76 S. E. 58.

So, children of a decedent, who, because of their relationship, are assessed at the lowest rate fixed by N. Y. Laws 1896, chap. 908, imposing a tax when property is transferred by deed intended to take effect at the death of the grantor, cannot urge that such statute operates to deny the equal protection of the laws because transfers to collaterals and strangers in blood are taxed at a higher rate. Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105, affirming 194 N. Y. 281, 87 N. E. 428.

An inheritance tax law will not be declared unconstitutional on the theory that there is a discrimination between citizens of the state and those of other states when it does not appear to which class the party raising the question belongs. Re Damon, 10 Cal. App. 542, 102 Pac. 684.

The objection that an inheritance tax statute subjecting residents of the state to a lower rate of taxation than nonresidents

77 Am. St. Rep. 765, 55 S. W. 627; Com. v. Standard Oil Co. 101 Pa. 119; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Chicago v. Collins, 175 Ill. 457, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; Banta v. Chicago, 172 Ill. 219, 40 L.R.A. 611, 50 N. E. 233; St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; Cooley, Taxn. 3d ed. 1098, 1138; Royall v. Virginia, 116 U. S. 572, 579, 29 L. ed. 735, 737, 6 Sup. Ct. Rep. 510; Youngblood v. Sexton, 32 Mich. 419, 20 Am. Rep. 654; Home Sav. Bank v. Des Moines, 205 U. S. 503, 519, 51 L. ed. 901, 910, 27 Sup. Ct. Rep. 571; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; Pittsburgh, C. & St. L. R. Co. v. State, 49 Ohio St. 199, 16 L.R.A. 380, 30 N. E. 435; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Postal Teleg. Cable v. Taylor, 192 U. S. 64, 73, 48 L. ed. 342, 346, 24 Sup. Ct. Rep. 208; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 298; Brookfield v. Tooey, 141 Mo. 619, 43 S. W. 387; State v. Canda Cattle Car Co. 85 Minn. 457, 89 N. W. 66; Ellis v. Frazier, 38 Or. 462, 53 L.R.A. 454, 63 Pac. 642; Pingree v. Auditor General (Pingree v. Dix) 120 Mich. 95, 44 L.R.A. 679, 78 N. W. 1025; Pullman Southern Car Co. v. Nolan, 22 Fed. 277; Burlington v. Putnam Ins. Co. 31 Iowa, 103; Home Ins. Co. v. Augusta, 50 Ga. 530; State ex rel. Atty. Gen. v. Winnebago Lake & F. River Pl. Road Co. 11 Wis. 35; Galveston, H. & S. A. R. Co. v. Texas, — Tex. Civ. App. —, 93 S. W. 436, 210 U. S. 228, 52 L. ed. 1038, 28 Sup. Ct. Rep. 638; Parker v. North British & M. Ins. Co. 42 La. Ann. 428, 7 So. 599; State v. United States & C. Exp. Co. 60 N. H. 233.

The court should not apply to this gross earnings law a forced or unnatural construction in order to sustain it as a license tax, for the supreme court of Florida has held, in line with the decisions of other courts, that where a license tax has been once imposed, such a construction will not be given to the law as will impose another license tax for the same privilege, if any other construction is permissible.

Ex parte Sims, 40 Fla. 440, 25 So. 280; Newport v. Fitzer, 131 Ky. 544, 21 L.R.A. (N.S.) 279, 115 S. W. 742.

This is not an ad valorem tax based upon a "just valuation of all property," and provided for by "a uniform and equal rate of taxation" throughout the state.

Afro-American Industrial & Ben. Asso. v. State, 61 Fla. 85, 54 So. 383; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29

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violates the constitutional provision that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" cannot be raised by an alien. Re Johnson, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424 (*dictum*).

The constitutionality of a statute providing for the assessment and taxation of omitted property owned by nonresidents of the state, without affording such nonresident owners notice, or a day in court, while such right is accorded to resident owners, cannot be assailed by a resident owner, on the ground that it discriminates against nonresident owners. Gallup v. Schmidt, — Ind. —, 54 N. E. 384, modified in 154 Ind. 196, 56 N. E. 443, affirmed in 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162.

Only nonresident shareholders in a national bank can complain of the supposed invalidity, as to them, of the retroactive features of Ky. act of March 21, 1900, making it the duty of certain officers of the bank to list its shares of stock for taxation, and requiring the bank to pay the tax, and a penalty for delinquency. Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532.

A resident owner of shares in a foreign corporation which has no taxable property in the state cannot complain that the provisions of Burns's Anno. Stat. (1908; Ind.), §§ 10,143, 10,233, 10,234, for the taxation of such shares, deny the equal protection of the laws because they make no allowance, as they do in the case of domestic corporations, where the corporation has property taxed within the state. Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 Sup. Ct. Rep. 120.

The objection that a statute taxing shares of national banks is unconstitutional, as discriminatory, because not allowing a deduction for the debts of the owner of the shares, while such deduction is allowed in the case of the taxation of other personal property, cannot be taken by a shareholder who owes no debts which he can deduct from the assessed value of his shares. Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044.

An objection that the rule of taxation fixed by a state highway law is unequal, because, though one township may have but a small portion of a highway improvement, the apportionment is made in the ratio the assessed value of all the property in each township bears to the assessed value of the property in all the townships, cannot be raised by a taxpayer in a case in which but one township is involved. He cannot be heard upon the moot question of the constitutionality of the law as affecting someone else. Cummins v. Pence, 174 Ind. 115, 91 N. E. 529.

And, generally, as to who may raise objection that a statute contains an unconstitutional discrimination, see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

L. ed. 785, 6 Sup. Ct. Rep. 635; Pittsburgh, C. & St. L. R. Co. v. State, 49 Ohio St. 189, 16 L.R.A. 380, 30 N. E. 435; State v. Canda Cattle Car Co. 85 Minn. 457, 89 N. W. 66; Rice County v. Citizens' Nat. Bank, 23 Minn. 280; State v. Duluth & I. Range R. Co. 77 Minn. 433, 80 N. W. 626; Drew v. Tifft, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839; Brookfield v. Tooey, 141 Mo. 619, 43 S. W. 387; State v. Cumberland & P. R. Co. 40 Md. 22; State v. Lakeside Land Co. 71 Minn. 283, 73 N. W. 970.

Section 47 of chap. 5596 is but an attempt on the part of the legislature of Florida to impose on the sleeping car companies and their property a tax and a burden not imposed on others or on other property, either through oversight in leaving that provision in the statute after adopting the ad valorem tax for sleeping car property, or with the intention to produce discrimination and inequality of taxation. But one property tax can be collected.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; State v. St. Paul Union Depot Co. 42 Minn. 142, 6 L.R.A. 234, 43 N. W. 840.

Whether oversight or intention, such an exaction is a taking of property without due process of law, and its effect is to deprive the person taxed of the equal protection of the laws.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 399.

We recognize that unequal taxation alone, growing out of overvaluation or by classification, does not ordinarily amount to a deprivation of property without due process of law; or, at any rate, that the question in such a case is not open in this court if the state court shall have sustained the tax; but where the statute itself proceeds upon a wrong principle, making an arbitrary exaction which, being unauthorized, is virtually no more than a forced contribution, then this court will form its own judgment as to the scope and purpose of a statute, and will for itself examine and determine whether there is a deprivation of property without due process of law, as well as whether there is a denial of the equal protection of the laws.

Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 462, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; Collins v. New Hampshire, 171 U. S. 30, 34, 43 L. ed. 60, 61, 18 Sup. Ct. Rep. 768; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 100, 101, 43 L. ed. 909, 911, 912, 19 Sup. Ct. Rep. 609; Western Turf Asso. v. Greenberg, 204 U. S. 359, 362, 51 L. ed. 520, 522, 27 Sup. Ct. Rep. 384; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

An exaction made without reference to a common ratio and without valuation, as required by the Constitution of Florida, is not a tax. This is not a question of overvaluation, but the imposition of a tax by legislative act which provides for its assessment and for summary proceedings for its collection, not giving the taxpayer a hearing, either judicially or otherwise. It is based upon a fundamentally wrong principle under the Florida Constitution, and the statute imposing the tax is an arbitrary exercise of power, and virtually provides for a forced contribution. Such arbitrary exactions not only deny the equal protection of the laws, but amount to a taking of property without due process of law.

Duluth & I. R. R. Co. v. St. Louis County, 179 U. S. 302, 305, 45 L. ed. 201, 202, 21 Sup. Ct. Rep. 124; Stearns v. Minnesota, 179 U. S. 223, 262, 45 L. ed. 162, 181, 21 Sup. Ct. Rep. 73; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318.

The equal protection of the laws is denied to appellant because, by §§ 46 and 47 of chap. 5596, Laws of 1907, and § 45 of chap. 6421, Laws of 1913, both its property and the earnings thereof are taxed.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 228, 52 L. ed. 1038, 28 Sup. Ct. Rep. 638; Meyer v. Wells, F. & Co. 223 U. S. 301, 56 L. ed. 447, 32 Sup. Ct. Rep. 218.

There is no real and substantial distinction, in fact no distinction whatever, except the ownership of the cars, between sleeping car business done in the cars of a railroad company, and that done in the cars of a sleeping car company; and the tax provided on sleeping or parlor car companies is a mere arbitrary selection.

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 20 L.R.A. (N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234; Harper v. Galloway, 58 Fla. 255, 26 L.R.A. (N.S.) 794, 51 So. 226, 19 Ann. Cas. 235; Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758.

It is true that license taxes, when imposed, are imposed by the state rather in the exercise of its police power than in the exercise of a taxing power itself. It is also true that the constitutional requirement as to the uniformity of taxation does not apply with the same strictness to license taxes as to other taxes.

Ex parte Montgomery, 64 Ala. 463; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; Baker v. Cincinnati, 11 Ohio St. 534.

But, nevertheless, license taxes may not be arbitrarily imposed with entire disregard of the rights of citizens affected thereby to the equal protection of the laws. License taxes must be based upon some valid classification; not arbitrary legislative caprice alone. It is true that legislatures may carry the process of subdivision into classes to a very great length, but the rule that all members of the same class must be treated alike in tax laws is inflexible. The court, therefore, must always decide the question as to whether a discriminating tax law discriminates between classes or between members of the same class. If the former, it is constitutional; if the latter, it is not.

Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 20 L.R.A.(N.S.) 126, 47 So. 1003, 16 Ann. Cas. 1234; Ferguson v. McDonald, 66 Fla. 494, 63 So. 915; Afro-American Industrial & Ben. Asso. v. State, 61 Fla. 85, 54 So. 383; State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co. 60 Fla. 465, 54 So. 394; Hardee v. Brown, 56 Fla. 377, 47 So. 834; Harper v. Galloway, 58 Fla. 255, 26 L.R.A.(N.S.) 794, 51 So. 226, 19 Ann. Cas. 235; VanDeman & L. Co. v. Rast, 214 Fed. 827; Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758; New Orleans v. Home Mut. Ins. Co. 23 La. Ann. 449; New Orleans v. Louisiana Sav. Bank & S. D. Co. 31 La. Ann. 637; St. Louis v. Spiegel, 75 Mo. 145; Alabama Consol. Coal & I. Co. v. Herzberg, 177 Ala. 248, 59 So. 305; Siciliano v. Neptune Twp. 83 N. J. L. 158, 83 Atl. 865; Little v. Tanner, 208 Fed 605; Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758.

In the imposition of the tax itself the appellant is not allowed a hearing, and the principle of due process is violated.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S 418, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Keeney v. New York, 222 U. S. 525, 535, 56 L. ed. 299, 305, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318.

Mr. Thomas F. West, Attorney General of Florida, argued the cause and filed a brief for appellee:

A decision of the highest court of the state upon questions of constitutional law arising under the Constitution of such state is binding upon the Federal courts.

Manley v. Park, 187 U. S. 547, 47 L. ed. 296, 23 Sup. Ct. Rep. 208; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Danville Water Co. v. Danville City, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; Moffitt v. Kelly, 218 U. S. 400, 54 L. ed. 1086, 30 L.R.A. (N.S.) 1179, 31 Sup. Ct. Rep. 79.

An interpretation placed by the highest court of the state upon a state statute is conclusive upon the Federal courts.

Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

The question of whether or not the gross-receipts tax, here complained of, is a license tax, is not open to debate here.

Johnson v. Armour & Co. 31 Fla. 424, 12 So. 842; Peninsular Industrial Ins. Co. v. State, 61 Fla. 376, 55 So. 398; Brown v. Pittsburgh Life & T. Co. 10 Ala. App. 614, 65 So. 699; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578.

It is settled in Florida and elsewhere that the levy of an ad valorem tax upon property, and also a license tax upon the use of the same property, is not double taxation, and that a license fee is not a tax within the provisions of the organic law requiring uniformity of rates and just valuations of property for purposes of taxation.

Jackson v. Neff, 64 Fla. 326, 60 So. 350; Cooley, Taxn. 3d ed. 392; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536; Garrett v. Turner, 235 Pa. 383, 84 Atl 354; Ayres v. Chicago, 239 Ill. 237, 87 N. E. 1073.

It is also held by the supreme court of Florida that a statute imposing a license tax upon occupations may be solely and wholly a revenue measure.

Harrison v. Kersey, 67 Fla. 24, 64 So. 353.

That a privilege or license tax may perform the double function of regulating the business under the police power, and producing revenue, if authorized by the law of the state, is settled in this court.

Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318.

That a state officer may have referred to the tax as other than a license tax does not change its true character, and this appellant should not be granted immunity from the tax now because a state officer may

have made a mistake in referring to it as a property tax when in fact it is a license tax.

Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 475, 46 L. ed. 283, 285, 22 Sup. Ct. Rep. 176.

The rules by which the validity of the statute involved here must be tested under the 14th Amendment of the Federal Constitution are the same in this court and in the supreme court of the state of Florida, the Florida court having expressly adopted the rules laid down by this court.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Peninsular Industrial Ins. Co. v. State, 61 Fla. 376, 55 So. 398.

That the statute here involved, imposing a gross-receipts license tax upon sleeping and parlor car companies, does not contravene in letter or in spirit the provisions of this Amendment to the Federal Constitution, is apparent.

Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 284; Butler v. Perry, 67 Fla. 405, 66 So. 150; Noble v. State, — Fla. —, 66 So. 154; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 562, 46 L. ed. 679, 689, 690, 22 Sup. Ct. Rep. 431; Cook v. Marshall County, 196 U. S. 261, 274, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233; Armour Packing Co. v. Lacy, 200 U. S. 226, 235, 50 L. ed. 451, 456, 26 Sup. Ct. Rep. 232; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496; Bell's Gap. R. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep 423; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493.

It is urged on behalf of appellant that no notice is given to it of the amount of the annual tax which it is required to pay. In this connection it must be remembered that the amount of the taxes is ascertained from information in the nature of reports furnished by appellant. Its record books are in its custody, and its bookkeeping is, of course, under its supervision. It therefore has full information on the subject at all times.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 238, 239, 33 L. ed. 892, 895, 896, 10 Sup. Ct. Rep. 533.

[25] Mr. Justice Holmes delivered the opinion of the court:

These are suits to prevent the collection of a tax on gross receipts for different years, derived from business done by the appellant in the state of Florida, and to have the laws under which the tax would be assessed declared contrary to the 14th Amendment. The bills are like those stated in 231 U. S. 571, 58 L. ed. 375, 34 Sup. Ct. Rep. 182, and aver the following facts: Chapter 5597 of the Laws of Florida for 1907, now § 44 of chapter 6421 of the Laws of 1913, imposes a license tax, which has been paid. Section 46 of chapter 5596 of the Laws of 1907, imposes a tax ad valorem, which also has been paid, with immaterial exceptions. Up to 1907 this property tax had not existed, but sleeping and parlor car companies had been required to make a return of gross receipts from business done between points within the state, and to pay a percentage upon such returns, which it paid in lieu of all other taxes. But by § 47 of said chapter 5596 (now § 45 of chapter 6421 of the Laws of 1913), the last-mentioned tax was continued in force alongside of the new ad valorem tax of § 46, and the appellant contends that after the levying of a property tax the tax on gross returns became void. An application for a preliminary injunction was heard before three judges and was denied, whereupon this appeal was taken and a supersedeas was granted upon payment of the sum in dispute into court.

The cases come here upon an alleged infringement of the Constitution of the United States, but are argued mainly upon the Constitution of the state. Of course the latter is not taken up into the 14th Amendment. Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Burt v. Smith, 203 U. S. 129, 135, 51 L. ed. 121, 126, 27 Sup. Ct. Rep. 37. It can be considered only because the cases come from the district court upon the other ground. We will deal with the Federal question first. It is suggested that there is an arbitrary classification [26] because the tax is confined to sleeping and parlor car companies, and does not fall upon railroads operating their own sleeping and parlor cars. If otherwise this were a valid objection, as to which we need express no opinion, it is enough to say that a tax is not to be upset upon hypothetical and unreal possibilities, if it would be

good upon the facts as they are. Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856. It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the attorney general of the state denies that such a case exists.

The other objection urged is that the taxpayer is not given a hearing. The statute, as we have said, requires the companies to make a report and fixes a percentage ($1.50 per $100) to be paid. If the report is not made, the comptroller is to estimate the gross receipts and add 10 per cent of the amount of the taxes as a penalty. If the companies do as required there is nothing to be heard about. They fix the amount and the statute establishes the proportion to be paid over. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533. The provision in case of their failure to report is not, as it seemed to be suggested in argument, an alternative left open for the companies to choose. It is a provision for their failure to do their duty. In that event their chance and right to be heard have gone by.

We do not feel called upon to discuss the objections under the Constitution of the state at length. Starting with the conceded proposition that the tax, to be valid, must be either ad valorem or a license tax, the appellant argues that this cannot be a license tax, as was held by the judges who refused the injunction, because the payment of it is not made a condition of the right to do business; because another tax is imposed in terms for a license; and because the history of the law shows that for years it took the place of a property tax. These considerations [27] undoubtedly are very strong. But as we are dealing with the validity of the law under the state Constitution, a matter that must be decided finally by the state court, and as the state court has held other gross earning taxes to be license taxes (Afro-American Industrial & Benefit Asso. v. State, 61 Fla. 85, 89, 54 So. 383), we are of opinion that if this act is to be overthrown, it should not be overthrown by us. It is true that there are possible distinctions between this case and the Florida decision cited, but it seems to us not improbable that the supreme court had in view a principle broad enough to cover the case at bar. Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 305, 58 L. ed. 229, 239, 34 Sup. Ct. Rep. 48.

Decree affirmed.

UNITED STATES, Plff. in Err.,
v.
ELIE PORTALE and Juliette Portale, alias Juliette Puppet, alias Madame Juliette.

(See S. C. Reporter's ed. 27–31.)

White slave trade — harboring — filing statement.

The requirement of the act of June 25, 1910 (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), § 6, that "every person" harboring an alien woman for the purpose of prostitution within three years after she shall have entered the United States from any country, party to the arrangement for the suppression of the white slave traffic, adopted July 25, 1902 (35 Stat. at L. 1979), shall file a statement of the facts with the Commissioner General of Immigration, cannot be construed as confined to persons who have had to do directly or indirectly with the bringing in or sending forth of such alien woman.

[No. 382.]

Argued October 22, 1914. Decided November 2, 1914.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment sustaining a demurrer to an indictment charging the harboring of an alien woman for the purpose of prostitution. Reversed without prejudice to further proceedings.

The facts are stated in the opinion.

Assistant Attorney General **Wallace** argued the cause and filed a brief for plaintiff in error:

The review here is limited to the precise question decided below.

United States v. Keitel, 211 U. S. 370–398, 53 L. ed. 230–244, 29 Sup. Ct. Rep. 123; United States v. Mescall, 215 U. S. 31, 54 L. ed. 79, 30 Sup. Ct. Rep. 19; United States v. Barber, 219 U. S. 72–78, 55 L. ed. 99–101, 31 Sup. Ct. Rep. 209; United States v. Birdsall, 233 U. S. 223–231, 58 L. ed. 930–934, 34 Sup. Ct. Rep. 512; United States v. Young, 232 U. S. 155, 160, 58 L. ed. 548, 550, 34 Sup. Ct. Rep. 303.

In interpreting a statute, you must neither introduce nor omit language if it can otherwise be given a reasonable meaning.

United States v. Goldenberg, 168 U. S. 95, 102, 103, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; United States v. Lexington Mills & Elevator Co. 232 U. S. 399, 409, 410, 58 L. ed. 658, 661, 662, L.R.A.1915 —, 34 Sup. Ct.

NOTE.—On construction, applicability, and effect of congressional white slave act—see note to Johnson v. United States, L.R.A. 1915A, 862.

Rep. 337; United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 163, 58 L. ed. 893, 897, 34 Sup. Ct. Rep. 550.

The meaning we contend for had been given this very language by this court before its use in the white slave traffic act.

Hamilton v. Rathbone, 175 U. S. 414, 420, 44 L. ed. 219, 221, 20 Sup. Ct. Rep. 155; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 218, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Mason v. Fearson, 9 How. 248, 258, 259, 13 L. ed. 125, 129, 130; The Abbotsford, 98 U. S. 440, 444, 25 L. ed. 168, 169; United States v. Mooney, 116 U. S. 104, 106, 29 L. ed. 550, 551, 6 Sup. Ct. Rep. 304; Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; H. Hackfeld & Co. v. United States, 197 U. S. 442, 451, 49 L. ed. 826, 830, 25 Sup. Ct. Rep. 456; Latimer v. United States, 223 U. S. 501, 504, 56 L. ed. 526, 527, 32 Sup. Ct. Rep. 242; Keller v. United States, 213 U. S. 139, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

No appearance for defendants in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an indictment alleging that an alien woman entered the United States from Great Britain in 1913; that the defendants knowingly harbored her in Denver for the purpose of prostitution, and that they, so knowingly harboring her for that purpose, wilfully failed to file, within thirty days from the date of the commencement of such harboring, with the Commissioner General of Immigration, a statement in writing setting forth her name, the place where she was kept, and the facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procuration to come to this country within the knowledge of the defendants. The proceeding is under the act of June 25, 1910, chap. 395, § 6, 36 Stat. at L. 825, 827, U. S. Comp. Stat. Supp. 1911, pp. 1343, 1345, which requires every person harboring an alien woman for the above purpose within three years after she shall have entered the United States from any country, [30] party to the arrangement for the suppression of the white slave traffic, adopted, July 25, 1902, 35 Stat. at L. 1979, to file a statement as aforesaid. A failure to do so is made a misdemeanor, and is punished by fine or imprisonment or both. Great Britain is a party to the arrangement. There was a demurrer to the indictment and it was sustained, as appears by a bill of exceptions, upon the ground set forth in the opinion, that, as the court construed the statute, the above requirement was confined to "persons who have had to do, directly or indirectly, with the bringing in or sending forth of such women or girls."

We see no sufficient reason for the limitation thus read into the generality and literal meaning of the words of the act. It is true that persons who have had to do with bringing the alien into the country are more likely than others to know the facts to be stated, and it may be assumed that others are not required to know them at their peril. It is true that the immunity from prosecution under the laws of the United States for any fact truthfully reported which the section grants most obviously applies to those who have taken part in bringing the woman in. But others who have not taken part are very likely to know the facts or some of them, and their knowledge may be of a kind to raise suspicion of guilt under the act. The requirement is that "every person" harboring a woman as above shall file the statement. It is, and purports to be, in furtherance of the international agreement. That agreement, among other things, is "to procure, within the limits of the laws, all information of a nature to discover a criminal traffic" (art. 2, 35 Stat. at L. 1982), although, perhaps, those words look more immediately to the points of departure and arrival and the journey. Taken literally the statute required the defendants to file a statement of any of the facts mentioned that were within their knowledge, and to read it otherwise would deprive the government of a [31] considerable source of information, to no good end that we can perceive.

"We therefore reach the conclusion that the court erred in sustaining the demurrer to the . . . indictment, so far as that ruling is based upon the construction of the statute in question." United States v. Stevenson, 215 U. S. 190, 199, 54 L. ed. 153, 157, 30 Sup. Ct. Rep. 35. That is the only question brought up; United States v. Keitel, 211 U. S. 370, 398, 53 L. ed. 230, 244, 29 Sup. Ct. Rep. 123; and the reversal of the judgment is without prejudice to further action of the court below, consistent with the opinion that we have expressed.

Judgment reversed.

CHARLES OVERTON, Plff. in Err.,
v.
STATE OF OKLAHOMA.

(See S. C. Reporter's ed. 31, 32.)

Error to state court — frivolousness of Federal question.

Contentions based upon the alleged

repugnancy to the commerce clause of the Federal Constitution of a state statute restricting the local transportation of intoxicating liquors are too frivolous to support a writ of error from the Federal Supreme Court to the state court of last resort to review a conviction for a violation of such statute by a movement of liquor which the accused claimed was to complete an interstate shipment, where the trial judge instructed the jury that the statute did not apply to such a shipment, and hence, if the movement was as accused asserted, there must be an acquittal, and the record affords no justification for the assumption that a conclusion of guilt could only have been reached by plainly disregarding the proof as to the character of the shipment, and thus in fact applying the statute to interstate commerce.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. Rep. 1908.]

[No. 40.]

Submitted October 19, 1914. Decided November 9, 1914.

IN ERROR to the Criminal Court of Appeals of the State of Oklahoma to review a judgment which affirmed a conviction in the County Court of Tulsa County, in that state, for violating the intoxicating liquor law. Dismissed for want of jurisdiction.

See same case below, 7 Okla. Crim. Rep. 203, 114 Pac. 1132, 123 Pac. 175.

Messrs. Charles B. Stuart and A. C. Cruce submitted the cause for plaintiff in error.

Mr. Charles West, Attorney General of Oklahoma, submitted the cause for defendant in error.

Memorandum opinion by direction of the court, by Mr. Chief Justice White:

The verdict and sentence were on an indictment for illegally moving liquor (§ 4180, Snyder's Compiled Laws of Oklahoma). The defense was that the movement was to complete an interstate shipment, from Missouri. The court instructed that the statute did not apply to such a shipment, and hence, if the movement was as asserted, there must be an acquittal. Under this situation the contention here made that the statute was repugnant to the commerce clause is too frivolous to support jurisdiction. And this is also true of the contention that there is jurisdiction because the facts establish that the conclusion of guilt could only have been reached by plainly disregarding the proof as to the character of the shipment, thus in fact applying the statute to interstate commerce,[1] since the record affords no justification for the assumption upon which the proposition rests.

Dismissed for want of jurisdiction.

NOTE.—On the general subject of writs of error from United States Supreme Court to state court—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On appellate review in Federal Supreme Court of state court decisions involving questions of interstate commerce—see note to American Exp. Co. v. Iowa, 49 L. ed. U. S. 417.

[1] Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 411, 412, 57 L. ed. 1248, 1258, 1259, 33 Sup. Ct. Rep. 820; Miedreich v. Lauenstein, 232 U. S. 236, 243, 244, 58 L. ed. 584, 590, 34 Sup. Ct. Rep. 309; Missouri, K. & T. R. Co. v. West, 232 U. S. 682, 691, 692, 58 L. ed. 795, 801, 34 Sup. Ct. Rep. 471.

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[33] LOUIS DEJONGE & COMPANY, Appt.,
v.
BREUKER & KESSLER COMPANY.

(See S. C. Reporter's ed. 33–37.)

Copyright — single notice on multiple reproduction of painting.

A single copyright notice on a sheet of paper containing a dozen copies of a copy-

NOTE.—Copyright notice where work is in several parts.

A copyrighted work in several volumes is protected when the notice required by the statute is published in its proper place in the first volume only of the series. Dwight v. Appleton, 1 N. Y. Leg. Obs. 195, Fed. Cas. No. 4,215.

And a statistical atlas containing several maps copyrighted as an entirety, and containing a single notice of the copyright in its proper place, is fully protected in all its parts. It is unnecessary to copyright and inscribe with notice every map by itself.

righted painting that so join and continue one another, side by side and above and below, as to form a harmonious whole, is not the notice which, under the act of June 18, 1874 (18 Stat. at L. 78, chap. 301, U. S. Comp. Stat. 1901, p. 3411), every copyrighted work must bear.

[For other cases, see Copyright, II. a, in Digest Sup. Ct. 1908.]

[No. 18.]

Argued October 27, 28, 1914. Decided November 9, 1914.

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Pennsylvania, dismissing a bill to restrain an alleged infringement of a copyright. Affirmed.

See same case below 111 C. C. A. 567, 191 Fed. 35.

The facts are stated in the opinion.

Mr. Soward Davis argued the cause, and, with Messrs. Walter F. Thompson and Charles E. Wilson, filed a brief for appellant:

In an action in equity under U. S. Rev. Stat. § 4970, the provisions of § 4962 are to be liberally construed.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 291, 52 L. ed. 208, 214, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; Myers v. Callaghan, 10 Biss. 139, 5 Fed. 732, affirmed in 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Holmes v. Donohue, 77 Fed. 180; Wreckmeister v. American Lithographic Co. 142 Fed. 827; American Lithographic Co. v. Werckmeister, 76 C. C. A. 649, 146 Fed. 377; Harper v. M. A. Donohue & Co. 144 Fed. 491; Ford v. Charles E. Blaney Amusement Co. 148 Fed. 642; Dam v. Kirk La Shelle Co. 41 L.R.A.(N.S.) 1002, 99 C. C. A. 392, 175 Fed. 902, 20 Ann. Cas. 1173; Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; Mifflin v. R. H. White Co. 190 U. S. 260, 264, 47 L. ed. 1040, 1042, 23 Sup. Ct. Rep. 769; Edison v. Lubin, 119 Fed. 993.

The only sections of the copyright statutes which the courts have held must be literally obeyed are those by which the copyright is obtained, governing the deposit of copies prior to publication (Holmes v. Donohue, 77 Fed. 180), and those statutes which authorize the proprietor of the copyright to recover a penalty and inflict a forfeiture for violation of his right.

Schreiber v. Sharpless, 6 Fed. 179, 110 U. S. 76, 28 L. ed. 65, 3 Sup. Ct. Rep. 423; McDonald v. Hearst, 95 Fed. 656; Taylor v. Gilman, 24 Fed. 634; Wheeler v. Cobbey, 70 Fed. 487; Walker v. Globe Newspaper Co. 2 L.R.A.(N.S.) 913, 72 C. C. A. 77, 140 Fed. 308, 5 Ann. Cas. 274; Werckmeister v. American Tobacco Co. 207 U. S. 375, 383, 52 L. ed. 254, 257, 28 Sup. Ct. Rep. 124.

Section 4962, when reasonably construed, requires only substantial compliance as to notice.

Snow v. Mast, 65 Fed. 995; Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; Mifflin v. R. H. White Co. 190 U. S. 260, 264, 47 L. ed. 1040, 1042, 23 Sup. Ct. Rep. 769; Callaghan v. Myers, 128 U. S.

Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 618.

A map of a lake and surrounding territory bearing numerical figures on each tract or piece of land, which purport to refer to an index-book or directory of owners, containing a pocket for such map, both being referred to as a "Map-Directory," is a part of the book, and a copyright notice on the title page of the book protects the map, although 500 more maps than books were published, and some of the extra maps were sold separately, but after the book had been copyrighted. Lydiard-Peterson Co. v. Woodman, 123 C. C. A. 243, 204 Fed. 921, rehearing denied in 126 C. C. A. 434, 205 Fed. 900.

Two cases under the English designs act, are of interest in this connection. In Fielding v. Hawley, 48 L. T. N. S. 639, 47 J. P. 582, it was held that a butter dish consisting of a dish and its separate cover is one "article of manufacture" within the copyright (design) act, and that it is a sufficient compliance with the act to stamp the registration mark upon the dish alone, although the entire design was upon the cover.

In Heywood v. Potter, 22 L. J. Q. B. N. S. 133, 17 Jur. 528, 1 El. & Bl. 439, 1 Week. Rep. 127, the owner of a registered design for wall paper, which was ordinarily sold in 12-yard lengths, sold as patterns smaller pieces, each containing the whole design, cut from the whole piece, the latter being marked "Rd.," but the smaller pieces containing no mark indicating registration. Because of this omission relief was denied in a suit against a person who had innocently copied the design from the small pattern, the court being of the opinion that the small patterns were "articles of manufacture" within the meaning of 5 & 6 Vict. chap. 100, § 4, governing the copyrighting (registration) of designs.

A sheet of photographs of a moving scene, 4,500 in number, taken at successive instants of time, need only be inscribed once with the statutory notice of copyright, in order fully to protect the several views of the series. Edison v. Lubin, 58 C. C. A. 604, 122 Fed. 240, reversing 119 Fed. 993.

On effect of omitting notice of copyright from licensed publication—see note to American Press Asso. v. Daily Story Pub. Co. 66 L.R.A. 446.

617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Falk v. Schumacher, 48 Fed. 222; Blume v. Spear, 30 Fed. 629; Werckmeister v. Springer Lithographing Co. 63 Fed. 808; Falk v. Gast Lithograph & Engraving Co. 4 C. C. A. 648, 14 U. S. App. 15, 54 Fed. 890; Hills & Co. v. Austrich, 120 Fed. 862; 7 Am. & Eng. Enc. Law, 555.

Complainant's notice complied substantially with the statutory requirements.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 55, 56, 28 L. ed. 349–351, 4 Sup. Ct. Rep. 279; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 294, 52 L. ed. 208, 215, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595.

Complainant's marking complies with the trade custom.

Knotts v. Virginia-Carolina Chemical Co. 123 C. C. A. 248, 204 Fed. 926.

The requirement of separate marking of each integer of complainant's multiple copy is literal and unreasonable, because it would render the reproductions valueless.

Edison v. Lubin, 58 C. C. A. 604, 122 Fed. 240.

In considering the requirement of the statute, it should be construed having in view the character of the property intended to be protected.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Ex parte Pingree-Traung Co. 197 Off. Gaz. 997; Knotts v. Virginia-Carolina Chemical Co. supra.

If the copy be marked with the statutory notice by the proprietor, subsequent removal of the mark does not affect the copyright.

Falk v. Gast Lithograph & Engraving Co. 48 Fed. 262, 4 C. C. A. 648, 14 U. S. App. 15, 54 Fed. 890; Edison v. Lubin, supra.

The use to which the reproduction of a copyright may be put does not affect the copyright.

Falk v. Donaldson, 57 Fed. 32; Yuengling v. Schile, 20 Blatchf. 452, 12 Fed. 97; Schumacher v. Schwencke, 25 Fed. 466; Bleistein v. Donaldson Lithographing Co. 188 U. S. 239, 47 L. ed. 460, 23 Sup. Ct. Rep. 298.

The copyright notice was sufficient.

Edison v. Lubin, supra; Harper v. Kalem Co. 94 C. C. A. 429, 169 Fed. 61; American Mutoscope & Biograph Co. v. Edison Mfg. Co. 137 Fed. 262.

It is inequitable to hold a copyright invalid against one not claiming to have been deceived or misled.

Black v. Henry G. Allen Co. 56 Fed. 764; Hills & Co. v. Hoover, 136 Fed. 701; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177.

Mr. Frank S. Busser argued the cause and filed a brief for appellee:

Assuming that appellant's design was copyrightable as a painting, the copyright is now invalid by reason of publication by appellant of copies not marked copyrighted.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Pierce & B. Mfg. Co. v. Werckmeister, 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to restrain an alleged infringement of a copyright under the law as it was before the act of March 4, 1909; *viz.*, Rev. Stat. §§ 4952, 4970, U. S. Comp. Stat. 1901, pp. 3406, 3416; act of June 18, 1874, chap. 301, 18 Stat. at L. 78, U. S. Comp. Stat. 1901, p. 3411. The work alleged to be infringed was described as a painting representing [36] sprigs of holly, mistletoe, and spruce, arranged in the form of an open cluster having substantially the outline of a square. It was exhibited in court, was a water color painting in fact, and no doubt might have been framed and used for the same purposes of pleasure as other more considerable works of art. But it was so designed that it could be reproduced in repetitions that fitted and continued one another side by side and above and below, and was reproduced in that way with twelve repetitions upon strips of paper having much the look of wall paper, and intended to be used in covering or wrapping boxes during the holiday season. Each strip bore a single notice of copyright. The circuit court, assuming that infringement was established, was of opinion that the work was a painting, capable of copyright, and also a design, patentable as such, but held that, as the appellant had elected to copyright, the notice must be repeated on each of the twelve squares, although they did not present themselves as separate squares on the continuous strip. 182 Fed. 150. The circuit court of appeals, reserving its opinion as to whether the sphere of copyright and patent for design overlapped, agreed with the circuit court that, if this was a painting, every reproduction of it must bear the statutory notice, and affirmed the dismissal of the bill. 111 C. C. A. 567, 191 Fed. 35.

It seems to us that the case is disposed of by the statement. The thing protected and the only thing was the painting, the whole of which was reproduced in a single square. Every reproduction of a copyrighted work must bear the statutory notice. American Tobacco Co. v. Werckmeister, 207 U. S. 284, 294, 52 L. ed. 208, 215, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595. It is sug-

gested that it is overtechnical to require a repetition of the notice upon every square in a single sheet that makes a harmonious whole. This argument tacitly assumes that we can look to such larger unity as the sheet possesses. But that unity is only the unity of a design that is not patented. [37] The protected object does not gain more extensive privileges by being repeated several times upon one sheet of paper, as anyone would recognize if it were the Gioconda. The appellant is claiming the same rights as if this work were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a Holy Family, or a scene of war.

Decree affirmed.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 37–41.)

Public lands — railway land grants — conditions — Indian lands.

The grant of alternate sections of land through the Indian Territory, made in aid of railway construction by the act of July 25, 1866 (14 Stat. at L. 236, chap. 241), § 9, "whenever the Indian title shall be extinguished . . . provided that said lands become a part of the public lands of the United States," never attached to lands which, under subsequent congressional legislation, have been distributed in severalty to the members of the Five Civilized Indian Tribes, or have been sold for their benefit.

[For other cases, see Public Lands, I. c, 2, h; Real Property, I. a, 2.]

[No. 25.]

Argued October 28, 29, 1914. Decided November 9, 1914.

APPEAL from the Court of Claims to review a decree which dismissed upon demurrer a claim based upon a congressional railway land grant. Affirmed.

See same case below, 47 Ct. Cl. 59.

The facts are stated in the opinion.

Messrs. **Joseph M. Bryson** and **H. S. Priest** argued the cause, and, with Messrs. A. B. Browne, C. L. Jackson, and W. W. Brown, filed a brief for appellant:

The United States, at the time of the grant, owned the paramount and ultimate title to the lands in the Indian Territory under its purchase from France in 1803, subject only to the right of occupancy in common of the Indian tribes and nations, under the Indian treaties and patents, and, as such owner, the United States had the unquestioned power to grant the lands to the railroad company.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Cherokee Nation v. Georgia, 5 Pet. 17, 8 L. ed. 31; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; United States v. Choctaw Nation, 179 U. S. 523, 45 L. ed. 302, 21 Sup. Ct. Rep. 149; Clark v. Smith, 13 Pet. 195, 10 L. ed. 123; United States v. Cook, 19 Wall. 591, 22 L. ed. 210; Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Irvine v. Marshall, 20 How. 558, 15 L. ed. 994; Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Veale v. Maynes, 23 Kan. 1; Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; Missouri, K. & T. R. Co. v. United States, 92 U. S. 760, note, 23 L. ed. 645; Mitchel v. United States, 9 Pet. 711, 9 L. ed. 283; United States v. Payne, 2 McCrary, 289, 8 Fed. 883; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; United States v. Choctaw Nation, 179 U. S. 523, 45 L. ed. 302, 21 Sup. Ct. Rep. 149.

As to the meaning and effect of the grants of land, as made by the acts of July 25 and 26, 1866, see 19 Am. & Eng. Enc. Law, 306; Baggaley v. Pittsburg & L. S. Iron Co. 33 C. C. A. 202, 62 U. S. App. 683, 90 Fed. 638; State ex rel. Holt Lumber Co. v. Bellew, 86 Wis. 189, 56 N. W. 782; United States v. Blendaur, 63 C. C. A. 636, 128 Fed. 910; Boynton v. People, 166 Ill. 64, 46 N. E. 791; Brattle Square Church v. Grant, 3 Gray, 142, 63 Am. Dec. 725; Cade v. Brown, 1 Wash. 401, 25 Pac. 457; Carter v. Hobbs, 92 Fed. 599; Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; United States v. Cook, 19 Wall. 591, 22 L. ed. 210; Wall v. Cox, 41 C. C. A. 408, 101 Fed. 409; 4 Cruise's Dig. p. 271; United States v. Denver & R. G. R. Co. 190 Fed. 825; United States v. Dickson, 15 Pet. 141, 10 L. ed. 689; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; Dustin v.

NOTE.—On land grants to railroads, generally—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

Newcomer, 8 Ohio, 49; Reichart v. Felps, 6 Wall. 160, 18 L. ed. 849; Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Hopkins v. Young, 11 Mass. 302; Phillips v. Herndon, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857; Hoselton v. Hoselton, 166 Mo. 182, 65 S. W. 1005; Thornhill v. Hall, 2 Clark & F. 36, 8 Bligh, N. R. 88; Johnson v. McMullin, 3 Wyo. 237, 4 L.R.A. 670, 21 Pac. 701; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Union P. R. Co. v. Karges, 169 Fed. 459; Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Re Matthews, 109 Fed. 614; Veale v. Maynes, 23 Kan. 1; McMicken v. United States, 97 U. S. 204, 24 L. ed. 947; United States v. Minidoka & S. W. R. Co. 111 C. C. A. 323, 190 Fed. 491; Minis v. United States, 15 Pet. 445, 10 L. ed. 799; Mitchell v. Simons, — Tex. Civ. App. —, 53 S. W. 76; Zumstein v. Mullen, 67 Ohio St. 382, 66 N. E. 140; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 614; Northern P. R. Co. v. United States, 227 U. S. 355, 57 L. ed. 544, 33 Sup. Ct. Rep. 368; United States v. De Repentigny, 5 Wall. 211, 18 L. ed. 627; United States v. Sapinkow, 90 Fed. 659; Smith v. Smith, 23 Wis. 176, 90 Am. Dec. 153; Wayman v. Southard, 10 Wheat. 30, 6 L. ed. 259; Sutherland, Stat. Constr. 2d ed. § 352; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; White v. United States, 191 U. S. 551, 48 L. ed. 297, 24 Sup. Ct. Rep. 171; Re Woodbury, 98 Fed. 836.

The land grant must be considered in the light of the history of the times and condition of the country,—what the parties to the grant had reason to believe it meant,—the purposes in view in making and accepting the grant. It must be viewed as a law in the nature of a statutory contract. It must be liberally construed in favor of the company that fully executed and relied upon it.

Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; Bl. Com. bk. 2, chaps. 20, 21; Cherokee Nation v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; United States v. Denver & R. G. Co. 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Northern P. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co. 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205; Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152.

The grant was a grant *in præsenti*. Every condition of the grant was complied with by the railroad company, and, upon the extinguishment of the Indian title, the lands became a part of the public lands of the United States, and the government, by breaching the grant, elected to respond in damages.

Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; Barney v. Winona & St. P. R. Co. 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep 100; Iowa R. Land Co. v. Courtright (Cedar Rapids & M. River R. Co. v. Courtright) 21 Wall. 310, 22 L. ed. 582; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; Dubuque & S. City R. Co. v. Des Moines Valley R. Co. 109 U. S. 329, 27 L. ed. 952, 3 Sup. Ct. Rep. 188; Glasgow v. Hortiz, 1 Black, 595, 17 L. ed. 110; Grinnell v. Chicago, R. I. & P. R. Co. 103 U. S. 739, 26 L. ed. 456; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Lessieur v. Price, 12 How. 59, 13 L. ed. 893; Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; Frasher v. O'Connor, 115 U. S. 102, 29 L. ed. 311, 5 Sup. Ct. Rep. 1141; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Wood v. Burlington & M. River R. Co. 104 U. S. 329, 26 L. ed. 772; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334.

The government's contention that the land grant could not operate as a grant *in præsenti*, because the lands were not surveyed at the time of the location and construction of the road, is without foundation and unsupported by any of the authorities. Indeed, the court of claims so ruled.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; Cooper v. Roberts, 18 How. 173, 15 L. ed. 338; Rutherford v. Green, 2 Wheat. 196, 4 L. ed. 218; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23

L. ed. 634; Lessieur v. Price, 12 How. 59, 13 L. ed. 893; Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152.

The grant in question was of "lands through the Indian Territory." The grant of the right-of-way through the Indian Territory was a grant of the same nature and in practically the same terms as the grant of the lands.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496.

The grant in question constituted a contract between the United States and the railroad company, whether considered a grant *in præsenti* or a grant *in futuro*.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Wirth v. Branson, 98 U. S. 118, 25 L. ed. 86; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Campbell v. Wade, 132 U. S. 37, 33 L. ed. 241, 10 Sup. Ct. Rep. 9; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Emblen v. Lincoln Land Co. 184 U. S. 660, 46 L. ed. 736, 22 Sup. Ct. Rep. 523; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Houston & T. C. R. Co. v. Texas, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. Rep. 610; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; McGee v. Mathis, 4 Wall. 143, 18 L. ed. 314; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727.

The United States, by rendering impossible a condition which was bound to occur in due course, and which both parties understood was certain to occur, and by disabling itself from carrying out and making effective its grant to the railroad company, and by alloting and selling the granted lands, violated the grant to the railroad company, and is concluded and estopped from making use of the proviso in § 9 of the grant, to defeat the claim of the railroad company, as no party to a contract can insist on the fulfilment of a condition, the happening or execution of which it renders impossible.

Reilly v. Albany, 112 N. Y. 30, 19 N. E. 508; Williams v. Bank of United States, 2 Pet. 96, 7 L. ed. 360; Barber Asphalt Paving Co. v. Denver, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336; Noyes v. Barnard, 11 C. C. A. 424, 15 U. S. App. 527, 63 Fed. 782; Beach, Contr. §§ 403–409; Boies v. Vincent, 24 Iowa, 387; Denny v. Campbell, 9 Ky. L. Rep. 367, 4 S. W. 301; Chicago v. People, 56 Ill. 327; Cowart v. Edwards, 4 Tex. Civ. App. 276, 23 S. W. 569; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Read v. Davis, 35 Me. 379; Fleming v. Gilbert, 3 Johns. 528; Gallagher v. Nichols, 60 N. Y. 438; Ray v. Hodge, 15 Or. 20, 13 Pac. 599, 15 Mor. Min. Rep. 371; Long v. Saufley, 79 Cal. 260, 21 Pac. 757; Lovell v. St. Louis. Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; Kies v. Tifft, 1 Cow. 98; United States v. Peck, 102 U. S. 64, 26 L. ed. 46; Risley v. Smith, 64 N. Y. 576; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; White v. Snell, 5 Pick. 426, 9 Pick. 16; Tureman v. Stephens, 83 Mo. 218.

The facts stated in the petition constitute a cause of action within the jurisdiction of the court of claims, and that court should have overruled the demurrer.

Bedford v. United States, 192 U. S. 224, 48 L. ed. 417, 24 Sup. Ct. Rep. 238; Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; Ogden v. Blackledge, 2 Cranch, 272, 2 L. ed. 276; Bonner v. United States, 9 Wall. 156, 19 L. ed. 666; Brown v. United States, 6 Ct. Cl. 171; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 524, 50 L. ed. 852, 26 Sup. Ct. Rep. 518; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; Choctaw & C. Nations v. United States, 34 Ct. Cl. 17; Pawlet v. Clark, 9 Cranch, 292, 3 L. ed. 735; United States v. Cook, 19 Wall. 591, 22 L. ed. 210; United States v. Curtner, 38 Fed. 1; Reichart v. Felps, 6 Wall. 160, 18 L. ed. 849; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, 16 Ct. Cl. 160; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Hill v. United States, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Juragua Iron Co. v. United States, 212 U. S. 297, 53 L. ed. 520, 29 Sup. Ct. Rep. 385; Kansas v. United States, 204 U. S. 331, 51 L. ed. 510, 27 Sup. Ct. Rep. 388; Langford v. United States, 12 Ct. Cl. 338, 101 U. S. 341, 25 L. ed. 1010; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; United States v. Louisiana, 123 U. S. 32, 31 L. ed. 69, 8 Sup. Ct. Rep. 17; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Manigault v. Springs, 199 U. S. 484, 50 L. ed. 280, 26 Sup. Ct. Rep. 127; Veale v. Maynes, 23 Kan. 1; Milliken Imprinting

Co. v. United States, 40 Ct. Cl. 81, 202 U. S. 168, 50 L. ed. 980, 26 Sup. Ct. Rep. 572; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; Northern P. R. Co. v. United States, 227 U. S. 355, 57 L. ed. 544, 33 Sup. Ct. Rep. 368; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

The acts and doings of the United States through acts of Congress and executive action thereunder since the acts of Congress of 1866 were passed in legal effect annulled such latter acts, treated as laws, and repudiated them, considered as a contract.

20 Am. & Eng. Enc. Law, 836; Bl. Com. bk. 2, chap. 7, pp. 106–109; chap. 10, pp. 155, 156, chap. 11, pp. 164–168, 175–178; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Cherokee Nation v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Choctaw & C. Nations v. United States, 34 Ct. Cl. 17; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

Messrs. Joseph M. Bryson, H. S. Priest, Alexander Britton, C. L. Jackson and W. W. Brown filed a brief in reply for appellant:

There is no merit in the contention of the government that there could not be a grant *in præsenti*, because there was then no ascertained grantee.

Jamestown & N. R. Co. v. Jones, 177 U. S. 131, 44 L. ed. 700, 20 Sup. Ct. Rep. 568; Pennsylvania Min. & Improv. Co. v. Everett & M. C. R. Co. 29 Wash. 102, 69 Pac. 628; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095.

Throughout this litigation, counsel for the government have claimed, in one way or another, that our grant was in no sense a grant of a property right or an executed grant, and that at best it could only be looked upon as a mere gift or promise of a grant in the future, which the government could take back entirely, or change or modify at will. This contention is completely answered in the recent decision of this court in the Southern Pacific Mineral Lands Case (Burke v. Southern P. R. Co. 234 U. S. 669, 58 L. ed. 1527, 34 Sup. Ct. Rep. 907).

Grants are not to be so construed as to defeat the intent of the legislature, or to withhold what is given, either expressly or by necessary or fair implication.

United States v. Denver & R. G. R. Co. 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11.

In order to determine the meaning of this contract, we must place ourselves in the circumstances of the parties at the time, with their surroundings and expectations.

Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; Cherokee Nation v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55.

It must be presumed that Congress acted and would act in good faith; and of course there could be no intent to deplete this grant by subsequent legislation in respect to land grants.

Northern P. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co. 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205.

Assistant Attorney General Thompson argued the cause, and, with Solicitor General Davis, filed a brief for appellee:

The terms of the grant must be strictly construed against appellant.

Rice v. Minnesota & N. W. R. Co. 1 Black, 358–380, 17 L. ed. 147–153; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733–739, 23 L. ed. 634–637; Dubuque & P. R. Co. v. Litchfield, 23 How. 66–88, 16 L. ed. 500–509; Slidell v. Grandjean, 111 U. S. 437, 28 L. ed. 329, 4 Sup. Ct. Rep. 475.

The Indian treaties and rights thereunder should be saved from interference by grants to others.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733–739, 23 L. ed. 634–637; Starr v. Long Jim, 227 U. S. 613–622, 57 L. ed. 670–674, 33 Sup. Ct. Rep. 358; Worcester v. Georgia, 6 Pet. 515–582, 8 L. ed. 483–508; Choctaw Nation v. United States, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75; Minnesota v. Hitchcock, 185 U. S. 373, 402, 46 L. ed. 954, 968, 22 Sup. Ct. Rep. 650.

Congress did not intend to make a grant *in præsenti* in the act of July 25, 1866.

Worcester v. Georgia; Choctaw Nation v. United States; and Minnesota v. Hitchcock, —supra.

The grant to appellant was *in futuro*.

Bardon v. Northern P. R. Co. 145 U. S. 535, 543, 36 L. ed. 806, 810, 12 Sup. Ct. Rep. 856; Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; Newhall v. Sanger, 92 U. S. 761, 763, 23 L. ed. 769, 770; United States v. Thomas, 151 U. S. 577, 583, 38 L. ed. 276, 278, 14 Sup. Ct. Rep. 426; Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 616; Hall v. Russell, 101 U. S. 503–509, 25 L. ed. 829–831;

Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780.

Mr. Justice Holmes delivered the opinion of the court:

This claim, as construed by the claimant and appellant, is based upon covenants supposed to be imported by an act of Congress of July 25, 1866, chap. 241, § 9. 14 Stat. at L. 236. Upon demurrer it was dismissed by the court of claims. 47 Ct. Cl. 59. The largeness of the demand tends to induce a correspondingly voluminous statement, but the issue really is narrow and the material facts are few.

The United States had made land grants to the great roads running east and west, but had not provided for a connection between those roads and the Gulf, through Kansas and the Indian territory to the south. To that end, the act of July 25, 1866, after granting to Kansas, for the use of a road to be built through eastern Kansas from the eastern terminus of the Union Pacific between Kansas and Missouri, ten alternate sections per mile on each side of the road, § 1, authorized the company mentioned to extend its road from the southern boundary of Kansas south, through the Indian territory to Red river, at or near Preston, in Texas, so as to connect with a road then being constructed from Galveston to that point. § 8. The appellant also had been authorized by charter to build a road running southerly from a point on the Union Pacific to where the southern boundary of Kansas crosses the Neosho river, and had acquired a land grant; and the act of July 25, 1866, went on to provide that if the appellant, under its former name of Union [39] Pacific Railway, Southern Branch, first completed its road to the point of crossing the southern boundary of Kansas, it should be authorized to construct its line to the point near Preston, "with grants of land according to the provisions of this act." The right of way was granted in accordance with treaties with the Indians, and is not in question here.

The appellant finished its road first, built the southern extension, and acquired the rights to land under the act of 1866, and the question is what rights it has, in the event that has happened, under § 9. That section enacted "that the same grants of land through said Indian territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act; Provided, That said lands become a part of the public lands of the United States." This part of the Indian territory was occupied by the five civilized tribes, and what has happened is that, under acts of Congress, the land concerned has been distributed in severalty to the members of those tribes, or sold for their benefit.

Taken literally, the grant or covenant of the United States was subject to two conditions precedent. "Whenever the Indian title shall be extinguished" means when and not until that occurs; and contemplates it as something that may or may not come to pass. That proviso attaches the further condition that if the Indian title shall be extinguished, it must be extinguished in such a way that the lands become a part of the public domain. It cannot be said that "whenever" imports that sooner or later the Indian title will and shall be disposed of. The Indians had to be considered, and it could not be assumed that they would be removed to another place, as they had been removed before. It cannot be said, either, that, on the face of the clause, the proviso adds nothing, and means [40] only that, on extinction of the Indian title, the rights of the railroad shall attach as if the land were public land. The section, taken by itself and on its face, excludes the claimant's interpretation that the United States made an absolute promise or grant, and it excludes it none the less that certain services were to be rendered by the road to the United States as one of the terms of the grant of a right of way which the railroad got. On this literal reading of the statute the conditions have not been fulfilled. The land has remained continuously appropriated to the use of the Indians, or has been sold for their benefit. It never for a moment has become a part of the public domain in the ordinary sense. Newhall v. Sanger, 92 U. S. 761, 763, 23 L. ed. 769, 770; Union P. R. Co. v. Harris, 215 U. S. 386, 388, 54 L. ed. 246, 247, 30 Sup. Ct. Rep. 138. It is argued that the grant attached the moment that the tribal title ceased, whatever it was. But, still looking only at the face of the act, and seeing the intent to respect the Indian rights, we cannot read it as preventing the United States from making the change from tribal to several possessions, or dealing with this land in any way deemed most beneficial for those whose rights were treated as paramount. The proviso that the land must become public land shows that a mere change from tribal title was not enough. Taken literally, the grant only

applied in case the Indians were removed or bought off the land.

The facts existing at the time confirm the literal interpretation of the act. Less than a week before the passage of the statute the United States had made a treaty with the Cherokees that contemplated the possible allotment of their share in this land to be held in severalty. Treaty of July 19, 1866, art. 16, 14 Stat at L. 799, 804. On June 14, 1866, it had agreed with the Creeks that their lands should be forever set apart as a home for the nation. 14 Stat. at L. 785. And by a treaty of April 28, 1866, art. 11, it had agreed with the Choctaws and Chickasaws that [41] they might have their lands surveyed and divided up, reciting that it was believed that the holding of the land in severalty would promote the general civilization of said nation. 14 Stat. at L. 769, 774. Whether or not, as the government contends, the title of these tribes to the land in controversy was higher than the original possessory right, the United States, as the appellant must be taken to have known, just before its covenant with the railroad, had been holding out to the Indians the desirableness and possibility of dividing up their lands into individual holdings; and it would be to accuse the government of bad faith to one party or the other to suggest that it forthwith agreed with the appellant that the moment such a division and allotment took place the appellant thereby should acquire a paramount title and render the allotment vain. See, further, Kansas v. United States, 204 U. S. 331, 341, 342, 51 L. ed. 510, 513, 514, 27 Sup. Ct. Rep. 388.

The action of Congress in making the allotment to individuals shows in express terms that it did not suppose that the railroads would, or intend that they should, acquire any new rights. Act of March 1, 1901, chap. 676, ¶ 23, 31 Stat. at L. 861, 868; July 1, 1902, chap. 1362, 32 Stat. at L. 641; July 1, 1902, chap. 1375, 32 Stat. at L. 716; April 26, 1906, chap. 1876, § 27, 34 Stat. at L. 137, 148. Our conclusion from the words of the statute and the circumstances seems to us too plain to require a reference to the rule of strict construction against the grantee of the government in case of doubt, and seems to us unaffected by the argument that a grant *in praesenti* was made by § 9. It appears to us that the appellant's claim stands most strongly if based upon a covenant; but, covenant or grant, the concession of the United States was dependent upon conditions that have not been fulfilled.

Judgment affirmed.

[42] RUAL F. TAYLOR, Plff. in Err.,
v.
MRS. ALLIE PARKER (*née* Collins, Joseph D. McCoy, W. L. T. Hilton, Legal Guardian of John Collins, et al.

(See S. C. Reporter's ed. 42-44.)

Indian allotments — restrictions on alienation — devise.

1. The restrictions upon alienation by Indian allottees, made by ¶¶ 12, 15, 16, of the supplemental agreement with the Choctaws and Chickasaws, ratified by the act of Congress of July 1, 1902 (32 Stat. at L. 641, chap. 1362), extend to a devise by will.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — restrictions on alienation — devise — extension of Arkansas laws.

2. The extension of the laws of Arkansas theretofore put in force in the Indian Territory so as to embrace all persons and estates in said territory, whether Indians, freedmen, or otherwise, made by the act of April 28, 1904 (33 Stat. at L. 573, chap. 1824), § 2, enabled an Indian in the Indian Territory to devise all his alienable property by a will made in accordance with the laws of the state of Arkansas, but did not operate to remove any of the restrictions on alienation by Indian allottees theretofore made by congressional legislation.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 58.]

Submitted November 5, 1914. Decided November 16, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Johnson County, in that state, for the recovery of an Indian allotment devised by an Indian allottee. Affirmed.

See same case below, 33 Okla. 199, 126 Pac. 573.

The facts are stated in the opinion.

Mr. H. A. Ledbetter submitted the cause for plaintiff in error:

By the act of April 28, 1904, the chapter on Wills in Mansfield's Digest was clearly put in force as to all Indians in the Indian Territory, including the Choctaw and Chicasaws, and jurisdiction was conferred upon the United States courts to administer upon such estates. Prior to that date the United States courts had no jurisdiction to settle estates of members of the Choctaw and Chickasaw tribes of Indians.

Re Poff, 7 Ind. Terr. 59, 103 S. W. 765; Hayes v. Barringer, 7 Ind. Terr. 697, 104 S. W. 937; Elliott v. Garvin, 7 Ind. Terr. 679, 104 S. W. 878.

The restrictions imposed in § 12 of the

Choctaw-Chickasaw supplemental agreement prohibit the alienation of the homestead portion of the testatrix's allotment during her lifetime, and only during her lifetime.

Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494.

In so far as the homestead portion of the lands involved is concerned, the restriction on alienation is against the allottee, and him alone. There is no restriction running with the land. Upon the death of the allottee, the homestead was alienable by his heirs.

Ibid.

In so far as that portion of the allotment in excess of homestead is concerned, the restriction does not run with the land, except that it cannot be sold by the allottee or his heirs for less than the appraised value, provided the sale is made before the expiration of the tribal government. The will is not an alienation.

Vining v. Willis, 40 Kan. 609, 20 Pac. 232; Burbank v. Rockingham Mut. F. Ins. Co. 24 N. H. 550, 57 Am. Dec. 300; Macrae v. Macrae, — Tenn. Ch. App. —, 57 S. W. 423; Bostick v. Chovin, 55 S. C. 427, 33 S. E. 508; Turner v. Bennett, 70 Ill. 263; Caro v. Caro, 45 Fla. 203, 34 So. 309.

Messrs. **Cornelius Hardy, A. C. Cruce, W. I. Cruce,** and **W. R. Bleakmore** submitted the cause for defendants in error:

Disposition of real estate by will is an alienation of the property.

Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221; Lewis's Bl. Com. 19, 23; Burbank v. Rockingham Mut. F. Ins. Co. 24 N. H. 558, 57 Am. Dec. 300; Lane v. Maine Mut. F. Ins. Co. 12 Me. 44, 28 Am. Dec. 150; Harty v. Doyle, 49 Hun, 410, 3 N. Y. Supp. 574; Butler v. Fitzgerald, 43 Neb. 204, 27 L.R.A. 252, 47 Am. St. Rep. 750, 61 N. W. 640; Anderson's Law Dict. p. 48; Kerr, Real Prop. 267; Jackson v. Thompson, 38 Wash. 282, 80 Pac. 454; United States ex rel. Zane v. Zane, 4 Ind. Terr. 185, 69 S. W. 842.

Where there is a general statute dealing with a subject and a special statute on the same subject, if there is any conflict between the two, the special statute will prevail over the general.

36 Cyc. 1151.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by the heirs of Maggie Taylor, a member of the Chickasaw tribe of Indians, against the plaintiff in error, her husband and devisee, to recover her allotment, which she devised to him. The answer relied upon the [43] will, the plaintiffs demurred, and the courts of Oklahoma sustained the demurrer and gave judgment for the plaintiffs. 33 Okla. 199, 126 Pac. 573. The question is whether the devise was invalid under the supplemental agreement with the Choctaws and Chickasaws, ratified by the act of Congress of July 1, 1902, chap. 1362, 32 Stat. at L. 641.

By ¶ 12 of the above act "each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead." By ¶ 16 all lands allotted to members of said tribes except homestead shall be alienable after issue of patent, one fourth in acreage in one year, one fourth in three years, and the rest in five years; but not for less than its appraised value before the expiration of the tribal governments. The plaintiff in error, in aid of the construction of ¶¶ 12, 16, for which he contends, and to show that transactions *inter vivos* alone were aimed at by the word "inalienable," invokes ¶ 15, which enacts that allotted lands "shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

The land in question was allotted to Maggie Taylor in 1903, including, it would seem, a homestead; patents were issued on December 20, 1904, and were approved by the Secretary of the Interior and delivered on December 28, 1904. She made her will on March 22 and died on March 25, 1905, so that if the foregoing prohibitions extend to a devise, they include the one under which the plaintiff in error claims. Obviously they could be read in a narrower [44] sense, and whichever interpretation be adopted, it would not be helped by long discussion. In view of the evils sought to be prevented, and in aid of what we understand to have been the policy of the Indians and the United States in their agreement, we are of opinion that the supreme court of this state was right in extending the prohibition to wills. To the same effect is Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221. See also Jackson v. Thompson, 38 Wash. 282, 80 Pac. 454.

A further and distinct argument is based upon the act to provide for additional judges, etc., of April 28, 1904, chap. 1824, § 2, 33 Stat. at L. 573, to the effect that all

the laws of Arkansas theretofore put in force in the Indian Territory are extended to embrace all persons and estates in said territory, whether Indians, freedmen, or otherwise, and full jurisdiction is conferred upon the district courts in the settlement of all estates of decedents, and the guardianship of minors and incompetents, whether Indians, freedmen, or otherwise. The Arkansas law of wills was a part of the law that thus had been adopted for the Indian Territory before 1904, and it is contended that the result of the above extension was to free the Indians from the restrictions so specifically imposed upon them in 1902. Of course, nothing of that sort was intended. As said below, the extension enabled "the Indian to devise all his alienable property by will made in accordance with the laws of the state of Arkansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by act of Congress." That this was the understanding of Congress is indicated by the acts of April 26, 1906, chap. 1876, § 23, 34 Stat. at L. 137, 145, and May 27, 1908, chap. 199, 35 Stat. at L. 312, giving Indians power to dispose of their allotments by will.

Judgment affirmed.

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[45] FRANK J. WILLOUGHBY, Louise Specht, Henry E. Sever, et al., Plffs. in Err.,

v.

CITY OF CHICAGO.

(See S. C. Reporter's ed. 45-50.)

Error to state court — Federal question — raising in trial court.

1. The objection that an assessment for benefits resulting from the widening of a street was imposed by mere judicial fiat that could not have been anticipated and that was without warrant of law, which, not being taken at the trial, was not open in the highest state court, cannot serve as the basis of a writ of error to that court from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1251-1256, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — local practice.

2. Whether the state could, not whether it did, authorize the procedure followed below, is ordinarily the only question open for consideration by the Federal Supreme Court on a writ of error to a state court, which attacks the validity, under the Federal Constitution, of an assessment for benefits resulting from the widening of a street.

[For other cases, see Appeal and Error, 1601-1644, 2209-2226, in Digest Sup. Ct. 1908.]

Public improvements — assessment for benefits — liability of purchaser.

3. Purchasers of real property after the damages for the part taken in the widening of a street have been fixed by judgment in due form take the property subject to the same liability as the original owners to the subsequent levy of an assessment for the benefits resulting from such improvement.

[For other cases, see Public Improvements, II., in Digest Sup. Ct. 1908.]

Error to state court — Federal question — statutory construction.

4. Whether or not an assessment of benefits resulting from the widening of a street could have been levied if the land had not been sold is a question of statutory construction, the decision of which by the state court will be followed by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Constitutional law — vested rights — change of judicial decision.

5. No vested rights of the owners of

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to when Federal question is raised in time to sustain appellate jurisdiction of Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On questions of local practice and procedure on writ of error from Federal Supreme Court to a state court—see note to Texas & N. O. R. Co. v. Miller, 55 L. ed. U. S. 790.

As to change of decision of state court as impairing obligation of contract—see notes to Mitchell v. Burlington, 18 L. ed. U. S. 351; Los Angeles v. Los Angeles City Water Co. 44 L. ed. U. S. 886; Allen v. Allen, 16 L.R.A. 646; Swanson v. Ottumwa, 5 L.R.A. (N.S.) 860; and Crigler v. Shepler, 23 L.R.A. (N.S.) 500.

As to review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On increase in proportion of tax or assessment imposed on property as impairment of vested right—see note to Durrett v. Davison, 8 L.R.A. (N.S.) 546.

As to impairment of vested rights, generally, see note to Fletcher v. Peck, 3 L. ed. U. S. 162.

real property can be said to be interfered with by the overruling of earlier decisions so as to render the property liable for an assessment for the benefits resulting from the widening of a street after the damages for the part taken have been fixed by judgment in due form.

[For other cases, see Constitutional Law, IV. e, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — question of fact.

6. Whether the benefit to real property from the widening of a street is greater or less than the damage is a question of fact not open for consideration on a writ of error from the Federal Supreme Court to a state court, attacking the validity of an assessment for benefits.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

[No. 66.]

Submitted November 6, 1914. Decided November 16, 1914.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cook County, in that state, confirming an assessment for benefits resulting from a local improvement. Dismissed for want of jurisdiction.

See same case below, 249 Ill. 249, 94 N. E. 513.

The facts are stated in the opinion.

Mr. Charles R. Holden submitted the cause for plaintiffs in error:

All that is essential is that the Federal questions be presented in the state court in such a manner as to bring them to the attention of that tribunal.

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 534, 46 L. ed. 673, 676, 22 Sup. Ct. Rep. 446.

Special assessments are statutory proceedings, and without a statutory warrant, no special assessment can be levied; and this applies to new or supplemental assessments.

Chicago v. Race, 256 Ill. 209, 99 N. E. 924.

These owners had purchased upon the faith of a long line of uniform and settled rulings of the supreme court of Illinois. And hence the judgment here, based upon a square reversal of these rulings, is a taking without due process of law, and an impairment of the contracts of purchase.

Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576.

The judgment upon its face is pure confiscation of property.

Bloomington v. Latham, 142 Ill. 462, 18 L.R.A. 487, 32 N. E. 506; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

Messrs. William H. Sexton and Philip J. McKenna submitted the cause for defendant in error. Mr. Howard F. Bishop was on the brief:

Special assessments are local matters.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Cooley, Taxn. 3d ed. p. 68.

This court does not interfere with the revenue laws of a state.

French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Witherspoon v. Duncan, 4 Wall. 210, 217, 18 L. ed. 339, 342; Williams v. Albany County, 122 U. S. 154, 164, 30 L. ed. 1088, 1089, 7 Sup. Ct. Rep. 1244; Schaefer v. Werling, 188 U. S. 516, 517, 47 L. ed. 570, 571, 23 Sup. Ct. Rep. 449.

A special assessment is a species of taxation.

French v. Barber Asphalt Paving Co. 181 U. S. 324, 343, 344, 45 L. ed. 879, 889, 890, 21 Sup. Ct. Rep. 625; Chicago & A. R. Co. v. Joliet, 153 Ill. 649, 39 N. E. 1077; Adams County v. Quincy, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624.

Special assessment proceedings are reviewed in this court only in exceptional cases.

Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Cooley, Taxn. 3d. ed. pp. 55, 1280; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Seattle v. Kelleher, 195 U. S. 351, 359, 49 L. ed. 232, 235, 25 Sup. Ct. Rep. 44; Williams v. Albany County, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244.

The decision of a state court on a question of fact is conclusive.

Spencer v. Merchant, 125 U. S. 345, 353, 31 L. ed. 763, 766, 8 Sup. Ct. Rep. 921; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 120, 121, 46 L. ed. 830, 833, 22 Sup. Ct. Rep. 566; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 103, 45 L. ed. 765, 771, 21 Sup. Ct. Rep. 561; E. Bement & Sons v. National Harrow Co. 186 U. S. 83, 46 L. ed. 1064, 22 Sup. Ct. Rep. 747; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Avery v. Popper, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Corry v. Campbell, 154

U. S. 629, 24 L. ed. 926, 14 Sup. Ct. Rep. 1183; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 669; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; German Nat. Bank v. Kimball, 103 U. S. 732, 26 L. ed. 469.

This court accepts the conclusion of the state court as to the proper construction of a state statute.

Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Green v. Neal, 6 Pet. 291, 8 L. ed. 402; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 590, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117; Re Converse, 137 U. S. 624, 631, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

A change of view by the state court does not raise a Federal question under the contract clause of the United States Constitution.

Mobile Transp. Co. v. Mobile, 187 U. S. 479, 488, 47 L. ed. 266, 272, 23 Sup. Ct. Rep. 170; Knox v. Exchange Bank, 12 Wall. 379, 383, 20 L. ed. 414, 415; St. Paul, M. & M. R. Co. v. Todd County, 142 U. S. 282, 286, 35 L. ed. 1014, 1015, 12 Sup. Ct. Rep. 281; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 30, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 181, 18 L. ed. 381, 382; Bacon v. Texas, 163 U. S. 207, 220, 41 L. ed. 132, 137, 16 Sup. Ct. Rep. 1023; Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 393, 36 L. ed. 191, 200, 12 Sup. Ct. Rep. 530; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 647, 48 L. ed. 823, 828, 24 Sup. Ct. Rep. 532; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169.

No Federal question was decided by the Illinois supreme court, nor was any Federal question necessary to its decision. Therefore, the writ should be dismissed.

Marrow v. Brinkley, 129 U. S. 178, 181, 32 L. ed. 654, 655, 9 Sup. Ct. Rep. 267; McQuade v. Trenton, 172 U. S. 636, 639, 43 L. ed. 581, 582, 19 Sup. Ct. Rep. 292; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Bacon v. Texas, 163 U. S. 207, 227, 41 L. ed. 132, 139, 16 Sup. Ct. Rep. 1023; Kreiger v. Shelby R. Co. 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Hopkins v. McLure, 133 U. S. 380, 386, 33 L. ed. 660, 662, 10 Sup. Ct. Rep. 407; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Beaupre v. Noyes, 138 U. S. 397, 401, 34 L. ed. 991, 992, 11 Sup. Ct. Rep. 296; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; Gillis v. Stinchfield, 159 U. S. 658, 660, 40 L. ed. 295, 296, 16 Sup. Ct. Rep. 131; Seneca Nation v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

As a matter of procedure, no Federal question is properly presented to this court for review, inasmuch as no Federal question was decided by the Illinois supreme court, nor could have been decided by the Illinois supreme court, as it was not properly presented before that court in accordance with the Illinois practice.

Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Keyes v. Kimmel, 186 Ill. 114, 57 N. E. 851; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; Kelly v. Chicago, 148 Ill. 90, 35 N. E. 752; Watts v. River Forest, 227 Ill. 31, 81 N. E. 12; Close v. Chicago, 217 Ill. 216, 75 N. E. 479; Clark v. Chicago, 214 Ill. 318, 73 N. E. 358; South Chicago City R. Co. v. Chicago, 196 Ill. 490, 63 N. E. 1046.

This case was decided on grounds not involving any Federal questions.

Beatty v. Benton, 135 U. S. 244, 34 L. ed. 124, 10 Sup. Ct. Rep. 747; Marrow v. Brinkley, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; Hopkins v. McLure, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; Gibson v. Chouteau, 8 Wall. 314, 19 L. ed. 317; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811.

No Federal question was necessary to the determination of this case.

Moore v. Mississippi, 21 Wall. 638, 22 L. ed. 653; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Brown v. Atwell, 92 U. S. 327, 23

L. ed. 511; Citizens' Bank v. Board of Liquidation, 98 U. S. 140, 25 L. ed. 114.

No Federal question is here presented on the theory that the provision of the 14th Amendment, forbidding the deprivation of property without due process of law, has been violated. There has been a full and complete hearing in the regular course of judicial proceedings.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

No question is presented for review on the ground that the contract clause of the Federal Constitution has been violated.

Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44; Cooley, Taxn. 3d ed. 527, 528; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

Mr. Justice Homes delivered the opinion of the court:

In 1893 a portion of certain land now belonging to the plaintiffs in error was taken by Chicago for the widening of a street, and the damages to the owners were fixed by judgment in due form. Afterwards an assessment for betterments by reason of the change was laid upon certain lands in this neighborhood, including the lots in question, and was confirmed as to the other land. At the trial with regard to these lots it was contended by the owner and ruled in the lower court that the matter was concluded [49] by the first judgment. This ruling was reversed by the supreme court of the state (Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117), but by the failure of the city to file the remanding order within two years the assessment upon these lots failed. In January, 1910, the city passed an ordinance for a new assessment, the object of which was to reach these lots, and a new petition was filed. The supreme court of the state held that the validity of the assessment did not depend on the validity of the ordinance; that the petition was warranted by the former proceedings, and that a judgment for the amount should be affirmed. 249 Ill. 249, 94 N. E. 513.

The error assigned is that the property of the plaintiffs in error is taken without due process of law, and that the obligation of their contracts is impaired (they having purchased before this supplementary proceeding was begun), contrary to the 14th Amendment and art. I, § 10, of the Constitution of the United States. There is a motion to dismiss upon which we must dispose of the case. The objection which is urged is that there was no statutory authority for this proceeding, and that the assessment was imposed by mere judicial fiat that could not have been anticipated, and that was without warrant of law. If there were anything in this objection, it was obvious from the beginning; and as it was not taken at the trial, it was not open in the supreme court of the state and could not be considered here. Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617. It is obvious, too, that the state could have authorized the proceeding followed here, which ordinarily is the only question to be considered by this court. Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53.

If the assessment could have been levied against the original owners of the land, purchasers took subject to the same liability. Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44. The question whether it could have been levied if the land had not been sold depended upon the construction of state [50] statutes, as to which we follow the decision of the state court. Even if the court had overruled earlier decisions, it would have interfered with no vested rights of the plaintiffs in error. Knox v. Exchange Bank, 12 Wall. 379, 383, 20 L. ed. 414, 415; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 626, 58 L. ed. 1503, 1506, 34 Sup. Ct. Rep. 941. But it does not appear to have done so, and although its decision may have been unexpected, there was plausible ground for it in the statutes. We go no further, because there is no question before us of the kind that was before the court in Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, and Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 243, 50 L. ed. 170, 173, 26 Sup. Ct. Rep. 23, and in circumstances like these it is not within our province to inquire whether the construction was right. It is objected that less was allowed for the land taken than was charged for the benefit, but it is quite possible that the benefit was greater than the loss, and we cannot inquire into the fact.

Writ of error dismissed.

CLEVELAND & PITTSBURGH RAILROAD COMPANY, Pennsylvania Company, the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company, and the Lake Shore & Michigan Southern Railway Company, Plffs. in Err.,

v.

CITY OF CLEVELAND, OHIO, Deft. in Err.

(See S. C. Reporter's ed. 50-55.)

Error to state court — Federal question — raising by assignments of error.

1. The contention made and passed upon in the highest court of a state may not be enlarged for the purpose of sustaining a writ of error from the Federal Supreme Court by the assignments of error made to bring the case up to that court.

[For other cases, see Appeal and Error, 1311-1318, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — impairing contract obligation — change of decision.

2. A contention based upon an alleged change in the judicial construction of a statute can present no question of the impairment of contract obligations which will sustain a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1709-1714, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — effect of certificate of state court.

3. A mere certificate of the highest state court, contained in its journal entry of judgment, cannot import into the record a Federal question which will sustain a writ of error from the Federal Supreme Court, where the record does not otherwise show it to exist.

[For other cases, see Appeal and Error, 2317-2339, in Digest Sup. Ct. 1908.]

[No. 95.]

Submitted October 13, 1914. Decided November 16, 1914.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Cuyahoga County, in that state, affirming a judgment of the Court of Common Pleas of that county, by which certain railroad companies were ousted from the exclusive possession of a city street. Dismissed for want of jurisdiction.

See same case below, 87 Ohio St. 469, 102 N. E. 1122.

Mr. **William B. Sanders** submitted the cause for plaintiffs in error. Mr. Harold T. Clark was on the brief:

This court has jurisdiction.

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545; Bryan v. Board of Education, 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; Bacon v. Texas, 163 U. S. 207, 219, 41 L. ed. 132, 137, 16 Sup. Ct. Rep. 1023; Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup Ct. Rep. 199.

Mr. **Newton D. Baker** submitted the cause for defendant in error. Messrs. John N. Stockwell and Arthur F. Young were on the brief:

Conceding every contention of the railroad, and though the state court has erroneously construed the act of 1848, though its judgment in so doing impairs the obligation of the contract of 1849, though the Supreme Court has clearly changed about in its construction of the state law, there is yet no Federal question presented, and the writ of error should be dismissed.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350, 46 L. ed. 936, 943, 22 Sup. Ct. Rep. 691; Lehigh Water Co. v. Easton, 121 U. S. 388, 392, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; Central Land Co. v. Laidley, 159 U. S. 103, 109, 40 L. ed. 91, 93, 16 Sup. Ct. Rep. 80; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170; Wood v. Brady, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

The assignment of errors cannot be used

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudication of state courts can be brought up for review in the Supreme court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to change of decision of state court as impairing obligation of contract—see notes to Mitchell v. Burlington, 18 L. ed. U. S. 351; Los Angeles v. Los Angeles City Water Co. 44 L. ed. U. S. 886; Allen v. Allen, 16 L.R.A. 646; Swanson v. Ottumwa, 5 L.R.A. (N.S.) 860; and Crigler v. Shepler, 23 L.R.A.(N.S.) 500.

as a cloak for the introduction of new and fictitious questions into a controversy for the purpose of invoking Federal jurisdiction.

Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

No Federal question is presented where the state court upholds the statute upon any independent ground broad enough to maintain its judgment, irrespective of the constitutionality of the state law.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850.

[53] Memorandum opinion by Mr. Justice Day, by direction of the court:

The original action was brought by the city of Cleveland, Ohio, to oust the railroad companies, now plaintiffs in error, from the exclusive possession of Bath street, in that city. A number of defenses were set up by the railroad companies, but we are concerned only with the alleged deprivation of Federal right, resulting from the decision of the state court. In the court of original jurisdiction, the common pleas, judgment was rendered in favor of the city. Upon proceedings in error, that judgment was affirmed by the state circuit court, and in the supreme court of the state of Ohio the judgment of the circuit court was affirmed without opinion.

It is now undertaken to bring the case here, because of alleged violation of rights under the Federal Constitution arising by virtue of § 10 of article I. of that instrument, preventing the impairment of contract rights by subsequent legislation.

In order to bring a case here under § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227] (formerly § 709 of the Revised Statutes of the United States [U. S. Comp. Stat. 1901, p. 575]), it is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case to this court. This proposition is too well settled to need discussion. First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Waters-Pierce Oil Co. v. Texas, 212 U. S. 113, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Mallers v. Commercial Loan & T. Co. 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699.

It is equally well settled that an impairment of the obligation of the contract, within the meaning of the [54] Federal Constitution, must be by subsequent legislation, and no mere change in judicial decision will amount to such deprivation. Ross v. Oregon, 227 U. S. 150, 161, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas 1914C, 224; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 624, 58 L. ed. 1503, 1505, 34 Sup. Ct. Rep. 941; and cases cited on page 625. An examination of the record shows that the Federal right set up in the court of common pleas, and considered in the circuit court, the latter judgment being affirmed by the supreme court without opinion, concerned an alleged change of decision in the supreme court of Ohio, construing a statute concerning the contract upon which the railroad companies relied, the effect of which, it was alleged, would be to do violence to the contract clause of the Federal Constitution. It was not set up that subsequent legislation had impaired the obligation of the contract of the railroad companies. Therefore, in the light of the decisions of this court above quoted, no Federal right was alleged to be impaired within the meaning of the Constitution of the United States, and no such right was passed upon in the decisions of the courts.

The contention is made that the presence of the Federal right set up and denied as violative of this clause of the Constitution is shown by the certificate of the Supreme Court, contained in its journal entry affirming the judgment of the circuit court. An examination of the certificate however, does not show that any contention that contract rights were impaired by subsequent state legislation was passed upon adversely to the railroad companies, but shows only that the contention was that the claim of the city, in respect to the contract of September 13th, 1849, sustained by the judgment of the circuit court, and affirmed by the supreme court was in contravention of the defendants' rights under said contract, and impaired their rights under said contract, in violation of the Constitution of the United States, particularly the [55] 10th section of article I. thereof; "which said claims fully appear in the pleadings and record herein, and that such claims were considered by the court and decided adversely to said plaintiffs in error." The character of the claims thus made we have

already described. Moreover a mere certificate of this character cannot bring an additional question into the record, where the record does not otherwise show it to exist. Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31.

It follows that the writ of error must be dismissed.

Mr. Justice Holmes took no part in the consideration and decision of this case.

UNITED STATES
v.
JULIUS M. MAYER, Judge of the District Court of the United States for the Southern District of New York.

(See S. C. Reporter's ed. 55-72.)

Cases certified — prohibition proceedings.

1. An application to a circuit court of appeals for a writ of prohibition forbidding a district judge to vacate a judgment of conviction in a criminal case then pending in the former court on writ of error, being a proceeding to procure the issue of a writ in aid of the exercise of such court's appellate jurisdiction, must be regarded as incidental thereto, and, hence, as being embraced within the purview of the Judicial Code, § 239, authorizing the certification of questions of law by a circuit court of appeals in any case within its appellate jurisdiction.

[For other cases, see Cases Certified, II., in Digest Sup. Ct. 1908.]

Cases certified — decisive question.

2. The importance or controlling character of the question certified by the circuit court of appeals, under Judicial Code, § 239, for decision by the Federal Supreme Court, furnishes no reason for its disallowance, if the question is suitably specific.

[For other cases, see Cases Certified, III., in Digest Sup. Ct. 1908.]

Judgment — vacating after term.

3. A Federal district court has no jurisdiction, after the term at which a judgment of conviction in a criminal case has been entered, to entertain a motion to set aside the judgment for misconduct of counsel, or bias of a juror, concealed on his *voir dire*, which were discovered after the expiration of said term, and did not appear in the record of the trial, even assuming that, in the case of errors in certain matters of fact, the district courts may exercise, in criminal cases, as an incident to their powers expressly granted, a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis*.

[For other cases, see Judgment, XII. b, 2, in Digest Sup. Ct. 1908.]

Courts — rules of decision — vacating after term.

4. Authority to set aside, vacate, and modify their final judgments after the term at which they were rendered can neither be conferred upon nor withheld from the Federal district courts by the statutes of a state or the practice of its courts.

[For other cases, see Courts, 2133, 2134a, in Digest Sup. Ct. 1908.]

Judgment — vacating after term — consent to confer jurisdiction.

5. The consent of the United States attorney could not confer jurisdiction upon a Federal district court to entertain a motion after the term at which a judgment of conviction in a criminal case had been entered, to set aside the judgment on facts discovered after the expiration of said term, and not appearing in the record of the trial, such as misconduct of counsel or bias of a juror, concealed on his *voir dire*.

[For other cases, see Judgment, XII. b, 2; Courts, V. c, 12, in Digest Sup. Ct. 1908.]

Prohibition — from circuit court of appeals — forbidding the vacation of judgment after term.

6. A circuit court of appeals before which a criminal case is pending on a writ of error to review a conviction in a district court may properly grant a writ of prohibition at the instance of the government, forbidding the district judge to set aside the judgment of conviction upon motion made after the term at which a judgment was entered, for the bias of a juror, concealed upon his *voir dire*, and discovered after the expiration of the term, and not appearing upon the record of the trial.

[For other cases, see Prohibition, III., in Digest Sup. Ct. 1908.]

Prohibition — from circuit court of appeals — forbidding vacation of judgment after term — waiver by consent below.

7. The consent of the United States attorney to the hearing by the district court of a motion made after the term at which a judgment of conviction had been entered to set aside the judgment for misconduct of counsel and bias of a juror, concealed on his *voir dire*, does not operate as a waiver of any right which the government might have to a writ of prohibition in the circuit court of appeals on defendant's writ of error.

[Matters as to prohibition, see Prohibition, in Digest Sup. Ct. 1908.]

[No. 462.]

NOTE.—On definiteness of question to be certified—see note to Waco Water & Light Co. v. Waco, 31 L.R.A. 392.

On sending up whole case to Federal Supreme Court by certificate—see note to Baltimore & O. R. Co. v. Interstate Commerce Commission, 54 L. ed. U. S. 164.

As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Mitchell v. Burlington, 18 L. ed. U. S. 351; and Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 380.

Argued October 22 and 23, 1914. Decided November 16, 1914.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting the question whether a Circuit Court of Appeals may prohibit the District Court from vacating a judgment after the term, and whether the District Court had jurisdiction so to set aside the judgment, and whether consent could confer such jurisdiction. First question answered in the affirmative. Two other questions answered in the negative.

Statement by Mr. Justice Hughes:

The facts stated in the certificate may be summarized as follows:

On March 14th, 1913, one Albert Freeman, with two other individuals, was convicted in the district court, southern district of New York, on five indictments for violation of the statutes relating to the use of the mails and for a conspiracy. On that day judgments of conviction were entered and sentences were imposed as to certain of these indictments, or counts therein, sentence being suspended as to others; and on March 24th, 1913, the defendant Freeman sued out a writ of error from the circuit court of appeals to review the judgments of conviction. Assignments of error were filed; and on May 13th, 1913, the plaintiff in error was admitted to bail by the appellate court. No bill of exceptions has been settled or filed or argument had.

On January 12th, 1914, the plaintiff in error gave notice of application in the district court to set aside the judgments of conviction, and for the quashing of the indictments, or for a new trial. The grounds were, among [57] others, (1) that the defendant had been deprived of a fair trial by the misconduct of an assistant United States attorney; and (2) that one juror, when examined on his *voir dire*, concealed a bias against the defendant. It is found as a fact by the district judge, that neither the defendant nor his counsel had knowledge of the facts on which the motion was based until after the conclusion of the trial and the expiration of the term as to those counts upon which sentence had been imposed, and that these facts could not have been discovered earlier by reasonable diligence.

Upon the hearing of the application, District Judge Mayer raised the question of the jurisdiction of the district court to entertain it, in view of the fact that the term had expired. Thereupon the United States attorney submitted a memorandum tendering his consent that the application be heard upon the merits. The application was heard and District Judge Mayer handed down his decision granting a new trial, "on the ground that defendant had not had a trial by an impartial jury for the reason that one of the jurors at the time of his selection entertained a bias against the defendant, resulting from the juror's observations of the conduct of the defendant and other corporate officers in relation to the production of certain corporate records before a grand jury of which he had been a member, the juror having concealed his bias on his examination on the *voir dire* for the purpose of securing the jury fees, and the events of the trial having been such as to strengthen and confirm this bias." The order vacating the judgments of conviction and granting a new trial has not yet been entered, the district judge having filed a memorandum stating in substance that the question of jurisdiction was an important one, and that the order would be withheld until the United States attorney had an opportunity to raise the question in a higher court.

[58] Thereafter, and on April 6th, 1914, the United States attorney procured an order in the circuit court of appeals, directing District Judge Mayer to show cause why a writ of prohibition should not be issued from that court, forbidding the entry of an order vacating the judgments of conviction and granting a new trial, upon the ground that the district court was without jurisdiction to enter it. Certain of the facts upon which the motion for a new trial was granted do not appear in the record of the previous trial.

The questions certified are:

"Question I.

"A. When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a district court, and thereafter, upon a motion made in the district court after the expiration of the term at which the judgment was entered, said district court has indicated its intention to enter an order vacating the judgment and ordering a new trial on facts discovered after the expiration of said term, and not appearing in the record of the previous trial, has the circuit court of appeals jurisdiction to issue a writ of prohibition against the entry of such order by the district court, when, in the opinion of the circuit court of appeals, the district court is without jurisdiction to enter such order?

"B. Or has the Supreme Court of the United States sole jurisdiction to issue such writ of prohibition, under the circumstances above stated?

"In case question I. A be answered in the affirmative, then—

"Question II.

"When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a district court, has the district court, upon a motion made after [59] the term at which judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term, and not appearing in the record of the previous trial?

"Question III.

"Whether, when a district court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of the term, to vacate a judgment of conviction, and the United States attorney thereupon tendered its consent to the hearing of the motion on the merits, if the jurisdictional question raised by the court were dependent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the district court to vacate said judgment?"

Solicitor General Davis argued the cause, and with Mr. Karl W. Kirchwey, filed a brief for the United States:

The circuit court of appeals has jurisdiction of the main cause.

Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

Its jurisdiction attached upon the filing of the writ of error with the clerk of the district court.

Brooks v. Norris, 11 How. 204, 207, 13 L. ed. 665, 666; Burnham v. North Chicago Street R. Co. 30 C. C. A. 594, 59 U. S. App. 274. 87 Fed. 168.

The circuit court of appeals has power to issue a writ of prohibition in aid of its appellate jurisdiction.

Zell v. Circuit Judges, 78 C. C. A. 670, 149 Fed. 91.

The expiration of the term at which the judgment was entered withdrew that judgment from the control of the district court.

Bronson v. Schulten, 104 U. S. 410, 415, 26 L. ed. 797, 799; Hickman v. Ft. Scott, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; Wetmore v. Karrick, 205 U. S. 141, 51 L. ed. 745, 27 Sup. Ct. Rep. 434; Pickett v. Legerwood, 7 Pet. 144, 8 L. ed. 638; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167; Bank of United States v. Moss, 6 How. 31, 12 L. ed. 331; Hendrickson v. Hinkley, 17 How. 443, 15 L. ed. 123; Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 901; Belknap v. United States, 150 U. S. 588, 590, 37 L. ed. 1191, 1192, 14 Sup. Ct. Rep. 183; Kingman & Co. v. Western Mfg. Co. 170 U. S. 675, 680, 42 L. ed. 1192, 1194, 18 Sup. Ct. Rep. 786; Fuller v. United States, 182 U. S. 562, 575, 45 L. ed. 1230, 1236, 21 Sup. Ct. Rep. 871; Re Metropolitan Trust Co. 218 U. S. 312, 54 L. ed. 1051, 31 Sup. Ct. Rep. 18.

The perfecting of the writ of error transferred exclusive jurisdiction of the cause to the circuit court of appeals.

Keyser v. Farr, 105 U. S. 265, 26 L. ed. 1025; Morrin v. Lawler, 91 Fed. 693; Burnham v. North Chicago Street R. Co. 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 169; Brooks v. Norris, 11 How. 204, 207, 13 L. ed. 665, 666; The S. S. Osborne (Winslow v. Wilcox) 105 U. S. 447, 450, 26 L. ed. 1065, 1066; Ensminger v. Powers, 108 U. S. 292, 27 L. ed. 732, 2 Sup. Ct. Rep. 643; Bronson v. La Crosse & M. R. Co. 1 Wall. 405, 409, 17 L. ed. 617, 618; Hovey v. McDonald, 109 U. S. 150, 157, 27 L. ed. 888, 890, 3 Sup. Ct. Rep. 136; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 35, 37 L. ed. 986, 987, 14 Sup. Ct. Rep. 4; Ex parte Roberts, 15 Wall. 384, 21 L. ed. 131; Citizens' Bank v. Farwell, 6 C. C. A. 30, 12 U. S. App. 419, 56 Fed. 539; Roemer v. Simon, 91 U. S. 149, 23 L. ed. 267; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 32 Fed. 530; Kimberly v. Arms, 40 Fed. 548; First Nat. Bank v. State Nat. Bank, 65 C. C. A. 414, 131 Fed. 430.

This rule obtains also in the matter of appeals in equity cases.

Ensminger v. Powers, 108 U. S. 292, 27 L. ed. 732, 2 Sup. Ct. Rep. 643; Roemer v. Simon, 91 U. S. 149, 23 L. ed. 267.

Jurisdiction of the subject-matter cannot be conferred by consent of the parties.

Re Winn, 213 U. S. 458, 469, 53 L. ed. 873, 878, 29 Sup. Ct. Rep. 515; Minnesota v. Northern Securities Co. 194 U. S. 48, 62, 48 L. ed. 870, 877, 24 Sup. Ct. Rep. 598; Minnesota v. Hitchcock, 185 U. S. 373, 382, 46 L. ed. 954, 961, 22 Sup. Ct. Rep. 650; Thomas v. Ohio State University, 195 U. S. 207, 211, 49 L. ed. 160, 164, 25 Sup. Ct. Rep. 24; Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 152, 53 L. ed. 126, 127, 29 Sup. Ct. Rep. 42; Fraenkl v. Cerecedo, 216 U. S. 295, 303, 54 L. ed. 486, 490, 30 Sup. Ct. Rep. 322; Re Moore, 209 U. S. 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706. 14 Ann. Cas. 1164; Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486; Beyer v. Le Fevre, 186 U. S. 114, 118, 46 L. ed. 1080, 1082, 22 Sup. Ct. Rep. 765; Rexford v. Brunswick-Balke-Collender Co. 228 U. S. 339, 344, 57 L. ed. 864, 866, 33 Sup. Ct. Rep. 515; Waldron v. Waldron, 156 U. S. 361, 378, 39 L. ed. 453, 457, 15 Sup. Ct. Rep. 383; Old Nick Williams Co.

v. United States, 215 U. S. 541, 54 L. ed. 318, 30 Sup. Ct. Rep. 221; Reliable Incubator & Brooder Co. v. Stahl, 42 C. C. A. 522, 102 Fed. 590.

Mr. Wilson B. Brice argued the cause, and, with Mr. Samuel Williston, filed a brief for Julius M. Mayer:

The jurisdiction of the circuit court of appeals to issue the writ of prohibition is an original jurisdiction.

Farnsworth v. Montana, 129 U. S. 104, 113, 32 L. ed. 616, 618, 9 Sup. Ct. Rep. 253; Ex parte Tom Tong, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871; McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501; Re Williams, 123 Fed. 322.

The extraordinary writs cannot be used to obtain an appellate jurisdiction which could not be otherwise obtained.

M'Clung v. Silliman, 6 Wheat. 598, 601, 5 L. ed. 340, 341; Bath County v. Amy, 13 Wall. 244, 249, 20 L. ed. 539, 541; Re Massachusetts, 197 U. S. 482, 488, 49 L. ed. 845, 848, 25 Sup. Ct. Rep. 512; Covington & C. Bridge Co. v. Hager, 203 U. S. 109, 110, 51 L. ed. 111, 112, 27 Sup. Ct. Rep. 24.

It appears to have been established at an early day and to have remained the law ever since:

(1) That the whole case cannot be sent to this court by certificate of division of opinion.

(2) Nor can this defect be avoided by submitting the whole case in the form of separate questions.

(3) Nor does it make any difference if the decision of the whole case turns upon matters of law only.

(4) Nor will this court answer abstract, hypothetical, or moot questions.

(5) And if an answer to one of the questions certified disposes of the case, this court will not answer the other questions.

United States v. Bailey, 9 Pet. 267, 9 L. ed. 124; Adams v. Jones, 12 Pet. 207, 9 L. ed. 1058; White v. Turk, 12 Pet. 238, 9 L. ed. 1069; Webster v. Cooper, 10 How. 54, 13 L. ed. 325; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; United States v. Buzzo, 18 Wall. 125, 21 L. ed. 812; United States v. Britton, 108 U. S. 199, 207, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; Jewell v. Knight, 123 U. S. 426, 433, 31 L. ed. 190, 192, 8 Sup. Ct. Rep. 193; United States v. Hall, 131 U. S. 50, 52, 33 L. ed. 97, 98, 9 Sup. Ct. Rep. 663; Warner v. New Orleans, 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892; Cross v. Evans, 167 U. S. 60, 42 L. ed. 77, 17 Sup. Ct. Rep. 733; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; Chicago B. & Q. R. Co. v. Williams, 205 U. S. 444, 51 L. ed. 875, 27 Sup. Ct. Rep. 559; The Folmina, 212 U. S. 354, 53 L. ed. 546, 29 Sup. Ct. Rep. 363, 15 Ann. Cas. 748; Chicago, B. & Q. R. Co. v. Williams, 214 U. S. 492, 53 L. ed. 1058, 29 Sup. Ct. Rep. 514.

No writ of error lies in favor of the government in a criminal case.

United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; United States v. Zarafonitis, 80 C. C. A. 51, 150 Fed. 97, 10 Ann. Cas. 290; United States v. Ball, 163 U. S. 662, 670, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192; Kepner v. United States, 195 U. S. 100, 130, 49 L. ed. 114, 124, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655.

Section 262 of the Federal Judicial Code does not confer an appellate jurisdiction which the circuit court of appeals would not have without it.

M'Clung v. Silliman, 6 Wheat. 598, 600, 5 L. ed. 340, 341; Bath County v. Amy, 13 Wall. 244, 249, 20 L. ed. 539, 541; Covington & C. Bridge Co. v. Hager, 203 U. S. 109, 110, 51 L. ed. 111, 112, 27 Sup. Ct. Rep. 24; Re Massachusetts, 197 U. S. 482, 488, 49 L. ed. 845, 848, 25 Sup. Ct. Rep. 512.

The decisions are irreconcilable unless it appears that the circumstances which may make the writ of prohibition necessary for the exercise of the court's jurisdiction are not necessarily the same as the circumstances which may make the writ of mandamus necessary for the exercise of the court's jurisdiction.

Covington & C. Bridge Co. v. Hager, 203 U. S. 109, 51 L. ed. 111, 27 Sup. Ct. Rep. 24; Ex parte Warmouth, 17 Wall. 64, 21 L. ed. 543; United States ex rel. Fisher v. Williams, 14 C. C. A. 440, 32 U. S. App. 126, 67 Fed. 384; Re Paquet, 52 C. C. A. 239, 114 Fed. 437; Zell v. Circuit Judges, 78 C. C. A. 670, 149 Fed. 86; Barber Asphalt Paving Co. v. Morris, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945; McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501; Ex parte United States, 226 U. S. 420, 57 L. ed. 281, 33 Sup. Ct. Rep. 170.

The government has no legal right to any relief under the writ of error.

Latham's Appeal, 9 Wall. 145, 19 L. ed. 771; United States v. Minnesota & N. W. R. Co. 18 How. 241, 15 L. ed. 347; United States v. Young, 94 U. S. 258, 24 L. ed. 153.

The government is merely trying by this petition to have this court decide before trial a question which the government can never raise in the case.

United States v. Perrin, 131 U. S. 55, 57, 33 L. ed. 88, 89, 9 Sup. Ct. Rep. 681; M'Clung v. Silliman, 6 Wheat. 598, 603, 5 L. ed. 340, 341.

It must be admitted that, except in so far as the court is expressly authorized by

statute to grant relief, the numerical weight of authority denies its power to do so in a criminal case after the term at which a judgment of conviction has been entered, even though newly discovered evidence shows the conviction to have been improper.

United States v. New York C. & H. R. R. Co. 90 C. C. A. 256, 164 Fed. 324; United States v. Rogers, 164 Fed. 521; Howard v. State, 58 Ark. 229, 24 S. W. 8; Beard v. State, 81 Ark. 515, 99 S. W. 837; Klink v. People, 16 Colo. 467, 27 Pac. 1062; Saleen v. People, 41 Colo. 317, 92 Pac. 731; Dobbs v. State, 62 Kan. 108, 61 Pac. 408; Asbell v. State, 62 Kan. 209, 61 Pac. 690; Hamlin v. State, 67 Kan. 724, 74 Pac. 242; Holt v. State, 78 Miss. 631, 29 So. 527; Fugate v. State, 85 Miss. 94, 107 Am. St. Rep. 268, 37 So. 554, 3 Ann. Cas. 326; State v. Williams, 147 Mo. 19, 47 S. W. 891; Appo v. People, 20 N. Y. 531; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; Kinch v. State, — Tex. Crim. Rep. —, 156 S. W. 649; State ex rel. Davis v. Superior Ct. 15 Wash. 339, 46 Pac. 399; State v. Armstrong, 41 Wash. 601, 84 Pac. 584.

On the other hand, cases are not wanting which support the right of the court to grant relief.

State v. David, 14 S. C. 428; Phillips v. Negley, 117 U. S. 665, 676, 29 L. ed. 1013, 1016, 6 Sup. Ct. Rep. 901; Gross v. Wood, 117 Md. 362, 83 Atl. 337, Ann. Cas. 1914A, 30; Wickel v. Mertz, 49 Pa. Super. Ct. 472; Villars v. Parry, 1 Ld. Raym. 182; Crookes v. Maxwell, 6 Blatchf. 468, Fed. Cas. No. 3,415; United States v. Millinger, 17 Blatchf. 451, 7 Fed. 849; United States v. New York C. & H. R. R. Co. 90 C. C. A. 256, 164 Fed. 324; United States ex rel. Fisher v. Williams, 14 C. C A. 440, 32 U. S. App. 126, 67 Fed. 384; United States v. Radford, 131 Fed. 378.

Greater freedom should be allowed in criminal cases than in civil in granting new trials.

Bishop, New Crim. Proc. § 1273; State v. Callahan, 47 La. Ann. 497, 17 So. 50, 10 Am. Crim. Rep. 97; Keliher v. United States, 114 C. C. A. 128, 193 Fed. 8; State v. Johnson, 40 Conn. 143; Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; State v. Wise, 83 Iowa, 596, 50 N. W. 59; State v. Tomlinson, 11 Iowa, 403; Falk v. People, 42 Ill. 331; State v. Hammond, 5 Strobh. L. 100; Owens v. State, 35 Tex. 362; Mitchell v. State, 60 Ala. 35; State v. Meshek, 61 Iowa, 316, 16 N. W. 143; Troxdale v. State, 9 Humph. 419; 3 Columbia L. Rev. 438.

It is believed to be the settled modern practice that in all instances in which irregularities could formerly be corrected upon a writ of error coram nobis or audita querela, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense.

Harris v. Hardeman, 14 How. 334, 346, 14 L. ed. 444, 445.

The reason why a new trial would be granted in this case, if granted at all, is because of the bias of a juror. This is one of the reasons for which new trials were always allowed at common law. The statute does not control the time within which new trials may be granted for these reasons. It has not even precluded the Federal courts from granting new trials in cases of felony for the reasons for which new trials have usually been granted in misdemeanors and in civil cases, although in England new trials in cases of felony were never allowed at common law.

Reg. v. Murphy, L. R. 2 P. C. 535, 6 Moore, P. C. C. N. S. 177, 38 L. J. P. C. N. S. 53, 21 L. T. N. S. 598, 17 Week. Rep. 1047, 11 Cox, C. C. 372; Sparf v. United States, 156 U. S. 51, 175, 39 L. ed. 343, 387, 15 Sup. Ct. Rep. 273.

Even though the lapse of the term deprived the district court of jurisdiction, the government's consent to the hearing of the motion for a new trial restored that jurisdiction.

Gracie v. Palmer, 8 Wheat. 699, 5 L. ed. 719; Taylor v. Longworth, 14 Pet. 172, 174, 10 L. ed. 405, 406; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; Re Moore, 209 U. S. 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; Gage v. Chicago, 141 Ill. 642, 31 N. E. 163; Hewetson v. Chicago, 172 Ill. 115, 49 N. E. 992; Gager v. Doe, 29 Ala. 344; Berry v. Nall, 54 Ala. 449; Kidd v. McMillan, 21 Ala. 325; Royal Trust Co. v. Exchange Bank, 55 Neb. 668, 76 N. W. 425; Newman v. Newton, 14 Fed. 635; Wilson v. Vance, 55 Ind. 394; National Home v. Overholser, 64 Ohio St. 517, 60 N. E. 628; Harrison v. Osborn, 31 Okla. 103, 114 Pac. 331; McHam v. Gentry, 33 Tex. 441; McCord-Collins Co. v. Stern, — Tex. Civ. App. —, 61 S. W. 341.

The pendency of a writ of error when the motion for a new trial was made did not defeat the jurisdiction of the district court, even though the government had not consented to the jurisdiction.

Fuller v. United States, 182 U. S. 562, 567, 45 L. ed. 1230, 1233, 21 Sup. Ct. Rep. 871; Johnson v. St. Louis, I. M. & S. R. Co. 141 U. S. 602, 610, 35 L. ed. 875, 877, 12 Sup. Ct. Rep. 124.

Where a motion for a new trial, based on newly discovered evidence, is permitted in the state courts, the pendency of appellate proceedings is no bar to the entertaining of the motion by the lower court.

Fuller v. United States, 182 U. S. 562, 45 L. ed. 1230, 21 Sup. Ct. Rep. 871; Cook v. Smith, 58 Iowa, 607, 12 N. W. 617; Henry v. Allen, 147 N. Y. 346, 41 N. E. 694; Birnbaum v. May, 170 N. Y. 314, 63 N. E. 347; Fricke v. State, 11 Tex. App. 6.

The necessity for this procedure is obvious. The writ of error does not carry to the appellate court the facts relied upon in a motion for a new trial because of newly discovered evidence, nor can the appellate record be amended to include these facts.

Burchett v. United States, 114 C. C. A. 525, 194 Fed. 821; State v. Offutt, 38 La. Ann. 364.

Accordingly, unless the lower court can act, the newly discovered evidence cannot be made use of in any way. Nor is there any technical difficulty in permitting this. A writ of error, though in substance a method of continuing in a higher court the litigation in a case (Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Nations v. Johnson, 24 How. 195, 16 L. ed. 628; Re Chetwood, 165 U. S. 443, 461, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385), nevertheless involves only so much of the litigation as relates to the errors carried to the upper court. This jurisdiction is not interfered with by the action of the lower court in granting a new trial.

Failure to object to jurisdiction debars the right to the writ.

Re Huguley Mfg. Co. 184 U. S. 301, 46 L. ed. 551, 22 Sup. Ct. Rep. 455; Re Alix, 166 U. S. 136, 41 L. ed. 948, 17 Sup. Ct. Rep. 522; Re Rice, 155 U. S. 396-402, 39 L. ed. 198-200, 15 Sup. Ct. Rep. 149; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; Harris v. Brooker, 8 Wash. 138, 35 Pac. 599.

Mr. Justice Hughes, after making the foregoing statement, delivered the opinion of the court:

Preliminarily, objection is raised to the authority of this court to answer the questions certified. Under § 239 of the Judicial Code [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 228], questions may be certified by the circuit court of appeals "in any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight;" and § 128 provides that the circuit courts of appeals "shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts," etc. The argument is that an application to a circuit court of appeals for a writ of prohibition is an original proceeding. But the jurisdiction of the circuit courts of appeals is exclusively appellate (act of March 3, 1891, §§ 2, 6 [26 Stat. at L. 826, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 547, 549], Judicial Code, §§ 117, 128; Whitney v. Dick, 202 U. S. 132, 137, 138, 50 L. ed. 963, 965, 26 Sup. Ct. Rep. 584); and their authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power (Judicial Code, [66] § 262; Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580; act of March 3, 1891, chap. 517, § 12, 26 Stat. at L. 826, 829, U. S. Comp. Stat. 1901, pp. 488, 553; Whitney v. Dick, supra; McClellan v. Carland, 217 U. S. 268, 279, 280, 54 L. ed. 762, 766, 767, 30 Sup. Ct. Rep. 501). Section 128 defines the class of cases in which the circuit court of appeals may exercise appellate jurisdiction, and, where a case falls within this class, a proceeding to procure the issue of a writ in aid of the exercise of that jurisdiction must be regarded as incidental thereto, and hence as being embraced within the purview of § 239, authorizing the court to certify questions of law.

It is also objected that the certificate sends up the entire case. It is a familiar rule that this court cannot be required through a certificate under § 239 to pass upon questions of fact, or mixed questions of law and fact; or to accept a transfer of the whole case; or to answer questions of objectionable generality, which, instead of presenting distinct propositions of law, cover unstated matters "lurking in the record," or questions that are hypothetical and speculative. United States v. Bailey, 9 Pet. 267, 273, 9 L. ed. 124, 126; Webster v. Cooper, 10 How. 54, 55, 13 L. ed. 325, 326; Jewell v. Knight, 123 U. S. 426, 432-435, 31 L. ed. 190, 192-194, 8 Sup. Ct. Rep. 193; United States v. Hall, 131 U. S. 50, 52, 33 L. ed. 97, 98, 9 Sup. Ct. Rep. 663; Cross v. Evans, 167 U. S. 60, 63, 42 L. ed. 77, 78, 17 Sup. Ct. Rep. 733; United States v. Union P. R. Co. 168 U. S. 505, 512, 42 L. ed. 559, 561, 18 Sup. Ct. Rep. 167; Chicago, B. & Q. R. Co. v. Williams, 205 U. S. 444, 452, 453, 51 L. ed. 875, 878, 879, 27 Sup. Ct. Rep. 559, 214 U. S. 492, 53 L. ed. 1058, 29 Sup. Ct. Rep. 514; Hallowell v. United States, 209 U. S. 101, 107, 52 L. ed. 702, 705, 28 Sup. Ct. Rep. 498; The Folmina, 212 U. S. 354, 363, 53 L. ed. 546, 551, 29 Sup. Ct. Rep. 363, 15 Ann. Cas. 748; Baltimore & O. R. Co. v. Interstate Com-

merce Commission, 215 U. S. 216, 221, 223, 54 L. ed. 164, 167, 168, 30 Sup. Ct. Rep. 86. But, on the other hand, there is no objection to the submission of a definite and clean-cut question of law merely because the answer may be decisive of the controversy. The question propounded must always be such that the answer will aid the court in the determination of the case, and the importance, or the controlling character, of the question, if suitably specific, furnishes no ground for its disallowance. This is abundantly illustrated in the decisions. United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; Helwig v. United States, 188 U. S. 605, 47 L. ed. 614, 23 Sup. Ct. Rep. 427; [67] United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; Hertz v. Woodman, 218 U. S. 205, 211, 54 L. ed. 1001, 1004, 30 Sup. Ct. Rep. 621; American Land Co. v. Zeiss, 219 U. S. 47, 59, 55 L. ed. 82, 94, 31 Sup. Ct. Rep. 200; Re Harris, 221 U. S. 274, 279, 55 L. ed. 732, 735, 31 Sup. Ct. Rep. 557; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; Beutler v. Grand Trunk Junction R. Co. 224 U. S. 85, 88, 56 L. ed. 679, 680, 32 Sup. Ct. Rep. 402; Re Loving, 224 U. S. 183, 186, 56 L. ed. 725, 726, 32 Sup. Ct. Rep. 446; The Jason, 225 U. S. 32, 56 L. ed. 969, 32 Sup. Ct. Rep. 560; Anderson v. Pacific Coast S. S. Co. 225 U. S. 187, 56 L. ed. 1047, 32 Sup. Ct. Rep. 626; Jordan v. Roche, 228 U. S. 436, 57 L. ed. 908, 33 Sup. Ct. Rep. 573; United States ex rel. Texas Cement Co. v. McCord, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 580; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163. In the present case the certificate submits distinct and definite questions of law, which—save question I. B—are clearly pertinent.

Coming, then, to the matters thus submitted, we deem the following considerations to be controlling:

1. In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term. Hudson v. Guestier, 7 Cranch, 1, 3 L. ed. 249; Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467; Sibbald v. United States, 12 Pet. 488, 492, 9 L. ed. 1167, 1169; Bank of United States v. Moss, 6 How. 31, 38, 12 L. ed. 331, 334; Bronson v. Schulten, 104 U. S. 410, 415-417, 26 L. ed. 797, 799, 800; Phillips v. Negley, 117 U. S. 665, 673, 674, 29 L. ed. 1013-1015, 6 Sup. Ct. Rep. 901; Hickman v. Ft. Scott, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; Hunne v. Bowie, 148 U. S. 245, 255, 37 L. ed. 438, 440, 13 Sup. Ct. Rep. 582; Tubman v. Baltimore & O. R. Co. 190 U. S. 38, 47 L. ed. 946, 23 Sup. Ct. Rep. 777; Wetmore v. Karrick, 205 U. S. 141, 149-152, 51 L. ed. 745, 748-750, 27 Sup. Ct. Rep. 434; Re Metropolitan Trust Co. 218 U. S. 312, 320, 321, 54 L. ed. 1051, 1054, 1055, 31 Sup. Ct. Rep. 18. There are certain exceptions. In the case of courts of common law,—and we are not here concerned with the special grounds upon which courts of equity afford relief,—the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors, and, in civil cases, to rectify such mistakes of fact as were reviewable on writs of error *coram nobis*, or *coram vobis*, for which the proceeding by motion is the modern substitute. Pickett v. Legerwood, 7 Pet. 144, 148, 8 L. ed. 638, 639; Murphy v. Stewart, 2 How. 263, 281, 11 L. ed. 261, 268; Bank of United States v. Moss, 6 How. 31, 38, 12 L. ed. 331, 334; Bronson v. [68] Schulten, 104 U. S. 410, 415-417, 26 L. ed. 797, 799, 800; Phillips v. Negley, 117 U. S. 665, 673, 674, 29 L. ed. 1013-1015, 6 Sup. Ct. Rep. 901; Re Wight, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; Wetmore v. Karrick, 205 U. S. 141, 149-152, 51 L. ed. 745, 748-750, 27 Sup. Ct. Rep. 434. These writs were available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment,—for, it was said, "error in fact is not the error of the judges, and reversing it is not reversing their own judgment." So, if there were error in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal. But if the error were "in the judgment itself, and not in the process," a writ of error did not lie in the same court upon the judgment, but only in another and superior court. 2 Tidd, Pr. 9th ed. 1136, 1137; Stephen, Pl. 119; 1 Rolle, Abr. 746, 747, 749. In criminal cases, however, error would lie in the King's bench whether the error was in fact or law. 2 Tidd, Pr. 1137; 3 Bacon, Abr. Bouvier's ed. "Error," 366; Chitty, Crim. Law, 156, 749. See United States v. Plumer, 3 Cliff. 28, 59, 60, Fed. Cas. No. 16,056. The errors of law which were thus subject to examination were only those disclosed by the record; and, as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or mis-

directions by the judge, the remedy applied "only to that very small number of legal questions" which concerned "the regularity of the proceedings themselves." See Report, Royal Commission on Criminal Code (1879) p. 37; 1 Stephen, History of Crim. Law, 309, 310.

In view of the statutory and limited jurisdiction of the Federal district courts, and of the specific provisions for the review of their judgments on writ of error, there would appear to be no basis for the conclusion that, after the term, these courts in common-law actions, whether civil or [69] criminal, can set aside or modify their final judgments for errors of law; and even if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases—as an incident to their powers expressly granted—a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis* (see Bishop, New Crim. Proc. 2d ed. § 1369), as to which we express no opinion, that authority would not reach the present case. This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid. In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by a motion for a new trial (Judicial Code, § 269),—an application which is addressed to the sound discretion of the trial court, and, in accordance with the established principles which have been repeatedly set forth in the decisions of this court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered.

State statutes relating to the granting of new trials are not applicable. As was said by this court in Bronson v. Schulten, 104 U. S. 410, 417, 26 L. ed. 797, 800: "The question relates to the *power* of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts." See also Indianapolis & St. L. R. Co. v. Horst, 93 [70] U. S. 291, 301, 23 L. ed. 898, 901, 7 Am. Neg. Cas. 331; Missouri P. R. Co. v. Chicago & A. R. Co. 132 U. S. 191, 33 L. ed. 309, 10 Sup. Ct. Rep. 65; Fishburn v. Chicago, M. & St. L. R. Co. 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8; Fuller v. United States, 182 U. S. 562, 575, 45 L. ed. 1230, 1236, 21 Sup. Ct. Rep. 871; United States v. 1,621 Pounds of Fur Clippings, 45 C. C. A. 263, 106 Fed. 161; Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 52.

2. As the district court was without power to entertain the application, the consent of the United States attorney was unavailing. Cutler v. Rae, 7 How. 729, 731, 12 L. ed. 890, 891; Byers v. McAuley, 149 U. S. 608, 618, 37 L. ed. 867, 872, 13 Sup. Ct. Rep. 906; Minnesota v. Hitchcock, 185 U. S. 373, 382, 46 L. ed. 954, 961, 22 Sup. Ct. Rep. 650. It is argued, in substance, that while consent cannot give jurisdiction over the subject-matter, restrictions as to place, time, etc., can be waived. Gracie v. Palmer, 8 Wheat. 699, 5 L. ed. 719; Toland v. Sprague, 12 Pet. 300, 331, 9 L. ed. 1093, 1105; Ayers v. Watson, 113 U. S. 594, 598, 28 L. ed. 1093, 1094, 5 Sup. Ct. Rep. 641; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 688, 38 L. ed. 311, 316, 14 Sup. Ct. Rep. 533; Rexford v. Brunswick-Balke-Collender Co. 228 U. S. 339, 344, 345, 57 L. ed. 864, 866, 867, 33 Sup. Ct. Rep. 515. This consideration is without pertinency here, for there was no general jurisdiction over the subject-matter, and it is not a question of the waiver of mere "modal or formal" requirements, of mere private right or personal privilege. In a Federal court of competent jurisdiction, final judgment of conviction had been entered and sentence had been imposed. The judgment was subject to review in the appellate court, but, so far as the trial court was concerned, it was a finality; the subsequent proceeding was, in effect, a new proceeding, which, by reason of its character, invoked an authority not possessed. In these circumstances it would seem to be clear that the consent of the prosecuting officer could not alter the case; he was not a dispensing power to give or withhold jurisdiction. The established rule embodies the policy of the law that litigation be finally terminated, and when the matter is thus placed beyond the discretion of the court, it is not confided to the discretion of the prosecutor.

3. We have no occasion to enter upon the broad inquiry [71] suggested by the argument as to the authority of the circuit courts of appeals to issue writs of prohibition. We

have no doubt of the power to issue the writ in the case stated, and we need not discuss other cases supposed. Prior to the application for a new trial in the district court, the defendant had sued out a writ of error, and the appellate jurisdiction of the circuit court of appeals had attached. Brooks v. Norris, 11 How. 204, 207, 13 L. ed. 665, 666; Re Chetwood, 165 U. S. 443, 456, 41 L. ed. 782, 786, 17 Sup. Ct. Rep. 385; Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 335, 44 L. ed. 1088, 1092, 20 Sup. Ct. Rep. 906; Old Nick Williams Co. v. United States, 215 U. S. 541, 543, 54 L. ed. 318, 320, 30 Sup. Ct. Rep. 221.

Basing the argument upon the proposition that the government had no right of review in the circuit court of appeals in a criminal case, it is urged that the government cannot be regarded as deprived of any relief which it is entitled to seek from that court, and hence that it cannot be said that the issue of the writ was necessary for the exercise of its jurisdiction. Judicial Code, § 262. But the case was actually pending in the circuit court of appeals on the defendant's writ of error, and the government had all the rights of a litigant in that court seeking to maintain a judgment assailed. It is said that the defendant could have procured the dismissal of his writ, but in fact the writ had not been dismissed. It is said, also, that the consent to the hearing by the district court of the application for a new trial operated as a waiver of any rights the government could have in the circuit court of appeals. This conclusion is sought to be derived from the asserted efficacy of the consent in the lower court, and, as we have seen, it had no efficacy there, and it had no reference whatever to the proceedings in the higher court. The defendant was still insisting upon his rights as plaintiff in error in the circuit court of appeals, and the United States, as the opposing party in that court, was entitled to its aid in order to preserve the integrity of the record and to prevent unauthorized action by the court below with respect to the judgment [72] under review. For this purpose, the writ of prohibition was the appropriate remedy.

We answer question I. A in the affirmative, and questions II. and III. in the negative. Question I. B involves an inquiry not raised by the case made, and is not answered.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

UNITED STATES, Appt.,
v.
H. U. BARTLETT and Theo. G. Lashley.

(See S. C. Reporter's ed. 72-80.)

Indian allotments — restrictions on alienation.

Restrictions on alienation by Indian allottees which have terminated by the lapse of the time prescribed for their existence have been "removed," within the meaning of the provision of the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), § 1, which, while extending or enlarging the period of such restrictions in respect to all allotted lands of enrolled mixed-bloods of three quarters or more Indian blood, declared that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 251.]

Argued October 22, 1914. Decided November 16, 1914.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, reversing a decree of the District Court for the Eastern District of Oklahoma, directed the dismissal of the bill in a suit to cancel deeds of land allotted to an Indian. Affirmed.

See same case below, 121 C. C. A. 520, 203 Fed. 410.

The facts are stated in the opinion.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for appellant:

Both the spirit and the letter of the act of May 27, 1908, demand that all the lands of the three-quarter blood Indians be held restricted until April 26, 1931, irrespective of the prior restrictions.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424.

If doubt exists, this construction should be adopted as the more beneficial to the Indians.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Starr v. Long Jim, 227 U. S. 613, 624, 57 L. ed. 670, 675, 33 Sup. Ct. Rep. 358; Franklin v. Lynch, 233 U. S. 269, 272, 58 L. ed. 954, 957, 34 Sup. Ct. Rep. 505; United States v. Celestine, 215 U. S. 290, 54 L. ed. 199, 30 Sup. Ct. Rep. 93.

Mr. George S. Ramsey argued the cause, and, with Mr. Edgar A. De Meules, filed a brief for appellees:

When a statute, or a portion thereof, is

ambiguous, the title of the act should be looked to as an aid in its construction and interpretation.

United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471; Smythe v. Fiske, 23 Wall. 374, 23 L. ed. 47.

In Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565, the court recognized that the restrictions against alienation of these lands were removed by the terms of the Creek supplemental agreement as well as by the Secretary of the Interior, or by affirmative general or special legislative enactment.

It has been repeatedly held by this court, that the agreements between an Indian tribe, on the one hand, and the United States government, on the other, are in no sense contracts or treaties; that they derive their efficacy solely by congressional enactment, and are only acts of Congress, and fall within the meaning of the word "law," as used in the act of May 27, 1908.

Red Bird v. United States, 203 U. S. 76, 93, 51 L. ed. 96, 103, 27 Sup. Ct. Rep. 29; Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580; Thomas v. Gay, 169 U. S. 271, 42 L. ed. 743, 18 Sup. Ct. Rep. 340; Lone Wolf v. Hitchcock, 187 U. S. 565, 47 L. ed. 306, 23 Sup. Ct. Rep. 216.

To say that a thing is done "under and by the authority" of a statute referred to is equivalent to saying that it is done in conformity with it, and is authorized by it.

Risley v. Howell, 12 C. C. A. 218, 22 U. S. App. 635, 64 Fed. 457; Stoddard v. Chambers, 2 How. 284, 317, 17 L. ed. 269, 282.

Where the same word is used by a legislative body in different portions of an act, or in different acts *in pari materia*, it will be understood that the legislature intended to use the same word in the same sense throughout the act, or throughout the several acts.

Black, Interpretation of Laws, p. 205; 2 Sutherland, Stat. Constr. 2d ed. § 358; Endlich, Interpretation of Statutes, §§ 53, 370; Shehan v. Louisville & N. R. Co. 125 Ky. 478, 101 S. W. 380; Collins Coal Co. v. Hadley, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353.

Admitting, for the sake of argument, that Congress had the power after statehood to prohibit the alienation and taxation of lands prior thereto free from restraint, we urge that unless the intent of Congress to exercise such power is clearly manifested, the court should reject the construction insisted upon by the government.

2 Sutherland, Stat. Constr. p. 910, §§ 488, 490.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit to cancel two deeds of land allotted to an enrolled citizen of the Creek tribe of Indians. The land is what is known as surplus, as distinguished from homestead, land, and the allottee is of three fourths Indian blood. The allotment was made under the act of June 30, 1902 (32 Stat. at L. 500, chap. 1323), known as the Supplemental Creek Agreement, which provided in ¶ 16 that the land should be inalienable by the allottee or his heirs for a period of five years, expiring, as it is said in the briefs, August 8, 1907. In 1912 the allottee deeded the land to Bartlett, one of the appellees, and shortly thereafter Bartlett deeded it to Lashley, the other appellee. These are the deeds sought to be canceled, and the right to that relief is rested upon a provision in § 1 of the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), declaring that "all allotted lands of . . . enrolled mixed-bloods of three quarters or more Indian blood . . . shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April twenty-sixth, nineteen hundred and thirty-one," etc. As the original restriction upon alienation expired several months before the passage of the act of 1908, and also long before the deed from the allottee to Bartlett, the important question in the case is whether Congress intended by the act of 1908 to reimpose [79] and extend that restriction in respect of allotments which theretofore had been entirely freed from it through the expiration of the period prescribed for its existence. The district court, adhering to an opinion given in another case (United States v. Shock, 187 Fed. 870, 873), answered the question in the affirmative, and the circuit court of appeals, concluding that the answer should be the other way, directed that the bill be dismissed. 121 C. C. A. 520, 203 Fed. 410.

If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to embrace all allotments of the class described, whether then subject to the original restriction or theretofore freed from it. But that language is not to be taken literally, for it is followed by a declaration that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act." That

this declaration is intended to qualify or restrain what precedes it is conceded, but to what extent is the subject of opposing contentions.

Under prior legislation the lands of the Five Civilized Tribes, including those of the Creeks, had been allotted in severalty, all subject to restrictions upon alienation which were to be terminated by the lapse of varying periods of time. As to some of the lands these periods had expired, thereby lifting the restrictions. In some instances Congress had abrogated the restrictions in advance of the time fixed for their termination, and in still other instances they had been canceled by the Secretary of the Interior in the exercise of authority conferred by law. But as to most of the lands the restrictions were still in force. It was in this situation that Congress, by the act of 1908, extended or enlarged the period of restriction in respect of "all allotted lands of . . . enrolled mixed-bloods of three quarters or more Indian blood," and accompanied its action with an explanation that it was not intended to [80] impose restrictions theretofore "removed from any land by or under any law."

The real controversy is over the meaning of the word "removed." It is not questioned that it embraces the action of Congress and of the Secretary of the Interior in abrogating or canceling restrictions in advance of the time fixed for their expiration, but it is insisted that it does not embrace their termination by the lapse of time. In short, the contention is that the word is used in a sense which comprehends only an affirmative act, such as a rescission or revocation while the statutory period was still running. Although having support in some definitions of the word, the contention is, in our opinion, untenable, for other parts of the same act, as also other acts dealing with the same subject, show that the word is employed in this legislation in a broad sense plainly including a termination of the restrictions through the expiration of the prescribed period. This is illustrated in §§ 4 and 5 of the act of 1908, and § 19 of the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), and is recognized in Choate v. Trapp, 224 U. S. 665, 673, 56 L. ed. 941, 945, 32 Sup. Ct. Rep. 565, where, in dealing with some of these allotments, it was said that "restrictions on alienation were removed by lapse of time."

Decree affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

[81] JUAN A. MONAGAS, José Arturo Monagas, et al., Appts.,
v.
JULIANA MARIA ALBERTUCCI Y ALVAREZ, Widow of Domínguez.

(See S. C. Reporter's ed. 81-88.)

Appeal — from Porto Rico supreme court — scope of review.

1. The jurisdiction of the Federal Supreme Court on an appeal from the supreme court of Porto Rico is confined to determining whether error of law was committed in admitting or rejecting evidence, and whether the findings of fact are adequate to sustain the conclusions based upon them.

[For other cases, see Appeal and Error, III. d, 5: 4286-4295, 4879-4888, in Digest Sup. Ct. 1908.]

Appeal — from Porto Rico supreme court — conclusiveness of findings.

2. The findings of fact of the Porto Rico supreme court on which is based its ruling that a contract is one of conditional sale may be accepted and treated as conclusive by the Federal Supreme Court without first determining the correctness of the ruling of the former court on an exception to testimony offered to show that the contract was a mortgage, where the conclusion of that court that error had been committed by the trial court in holding that the contract of sale was one of mortgage did not arise from a ruling that there was a want of power to admit any testimony for such purpose, but from the fact that the particular testimony which was offered and received over objection was found, after considering and weighing it, to bear no legal relation to such purpose, and hence not to afford any probative force tending to support the varying of the contract.

[For other cases, see Appeal and Error, VIII. 1, 3, in Digest Sup. Ct. 1908.]

[No. 44.]

Submitted October 29, 1914. Decided November 30, 1914.

APPEAL from the Supreme Court of Porto Rico to review a decree which, reversing a decree of the District Court of Mayaguez, refused to permit a redemption from a contract of sale which the plaintiffs claimed was only a mortgage. Affirmed.

See same case below, 17 P. R. R. 684.

The facts are stated in the opinion.

Mr. N. B. K. Pettingill submitted the cause for appellants.

No appearance for appellee.

Mr. Chief Justice White delivered the opinion of the court:

Only that which is deemed necessary for the decision of the case is stated, bearing in mind that our power is confined [82] to

NOTE.—On appellate jurisdiction of Federal Supreme Court over Porto Rican courts —see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

determining whether error of law was committed in admitting or rejecting evidence, and whether the findings of fact are adequate to sustain the conclusions based on them. Rosaly v. Graham y Frazer, 227 U. S. 584, 590, 57 L. ed. 655, 657, 33 Sup. Ct. Rep. 333.

The appellants sued in August, 1909, to recover immovable property upon the ground that a contract of sale made by them of the property in September, 1906, subject to a right to redeem, was not a sale subject to condition, but a mortgage, and, therefore, although the period for redemption had long expired without the exercise of that right, they were entitled to a decree for cancelation of the recorded sale on payment of the mortgage debt. Moreover, a right to recover rents and revenues was sought for the purpose of imputing the amount to the extinction of the mortgage debt. At the trial Juan A. Monagas, one of the plaintiffs, was tendered in their behalf as a witness, and he was permitted to testify over objection made and exception reserved by the defendant. The court substantially awarded the relief prayed. The prayer, however, for an accounting, was denied upon the ground that, although there was no agreement as to rate of interest, nevertheless it was contemplated that the lender should go into possession of the property, collect the rents and revenues, and appropriate them in lieu of collecting interest on the debt. Both sides appealed.

On the appeal it developed in the argument that neither side had complied with the rules as to assigning errors. The case was heard and taken under advisement with leave to file assignments of errors within a time fixed. In its opinion the court came first to the appeal of the defendant below. Directing attention to the fact that the permission to file assignments had not been complied with, the court then considered what was open, and after referring to the exception concerning the testimony of the witness, offered for the purpose of showing that the deed was not a sale, but was a mortgage, treated the exception [83] as covering two considerations: first, Was parol evidence admissible, "under our Civil Code, to vary the terms of the sale?" and second, whether "An improper construction was put on the written contract entered into between the parties," evidently considering, therefore, that even if parol evidence was admissible, it was yet necessary, as a result of the exception, to determine whether the contract had been improperly construed by a wrongful effect given to the evidence admitted over objection.

The contention as to mere inadmissibility was at once disposed of by stating that the real question to be decided was not whether any testimony could have been received, but the character and probative force of that which was admissible. The court said:

"The whole case really turns on the question of whether the written instrument in controversy was a mortgage or a conditional sale. If it is the latter, it must be complied with according to its terms; if the former, the plaintiff must be allowed to repay the money received and take a reconveyance of the land. The real intention of the parties at the time the written instrument was made must govern in the interpretation given to it by the courts. This must be ascertained from the circumstances surrounding the transaction and from the language of the document itself. The correct test, where it can be applied, is the continued existence of a debt or liability between the parties. If such exists, the conveyance may be held to be merely a security for the debt or an indemnity against the liability. On the contrary, if no debt or liability is found to exist, then the transaction is not a mortgage, but merely a sale with a contract of repurchase within a fixed time. While every case depends on its own special facts, certain circumstances are considered as important, and the courts regard them as throwing much light upon the real intent of the parties and upon the nature of such transactions: such are the existence of a collateral agreement made by [84] the grantor for the payment of money to the grantee, his liability to pay interest, inadequacy of price paid for the conveyance, the grantor still remaining in possession of the land conveyed, and any negotiation or application for a loan made preceding or during the transaction resulting in the conveyance. The American doctrine on this subject does not differ materially from the principles set forth in our Civil Code. 3 Pom. Eq. Jur. ¶¶ 1194 and 1195. Civil Code of Porto Rico, ¶¶ 1248-1250, 1348, 1410; and 1421." [17 P. R. R. 686.]

Coming, then, presumably to analyze the testimony admitted over the objection for the purpose of ascertaining whether it was of a character to engender any probative force proper to be considered for the purpose of showing that the minds of the parties met not on a conditional sale, but a mortgage, and therefore justified construing the written contract to be not what it purported to be, it was held that it did not, the court saying: "In accordance with these principles we must consider the conveyance in this case as a conditional sale and that plaintiff has failed to comply therewith;" it being added, "We are further satisfied that the exception of the defendant was well taken and ought to have been

sustained; and that the court consequently erred in its judgment." The decree was reversed, with direction to dismiss the suit.

The court in subsequently making its findings of fact and stating its conclusions included therein the testimony of the witness which had been admitted at the trial over objection, that testimony being to the following effect:

"The witness then proceeded to testify in substance that he applied to the defendant for a loan, and she made him an offer to make negotiations, taking the house in question as security under the conditions stated in the written contract; that he had no intention of selling the house to the defendant, as he had other better offers; and that the contract was made in the form of a deed of sale [85] with option of return because she requested it and he had no objection."

As there is no contention that the findings if accepted do not support the conclusion which the court based on them, it is sufficient to give the following summary: The contract in question was notarial in form, on its face a sale transferring ownership and possession to the purchaser for a stipulated cash price, conditioned, however, on the right of the sellers to redeem within two years on paying a sum equal to the purchase price, no interest being provided for, with the right to extend the time to redeem for one year further if it was elected to do so before the expiration of the original time, and conferring on the purchaser the power of noting on the public records the fact of the failure to redeem, if it took place, and to convert the title if recorded into an unconditional one. The findings disclose that there was no evidence that the right to redeem had been exercised within the time fixed by the contract, that the purchaser inscribed that fact upon the records, and that thereby she became apparently the indefeasible owner. The following facts, however, relating to this subject, were found: (a) That shortly before the original redemption period elapsed, one of the sellers in behalf of all, wrote a letter to the purchaser, asking her to name a time when, before a notary, an agreement of extension could be signed in accordance with the original contract of repurchase, and that no answer appears to have been made to this letter; at all events that nothing was shown establishing that anything was done under it. (b) That after the original period had expired and the failure to avail of the condition had been noted on the public records, three several letters were written, one on October 17th, 1908, one on December 24th, 1908, and the last on May 5th, 1909; the two first requesting the appointment of a day for the purpose of signing an extension of the original time because an agreement expressed in a letter [86] to give such extension had been made, and the last offering to pay the amount fixed in the condition of redemption on the ground that there was a right to do so because of an assent to an extension which had been previously given by letter; but, as we have said, the findings recite that nothing as to the existence of the letter referred to was shown in the record. All four of the letters in unequivocal terms treated the contract as having been one of sale and sought to enforce it accordingly, and contained nothing in the slightest degree asserting the existence of a mortgage as now relied upon. Indeed, the findings fail to show anything directly or indirectly asserting that view of the contract prior to its being made the basis of this suit, filed, as we have seen, in August, 1909.

The conclusions drawn from the findings were as follows:

"This supreme court disposed of the appeal by its judgment of June the 5th of the last year, reversing that rendered by the court below and ordering the dismissal of the complaint, not only upon the ground that the exception to which we have already referred was well taken and should have been sustained, but also because the agreement made by the parties was a conditional sale."

As we are bound by the conclusion as to the character of the contract if it is supported by the findings, and as there is no dispute that if the findings be accepted as legal they do support such conclusion, it follows that there must be an affirmance since the real question for decision is, Was the court right in holding that the contract in question was a conditional sale, and not a mortgage? But it is insisted—and that is really the only issue in the case—that the findings cannot be accepted and treated as conclusive without previously determining the correctness of the ruling of the court on the exception to the testimony, since if that ruling be held to have been wrongful, it will follow either that there were no findings, or, if there were such findings in [87] form, that they were legally inadequate because made from an incomplete and partial consideration of the evidence resulting from excluding from view the testimony which was wrongfully held to be inadmissible. Indeed, the argument is that this must be the case unless it be assumed that the court, after excluding the testimony on the ground that it was inadmissible, and hence wrong to consider it, proceeded at once to consider it for the purpose of making its findings. From this it is urged that

there must be a reversal and remanding for a new trial, or at least for the purpose of enabling the court below to make new findings and express new conclusions upon all the evidence, including that which it should consider if it be found that it was wrong in holding that the evidence excluded was inadmissible.

But when the statement we have made of the case is considered, the proposition rests upon the plainest misconception of the action of the court below, since, as we have seen, its conclusion that error had been committed by the trial court in holding that the contract of sale was one of mortgage did not arise from a ruling that there was a want of power to admit any testimony for such purpose, but from the fact that the particular testimony which was offered and received over objection was found, after considering and weighing it, to bear no legal relation to such purpose, and hence not to afford any probative force tending to support the varying of the contract. This clearly is made manifest by the excerpt from the opinion of the court which we have quoted and becomes indisputable when it is observed that the authorities which the court cited and relied upon as sustaining its action expressly recognized that testimony was admissible for the purpose of showing that a contract of conditional sale was one of mortgage, but pointed out the nature and character of the testimony and the force of the proof required to accomplish such result. The error of the contention, hence, [88] consists in assuming that testimony was not considered and weighed for the purpose of the findings, when in fact, on the face of the record, it is apparent that all the testimony offered was considered and weighed. When this is borne in mind, it results that the contention at last reduces itself to the proposition that the decree below should be reversed and the case remanded because of an error never committed; that is, to enable a duty to be legally performed which the record discloses had already been completely and lawfully discharged.

Affirmed.

L. E. WATERMAN COMPANY, Appt.,
v.
MODERN PEN COMPANY. (No. 54.)

MODERN PEN COMPANY, Appt.,
v.
L. E. WATERMAN COMPANY. (No. 72.)

(See S. C. Reporter's ed. 88-99.)

Unfair competition — use of surname.

1. The law will require a later competitor whose use of his own name upon his goods will and does lead the public to understand that those goods are the product of a concern already established and well known under that name to take reasonable precautions to prevent the mistake, where the profit of the confusion is known to, and intended by, the later man.

[For other cases, see Unfair Competition in Digest Sup. Ct. 1913 Supp.]

Unfair competition — use of surname — Waterman pens.

2. A corporation long engaged in the manufacture and sale of fountain pens as "Waterman's" and "Waterman's Ideal," under the name "L. E. Waterman Co.," the origin of whose product is confused in the mind of the public by the use of the name "Waterman" in connection with the fountain pen business by the corporate selling agent of a firm calling itself "A. A. Waterman & Co.," and deriving its name from a man who started in business long after the first-named corporation, is entitled to protection against such use, except in the form "Arthur A. Waterman & Co.," and then only in juxtaposition with the suffix, "Not connected with the L. E. Waterman Co.," equally prominently displayed.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1913 Supp.]

Unfair competition — use of surname — extent of protection.

3. All the protection to which a corporation long engaged in manufacturing and selling fountain pens as "Waterman's" and "Waterman's Ideal" under the name "L. E. Waterman Co." is entitled against the use of the name "Waterman" in connection with the fountain pen business by the corporate selling agent of a firm calling itself "A. A. Waterman & Co.," and deriving its name from a man who started in business long after the first-named corporation, is afforded by a decree which permits such use only in the form "Arthur A. Waterman & Co.," and then only in juxtaposition with the suffix, "Not connected with the L. E. Waterman Company," equally prominently displayed, although one of Arthur A. Waterman's motives in going into business was the hope of some residual advantages from the use of his own name.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1913 Supp.]

Note.—As to trademark in proper name—see notes to Lawrence Mfg. Co. v. Tennessee Mfg. Co. 34 L. ed. U. S. 997, and Dr. S. A. Richmond Nervine Co. v. Richmond, 40 L. ed. U. S. 155.

As to limitation of right to use one's own name as tradename—see notes to Morton v. Morton, 1 L.R.A.(N.S.) 660; Enoch Morgan's Sons Co. v. Ward, 12 L.R.A.(N.S.) 731; Ætna Mill & Elevator Co. v. Kramer Mill. Co. 28 L.R.A.(N.S.) 934; and Donnell v. Herring-Hall-Marvin Safe Co. 52 L. ed. U. S. 481.

As to when injunction will be granted to restrain the unauthorized use of trademark—see note to McLean v. Fleming, 24 L. ed. U. S. 828.

Appeal — review of facts — concurrent findings below.

4. Concurrent conclusions of the two courts below upon the facts will not ordinarily be disturbed by the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, 4931–4959, in Digest Sup. Ct. 1908.]

Unfair competition — use of surname — transfer of right.

5. The right of a later competitor to use his own name upon his goods so long as he does not lead the public to believe that they are the product of an already well-established concern may, so far as respects the latter, be transferred by him to a partnership, together with whatever good will he has, although by the partnership agreement he is only to remain a partner for a year and a few days, and then is either to start a business in western territory, or become selling agent for such territory, at his option.

[For other cases, see Unfair Competition in Digest Sup. Ct. 1913 Supp.]

[Nos. 54 and 72.]

Argued November 10, 1914. Decided November 30, 1914.

CROSS APPEALS from the United States Circuit Court of Appeals for the Second Circuit to review a decree which modified, and as modified affirmed, a decree of the District Court for the Southern District of New York in favor of complainant in a suit to restrain the unfair use of a surname in connection with the manufacture and sale of fountain pens. Affirmed.

See same case below, 117 C. C. A. 30, 32, 197 Fed. 534, 536.

The facts are stated in the opinion.

Messrs. Walter B. Raymond and Oliver Mitchell argued the cause, and, with Messrs. Victor C. Cormier and Mortimer W. Byers, filed a brief for the L. E. Waterman Company:

The burden is on a defendant who uses plaintiff's tradename to justify the using thereof.

Jacobs v. Beecham, 221 U. S. 263, 55 L. ed. 729, 31 Sup. Ct. Rep. 555.

The alleged partnership agreement between Waterman and the two Chapmans, as Mr. Waterman's testimony shows, never ripened into an actual partnership. According to Mr. Waterman's testimony, he never took any part or did any work in connection with the firm. Under the terms of the instrument, he was excluded from all participation in the management of the alleged firm's affairs, and was at the outset ejected from the firm automatically at the end of one year. Mr. Waterman testifies that the alleged firm never did any business; it bought nothing; it sold nothing; it made nothing, it did nothing. It was, as Mr. Waterman says, a paper partnership, which the writers venture to think is no partnership at all. Under the authorities, such a state of affairs creates no partnership.

Davis v. Key, 123 U. S. 79, 31 L. ed. 112, 8 Sup. Ct. Rep. 55; R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; Gray v. Gibson, 6 Mich. 300; Shea v. Nilima, 66 C. C. A. 263, 133 Fed. 209; L. E. Waterman Co. v. Guido (Decision Royal, Civil, and Penal Tribunal of Milan, Italy, July 19, 1911); Abel Morrall v. T. Hessin & Co. 20 Rep. Pat. Cas. 429.

The alleged transfer of good will contained in the instrument by Waterman could not have been effective in any sense, as a matter of law, because no going business was transferred, and the good will could not be transferred in gross.

R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; Abel Morrall v. T. Hessin & Co. 20 Rep. Pat. Cas. 429; Mayer Fertilizer & Junk Co. v. Virginia-Carolina Chemical Co. 35 App. D. C. 425; Thorneloe v. Hill, 11 Rep. Pat. Cas. 61.

Not merely has the defendant failed to sustain the burden of proof, but it has failed to meet the proof offered by the plaintiff to disprove in advance defendant's alleged justification, which proof would have been easy to produce had it existed.

Kirby v. Tallmadge, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349; Pacific Coast S. S. Co. v. Bancroft-Whitney Co. 36 C. C. A. 135, 94 Fed. 180.

This case rests upon the proposition whether or not a man has the right to cede by contract the use of his name to strangers to that name, for the purpose of competition with an already established business.

R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; Abel Morrall v. T. Hessin & Co. 20 Rep. Pat. Cas. 429.

Such a personal right or license, as indicated in the Kellogg decree, by its very nature was not such as could be assigned or transferred to others, to be used to the detriment and damage of this plaintiff. Inasmuch as such a right was conceded solely as a right to use one's own name in one's own business, when such business ceased to be the business of the person bearing such name, such right or license also ceased.

Wm. G. Rogers Co. v. International Silver Co. 55 C. C. A. 83, 118 Fed. 133; National Distilling Co. v. Century Liquor & Cigar Co. 105 C. C. A. 638, 183 Fed. 206; Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 343; Garrett v. T. H. Garrett & Co. 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472.

The mere attaching of that name to a similar product, without more, would have

the effect of a falsehood; it must be accompanied by information that the defendant is not the original.

Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. 208 U. S. 554-560, 52 L. ed. 616-621, 28 Sup. Ct. Rep. 350; Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co. 92 C. C. A. 60, 166 Fed. 26; Charles E. Hires Co. v. Consumers' Co. 41 C. C. A. 71, 100 Fed. 809; Walter Baker & Co. v. Sanders, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889.

An injunction will not be refused on the ground of delay.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 54 C. C. A. 204, 116 Fed. 332; Bissell Chilled Plow Works v. T. M. Bissell Plow Co. 121 Fed. 357; Benkert v. Feder, 34 Fed. 534, affirmed in 18 C. C. A. 549, 44 U. S. App. 99, 70 Fed. 613.

Obviously, the marking of goods with the maker's name is a natural and proper thing, and the personal name will be protected against any who cannot truthfully use it.

Brown Chemical Co. v. Stearns, 37 Fed. 360; R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; Abel Morrall v. T. Hessin & Co. 20 Rep. Pat. Cas. 429.

But, where the second comer truthfully uses the name, and honestly, it is *damnum absque injuria*.

Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625.

Obviously the "Modern Pen Co." could not truthfully use the name "Waterman" on pens of its manufacture. It would be an untruthful and unauthorized use.

Brown Chemical Co. v. Stearns, 37 Fed. 360.

Hence the attempt to justify the defendant's sales, as sales of pens made and stamped by a second comer in the field, named Waterman, in the honest exercise of his natural right.

Brown Chemical Co. v. Meyer, supra.

As to the first link in the defendant's chain of proof, *i. e.*, the existence of a firm of which A. A. Waterman was a member, plaintiff contends that, on the record, there is no proof of this fact, because the deed of partnership, as and of itself, is not sufficient to sustain the issue.

Davis v. Key, 123 U. S. 79, 31 L. ed. 112, 8 Sup. Ct. Rep. 55; Gray v. Gibson, 6 Mich. 300.

Where proof would be easy, if it existed, rebutting the inferences which the proofs tend to establish, and it is not made, the presumption is that rebutting proof cannot be made.

Kirby v. Tallmadge, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349; Pacific Coast S. S. Co. v. Bancroft-Whitney Co. 36 C. C. A. 135, 94 Fed. 180; Pennsylvania R. Co. v. Anoka Nat. Bank, 47 C. C. A. 454, 108 Fed. 482.

Mr. Waterman's uncontradicted evidence brings the case within the principle of Gray v. Gibson and Davis v. Key, supra.

Intent is the basic fact in the contract of partnership, as in other contracts.

Drennan v. London Assur. Corp. 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. Rep. 341.

The contract and the acts done in connection with it must be considered to discover the intent.

Ibid. Shea v. Nilima, 6 C. C. A. 263, 133 Fed. 209; Salter v. Ham, 31 N. Y. 321, 5 Am. Neg. Cas. 87.

Where the defendants, as here, rely upon an alleged partnership between Chapman, Waterman, and Chapman, they must prove an actual partnership between these parties; it is not enough to show a fact which would estop the parties to deny partnership as against a stranger misled.

Gray v. Gibson, supra.

This is obviously a case in which the elemental "intent" to create the status of partnership is absent, and the "contract" is seen to be merely a shell or blind to give color to a claim of right to use the name "Waterman."

R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; Abel Morrall v. T. Hessin & Co. 20 Rep. Pat. Cas. 429.

The good will, if any existed, died.

Mayer Fertilizer & Junk Co. v. Virginia-Carolina Chemical Co. 35 App. D. C. 425.

It is obvious that if the original aggregation of the two Chapmans and A. A. Waterman did not ripen into a partnership, either because of the entire lack of action in pursuance of the deed, or because, on the deed itself and the facts testified to by Mr. Waterman, it is apparent that the fundamental intent to be partners was entirely lacking, then nothing accrued to the two Chapmans which would warrant their use of the name "Waterman;" certainly after the departure of Mr. Waterman for the West in July, 1906.

Peck Bros. & Co. v. Peck Bros. Co. 62 L.R.A. 81, 51 C. C. A. 251, 113 Fed. 291.

Mr. Waterman had no good will to grant and no going business to which any good will could be appurtenant. As to the alleged grant of a right to use Waterman's personal name, such a right cannot be granted in gross.

Thorneloe v. Hill, 11 Rep. Pat. Cas. 61; Burrow v. Marceau, 124 App. Div. 665, 109 N. Y. Supp. 105.

Mr. Alexander S. Bacon argued the cause and filed a brief for the Modern Pen Company:

The plaintiff's claim to the exclusive use of the word "Waterman;" either by virtue

of Mr. L. E. Waterman having first used it in the sale of fountain pens, or by virtue of the registry of a trademark, is, at this late day, wholly inexcusable.

Thaddeus Davids Co. v. Davids, 102 C. C. A. 249, 178 Fed. 801, 114 C. C. A. 355, 192 Fed. 915; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756, 9 N. W. 615; Notes to R. W. Rogers Co. v. Wm. Rogers Mfg. Co. 17 C. C. A. 579, and Kathreiner's Malzkaffee v. Pastor Kneipp Medicine Co. 27 C. C. A. 357.

Mr. Arthur A. Waterman had just as much right to sell his trademark or his tradename as he had to sell his horse. Both are property. Or he had as much right to assign his tradename to his continuing partners as L. E. Waterman had to assign his tradename to the plaintiff corporation.

Burton v. Stratton, 12 Fed. 696; 19 Am. & Eng. Enc. Law, title Trademarks, 401; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Pepper v. Labrot, 8 Fed. 29; Skinner v. Oakes, 10 Mo. App. 45; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Churton v. Douglas, Johns V. C. (Eng.) 174, 28 L. J. Ch. N. S. 841, 7 Week. Rep. 365, 19 Eng. Rul. Cas. 606; Kennedy v. Dr. David Kennedy Corp. 32 Misc. 480, 66 N. Y. Supp. 225; Glenn & H. Mfg. Co. v. Hall, 61 N. Y. 226, 19 Am. Rep. 278; Devlin v. Devlin, 69 N. Y. 213, 25 Am. Rep. 173; Tussaud v. Tussaud, L. R. 44 Ch. Div. 678, 59 L. J. Ch. N. S. 631, 62 L. T. N. S. 633, 38 Week. Rep. 503, 2 Megone, 120.

Where the only confusion created is that which results from the similarity of the names, the court will not interfere.

Meneely v. Meneely, 62 N. Y. 432, 20 Am. Rep. 489; Car Advertising Co. v. New York City Advertising Co. 57 Misc. 105, 107 N. Y. Supp. 546; William Rogers Mfg. Co. v. Simpson, 54 Conn. 527, 9 Atl. 395.

Walter Baker & Co. v. Gray, 52 L.R.A. (N.S.) 899, 113 C. C. A. 417, 192 Fed. 921, is on all fours with the case at issue. It sustains every position ever taken by the defendant in this litigation.

The latest pronouncement of the New York courts on this subject in an extreme case did nothing except to require the defendant to use his own full name.

World's Dispensary Medical Asso. v. Pierce, 203 N. Y. 419, 96 N. E. 738.

Mr. Justice Holmes delivered the opinion of the court:

This suit was brought by the L. E. Waterman Company to enjoin the Modern Pen Company from using in connection with the manufacture and sale of fountain pens, other than those of the plaintiff's make, the name "A. A. Waterman" or any name containing the word "Waterman" in any form, and for an account. The decision of the circuit court of appeals upon an order for a preliminary injunction is reported, 105 C. C. A. 408, 183 Fed. 118; that of the district court upon the merits, 193 Fed. 242; and that of the circuit court of appeals, 117 C. C. A. 30, 32, 197 Fed. 534, 536. The final decree, in the parts material here, restricted the defendant to using the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co.," and required the words "not connected with the L. E. Waterman Co." to be juxtaposed in equally large and conspicuous letters when the permitted name was marked upon any part of the fountain pen sold by the defendant, or upon boxes containing such pens, and whenever the name was used by way of advertisement or otherwise to denote any fountain pens made or sold by the defendant, or to denote that it was the maker or seller of such pens. 105 C. C. A. 408, 183 Fed. 118, 193 Fed. 248; 117 C. C. A. 30, 32, 197 Fed. 535, 536. See further, L. E. Waterman Co. v. Standard Drug Co. 120 C. C. A. 455, 459, 202 Fed. 167, 171. The bill, besides alleging diversity of citizenship and unfair competition, seemingly relied upon the registration of "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y.," as trademarks under the act of Congress of March 3, 1881, chap. 138, 21 Stat. at L. 502, U. S. Comp. Stat. 1901, p. 3401, as a ground of jurisdiction. [94] Jacobs v. Beecham, 221 U. S. 263, 274, 55 L. ed. 729, 732, 31 Sup. Ct. Rep. 555. Both parties appeal.

The defendant's appeal is from the requirements that it use the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co.," and that it juxtapose the words "not connected with the L. E. Waterman Co." After the finding of two courts and upon the evidence it must be assumed that the defendant had used the name Waterman in such a way as to mislead the public and to interfere with the plaintiff's rights unless the defendant had the right to use the name as matter of law, because it was the selling agent of a firm calling itself "A. A. Waterman & Co.," and deriving its name from a man who started in business long after the plaintiff had acquired whatever rights it has. In support of this proposition the defendant lays hold of language in Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140, 49 L. ed. 972, 986, 25 Sup. Ct. Rep. 609, and in other books, to the effect that courts will not interfere with the use of a party's own name "where the only confusion, if any, results from a similarity

of the names, and not from the manner of the use." But, whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to, and, if that be material, is intended by, the later man, the law will require him to take reasonable precautions to prevent the mistake. Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. 208 U. S. 554, 559, 52 L. ed. 616, 620, 28 Sup. Ct. Rep. 350. There is no distinction between corporations and natural persons in the principle, which is to prevent a fraud. Ibid.; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 136, 49 L. ed. 972, 984, 25 Sup. Ct. Rep. 609; Donnell v. Herring-Hall-Marvin Safe Co. 208 U. S. 267, 273, 52 L. ed. 481, 487, 28 Sup. Ct. Rep. 288. In the Howe Scale Co. Case it was stated upon the same page [95] with the passage quoted that "defendant's name and trademark were not intended or likely to deceive."

The only other ground for the defendant's appeal that needs a word after the findings below is a decree of the supreme court of New York in a suit by the plaintiff against Arthur A. Waterman and Edward L. Gibson, partners doing business as the A. A. Waterman Pen Company of New York and Boston. The defendant alleges that it has succeeded to A. A. Waterman's rights. The decision found in the strongest terms that the name was used with fraudulent intent, and the decree in some detail enjoined the defendant from using that or any corporate name containing the word "Waterman," and from using in connection with the business of making or selling fountain pens the word "Waterman" alone or with others in such collocation with the word "pen" as to indicate that such pens were a variety of Waterman's fountain pens. This rather damaging decree is thought to give some help because of a following sentence to the effect that the defendants were not prohibited from indicating that their pens were made or sold for or by Arthur A. Waterman & Co. or A. A. Waterman & Co. But that sentence was subject to the previous prohibition and consistent with it. The present defendant still not only may indicate the source of its pens in undeceptive ways, but may mark them "Arthur A. Waterman & Co." if only it add words that prevent the fraud that it insists upon the right to effect. It is unnecessary to go into other considerations presented by the record to show that the defendant's appeal cannot be maintained.

The plaintiff's appeal is from the failure of the decree to prohibit the use of the name "Arthur A. Waterman & Co." even with the suffix required by the court. The ground upon which it claims this broader relief is that the agreement with A. A. Waterman by which he purported to become a partner in the firm of A. A. Waterman & Co. [96] was a sham, that the firm does not make the pens sold by the defendant, and that all the arrangements between Waterman, the firm, and the defendant were merely colorable devices to enable the defendant to get the name upon its pens. If we were to adopt this view of the facts the nature of the parties' rights and powers perhaps might need a more careful discussion than, so far as we are aware, it has received as yet. Under the decree in its present form the plaintiff gets all the protection to which it is entitled as against another Waterman who has established himself in the business, even though one of his motives for going into it was the hope of some residual advantages from the use of his own name. If with the warning that the law decrees sufficient to prevent a fraud a second Waterman could go into the business and give it his name, the question occurs whether a man might not change his name to Waterman and do the same thing; and, if so, whether the nature of the defendant's title to the name is any concern of the plaintiff,—whether, in short, the protection now granted is limited by reason of a personal privilege, or is the measure of the plaintiff's rights as against the world. We express no opinion upon the point beyond saying that it would have to be considered before the plaintiff could obtain a broader decree. For the purposes of decision we give the plaintiff the benefit of the doubt.

Whatever view may be taken of the agreements, there is no question that they were intended, with A. A. Waterman's assent, to authorize the use of his name in a business that he had pecuniary reasons for wishing to see succeed. He purported to transfer to the partnership the good will attaching to his name. While it very well may be true that the transfer of a name without a business is not enough to entitle the transferee to prevent others from using it, it still is a license that may be sufficient to put the licensee on the footing of the licensor as against the plaintiff. Moreover, two courts have upheld the arrangements [97] as effective to give the defendant the protection of such rights as A. A. Waterman would have had in establishing a business after the plaintiff, and therefore we

shall not go into any consideration of the facts.

It cannot be said the partnership agreement was ineffectual for the present purpose as matter of law. The object is pretty plain, but it is none the worse for that. The leading features are as follows: A partnership is formed under the name "A. A. Waterman & Co." Contributions of capital are to be deemed loans and bear interest. The two partners other than Waterman have the management of the business and alone can sign negotiable paper and contracts. The business is to make, buy, and sell fountain pens, and the defendant corporation is to be formed (the parties to be interested in it), and is to be the sole selling agent of the firm. Waterman grants to the firm the exclusive use of his own and the firm names in connection with the business, and all the good will attaching to either. The continent is divided into two defined districts, and Waterman has the exclusive right to do business under the name "A. A. Waterman & Co." in the western district, if he begins it before July 1, 1906, and the remaining members the exclusive right to the eastern district. In any event Waterman leaves the present firm at that date. Each party has the free use of all patents, trademarks and tradenames within their territories that either party has or may acquire. Eastern territory goods are to be marked "A. A. Waterman & Co., New York, and those made in the western, "A. A. Waterman & Co. (or some similar name) Chicago." Waterman covenants not to compete for thirty-six years, or to use or allow the use of his name except as provided. Finally if Waterman does not go into independent business, he is to have the exclusive agency for the western territory for the thirty-six years, and his commissions are fixed in detail and with care.

[98] As we have said, we do not reopen the matters of fact that must be taken to have been found by the two courts. So we assume that there was nothing to hinder Waterman from making this agreement, and that the defendant was organized and acted under it. Whether he had more or less good will to convey perhaps is not very material. We are not prepared to say as matter of law that a man who for years has been trying to do business may not join a partnership for a time long enough to start it with his name and whatever good will he has, and provide that thereafter he will divide territory as above stated, or become a selling agent, at his choice. The obvious motive is met by the protection given in the decree, but does not deprive him of all rights in his name. A sufficient interest is disclosed to sustain the transfer as against the plaintiff, and to free the defendant from a greater liability than would have fallen on A. A. Waterman had he gone on alone.

Decree affirmed.

Mr. Justice **Pitney:**

In No. 72, the appeal of the Modern Pen Company, I concur in the result.

In No. 54, the appeal of the L. E. Waterman Company, I dissent from the conclusion reached by the court. It seems to me that the alleged partnership agreement of June 12, 1905, made between Arthur A. Waterman and others, pursuant to which the Modern Pen Company was organized, and under which it claims the right to use the name of "A. A. Waterman" and "A. A. Waterman & Co.," appears upon its face to be a mere sham and a fraudulent device, and is demonstrated to be such by the other evidence. The case presents no question respecting the right of an individual to the bona fide use of his name, but rather the question whether a partnership or a corporation can, [99] by purchase or otherwise, obtain the right to use the name of a third party for the very purpose of employing it in unfair competition with the established business of still another party. The case in its circumstances closely resembles International Silver Co. v. William H. Rogers Corp. 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 Ann. Cas. 804, and, for reasons sufficiently indicated by a reference to that case, I think the Modern Pen Company should be unqualifiedly enjoined from using the name "Waterman."

AARON SAGE, Plff. in Err.,
v.
GEORGE HAMPE.

(See S. C. Reporter's ed. 99-106.)

Error to state court — Federal question — defense under Federal statute.

1. A party who unsuccessfully relies in the state courts upon an act of Congress as a defense is entitled to bring the case up to the Federal Supreme Court by writ of error.

[For other cases, see Appeal and Error, 1168-1191, 1751-1797, in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme

Indian allotments — restrictions on alienation — contract by stranger — damages for breach.

2. One who contracts to convey Indian lands not belonging to him, but allotted and patented to members of the Pottawatomie tribe, under the act of February 8, 1887 (24 Stat at L. 388, chap. 119, Comp. Stat. 1913, §§ 4195–4210), cannot consistently with the policy of the United States as expressed in the restrictions on alienation made by § 5 of that act, and by the act of August 15, 1894 (28 Stat. at L. 286, chap. 290), and the act of May 31, 1900 (31 Stat. at L. 221, chap. 598), § 7, be held bound by his contract so as to be liable in damages at law for its breach.

[For other cases, see Indians, VIII.; Contracts, IV. g, in Digest Sup. Ct. 1908.]

[No. 82.]

Argued November 12 and 13, 1914. Decided November 30, 1914.

IN ERROR to the Supreme Court of the State of Kansas to review a Judgment which affirmed a judgment of the District Court of Shawnee County in that state, in favor of plaintiff in an action to recover damages for the breach of an executory contract to convey an Indian allotment. Reversed.

See same case below, 87 Kan. 536, 125 Pac. 53.

The facts are stated in the opinion.

Mr. Lee Monroe argued the cause, and, with Messrs. Edwin A. Austin, W. S. Roark, and Carr W. Taylor, filed a brief for plaintiff in error:

A losing party to a suit who insists that the judgment therein cannot be rendered against him consistently with a given statute of the United States should be held, within the meaning of U. S. Rev. Stat. § 709, now § 237 of the Judicial Code, to claim such a right and immunity under such statute as to confer jurisdiction upon this court to review an adverse final judgment of the highest state court in such suit.

Nutt v. Knut, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 525, 51 L. ed. 298, 303, 27 Sup. Ct. Rep. 153; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 532, 51 L. ed. 596, 603, 27 Sup. Ct. Rep. 391; Straus v. American Pub. Asso. 231 U. S. 222, 233, 58 L. ed. 192, 198, L.R.A. 1915A, —, 34 Sup. Ct. Rep. 84; Anderson v. Carkins, 135 U. S. 483, 486, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 73, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496; McNulta v. Lochridge, 141 U. S. 327, 331, 35 L. ed. 796, 799, 12 Sup. Ct. Rep. 11; McCormick v. Market Nat. Bank, 165 U. S. 538, 546, 41 L. ed. 817, 820, 17 Sup. Ct. Rep. 433; Hammond v. Whittredge, 204 U. S. 538, 547, 51 L. ed. 606, 611, 27 Sup. Ct. Rep. 396; St. Louis & I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Monson v. Simonson, 231 U. S. 341, 345, 58 L. ed. 260, 261, 34 Sup. Ct. Rep. 71.

A contract to convey Indian lands prior to the removal of the statutory restrictions upon their alienation is void, and no recovery can be had thereon by either party.

Goat v. United States, 224 U. S. 458, 470, 56 L. ed. 841, 847, 32 Sup. Ct. Rep. 541; 23 Cyc. 341; Lamb v. James, 87 Tex. 485, 29 S. W. 647; Franklin v. Lynch, 233 U. S. 269, 273, 58 L. ed. 954, 957, 34 Sup. Ct. Rep. 505; Starr v. Long Jim, 227 U. S. 613, 625, 57 L. ed. 670, 675, 33 Sup. Ct. Rep. 358; Bledsoe v. Wortman, 35 Okla. 261, 129 Pac. 841; Bowling v. United States, 233 U. S. 528, 58 L. ed. 1080, 34 Sup. Ct. Rep. 659; Clark, Contr. 2d ed. p. 134; Bishop, Contr. § 471; Larson v. First Nat. Bank, 62 Neb. 303, 87 N. W. 18; Williams v. Steinmetz, 16 Okla. 104, 82 Pac. 986; Kelly v. Harper, 7 Ind. Terr. 541, 104 S. W. 829; Sayer v. Brown, 7 Ind. Terr. 675, 104 S. W. 877; Dupas v. Wassell, 1 Dill. 213, Fed. Cas. No. 4,182; Mayes v. Cherokee Strip Live Stock Asso. 58 Kan. 712, 51 Pac. 215; Light v. Conover, 10 Okla. 732, 63 Pac. 966; Muskogee Land Co. v. Mullins, 91 C. C. A. 213, 165 Fed. 179, 16 Ann. Cas. 387; Beck v. Flournoy Live-Stock & Real-Estate Co. 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30.

The restrictions upon the alienation of the Indian lands involved herein had not been removed at the date of the contract for the sale thereof.

Monson v. Simonson, 231 U. S. 341, 346, 58 L. ed. 260, 262, 34 Sup. Ct. Rep. 71; Trist v. Child (Burke v. Child) 21 Wall. 448, 452, 22 L. ed. 624, 625; Meguire v. Corwine, 101 U. S. 108, 111, 25 L. ed. 899, 900; McMullen v. Hoffman, 174 U. S. 639, 654, 43 L. ed. 1117, 1123, 19 Sup. Ct. Rep. 839.

The description of the lands in question, contained in the contract sued on, was insufficient to relieve it from the operation of the statute of frauds, and the reception

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Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

of parol evidence to supply such description denied the effect of the Indian allotment act.

Williams v. Morris, 95 U. S. 444, 24 L. ed. 360; Bayne v. Wiggins, 139 U. S. 210, 35 L. ed. 144, 11 Sup. Ct. Rep. 521; Hampe v. Sage, 82 Kan. 733, 109 Pac. 406; Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; Brice v. Hays, 144 Ky. 535, 139 S. W. 810; Scherck v. Moyse, 94 Miss. 259, 48 So. 513; Benjamin, Sales, 6th Am. ed. p. 209, note; 20 Cyc. 278; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Walker v. Fleming, 37 Kan. 171, 14 Pac. 470.

Mr. A. M. Harvey argued the cause, and, with Messrs. J. B. Larimer, J. E. Addington, and W. H. Thompson, filed a brief for defendant in error:

The plaintiff in error cannot maintain this appeal for the reason that this court is without jurisdiction to consider or determine the questions sought to be raised by him on such appeal, and no Federal question is presented by the transcript of the record for the consideration of this court. An examination of the issues as shown by the pleadings, and of the opinion of the supreme court of Kansas, shows conclusively that a decision as to the validity and application of the Federal statute sought to be invoked was not necessary to a determination of the cause.

California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Schuyler Nat. Bank v. Bollong, 150 U. S. 85–88, 37 L. ed. 1008, 1009, 14 Sup. Ct. Rep. 24; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Seneca Nation v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; McQuade v. Trenton, 172 U. S. 636, 43 L. ed. 581, 19 Sup. Ct. Rep. 292; Seeberger v. McCormick, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

The opinion of the supreme court of Kansas shows that the judgment appealed from was expressly rendered upon considerations other than the Federal statutes sought to be invoked as the basis for this appeal.

Provident Loan Trust Co. v. McIntosh, 68 Kan. 462, 75 Pac. 498, 1 Ann. Cas. 906; Maddux v. Simonson, 83 Kan. 327, 111 Pac. 428; Krhut v. Phares, 80 Kan. 515, 103 Pac. 117; Robertson v. Talley, 84 Kan. 820, 115 Pac. 640; 29 Am. & Eng. Enc. Law, 2d ed. 667.

It appearing from the record by the admission and declaration of the plaintiff in error that this land had been sold prior to the expiration of twenty-five years from the date of the allotment, it must be conclusively presumed that the restrictions had been removed, as provided by the acts of Congress.

Bledsoe, Indian Laws, § 164, p. 240.

Under the issues raised by the answer of the defendant there was no allegation in the answer, nor any proof offered, that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later acts of Congress, and such objection was not entertained by the supreme court of Kansas, and cannot now be entertained in this court.

4 Wigmore, Ev. ¶ 2573; Olive v. State, 4 L.R.A. 39, note; State v. Herold, 9 Kan. 194; 16 Cyc. 889.

The sufficiency of the terms of the contract as to the description of the lands therein referred to presents a question of general commercial law which has been finally and conclusively determined by the judgment of the supreme court of Kansas in numerous decisions, and such question is not open for consideration by this court.

Bacon v. Leslie, 50 Kan. 494, 34 Am. St. Rep. 134, 31 Pac. 1066; Cummins v. Riordon, 84 Kan. 795, 115 Pac. 568; 20 Cyc. 271; 36 Cyc. 593–595; 29 Am. & Eng. Enc. Law, 866; Hurley v. Brown, 98 Mass. 547, 96 Am. Dec. 671; Waring v. Ayres, 40 N. Y. 357; White v. Breen, 106 Ala. 159, 32 L.R.A. 127, 19 So. 59; Howison v. Bartlett, 147 Ala. 408, 40 So. 757; Bates v. Harris, 144 Ky. 399, 36 L.R.A.(N.S.) 154, 138 S. W. 276; Wood, Stat. Fr. § 353; Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; Hyden v. Perkins, 119 Ky. 188, 83 S. W. 128; Eisleben v. Brooks, 102 C. C. A. 380, 179 Fed. 86; Gray v. Smith, 76 Fed. 533, 28 C. C. A. 168, 48 U. S. App. 581, 83 Fed. 824; Towle v. Carmelo Land & Coal Co. 99 Cal. 397, 33 Pac. 1127; Wilcox v. Sonka, 137 Mo. App. 54, 119 S. W. 445; Flegel v. Dowling, 54 Or. 40, 135 Am. St. Rep. 812, 102 Pac. 178, 19 Ann. Cas. 1159.

It must be presumed that the contract was legal.

Craft v. Bent, 8 Kan. 332; McBratney v. Chandler, 22 Kan. 695, 31 Am. Rep. 213.

The plaintiff in error did not offer proof sufficient to establish a defense under the acts of Congress, and Aaron Sage, the plaintiff in error, is not an Indian, and even if the lands in question were not subject to sale, which was not shown, and is not a fact, he is liable to the defendant in error.

9 Cyc. 551, 554, 570; 16 Cyc. 889; 4 Wig-

more, Ev. ¶ 2573; Olive v. State, 4 L.R.A. 39, note.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the defendant in error (Hampe) to recover damages for breach of a contract to [104] purchase certain land and to convey to the plaintiff certain other land of greater value. The answer alleges that the land to be conveyed by the defendant (Sage) was Indian land, not belonging to him, but allotted and patented to members of the Pottawatomie Tribe, under the act of Congress of February 8, 1887, chap. 119, 24 Stat. at L. 388, Comp. Stat. 1913, §§ 4195–4210. By § 5 of that act any conveyance or contract touching such land within twenty-five years from the date of the allotment and trust patent was made null and void, and it is alleged that the period had not expired and had not been abrogated at the date of the contract. Evidence was offered to prove the facts alleged, but was excluded, subject to exception. It is unnecessary to set forth the contract more particularly, because, whatever doubts might be felt whether it was or could be shown to be a contract for specific land, the case was tried on the footing that it was such a contract, and the breach and the damages, so far as we can judge, both depended on that view. The supreme court of Kansas was of the same opinion, and held that, notwithstanding the character of the land contracted for and the statute, the defendant, being a stranger to the allotment, was bound by his contract so far as to be liable in damages at law. 87 Kan. 536, 125 Pac. 53.

The defendant relied upon the act of Congress as a defense and is entitled to come to this court. Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216. With regard to that defense, no doubt it is true that a man may contract that a future event shall come to pass over which he has no, or only a limited, power. Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 545, 47 L. ed. 1171, 1173, 23 Sup. Ct. Rep. 754. And we assume in accordance with the decision of the Kansas courts that the principle applies to contracts for the conveyance of land that the contractor does not own. But that principle is not enough to dispose of the case, even if, subject to what we have to say hereafter, the universality of the invalidating language of the statute ("any contract") be confined to [105] contracts by the owners of the land. A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for nonperformance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Kalem Co. v. Harper Bros. 222 U. S. 55, 63, 56 L. ed. 92, 96, 32 Sup. Ct. Rep. 20; Ann. Cas. 1913A, 1285. And more broadly, it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. ed. 868; Trist v. Child (Busk v. Child) 21 Wall. 441, 22 L. ed. 623; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Fuller v. Dame, 18 Pick. 472. It appears to us that this is a contract of that class. It called for an act that could not be done at the time, and it tended to lead the defendant to induce the Indian owner to attempt what the law, for his own good, forbade. Such contracts, if upheld, might be made by parties nearly connected with the Indian, and strongly tend by indirection to induce him to deprive himself of rights that the laws seeks to protect.

It is true that later statutes in force when the contract was made allowed a conveyance with the approval of the Secretary of the Interior. Act of August 15, 1894, chap. 290, 28 Stat. at L. 286, 295. Act of May 31, 1900, chap. 598, § 7, 31 Stat. at L. 221, 247. The Kansas court laid these statutes on one side, and in our view also they do not affect the case. The purpose of the law still is to protect the Indian interest, and a contract that tends to bring to bear improper influence upon the Secretary of the Interior, and to induce attempts to mislead him as to what the welfare of the Indian requires, are as contrary to the policy of the law as others that have been condemned by the courts. Kelly v. Harper, 7 Ind. Terr. 541, 104 S. W. 829. See Larson v. First Nat. Bank, 62 Neb. 303, 308, 87 N. W. 18.

[106] The only doubt open in the present position of the case is whether the ground upon which we hold the contract unenforceable is not a matter of common law, which we may think that the Kansas courts ought to apply, but which is not open to review here. The case at first sight seems like those in which a state decides to enforce or not to enforce a domestic contract notwithstanding or because of its tendency to cause a breach of the law of some other state. Graves v. Johnson, 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383, 156 Mass. 211, 15 L.R.A. 834, 32 Am. St. Rep. 446, 30 N. E. 818. But the policy involved here is the policy of the United States. It is not a matter that the states can regard or dis-

regard at their will. There can be no question that the United States can make its prohibitions binding upon others than Indians to the extent necessary effectively to carry its policy out, and therefore, as on the grounds that we have indicated, the contract contravenes the policy of the law, there is no reason why the law should not be read, if necessary, as broad enough to embrace it in terms.

Judgment reversed.

ALEXANDER R. MAGRUDER and Isabel R. Magruder, Appts.,
v.
SAMUEL A. DRURY and Samuel Maddox, Trustees.

(See S. C. Reporter's ed. 106–120.)

Appeal — from District of Columbia court of appeals — scope of review — questions not raised below.

1. Errors not of a fundamental or judicial character, which were not presented to the court of appeals of the District of Columbia for consideration, and which were waived either expressly or by implication, will not be regarded as before the Federal Supreme Court, on an appeal which lies only by reason of the amount involved, since the Supreme Court's jurisdiction on such an appeal extends only to a review of the decree of the court of appeals.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

Appeal —from District of Columbia court of appeals — following decision below — allowance to trustees.

2. An allowance to trustees judicially appointed to perform testamentary trusts of 5 per cent commission on the principal, and 10 per cent on the income, will not be disturbed by the Federal Supreme Court on an appeal from the court of appeals of the District of Columbia, where such allowance was made by an auditor appointed to state the account, and was approved by both courts below.

[For other cases, see Appeal and Error, VIII. m, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — collateral attack — decree of foreign probate court — allowance to executor.

3. The expenses of administration of a decedent's estate as allowed to the executors by a Massachusetts probate court when settling their account and ordering the property to be turned over to trustees who had been subsequently appointed to perform the trusts of the will by a District of Columbia court in an equity cause in which it was determined that the testator was last domiciled in that District must be allowed to the trustees by the District of Columbia courts, and such trustees may be charged only with the balance of the estate after such allowance has been made.

[For other cases, see Judgment, 666–684, 998–1002, in Digest Sup. Ct. 1908.]

Trusts — accounting — dealings with trust estate — individual interest of trustee.

4. Trustees who invest the trust funds in notes owned by a firm of real estate brokers in which one of the trustees is a partner, paying their full face value and accrued interest, must account for commissions received by the firm from the makers of the notes when the loans were made which the notes represent, although no injury was intended and none was in fact done to the trust estate.

[For other cases, see Trusts, 146–165, in Digest Sup. Ct. 1908.]

[No. 17.]

Argued October 27, 1914. Decided November 30, 1914.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, overruling exceptions to the accounting of trustees as stated by an auditor. Reversed and remanded for further proceedings.

See same case below, 37 App. D. C. 519.

The facts are stated in the opinion.

Mr. **Nathaniel Wilson** argued the cause and filed a brief for appellants:

Can it be seriously urged that the fact that former annual accounts have been passed by the court is a bar to the granting of the full relief prayed and evidently intended to be granted, or a defense against the present demand for a complete accounting?

36 Cyc. 502–504; Jackson v. Reynolds, 39 N. J. Eq. 313; Blake v. Pegram, 109 Mass. 541.

The failure to account was not cured by acquiescence.

Bouvier's Law Dict. "Acquiescence"; Pence v. Langdon, 99 U. S. 578, 581, 25 L.

NOTE.—On appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

On conclusiveness of judgments, generally —see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

As to dealings of trustee with trust estate —see notes to Massie v. Watts, 3 L. ed. U. S. 181, and Wormley v. Wormley, 5 L. ed. U. S. 651.

ed. 420, 421, 13 Mor. Min. Rep. 32; Matthews v. Murchison, 17 Fed. 760.

A trustee has no power to bind a trust estate by his consent to an uncontested order which adversely affects the interests of his beneficiaries, whose interests have not been represented to or considered by the court.

Mallory v. Clark, 9 Abb. Pr. 358; Mallery v. Quinn, 88 Md. 38, 40 Atl. 1079.

As trustees, it was the duty of Drury and Maddox to see that the allowance of "expense," which they knew meant "compensation," was no larger than was proper. But, inasmuch as the larger it was the more was to be received by them, it became to their individual interest to increase this allowance, and thus that very conflict between duty on the one hand and interest on the other was brought about which the appellants claim compels an examination into the propriety of their consent to this allowance.

Miller v. Holcombe, 9 Gratt. 665.

The trustees are accountable for the profits realized by Mr. Drury from sales of notes to the trust estate.

Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; United States v. Carter, 217 U. S. 286, 54 L. ed. 769, 30 Sup. Ct. Rep. 515, 19 Ann. Cas. 594; 2 Pom. Eq. Jur. §§ 1675, 963, 958; White v. Sherman, 168 Ill. 611, 61 Am. St. Rep. 132, 48 N. E. 128; Jarrett v. Johnson, 216 Ill. 219, 74 N. E. 756; Bay State Gas Co. v. Rogers, 147 Fed. 558; Findlay v. Pertz, 29 L.R.A. 188, 13 C. C. A. 559, 31 U. S. App. 340, 66 Fed. 435.

The trustees are entitled to no compensation whatever because of the maladministration of the trust.

Barney v. Saunders, 16 How. 535, 14 L. ed. 1047.

Mr. J. J. Darlington argued the cause and filed a brief for appellees:

If appellants proposed to contend that the auditor erred in holding the trustees entitled to any compensation, that contention should have been brought directly to the view of the court in the form of the exception itself, exceptions to such reports being in the nature of special demurrers, which require the particular error relied upon to be pointed out, otherwise they will not be considered.

Dexter v. Arnold, 2 Sumn. 108, Fed. Cas. No. 3,858; Story v. Livingston, 13 Pet. 359, 366, 10 L. ed. 200, 203; Greene v. Bishop, 1 Cliff. 191, Fed. Cas. No. 5,763; Sheffield & B. Coal, Iron & R. Co. v. Gordon, 151 U. S. 285, 290, 38 L. ed. 164, 165, 14 Sup. Ct. Rep. 343; Richardson v. Van Auken, 5 App. D. C. 209.

A decree made upon consent of the guardian *ad litem* of an infant and the representation of counsel, and an adjudication of the court that it was a decree fit and proper to be made, is binding upon the infant.

Walsh v. Walsh, 116 Mass. 377, 17 Am. Rep. 162; Thompson v. Maxwell Land-Grant & R. Co. 95 U. S. 391, 398, 24 L. ed. 481, 484.

The *allegata* must be the basis for the *probata*.

Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388; Carneal v. Banks, 10 Wheat. 181, 6 L. ed. 297; Foster v. Goddard, 1 Black, 518, 17 L. ed. 232.

Could the judgment of the probate court, making the allowance in question, be collaterally reviewed by an equity court, either in the District of Columbia, or in the state of Massachusetts itself?

Jennison v. Hapgood, 7 Pick. 1, 19 Am. Dec. 258; Paine v. Stone, 10 Pick. 75; Abbott v. Bradstreet, 3 Allen, 587; Goodrich v. Thompson, 4 Day, 215; State use of Tourville v. Roland, 23 Mo. 95; Iverson v. Loberg, 26 Ill. 180, 79 Am. Dec. 364; Com. v. Cain, 80 Ky. 318; Reynolds v. Jackson, 36 N. J. Eq. 515.

So separate and distinct are the position and duties of executors and trustes, though created by the same will and reposed in the same persons, that, after the passing of the final account of the former, the assets are, as a matter of law, held by them in their latter capacity, for which they are not accountable in their former one, nor are their sureties as executors liable therefor.

Seegar v. State, 6 Harr. & J. 165, 14 Am. Dec. 265; Conner v. Ogle, 4 Md. Ch. 448; State use of Gable v. Cheston, 51 Md. 377; United States Trust Co. v. National Sav. & T. Co. 37 App. D. C. 299.

Commissions or compensation paid A as executor have no bearing upon the question of his compensation or commissions as trustee.

Pitney v. Everson, 42 N. J. Eq. 367, 7 Atl. 860.

Mr. Justice Day delivered the opinion of the court:

William A. Richardson, for some years before his death chief justice of the court of claims of the United States, died at Washington, District of Columbia, October 19th, 1896. By his last will and testament, dated August 9, 1895, he described himself as "chief justice of the court of claims at Washington, a citizen and inhabitant of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, and having property in said county." By his will he appointed his brother George F. Richardson, of Lowell, Massachusetts, and Samuel A. Drury, of Washington, District of Columbia, as executors and trustees. The will was probated in the

probate court of Middlesex county, Massachusetts, on the 28th day of October, 1896. It appears in the record that the deceased had a little real estate in Massachusetts, but the main portion of his estate was, and always had been, in the city of Washington. The probate of the will in Massachusetts seems to have been in deference to the expression in the will as to his place of residence. Subsequently, and upon certain proceedings being instituted to enforce taxation in Massachusetts of the estate in the hands of the executors, the supreme judicial court of Massachusetts held that the actual residence of Mr. Richardson could be inquired into in that proceeding, and upon the facts shown it was in the District of Columbia. Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224. That case grew out of the imposition of personal taxes amounting to $7,500 annually on the assets of the estate. As this would have nearly exhausted the income of the [111] estate and cut off the support of the beneficiaries under the will, a bill for injunction was filed in this case in the supreme court of the District by the father in behalf of the present appellants, who were the beneficiaries under the will. An amended bill was subsequently filed, having for its object an injunction against the executors from paying out of the estate any taxes in the state of Massachusetts, it being stated that, notwithstanding the recitals of the will, William A. Richardson's place of residence and last domicil was in the District of Columbia, where the assets and personal securities of the estate were in the keeping of Samuel A. Drury, also a resident of the District of Columbia. In addition to the injunction, the bill prayed an account of the property of the estate which had come into the hands of the executors under the will, and that they might be required to file an account from time to time. Mr. George F. Richardson, one of the executors, being a resident of the state of Massachusetts, and declining to submit to the local jurisdiction, the amended bill was filed against Samuel A. Drury alone. The answer of Drury stated that he had the custody and control of the assets and personal securities, and expressed his willingness to account in the court or in any other jurisdiction in that behalf for the moneys received by him as executor and trustee. Such proceedings were had that, on April 1, 1899, a decree was made continuing the restraining order theretofore made in the case, and finding that the late William A. Richardson was last domiciled in the District of Columbia, where the beneficiaries lived, and it was ordered and decreed that Samuel A. Drury and Samuel Maddox, both of the District of Columbia, be appointed trustees to perform the trusts created in the will, and they were "authorized and empowered to receive from the executors named in said will all the property whereof the deceased died seised and possessed, provided, nevertheless, that the said Samuel A. Drury and Samuel Maddox shall first give [112] separate bonds in the penal sum of $25,000 each, with one or more securities to be approved by this court, conditioned for the faithful discharge of their duties as such trustees." Some five reports were made by the auditor to whom the matter was referred to take accounts, and various proceedings were had, which are fully set out in the opinion of the court of appeals in this case (37 App. D. C. 519). It is enough for our purposes to state that the proceedings resulted in an order of reference to the auditor to state the account of the trustees. This order was made on January 17, 1909. The auditor named having died, a further order of reference was made to another auditor to "state the final account of the trustees and the distribution of the trust estate in their hands, and report such commission or compensation to the trustees as may be appropriate and proper." To this report certain exceptions were filed by the present appellants. Upon final hearing, a decree was entered by which these exceptions were overruled, and the court of appeals sustained this action of the supreme court (37 App. D. C. supra). Hence this appeal.

The argument has taken a wide range, and questions are discussed which are not embraced in the exceptions filed to the auditor's report which was the basis of action in the courts below, and in the court of appeals that court dealt with only three exceptions, stating that a number of exceptions were entered to the report, and that those relied upon in that court related to the allowance of a 5 per cent commission on principal and 10 per cent on income; to the $18,800 item allowed by the Massachusetts court; and to alleged profits made by the trustees in the purchase of notes for reinvestment.

Under the statute in force at the time of this appeal, owing to the amount involved, the decision of the court of appeals might be brought by appeal in review before this court. This court therefore sits as an appellate court [113] for the purpose of reviewing the decree of the court of appeals, and that is the extent of the jurisdiction here. Original objections to the auditor's report and the decree of the supreme court, not brought forward in the court of appeals, cannot be made here. Alleged errors not of a fundamental or jurisdictional character, which were not presented to the appellate court

for consideration, and which were waived, either expressly or by implication, will not be regarded as before this court. Montana R. Co. v. Warren, 137 U. S. 348, 351, 34 L. ed. 681, 682, 11 Sup. Ct. Rep. 96; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 98, 58 L. ed. 521, 523, 34 Sup. Ct. Rep. 229; Grant Bros. Constr. Co. v. United States, 232 U. S. 647, 660, 58 L. ed. 776, 784, 34 Sup. Ct. Rep. 452. We shall, then, consider the assignments of error which were brought to the attention of the district court of appeals.

First, as to the allowance to the trustees of 5 per cent commission on the principal, and 10 per cent on the income. As to this allowance, the auditor made a lengthy finding of fact, setting forth in detail the services rendered by the trustees over a period of ten years, finding, as to the character of the estate, that the great bulk thereof was second trust notes of small amounts, as to which the auditor says that the transactions were almost innumerable, the total number of notes approximating three thousand, and he sets forth in detail other services involving care of the real estate, looking after the repairs of the property, acquiring parcels of real estate, and the sale thereof, and saying in conclusion that he had no hesitancy in finding that the trustees were well entitled to the commissions allowed. This allowance met with the approval of both the District supreme court and the court of appeals, and seems to have the sanction of an earlier decision of this court, where it was said that such allowances were customary in Maryland and the District of Columbia. Barney v. Saunders, 16 How. 535, 542, 14 L. ed. 1047, 1050. We are not, therefore, prepared to disturb the decree of the courts below in this respect.

[114] The next exception involves the allowance of the item of $18,800 in the probate court of Massachusetts, and charging the trustees with the balance of the estate after that allowance had been made. It appears that the executors Richardson and Drury appeared on April 4, 1899, in the Massachusetts probate court, and by petition set forth that they had been appointed and had given bond and due notice of their appointment as executors of the will of William A. Richardson; that there was not at the time of the grants of the letters testamentary, and had not been since, property belonging to the testator in the commonwealth of Massachusetts; that since the granting of letters testamentary Isabel Magruder, the only surviving child and heir at law of the said testator, had deceased, and that under and by the terms and provisions of said will it was provided that upon her decease the property of the testator should be held by the executors of said will for the benefit of the two minor children surviving the said daughter, namely, Alexander Richardson Magruder, of the age of sixteen years, and Isabel Richardson Magruder, of the age of about thirteen years; that these children, who were interested as beneficiaries in the trusts created by the will, at the time of the probate thereof and ever since had resided at Washington, in the District of Columbia; that Samuel Maddox and Samuel A. Drury had been appointed by the supreme court of the District of Columbia trustees for said minors, to carry out the provisions of said will in behalf of the said minors, and that Alexander F. Magruder had been appointed guardian of said minors; and they further represented to the court that William A. Richardson was not, at the time of his decease, a resident of Massachusetts, but of the District of Columbia, and that all the parties in interest under the will, at the time of the probate thereof, lived in Washington, as they had since and did then. They represented that the will should have been probated [115] at Washington, in the District of Columbia, but either by accident or mistake, probate in the probate court of Middlesex county, Massachusetts, was had, and they asked an order that they be authorized to pay over the trust funds to the trustees appointed by the supreme court of the District of Columbia, and that, upon the payment of such funds to such trustees, they be discharged from further liability.

A decree was entered in the probate court of Massachusetts on April 11th, 1899, wherein it was found that by the decree of the supreme court of the District of Columbia, dated April 1st, 1899, Samuel Maddox and Samuel A. Drury had been duly appointed trustees to perform the trusts of the will, and that the beneficiaries were residents of Washington, and that the guardian of the minors had signified his consent to the granting of the petition, and that the laws of the District of Columbia secured the performance of the trusts, and Richardson and Drury, as executors, were authorized to pay over the trust funds to Maddox and Drury, as trustees. On April 25th, 1899, in the same probate court, Richardson and Drury, as executors, filed their first and final account, in which they charged themselves with property in the aggregate of $415,458.37, and asked to be allowed sundry payments and charges. This account was indorsed with a request for its allowance, signed by Alexander R. Magruder and Isabel R. Magruder, by their guardian, Alexander F. Magruder, and by Maddox and Drury, as trustees. On the 25th of April, the probate court made the

following order: "The foregoing account having been presented for allowance, and verified by the oath of the accountant, and all persons interested having consented thereto in writing, and no objection being made thereto, and the same having been examined and considered by the court, it is decreed that said account be allowed." The schedules attached show the property and the payments, charges, losses, and [116] distributions, among others the item of $18-800, to which exception is made. This item states: "Expense of administration, including care of property, the payment of debts, the making of final account, the collection of notes amounting to $226,607.54, the investment in trust notes of $166,958.21, the collection from interest and other sources of $58,168.94, the payment of about $50,000 for repairs on real estate, the taking up of prior mortgages, taxes, etc., including also the payments of moneys to Isabel Magruder and to Alexander F. Magruder, the guardian of their minor children, counsel fees incurred in the defense of suits for taxes in Massachusetts and for counsel fees in Washington, etc., . . . $18,800."

The auditor held that he had no authority to disregard or change this item of credit; that the same had been included in the reports of his predecessors and confirmed by the court; and that the allowance, having been made in the probate court of Massachusetts, was not open to review.

The court of appeals of the District of Columbia, in the course of its opinion in this case, states that the appellants contended that there was no jurisdiction in the probate court of Massachusetts to probate the will,—a position which counsel for the appellant in this case disclaims in his brief filed herein, and says that the contention is that the order and decree in Massachusetts was not intended to be operative to diminish the accountability of the executors and trustees to the District of Columbia court. But we do not so interpret the proceedings. The account was filed in the Massachusetts court; and, the record recites, was examined and considered by the court and duly allowed. This order, reads in connection with the rules of the Massachusetts court set out at the head of the account, stating the authority of the court to allow reasonable expenses and compensation, shows that it was the intention of the probate court to make an [117] allowance including such expenses and compensation. Apart from the concession of the jurisdiction here made, we have no doubt that the Massachusetts court, on the presentation of the will, had the right to determine its jurisdiction to receive and probate the same, and upon ordering the property turned over to the trustees appointed in the District of Columbia, to settle the account and fix the compensation of the executors, and order the balance turned over to the trustees. True, the Massachusetts court held, in the case of Dallinger v. Richardson, 176 Mass. 77, supra, that Richardson was not a resident of Massachusetts. In the course of the opinion in that case, the court points out that, for the purpose of the tax question, the matter of residence was not foreclosed by the adjudication of the probate court, whether in accordance with the truth or not.

It is well settled that the decree of the court which has acquired jurisdiction of an estate and settled an account cannot be collaterally attacked (Jennison v. Hapgood, 7 Pick. 1, 7, 19 Am. Dec. 258). In that case it was held that what assets came into the executor's hands, what debts he had paid, and so of every matter properly done or cognizable in the probate court, the judgment of that court is conclusive. See also Abbott v. Bradstreet, 3 Allen, 587. There was no attempt to probate the will in the District of Columbia, in which event the finding of the fact of domicil in the proceedings in Massachusetts would not have been conclusive here. Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603. The trustees were authorized to receive the assets from the executors. The probate court in Massachusetts, and no other court, had authority to settle the executors' accounts and determine their compensation. Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639. We cannot agree with counsel for the appellant that the order of the probate court was based upon consent only, and that this is a case for the application of the rule that the trustees' consent to such a decree [118] cannot work to the prejudice of the beneficiaries of the trust. Whether the guardian might give such consent, we do not find it necessary to decide, for the decree shows that the account was presented, verified by the oath of the accountants, and that it was examined and considered by the court.

The next exception involves the allowance of commissions on the notes purchased from Mr. Drury's firm. The contention before the auditor was that one trustee had received compensation in connection with the handling of these investments, and that that should be taken into account. As to this exception, the auditor finds that "the fact clearly appears from the testimony that Arms & Drury, as real estate brokers, made

loans on trust notes, upon which loans they were paid by the borrowers a commission ranging from 1 to 2 per cent, according to the circumstances of the case, many being building loans; that subsequently, as notes of the trust estate were paid off, Mr. Drury would reinvest the moneys of the estate in trust notes held by Arms & Drury, paying the face value and accrued interest on the notes so purchased." As a matter of law, the auditor concluded: "No profit was made by the firm of Arms & Drury on sales of the notes to the trustees. . . . The transactions of Arms & Drury with the trustees were in the regular course of their business, in which they had their own moneys invested. They cost the estate not a penny more than if the transactions had been with some other firm or individual. If the firm of Arms & Drury, out of their own moneys, made loans on promissory notes, upon which loans were paid by the borrower the customary brokerages, those were profits on their own funds, in which this estate could have no interest, and in which it could acquire no interest by reason of the subsequent purchase of those notes by the trustees for their real value, any more than could any of the purchasers of such notes from Arms & Drury claim such an [119] interest. No charge of malfeasance or misfeasance is made against the trustees or that, by reason of these transactions, the trustees benefited in any manner out of the money of this estate. On the contrary, the relation of the firm of Arms & Drury to Drury and Maddox, trustees, benefited the estate, by enabling the trustees at all times to make immediate reinvestment of its funds, without loss of income, and by enabling the trustees to at all times readily procure reinvestments without payment of brokerage,—a brokerage not uncommonly charged the lender for placing his money, as well as the borrower for procuring his loan in times of stringency. The application of the well-known rule in equity should rather, therefore, be in favor of the trustees than against them with respect to these transactions. The objection narrows itself to a claim that Drury, by reason of his position as trustee, should, in addition to the benefit of his valuable services, commercial knowledge, and business acumen, make the estate a gift of profits on his individual moneys, to which the estate is in no wise entitled, and to which it could not make a semblance of reasonable claim had the trustees been other than Drury, or the agents of the estate been other than Arms and Drury." This view seems to have met with the approval of the supreme court, and a like view was taken by the court of appeals of the District of Columbia (37 App. D. C. 505, supra).

It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity. "It therefore prohibits a party from purchasing on his own account that which his duty or trust required him to sell on account of another, [120] and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells." Michoud v. Girod, 4 How. 503, 555, 11 L. ed. 1076, 1099.

It makes no difference that the estate was not a loser in the transaction, or that the commission was no more than the services were reasonably worth. It is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself. The findings show that the firm of which Mr. Drury was a member, in making the loans evidenced by these notes, was allowed a commission of 1 to 2 per cent. This profit was in fact realized when the notes were turned over to the estate at face value and accrued interest. The value of the notes when they were turned over depended on the responsibility and security back of them. When the notes were sold to the estate it took the risk of payment without loss. While no wrong was intended, and none was in fact done to the estate, we think nevertheless that upon the principles governing the duty of a trustee, the contention that this profit could not be taken by Mr. Drury, owing to his relation to the estate, should have been sustained.

We find no other error in the proceedings of the Court of Appeals, but for the reason last stated, its decision must be reversed, and the cause remanded to that court with directions to remand the cause to the Supreme Court of the District of Columbia for further proceedings in accordance with this opinion.

Reversed.

[121] MISSOURI PACIFIC RAILWAY COMPANY, Appt.,
v.
CITY OF OMAHA.

(See S. C. Reporter's ed. 121-132.)

Constitutional law — due process of law — requiring construction of viaduct by railway company.

1. A railway company may, consistently with due process of law, be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, the consequent cost to the company being, as a matter of law, *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share.

[For other cases, see Constitutional Law, 458-466, 862-864, in Digest Sup. Ct. 1908.]

Courts — relation to legislative department — police power.

2. Courts cannot interfere with the exercise of the police power by enjoining regulations in the interest of the public safety which the legislature has duly enacted, provided the means employed have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights.

[For other cases, see Courts, I. e, 3, b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — requiring construction of viaduct by railway company.

3. The entire cost of constructing a viaduct over the tracks of a railway company at a street crossing may, consistently with due process of law, be imposed upon the railway company by a duly authorized municipality acting under state authority, although the structure ordered by the city, being designed to carry the tracks of a street railway company operating in such street, will cost considerably more than a viaduct sufficient to carry the ordinary street traffic.

[For other cases, see Constitutional Law, 458-466, 862-864, in Digest Sup. Ct. 1908.]

Appeal — review of facts — concurrent findings.

4. The conclusions of the two courts below upon the facts that an extension of the original plan of a viaduct at a street crossing which a municipality has ordered a railway company to construct at the latter's expense was for the purpose of making better grades in crossing thereon, and not to make a crossing for a proposed boulevard thereafter to be laid out, will not be lightly disturbed by the Federal Supreme Court.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908]

Constitutional law — due process of law — requiring construction of viaduct by railway company.

5. A municipal ordinance adopted by legislative authority requiring a railway company to construct at its own expense a viaduct over its tracks at a street crossing is not wanting in due process of law because such viaduct is to be built along one side of the street only, leaving the other side still open to public traffic.

[For other cases, see Constitutional Law, 458-466, 862-864, in Digest Sup. Ct. 1908.]

Appeal — review of facts — concurrent findings below.

6. The Federal Supreme Court will not lightly disturb the conclusions of the two lower courts that the plans and specifications of a viaduct at a street crossing which a municipality has ordered a railway company to construct at its own expense were sufficient to enable the railway company to know what it had to do, and to make the structure required of it.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

[No. 47.]

Argued November 4, 1914. Decided November 30, 1914.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court of the District of Nebraska, dismissing the bill in a suit to enjoin a municipality from requiring a railway company to construct a viaduct over its tracks at a street crossing. Affirmed.

See same case below, 117 C. C. A. 12, 197 Fed. 516.

The facts are stated in the opinion.

Mr. J. A. C. Kennedy argued the cause, and Messrs. B. P. Waggener, T. L. Philips, and Martin L. Clardy filed a brief for appellant:

The court below erred in deciding that the

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A.(N.S.) 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On power to compel railroad to establish or maintain at its own expense overhead or underground crossing, as affected by the fact that street or highway was opened subsequently to construction of railroad—see note to State ex rel Minneapolis v. St. Paul, M. & M. R. Co. 28 L.R.A.(N.S.) 298.

city has power to compel appellant to construct a viaduct of greater width and strength than is necessary to provide for ordinary street traffic, for the purpose of providing for the traffic of the street railway company over said viaduct.

33 Cyc. 276, 289, 290; Chicago v. Rogers Park Water Co. 214 Ill. 212, 73 N. E. 375; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; Briden v. New York, N. H. & H. R. Co. 27 R. I. 569, 65 Atl. 315; People ex rel. Western New York & P. R. Co. v. Adams, 88 Hun, 122, 34 N. Y. Supp. 579, affirmed in 147 N. Y. 722, 42 N. E. 725; Carolina C. R. Co. v. Wilmington Street R. Co. 120 N. C. 520, 26 S. E. 913; Conshohocken R. Co. v. Pennsylvania R. Co. 15 Pa. Co. Ct. 445.

Notwithstanding the rights which a street railway company may acquire in the streets by a franchise voted to it by the people, it acquires no contract rights thereby, but is merely authorized and permitted to enter upon the streets, under the statute, and is subject to valid regulations imposed upon it by law and ordinance passed pursuant thereto.

Lincoln Street R. Co. v. Lincoln, 61 Neb. 109, 84 N. W. 802; State ex rel. Lincoln Traction Co. v. Frost, 78 Neb. 325, 110 N. W. 986.

Even the police power of the state, however broadly it be considered or construed, may not be used to authorize the taking of the property of one party for the use and benefit of another. Such action is contrary to the very foundation principles of organized society and government.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; 1 Tiedeman, State & Federal Control of Persons & Property, p. 13.

That the police power of the state is subject to all the limitations of state and Federal Constitutions is now so well settled that it is no longer questioned.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A. (N.S.) 1071, 84 N. E. 1049; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; State v. Walker, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Pittsburgh, C. C. & St. L. R. Co. v. Crown Point, 146 Ind. 421, 35 L.R.A. 684, 45 N. E. 587; Cleveland, C. C. & St. L. R. Co. v. Connersville, 147 Ind. 277, 37 L.R.A. 175, 62 Am. St. Rep. 418, 46 N. E. 579; Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355: Wenham v. State, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421; Re Anderson, 69 Neb. 689, 96 N. W. 149, 5 Ann. Cas. 421; Halter v. State, 74 Neb. 757, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754, 105 N. W. 298.

When the legislature confers upon the government of a municipality the general power of passing ordinances for the safety and protection of the inhabitants, municipal legislation passed pursuant to such general grant of power will be held void by the courts, unless found to be a reasonable exercise of such power.

Iler v. Ross; 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; State, Pennsylvania R. Co. Prosecutor, v. Jersey City, 47 N. J. L. 286; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Wice v. Chicago & N. W. R. Co. 193 Ill. 351, 56 L.R.A. 268, 61 N. E. 1084; Curran Bill Posting & Distributing Co. v. Denver, 47 Colo. 221, 27 L.R.A.(N.S.) 544, 107 Pac. 261; Landberg v. Chicago, 237 Ill. 112, 21 L.R.A.(N.S.) 830, 127 Am. St. Rep. 319, 86 N. E. 638; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; Champer v. Greencastle, 138 Ind. 339, 24 L.R.A. 768, 46 Am. St. Rep. 390, 35 N. E. 14.

It is true that where the legislature authorized the city to enact ordinances in the exercise of the police power, and there is no judgment or discretion required on the part of the city in carrying the permission into effect, except in so far as it decides to enact or not to enact the ordinance, then the question of reasonableness in the regulation can only be inquired into in so far as it goes to the constitutionality of the statute itself. For illustration, if the statute authorized the council to forbid by ordinance peddlers and hucksters upon the streets of the city, an ordinance of the city forbidding in general terms such traffic will be sustained unless there is ground for holding the legislation itself invalid.

Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421.

But it is equally well settled that when the power to legislate on a given subject is conferred by statute, but the details of the legislation and the manner of adapting the provisions of the ordinance to the requirements of each particular case are not prescribed by statute, then the ordinance may be held invalid if it is found by the courts to be an unreasonable exercise of the power.

1 Dill. Mun. Corp. 4th ed. § 328; Peterson v. State, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306; Union P. R. Co. v. State, 88 Neb. 247, 129 N. W.

290; Shelbyville v. Cleveland, C. C. & St. L. R. Co. 146 Ind. 66, 44 N. E. 929; Hawes v. Chicago, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373; Saginaw v. Swift Electric Light Co. 113 Mich. 660, 72 N. W. 6; LeFeber v. West Allis, 119 Wis. 608, 100 Am. St. Rep. 917, 97 N. W. 203; Passaic v. Paterson Bill Posting Adv. & Sign Painting Co. 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995; St. Louis v. Weber, 44 Mo. 547; Ford v. Standard Oil Co. 32 App. Div. 596, 53 N. Y. Supp. 48; Chicago v. Rogers Park Water Co. 214 Ill. 212, 73 N. E. 375; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A.(N.S.) 1071, 84 N. E. 1049.

Messrs. John A. Rine and William C. Lambert argued the cause, and, with Messrs. B. S. Baker and L. J. Te Poel, filed a brief for appellee:

The legislature of the state of Nebraska possesses ample and plenary power to require railroad companies in this state, intersecting public streets and highways with their roads, and at the cost of such company or any one of them, to bridge or viaduct or otherwise render and keep safe that part of the public street or road intersected and made dangerous by their roads, as to all ordinary travel on and over such public streets, including that of street railways rightfully thereon.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, affirmed in 214 U. S. 498, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Phœnix Mut. L. Ins. Co. v. Lincoln, 91 Neb. 150, 135 N. W. 445; State ex rel. Omaha v. Union P. R. Co. 94 Neb. 556, 143 N. W. 918; Chicago, B. & Q. R. Co. v. Steel, 47 Neb. 741, 66 N. W. 830; New York, N. H. & H. R. Co. v. Bridgeport Traction Co. 65 Conn. 410, 29 L.R.A. 367, 32 Atl. 953; Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co. 139 Ind. 297, 26 L.R.A. 337, 38 N. E. 604; Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co. 149 Pa. 1, 24 Atl. 179; Chicago, B. & Q. R. Co. v. West Chicago Street R. Co. 156 Ill. 255, 29 L.R.A. 485, 40 N. E. 1008; Atchison, T. & S. F. R. Co. v. General Electric R. Co. 50 C. C. A. 424, 112 Fed. 689; Southern R. Co. v. Atlanta Rapid Transit Co. 111 Ga. 679, 51 L.R.A. 125, 36 S. E. 873; General Electric R. Co. v. Chicago, I. & L. R. Co. 58 L.R.A. 231, 39 C. C. A. 345, 98 Fed. 907, affirmed on rehearing in 46 C. C. A. 629, 107 Fed. 771; Elizabethtown, L. & B. S. R. Co. v. Ashland & C. Street R. Co. 96 Ky. 347, 26 S. W. 181; Texas & P. R. Co. v. Rosedale Street R. Co. 64 Tex. 80, 53 Am. Rep. 739; Missouri P. R. Co. v. Omaha, 117 C. C. A. 12, 197 Fed. 516; South East & St. L. R. Co. v. Evansville & Mt. V. Electric R. Co. 169 Ind. 339, 13 L.R.A.(N.S.) 916, 82 N. E. 765, 14 Ann. Cas. 214.

The legislature of the state of Nebraska had delegated to the governing authorities of the city of Omaha ample power and authority to require appellant to construct at its own cost the viaduct in question, of sufficient strength, width, capacity, and grades to carry and safeguard all travel and traffic on Dodge street at the intersecting point, including that carried by the Omaha & Council Bluffs Street Railway Company.

Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Chicago v. Chicago & O. P. Elev. R. Co. 250 Ill. 486, 95 N. E. 456; Louisville & N. R. Co. v. Hopkins County, 153 Ky. 718, 156 S. W. 379; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; State ex rel. Omaha v. Union P. R. Co. 94 Neb. 556, 143 N. W. 918; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Rogers Park Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Chicago v. Rogers Park Water Co. 214 Ill. 212, 73 N. E. 375; Missouri P. R. Co. v. Omaha, 117 C. C. A. 12, 197 Fed. 516; Phœnix Mut. L. Ins. Co. v. Lincoln, 91 Neb. 150, 135 N. W. 549; Olney v. Omaha & C. B. Street R. Co. 78 Neb. 767, 111 N. W. 784; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

Even if the requirements of the city as to the added length to the end of said viaduct were to protect a proposed boulevard, constructed sewer lines and sewer pipes crossing Dodge street under such boulevard or its abutments, we think the city had the authority rightfully to require it.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; New Orleans Gas-

light Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Phœnix Mut. L. Ins. Co. v. Lincoln, 91 Neb. 150, 135 N. W. 549; Burritt v. New Haven, 42 Conn. 174; State ex rel. Omaha v. Union P. R. Co. 94 Neb. 556, 143 N. W. 918; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376; State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Chicago, M. & St. P. R. Co. v. Minneapolis, 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Twin City Separator Co. v. Chicago, M. & St. P. R. Co. 118 Minn. 491, 137 N. W. 193; State v. United States Exp. Co. — Iowa, —, 145 N. W. 451.

The city is not required to close to public travel a street over which a viaduct is ordered to be built by a railroad.

State ex rel. Omaha v. Union P. R. Co. 94 Neb. 556, 143 N. W. 918; People ex rel. Denver v. Union P. R. Co. 20 Colo. 186, 37 Pac. 610.

Mr. Justice Day delivered the opinion of the court:

This suit was originally instituted in the circuit court of the United States for the district of Nebraska. Its object was to enjoin the city of Omaha from requiring the Missouri Pacific Railway Company, by virtue of a certain ordinance of the city, to construct a viaduct over and across its line of railway and along Dodge street, in said city. The circuit court dismissed the bill and the decree was affirmed in the circuit court of appeals. 117 C. C. A. 12, 197 Fed. 516. The ordinance, passed March 29, 1910, ordered the appellant to erect, construct, and complete the viaduct and approaches on Dodge street, of the width, height, strength, and of the material and manner of construction required by the city engineer of the city of Omaha, and according to the plans and specifications prepared by him. The ordinance required that the company commence the erection and construction of the viaduct by May 1st, 1910, and complete the same on or before January 1, 1911.

Dodge street is a well-known thoroughfare of the city for the passage of foot passengers and vehicles of all sorts, and it is also used by the tracks of a street railway company. There is testimony in the record tending to show that the viaduct, as ordered to be constructed, is of a width and strength sufficient to sustain the street railway system theretofore laid upon Dodge street, and crossing thereon the tracks of the railway company. It is contended [127] and there is testimony tending to show, that a viaduct sufficient to carry the ordinary traffic of the street, other than that of the street railroad, could be constructed at a cost of about $30,000, whereas the viaduct ordered to be built would cost approximately $80,000, the increase being largely due to the requirements of the street railway traffic. This requirement on the part of the city is alleged to be a confiscation of the property of the railroad company to the extent of this increased cost, and a taking of its property without compensation for the benefit of another, and therefore without due process of law, contrary to the 14th Amendment of the Constitution of the United States.

That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 59 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 438, 58 L. ed. 671, 674, 34 Sup. Ct. Rep. 400.

This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; [128] McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364. That the city of Omaha had power to pass an ordinance of this character in execution of the authority conferred upon it by the legislature of the state has been determined by the highest court of the state of Nebraska, considering chapter 12a, § 128,

Compiled Statutes of Nebraska, 1911.[1] State ex rel. Omaha v. Union P. R. Co. 94 Neb. 556, 143 N. W. 918. In that case the state supreme court declares the "power to require railway companies to construct upon their tracks at street crossings [129] such viaduct 'as may be deemed and declared by the mayor and council necessary for the safety and protection of the public,' is in direct terms conferred by the legislature upon the city of Omaha." As this is a question of state law (Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364) we need not dwell upon it further. Indeed, such authority seems to be admitted in the brief of appellant, and the argument is addressed to an alleged abuse of the power conferred. To maintain this position, it is first insisted that the construction of the viaduct in such manner as to carry the tracks of the street railway company will entail additional expense of about $50,000, over the cost of a viaduct providing only for the transportation of other kinds of traffic. It may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have made such division of expenses. Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 389, 47 L. ed. 860, 864, 23 Sup. Ct. Rep. 540. But there is nothing in the statute requiring the municipality to divide the expense of such improvement among those responsible for the dangerous condition of the street crossing. Where a number of railroads have contributed to the condition which necessitates such improvement in the interest of public safety, it is not an unconstitutional exercise of authority, as this court has held, to require one of the companies interested to perform such work at its own expense. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 76, 42 L. ed. 948, 954, 18 Sup. Ct. Rep. 513. The broad authority to require any railroad company to make such improvement, in the interest of public safety, is conferred by the legislature upon the city. The safety of the traveling public is the primary consideration, and this is accomplished by the construction of the viaduct which is used by many people who travel across the viaduct every day. The public, when being [130] transported by the street railway company, was exposed to the dangers of a grade crossing, which it was within the authority of the state to authorize the municipality to discontinue. Under competent legislation the city has undertaken to do this. In placing the expense entirely upon the railroad company, whose locomotives and trains are principally responsible for the resulting danger to the public, we do not find such abuse of the recognized authority of the state as has justified the courts in some cases in enjoining the enforcement of state and municipal legislation. Examples of such arbitrary and oppressive action with which the courts may interfere are found in such cases as Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, and Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

The Constitution of the United States, requiring that no state shall deprive any person of life, liberty, or property without due process of law, has not undertaken to equalize all the inequalities which may result from the exercise of recognized state authority. In the exercise of the police power, it may happen, as it often does, that

[1] To require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete, and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches of such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. . . . The width, height, and strength of any such viaduct and approaches thereto, the material therefor, and the manner of construction thereof, shall be as required by the city engineer, and approved by the mayor and council. When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies, upon being required as herein provided to erect, construct, reconstruct, or repair any viaduct, to proceed within the time and in the manner required by the mayor and council to erect, construct, reconstruct, or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect, or refuse to perform such duty, and upon conviction of any such company or companies shall be fined $100, and each day such company or companies shall fail, neglect, or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and, in addition to the penalty herein provided, any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, reconstruct, or repair any viaduct as may be required by ordinance as herein provided.

inequality results which the law is powerless to redress. It is only in those clear and unmistakable cases of abuse of legislative authority that the court is authorized, under section of the Federal Constitution, to enjoin the exercise of legislative power. As we have said, we do not think this case presents that character of abuse because the street railway company is not required to share in the expense of the erection of this viaduct.

It is next urged that there is an abuse of authority shown which should justify an injunction against the enforcement of this ordinance, because a viaduct about 600 feet long would be sufficient to carry the traffic of Dodge street over the railroad crossing, including the traffic of the street railway company, yet by this ordinance it is sought to compel the railroad company to construct a viaduct 810 feet long, the extension being made necessary, [131] it is said, for the purpose of carrying the Dodge street traffic, including that of the street railway company, over a proposed boulevard, which the city might thereafter decide to lay out and establish across Dodge street, which boulevard is alleged to be about 350 feet east of, and parallel to, the line of the railroad. But there is testimony in the record tending to show that this extension of the original plan of the viaduct was for the purpose of making better grades in crossing thereon, and both courts below have rejected the contention of the railroad company that it was intended thereby to make a crossing for a proposed boulevard thereafter to be laid out. We are not prepared to disturb this conclusion of two courts upon the facts.

It is next insisted that the ordinance in question is unconstitutional and void, because the railroad company is required to construct a viaduct along the south side of Dodge street only, leaving some portion of the street—that upon the north side—still open to public traffic; in other words, the argument is that the viaduct would be made to carry a part of the traffic, still leaving some portion of the street open. We are unable to find force in this contention. The necessity of the viaduct, and the manner of its construction, were primarily vested in the discretion of the city authorities, and that they have found cause to leave some part of the street still open to traffic does not afford any reason why the principal part of the traffic, including that of the street railway company, might not, in the interest of the public safety, be required to be carried by the overhead structure. The local authorities are presumed to have knowledge of local conditions, and to have been induced by competent reasons to take the action which they did. That the city had authority to require a viaduct to be constructed over tracks without entirely closing the street was held by the supreme court of Nebraska. State ex rel. Omaha v. Union P. R. Co. 94 Neb. supra.

[132] It is further contended the ordinance is void for uncertainty, and that the plans are confused and uncertain, and not sufficient to indicate the width, height, and manner of construction of the proposed viaduct, and that the plans and specifications existing are not capable of being followed in such manner as to comply with the ordinance. This contention was also rejected by the courts below upon the facts shown, and we are not prepared to disturb the conclusion that the plans and specifications were sufficient to enable the railroad company to know what it had to do, and to make the structure required of it.

The last objection is that the railroad company was required to begin construction within twenty-six days after the passing of the ordinance,—a time so short as to render it physically impossible to comply with the ordinance, and that upon lack of such compliance, the ordinance imposes penalties upon the railroad company, the collection of which penalties it is also sought to enjoin. It is to be noted that the enforcement of this ordinance has been entirely prevented by the injunction issued in this case, and kept in force since. and we have no doubt that should an attempt be made hereafter to require compliance with the terms of the ordinance as to the beginning of construction, they would be given a reasonable interpretation so as to permit of preparation before the beginning of the work, and if any oppression should result in this respect, there is no doubt as to the power of a court of equity to relieve the railroad company from the infliction of unwarranted penalties if it should turn out to be physically impossible, as the company insists, to comply with the ordinance in this respect.

We find no error in the decree of the Circuit Court of Appeals affirming the decree of the Circuit Court, and it is accordingly affirmed.

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[133] UNITED STATES, Plff. in Err.,
v.
J. A. REYNOLDS. (No. 478.)
and
UNITED STATES, Plff. in Err.,
v.
G. W. BROUGHTON, alias Gideon W. Broughton. (No. 479.)

(See S. C. Reporter's ed. 133-150.)

Constitutional law — involuntary servitude — peonage — labor contracts.

A condition of peonage forbidden by

U. S. Const. 13th Amend., and U. S. Rev. Stat. §§ 1990, 5526, U. S. Comp. Stat. 1901, pp. 1266, 3175, results from the operation of the provisions of Ala. Code, § 6846, under which a person fined upon conviction for a misdemeanor may confess judgment with a surety in the amount of the fine and costs, and may agree with the surety, in consideration of the latter's payment of the confessed judgment, to reimburse him by working for him upon terms, approved by the court, which may in fact be more onerous than if the convict had been sentenced to imprisonment at hard labor, the performance of his agreed service being coerced by the constant fear of rearrest, a new prosecution, and a new fine for his breach of contract, which new penalty he may undertake to liquidate by a similar contract, attended by similar circumstances and penalties.

[For other cases, see Constitutional Law, 1581–1587, in Digest Sup. Ct. 1908.]

[Nos. 478 and 479.]

Argued October 23, 1914. Decided November 30, 1914.

TWO WRITS of error to the District Court of the United States for the Southern District of Alabama to review judgments holding that indictments based on the Federal statutes against peonage charge no offense. Reversed.

See same case below, No. 478, 213 Fed. 352; No. 479, 213 Fed. 345.

The facts are stated in the opinion.

Solicitor General **Davis** argued the cause and filed a brief for plaintiff in error:

One who is compelled to work for his creditor until his debt is paid is in a state of peonage, even though he may have contracted to perform the labor which is sought to be compelled.

Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.

The whole argument of the Alabama decisions is based upon a supposed identity or analogy between the status of a convict who has been sentenced to hard labor in default of payment of his fine, and that of a convict who has given security to the state for its payment and contracted to labor for his surety; between the custody of the former by the state, or by someone to whom the state has leased him under some convict labor law, and the contract obligation of the latter to his chosen employer; between an escape in the former instance and a breach of contract in the latter.

Lee v. State, 75 Ala. 29; Smith v. State, 82 Ala. 40, 2 So. 629; Ex parte Davis, 95 Ala. 16, 11 So. 308; Shepherd v. State, 110 Ala. 105, 20 So. 330; Simmons v. State, 139 Ala. 151, 36 So. 728; Winslow v. State, 97 Ala. 68, 12 So. 423; Peonage Cases, 123 Fed. 683.

No sentence of involuntary servitude ever was or ever could have been imposed by the state, and therefore the state had no right in the labor of these convicts, nor could it transfer such right to anyone.

Bailey v. State, 87 Ala. 45, 6 So. 398; Re Newton, 94 Ala. 433, 10 So. 549; Bowen v. State, 98 Ala. 85, 12 So. 808.

The indebtedness for the satisfaction of which the labor is to be performed is an indebtedness to the surety, and not to the state, —a private debt, not a public penalty.

State v. Allen, 71 Ala. 545; State v. Etowah Lumber Co. 153 Ala. 78, 45 So. 162.

The relations which so exist between the convict and his hirer are not those of master and servant, but rather of prisoner and keeper.

Buckalew v. Tennessee Coal, Iron & R. Co. 112 Ala. 156, 20 So. 606.

Mr. William L. Martin argued the cause, and, with Robert C. Brickell, Attorney General of Alabama, filed a brief for defendants in error:

Peonage is based on indebtedness.

Jaremillo v. Romero, 1 N. M. 194; Peonage Cases, 123 Fed. 673; United States v. McClellan, 127 Fed. 976; Peonage Cases, 136 Fed. 708; Re Peonage Charge, 138 Fed. 687; United States v. Cole, 153 Fed. 805; United States v. Clement, 171 Fed. 975; Clyatt v. United States, 197 U. S. 207, 215, 49 L. ed. 726, 729, 25 Sup. Ct. Rep. 429; Hodges v. United States, 203 U. S. 1, 33, 51 L. ed. 65, 75, 27 Sup. Ct. Rep. 6; Bailey v. Alabama, 219 U. S. 219, 242, 243, 55 L. ed. 191, 201, 202, 31 Sup. Ct. Rep. 145.

An inhibition against imprisonment for debt is limited to contract liabilities, and is not applicable to fines, forfeitures, mulcts, damages for wrong and tort.

Ex parte Hardy, 68 Ala. 316; Freeman v. United States, 217 U. S. 539, 544, 545, 54 L. ed. 874, 876, 30 Sup. Ct. Rep. 592, 19 Ann. Cas. 755.

Though the convict may pay the fine and costs due the state, and thereby gain his release, such cannot be regarded as a debt.

Nelson v. State, 46 Ala. 189; Caldwell v. State, 55 Ala. 135; Lee v. State, 75 Ala. 30; Smith v. State, 82 Ala. 41, 2 So. 629; Ex parte King, 102 Ala. 183, 15 So. 524; Carr v. State, 106 Ala. 35, 34 L.R.A. 651, 54 Am. St. Rep. 17, 17 So. 350; Brown v. State, 115

NOTE.—On constitutionality of statute providing for imprisonment for breach of contract of labor or rental—see note to Ex parte Hollman, 21 L.R.A.(N.S.) 242.

Ala. 79, 22 So. 458; United States v. Walsh, 1 Abb. (U. S.) 71, Fed. Cas. No. 16,635; Stroheim v. Deimel, 73 Fed. 430; Freeman v. United States, 217 U. S. 539, 544, 54 L. ed. 874, 876, 30 Sup. Ct. Rep. 592, 19 Ann. Cas. 755.

By the confession of judgment the nature of the convict's obligation is not changed so far as he is concerned; the state chooses, with his consent, to substitute for his labor and service and imprisonment, a civil liability on the part of the surety.

Smith v. State, 82 Ala. 40, 2 So. 629; Shepherd v. State, 110 Ala. 105, 20 So. 330; Simmons v. State, 139 Ala. 150, 36 So. 728.

The confessed judgment, and the contract approved by the court, do not satisfy the offended law, nor pay the penalty imposed. They are but the condition on which the offender is permitted to select how and whom he will serve, in satisfying the broken law.

Ward v. State, 88 Ala. 203, 7 So. 298.

The hirer becomes the transferee only of the right of the state to compel the satisfaction of such fine and costs, and nothing more, by exacting the involuntary servitude of the convict, who himself contracts to change masters for that purpose.

Smith v. State, 82 Ala. 41, 2 So. 629.

If the surety changes the labor to some other work than that contracted for, such is a good and sufficient excuse for nonperformance.

Shepherd v. State, 110 Ala. 104, 20 So. 330.

If the contract provides for "advances," it is void and its performance cannot be enforced.

Smith v. State, 82 Ala. 40, 2 So. 629; Ex parte Davis, 95 Ala. 16, 11 So. 308; Winslow v. State, 97 Ala. 68, 12 So. 423; Elston v. State, 154 Ala. 62, 45 So. 667.

Nor if it provides for work as the surety "may direct."

Salter v. State, 117 Ala. 137, 23 So. 141.

Nor if it provides for work on the farm of one man, and the convict is worked on that of another.

Wade v. State, 94 Ala. 109, 10 So. 235.

The contract is not a guaranty of efficient service on the part of the convict.

Wynn v. State, 82 Ala. 57, 2 So. 630.

Where the contract provides for the payment of costs only, a prosecution charging judgment confessed for fine and costs cannot be sustained.

McQueen v. State, 138 Ala. 67, 35 So. 39.

It has been held that where a defendant is in the employment of his surety, he is regarded as a convict to the extent that he cannot be compelled to work the roads; such servitude being a good excuse.

Ward v. State, 88 Ala. 202, 7 So. 298.

But the minority of the convict is no defense to an indictment for leaving or escaping the service.

Wynn v. State, supra.

The state retains control of the convict.

Bailey v. State, 87 Ala. 44, 6 So. 398.

In interpreting the Alabama statutes on this point, the court will follow the decisions of the highest court of that state.

Shelby v. Guy, 11 Wheat. 361, 367, 6 L. ed. 495, 497; Nesmith v. Sheldon, 7 How. 812, 818, 12 L. ed. 925, 927; Van Rensselaer v. Kearney, 11 How. 297, 318, 13 L. ed. 703, 712; Webster v. Cooper, 14 How. 488, 504, 14 L. ed. 510, 517; Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261, 262; Hagar v. Reclamation Dist. 111 U. S. 701, 704, 28 L. ed. 569, 570, 4 Sup. Ct. Rep. 663; Detroit v. Osborne, 135 U. S. 492, 498, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 154, 155, 41 L. ed. 369, 387, 17 Sup. Ct. Rep. 56; Hooker v. Los Angeles, 188 U. S. 314, 320, 47 L. ed. 487, 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; Hairston v. Danville & W. R. Co. 208 U. S. 598, 607, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Siler v. Louisville & N. R. Co. 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; Trimble v. Seattle, 231 U. S. 683, 58 L. ed. 435, 34 Sup. Ct. Rep. 218.

A single decision of a state court which departs from the whole course of the decisions of that state will not be followed.

Gibson v. Lyon, 115 U. S. 439, 446, 29 L. ed. 440, 442, 6 Sup. Ct. Rep. 129; Hardin v. Jordan, 140 U. S. 371, 387, 35 L. ed. 428, 435, 11 Sup. Ct. Rep. 808, 838.

The statute is a humane one.

Peonage Cases, 123 Fed. 676.

The 13th Amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional.

Robertson v. Baldwin, 165 U. S. 275, 282, 41 L. ed. 715, 717, 17 Sup. Ct. Rep. 326; Clyatt v. United States, 197 U. S. 207, 216, 49 L. ed. 726, 729, 25 Sup. Ct. Rep. 429.

Mr. Justice Day delivered the opinion of the court:

These cases were argued and considered together, and may be disposed of in a single opinion. They come here under the criminal appeals act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704), as involving the construction of the statutes of the United States which have for their object the prohibition and punishment of peonage. Case No. 478, United States v. Reynolds, was decided upon demurrer and objections to a plea filed to the indictment. The case [139] against Broughton, No. 479, was decided upon demurrer to the indictment. In both cases

the district court held that no offense was charged. 213 Fed. 345, 352. Both indictments for holding certain persons in a state of peonage were found under § 1990 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1266), as follows:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or in any other territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the territory of New Mexico, or of any other territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void;"

and § 269 of the Criminal Code [35 Stat. at L. 1142, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1670] (§ 5526, Rev. Stat. U. S. Comp. Stat. 1901, p. 3715), which provides that—

"Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return, of any person to a condition of peonage, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

The facts to be gathered from the indictments and pleas, upon which the court below decided the cases and determined that no offense was charged against the statutes of the United States as above set forth, are substantially these: In No. 478, one Ed Rivers, having been convicted in a court of Alabama of the offense of petit larceny, was fined $15, and costs, $43.75. The defendant Reynolds appeared as surety for Rivers, and a judgment by confession was entered up against him for the amount of the fine and costs, which Reynolds afterwards paid to the state. On May 4, 1910, Rivers, the convict, entered into a written contract with Reynolds to work for him as a [140] farmhand for the term of nine months and twenty-four days, at the rate of $6 per month, to pay the amount of fine and costs. The indictment charges that he entered into the service of Reynolds, and under threats of arrest and imprisonment if he ceased to perform such work and labor, he worked until the 6th day of June, when he refused to labor. Thereupon he was arrested upon a warrant issued at the instance of Reynolds from the county court of Alabama, on the charge of violating the contract of service. He was convicted and fined the sum of 1 cent for violating this contract, and additional costs in the amount of $87.05, for which he again confessed judgment with G. W. Broughton as surety, and entered into a similar contract with Broughton to work for him as a farm hand at the same rate, for a term of fourteen months and fifteen days.

In No. 479, the case against Broughton, E. W. Fields, having been convicted in an Alabama state court, at the July, 1910, term, of the offense of selling mortgaged property, was fined $50 and costs in the additional sum of $69.70. Thereupon Broughton, as surety for Fields, confessed judgment for the sum of fine and costs, and afterwards paid the same to the state. On the 8th day of July, 1910, a contract was entered into, by which Fields agreed to work for Broughton as a farm and logging hand for the term of nineteen months and twenty-nine days, at the rate of $6 per month, to pay the fine and costs. He entered into the service of Broughton, and, it was alleged, under threats of arrest and imprisonment if he ceased to labor, he continued so to do until the 14th day of September, 1910, when he refused to labor further. Thereupon Broughton caused the arrest of Fields upon a charge of violating his contract, and upon a warrant issued upon this charge, Fields was again arrested.

The rulings in the court below upon the plea and demurrers were that there was no violation of the Federal [141] statutes, properly construed, and also held that the conduct of the defendants was justified by the provisions of the Alabama Code, upon which they relied. These provisions are as follows:

"7632. Confession of judgment by defendant for fine and costs.—When a fine is assessed, the court may allow the defendant to confess judgment, with good and sufficient sureties, for the fine and costs.

"7633. Execution issues as in civil cases.—Execution may issue for the fine and costs, or any portion thereof remaining unpaid, as in civil cases.

"7634. On default in payment of fine and costs, imprisonment or hard labor imposed.—If the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county as follows: If the fine does not exceed $20, ten days; if it exceeds $20 and does not exceed $50, twenty days; if it exceeds $50 and does not exceed $100, thirty days; if it exceeds $100 and does not exceed $150, fifty days; if it exceeds $150 and does not exceed $200, seventy days; if it exceeds $200 and does not exceed $300, ninety days;

and for every additional $100, or fractional part thereof, twenty-five days.

"7635. When additional hard labor imposed for costs; rules in reference to.—If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, as provided by law, then the court may impose additional hard labor for the county for such period, not to exceed ten months, as may be sufficient to pay the costs, at the rate of 75 cents per day, and the court must determine the time required [142] to work out such costs at that rate; and such convict must be discharged from the sentence against him for costs on the payment thereof, or any balance due thereon, by the hire of such convict or otherwise; and the certificate of the judge or clerk of the court in which the conviction was had, that the costs, or the residue thereof, after deducting the amount realized from the hire of the convict, have been paid, or that the hire or labor of the convict, as the case may be, amounts to a sum sufficient to pay the costs, shall be sufficient evidence to authorize such discharge."

"6846. Failure of defendant to perform contract with surety confessing judgment for fine and costs.—Any defendant, on whom a fine is imposed on conviction for a misdemeanor, who in open court signs a written contract, approved in writing by the judge of the court in which the conviction is had, whereby, in consideration of another becoming his surety on a confession of judgment for the fine and costs, agrees to do any act, or perform any service for such person, and who, after being released on such confession of judgment, fails or refuses, without good and sufficient excuse, to be determined by the jury, to do the act, or perform the service, which in such contract he promised or agreed to do or perform, must, on conviction, be fined not less than the amount of the damages which the party contracting with him has suffered by such failure or refusal, and not more than $500; and the jury shall assess the amount of such damages; but no conviction shall be had under this section, unless it is shown on the trial that such contract was filed for record in the office of the judge of probate of the county in which the confession of judgment was had, within ten days after the day of the execution thereof."

"6848. Damages paid to injured party out of fine imposed.—From the fine imposed under the two preceding sections, when collected, the damages sustained by [143] the party contracting with such defendant must be paid to such person by the officer collecting the same."

The defendants having justified under this system of law, the question for consideration is, Were the defendants well charged with violating the provisions of the Federal statutes, to which we have referred, notwithstanding they undertook to act under the Alabama laws, particularly under the provisions of § 6846 of the Alabama Code, authorizing sureties to appear and confess judgment and enter into contracts such as those we have described?

The 13th Amendment to the Constitution of the United States provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

It was under the authority herein conferred, to enforce the provisions of this amendment by appropriate legislation, that Congress passed the sections of the Revised Statutes here under consideration. Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. St. Rep. 145.

By these enactments Congress undertook to strike down all laws, regulations, and usages in the states and territories which attempted to maintain and enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in the liquidation of any debt or obligation. To determine whether the conduct of the defendants charged in the indictments amounted to holding the persons named in a state of peonage, it is essential to understand what Congress meant in the use of that term prohibiting and punishing those guilty of maintaining it. Extended discussion of this subject is rendered unnecessary in view of the full consideration thereof in the prior adjudications of this [144] court. Clyatt v. United States and Bailey v. Alabama, supra.

Peonage is a "condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . 'One fact existed universally; all were indebted to their masters. . . . ' Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law.

But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case, the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." Clyatt v. United States, supra.

Applying this definition to the facts here shown, we must determine whether the convict was in reality working for a debt which he owed the surety, and whether the labor was performed under such coercion as to become a compulsory service for the discharge of a debt. If so, it amounts to peonage, within the prohibition of the Federal statutes. The actual situation is this: The convict, instead of being committed to work and labor as the statute provides for the state, when his fines and costs are unpaid, comes into court with a surety, and confesses judgment in the amount of fine and costs, and agrees [145] with the surety, in consideration of the payment of that fine and costs, to perform service for the surety after he is released because of the confession of judgment. The form of the contract, said to be the usual one entered into in such cases, is given in the record, and reads:

Labor Contract.

The state of Alabama, Monroe county:

Whereas, at the May term, 1910, of the county court, held in and for said county, I, Ed. Rivers, was convicted in said court of the offense of petit larceny and fined the sum of $15, and judgment has been rendered against me for the amount of said fine, and also in the further and additional sum of forty-three and 75/100 dollars, cost in said case, and whereas J. A. Reynolds, together with A. C. Hixon, have confessed judgment with me in said court for said fine and costs. Now, in consideration of the premises, I, the said Ed. Rivers, agree to work and labor for him, the said J. A. Reynolds, on his plantation in Monroe county, Alabama, and under his direction as a farm hand to pay fine and costs for the term nine months and twenty-four days, at the rate of $6 per month, together with my board, lodging, and clothing during the said time of hire, said time of hire commencing on the 4 day of May, 1910, and ending on the 28 day of Feby., 1911, provided said work is not dangerous in its character.

Witness our hands this 4 day of May, 1910.

Ed (his x mark) Rivers.
J. A. Reynolds.

Witness:
John M. Coxwell.

It also stands admitted in this record that the sureties in fact paid the judgment confessed. Looking, then, to the substance of things, and through the mere form which they have taken, we are to decide the question whether the labor of the convict, thus contracted for, amounted to [146] involuntary service for the liquidation of a debt to the surety, which character of service it was the intention of the acts of Congress to prevent and punish. When thus at labor, the convict is working under a contract which he has made with his surety. He is to work until the amount which the surety has paid for him—the sum of the fine and costs—is paid. The surety has paid the state and the service is rendered to reimburse him. This is the real substance of the transaction. The terms of that contract are agreed upon by the contracting parties, as the result of their own negotiations. The statute of the state does not prescribe them. It leaves the making of contract to the parties concerned, and this fact is not changed because of the requirement that the judge shall approve of the contract. When the convict goes to work under this agreement, he is under the direction and control of the surety, and is in fact working for him. If he keeps his agreement with the surety, he is discharged from its obligations without any further action by the state. This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done. Bailey v. Alabama, 219 U. S. 244, 55 L. ed. 202, 31 Sup. Ct. Rep. 145; Ex parte Hollman, 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 24, 14 Ann. Cas. 1105.

Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again

broken, may be again prosecuted, and the convict is thus kept chained to an ever-turning [147] wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the state, or paid money in his behalf. The rearrest of which we have spoken is not because of his failure to pay his fine and costs originally assessed against him by the state. He is arrested at the instance of the surety, and because the law punishes the violation of the contract which the convict has made with him.

Nor is the labor for the surety by any means tantamount to that which the state imposes if no such contract has been entered into, as these cases afford adequate illustration. In the case against Reynolds, Rivers was sentenced to pay $15 fine and $43.75 costs. Under the Alabama Code, he might have been sentenced to hard labor for the county for ten days for the nonpayment of the fine, and assuming that he could be sentenced for nonpayment of costs under § 7635 of the Alabama Code, he could have worked it out at the rate of 75 cents per day, an additional fifty-eight days might have been added, making sixty-eight days as his maximum sentence at hard labor. Under the contract now before us, he was required to labor for nine months and twenty-four days, thus being required to perform a much more onerous service than if he had been sentenced under the statute, and committed to hard labor. Failing to perform the service, he may be again rearrested, as he was in fact in this case, and another judgment confessed to pay a fine of 1 cent and $87.05 costs, for which the convict was bound to work for another surety for the term of fourteen months and seventeen days. In the case against Broughton, Fields was fined $50 and $69.70 costs. Under the law he might have been condemned to hard labor for less than four months. By the contract described, he was required to work for Broughton for a period of nineteen months and twenty-nine days.

We are cited to a series of Alabama cases, in which it is [148] held that the confessed judgment and the contract do not satisfy the law nor pay the penalty imposed, but the hirer becomes the transferee of the right of the state to compel the payment of the fine and costs, and by this exaction of involuntary servitude the convict has only changed masters, and that under the Alabama Constitution the law is constitutional, and that the convict is not being imprisoned for indebtedness. It is to be observed that the same learned court, in one of its later deliverances (State v. Etowah Lumber Co. 153 Ala. 77, 78, 45 So. 162), has said, in speaking of this contract, "the state was in no sense a party to the contract by which the company acquired the custody of Falkner [the convict in that case]. It is true it [the state] permitted the making of the contract, and provides a punishment for its breach." Here is a direct utterance of that court that the state was not a party to the surety's agreement, but its connection with it was to permit it, and provide the punishment for its breach.

True it is that this court follows the decisions of the state courts, in determining the constitutionality of its statutes under the Constitutions of the states; and in considering the constitutionality of statutes ordinarily accepts their meaning as construed by the state courts. The Alabama decisions, to which we have been referred, are, more strictly speaking, determinations of the legal effect of these statutes than interpretation of any doubtful meaning which may be found within their terms. Moreover, we are here dealing with a case which involves the Constitution and statutes of the United States, as to which this court, by force of the Constitution, and the several judiciary acts which have been enacted by Congress, is the ultimate arbiter. In such cases this court must determine for itself whether a given enactment violates the Constitution of the United States or the statutes passed in pursuance thereof. The validity of this system of state law must be judged by its operation and effect upon rights [149] secured by the Constitution of the United States and offenses punished by the Federal statutes. If such state statutes, upon their face, or in the manner of their administration, have the effect to deny rights secured by the Federal Constitution, or to nullify statutes passed in pursuance thereto, they must fail. Bailey v. Alabama, supra; Henderson v. New York (Henderson v. Wickham) 92 U. S. 268, 23 L. ed. 547.

Nor do we think this case is controlled by Freeman v. United States, 217 U. S. 539, 54 L. ed. 874, 30 Sup. Ct. Rep. 592, 19 Ann. Cas. 755, cited by counsel for defendants in error. In that case it was held that a money penalty imposed for embezzlement which went to the creditor, and not into the Treasury, under the Penal Code of the Philippine Islands, did not make imprisonment for the nonpayment of such penalty equivalent to imprisonment for debt. In that case, although the penalty affixed went to the creditor, it was part of the sentence imposed by the law as a punishment for the crime. In the present case, the contract under which the convict serves for the surety is made between the parties concerned, who determine and fix its terms,

and is not fixed by the state as the punishment for the commission of an offense.

There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the 13th Amendment, and such punishment expressly excepted from its terms. Of course, the state may impose fines and penalties which must be worked out for the benefit of the state, and in such manner as the state may legitimately prescribe. See Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429, and Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145. But here the state has taken the obligation of another for the fine and costs, imposed upon one convicted for the violation of the laws of the state. It has accepted the obligation of the surety, and, in the present case, it is recited in the record that the money has been in fact paid by the surety. The surety and convict have made a new contract for service, in regard to the terms of which the [150] state has not been consulted. The convict must work it out to satisfy the surety for whom he has contracted to work. This contract must be kept, under pain of rearrest, and another similar proceeding for its violation, and perhaps another and another. Thus, under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer.

In our opinion, this system is in violation of rights intended to be secured by the 13th Amendment, as well as in violation of the statutes to which we have referred, which the Congress has enacted for the purpose of making that Amendment effective.

It follows that the judgment of the District Court must be reversed. Judgment accordingly.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

Mr. Justice Holmes, concurring:

There seems to me nothing in the 13th Amendment or the Revised Statutes that prevents a state from making a breach of contract, as well a reasonable contract for labor as for other matters, a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain, even though it will cause greater trouble by and by. The successive contracts, each for a longer term than the last, are the inevitable, and must be taken to have been the contemplated, outcome of the Alabama laws. On this ground I am inclined to agree that the statutes in question disclosed the attempt to maintain service that the Revised Statutes forbid.

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[151] E. P. McCABE, J. T. Jeter, John W. Capers, and S. G. Garrett, Appts.,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, the St. Louis & San Francisco Railroad Company, the Missouri, Kansas, & Texas Railway Company, the Chicago, Rock Island, & Pacific Railway Company, and the Fort Smith & Western Railroad Company.

(See S. C. Reporter's ed. 151-164.)

States — admission — equality with other states — separate coach law.

1. The admission of Oklahoma into the Union "on an equal footing with the original states" gives it authority to enact such separate coach laws not in conflict with the Federal Constitution as other states may enact.

[For other cases, see States, XI., in Digest Sup. Ct. 1908.]

Civil rights — race discrimination — separate accommodations.

2. A state may, without infringing U. S. Const. 14th Amend., require separate but equal accommodations for the white and negro races.

[For other cases, see Civil Rights, in Digest Sup. Ct. 1908.]

Civil rights — race discrimination — separate accommodations.

3. The doctrine that a state statute, although fair on its face, may be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the state itself, is not applicable where it is the administration of the provisions of a separate coach law by common carriers which is claimed to produce the alleged discrimination.

[For other cases, see Civil Rights, in Digest Sup. Ct. 1908.]

Commerce — state regulation — separate coach law.

4. The separate coach provisions of Okla. act of December 18, 1907, must be construed as applying to transportation

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NOTE.—As to duty to provide separate compartments for colored passengers in sleeping or palace cars—see note to Com. v. Illinois C. R. Co. 32 L.R.A. (N.S.) 801.

On constitutionality of statutes requiring separate accommodations for white and colored passengers—see note to Chesapeake & O. R. Co. v. Kentucky, 45 L. ed. U. S. 244.

On civil rights of negroes—see note to Civil Rights Cases, 27 L. ed. U. S. 836.

As to right to enjoin acts under an unconstitutional statute, as affected by other remedies in case such acts are done—see note to Harley v. Lindemann, 8 L.R.A. (N.S.) 124.

wholly intrastate, in the absence of a different construction by the state courts, and hence not to contravene the commerce clause of the Federal Constitution.

[For other cases, see Commerce, III. f, in Digest Sup. Ct. 1908.]

Civil rights — race discrimination — separate coach law.

5. So much of the Oklahoma separate coach law of December 18, 1907, as permits carriers to provide sleeping cars, dining cars, and chair cars exclusively for white persons, and to provide no similar accommodations for negroes, denies the latter the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution.

[For other cases, see Civil Rights, 35, 36, in Digest Sup. Ct. 1908.]

Injunction — against compliance with statute — sufficiency of bill.

6. A case for injunctive relief against compliance by certain carriers made parties defendant with the provisions of the Oklahoma separate coach law of December 18, 1907, permitting carriers to discriminate between white persons and negroes in providing sleeping, dining, and chair cars, is not presented by a bill filed by five negro citizens, which contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue, and states that there will be a multiplicity of suits, there being at least fifty thousand persons of the negro race in the state who will be injured and deprived of their civil rights, where it is not alleged that any one of the complainants has ever traveled on any one of the railroads in question, or has ever requested transportation on any of them, or that any one of the complainants has ever requested that accommodations be furnished him in any sleeping cars, dining cars, or chair cars, or that any of these railway companies has ever notified any one of these complainants that such accommodations would not be furnished to him when furnished to others upon reasonable request and payment of the customary charge, and there is nothing to show that in case any of these complainants offers himself as a passenger and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law.

[For other cases, see Injunction, 209–217, in Digest Sup. Ct. 1908.]

[No. 15.]

Argued and submitted October 26, 1914. Decided November 30, 1914.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Oklahoma, dismissing the bill in a suit to enjoin railway carriers from complying with the separate coach law. Affirmed.

See same case below, 109 C. C. A. 110, 186 Fed. 966.

The facts are stated in the opinion.

Mr. William Harrison argued the cause, and, with Messrs. Edwin O. Tyler and Ethelbert T. Barbour, filed a brief for appellants:

The police power cannot be interposed to support statutes which have no possible tendency to protect the community or to preserve the public safety, but which, having no substantial relation to the public welfare, arbitrarily deprive the owner of liberty or property.

Mugler v. Kansas, 123 U. S. 623, 661, 669, 31 L. ed. 205, 210, 213, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Holden v. Hardy, 169 U. S. 366, 398, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Freund, Pol. Power, 525.

Police legislation (if this statute can be so considered) on the part of the state may be invalid because it trenches on the sphere of the national government under the Federal Constitution.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Police legislation which purports to deal with subjects beyond territorial jurisdiction is opposed to the conception of due process of law, and void.

Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455–464, 30 L. ed. 237–241, 6 Sup. Ct. Rep. 1114; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 618, 42 L. ed. 879, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

A law not enacted in good faith for the promotion of the public good, but passed from a sinister motive of annoying or oppressing a particular person or class, is invalid as offending the fundamental principle of the generality of the law.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The Oklahoma act is violative of the commerce clause of the Constitution.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The Oklahoma act in question is so plain and unambiguous as to leave no room for interpretation. Courts have held that even if a conflicting contemporaneous construction could enter into consideration, it would not be allowed to override the positive language of the law.

Houghton v. Payne, 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. Rep. 590.

Theoretically, at least, the doctrine of contemporaneous practical construction does not apply to statutes which are explicit and free from any ambiguity.

Swift & C. & B. Co. v. United States, 105 U. S. 695, 26 L. ed. 1109; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; Merritt v. Cameron, 137 U. S. 542, 34 L. ed. 772, 11 Sup. Ct. Rep. 174; Studebaker v. Perry, 43 C. C. A. 69, 102 Fed. 947; Franklin Sugar Ref. Co. v. United States, 153 Fed. 653.

Commerce among the commonwealths is traffic, transportation, and intercourse, between two points situated in different states.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

National courts may not by judicial construction amend a statute which, in plain terms, applies without discrimination to subjects without and subjects within the constitutional power of the state, so as to exclude the former and include the latter in order to take the law out from under the ban of the construction.

United States v. Reese, 92 U. S. 214, 218, 221, 23 L. ed. 563–565; Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Pollock v. Farmers' Loan & T. Co. 158 U. S. 636, 39 L. ed. 1125, 15 Sup. Ct. Rep. 920; United States v. 99 Diamonds, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 964; Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 157; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Union Cent. L. Ins. Co. v. Champlin, 54 C. C. A. 208, 116 Fed. 860; Wrightman v. Boone County, 31 C. C. A. 570, 60 U. S. App. 100, 88 Fed. 437; Madden v. Lancaster County, 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 194; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 537, 78 C. C. A. 467, 147 Fed. 425; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 488, 499, 31 L. ed. 700, 708, 712, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

Where a statute contains provisions which are objectionable and unconstitutional, the whole statute is void unless the court is able to determine that the good and bad parts of the statute are capable of being separated. If they are mutually connected and depend upon each other as conditions, considerations, or compensations for each other, so as to warrant the belief that if all could not be carried into effect, the legislature would not have passed the residue independently, then, if some parts are unconstitutional, all the provisions thus dependent, conditional, or connected, must fall with them.

Cooley, Const. Lim. 209; State ex rel. Holt v. Denny, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 275; State ex rel. Huston v. Perry County, 5 Ohio St. 497; Allen v. Louisiana, 103 U. S. 80, 26 L. ed. 318; Spraigue v. Thompson, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 632.

It is admitted that a statute may be unconstitutional in part and valid as to other parts; but we contend that the statute in question is unconstitutional; that a statute void in part is void as a whole unless it is manifest that the portion that is constitutional and the unconstitutional part are capable of separation, so that each may be read and may stand by itself.

Baldwin v. Franks, 120 U. S. 678, 685, 696, 30 L. ed. 766, 768, 774, 7 Sup. Ct. Rep. 656, 763; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; Redell v. Moores, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243; Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 537, 78 C. C. A. 467, 147 Fed. 419; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 534; Allen v. Louisiana, 103 U. S. 80, 84, 26 L. ed. 318, 319; United States v. Reese, 92 U. S. 214, 218, 221, 23 L. ed. 563–565; Trade Mark Cases, 100 U. S. 82, 99, 25 L. ed. 550, 553; United States v. Harris, 106 U. S. 629–642, 27 L. ed. 290–295, 1 Sup. Ct. Rep. 601; Poindexter v. Greenhow, 114 U. S. 270, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Spraigue v. Thompson, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

A statute so formed and applied that its application and operation can be used to discriminate against one class of citizens is in violation of the law of the United States, and is therefore void.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

Can the state of Oklahoma, after having accepted irrevocably the terms and all of the terms of the enabling act, thereafter be heard to complain, and, complaining, repudiate any or all of such terms?

Re Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667; Frantz v. Autry, 18 Okla. 561, 91 Pac. 193.

The act in question conflicts with the 14th Amendment to the Constitution of the United States.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Strauder v. West Virginia, 100 U. S. 303, 306, 25 L. ed. 664, 665, 3 Am. Crim. Rep. 515.

Mr. S. T. Bledsoe submitted the cause for appellees. Messrs. J. R. Cottingham, C. O. Blake, Clifford L. Jackson, R. A. Kleinschmidt, and C. E. Warner were on the brief.

The supreme court of the state has not been called upon to determine whether the Oklahoma separate coach law applies to interstate passengers. It has, however, forecasted what its conclusions will be in other cases involving very similar questions, from which it is manifest that the law will be held applicable only to intrastate passengers.

Atchison, T. & S. F. R. Co. v. State, 33 Okla. 158, 124 Pac. 56; Atchison, T. & S. F. R. Co. v. State, 33 Okla. 105, 124 Pac. 57. See also State ex rel. Abbott v. Hicks, 44 La. Ann. 770, 11 So. 74; Louisville, N. O. & T. R. Co. v. State, 66 Miss. 662, 5 L.R.A. 132, 2 Inters. Com. Rep. 615, 14 Am. St. Rep. 599, 6 So. 203; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Ohio Valley R. Co. v. Lander, 104 Ky. 431, 47 S. W. 344, 882; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 18.

The bill does not allege that the railway companies contemplate applying or will apply the separate coach statute to interstate passengers. Nor does it charge that the plaintiffs have suffered or will suffer any wrong or injury by the defendants' applying the Oklahoma statute to interstate passengers. They have not alleged such a state of facts as entitles them to the judgment of this court upon the question as to whether or not such statute is a regulation of interstate commerce.

Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; Thompkins v. Missouri, K. & T. R. Co. 52 L.R.A. (N.S.) 791, 211 Fed. 391.

There is nothing whatever in the contention that the enabling act prohibited the legislature from making a distinction on account of race or color, or that the separate coach law of Oklahoma does make a distinction on account of race or color.

Permoli v. New Orleans, 3 How. 589, 609, 11 L. ed. 739, 748; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287.

The authority of a state to require a separation of the races traveling by common carrier between stations within its border is authoritatively settled.

Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

Likewise the right of the carrier to prescribe reasonable rules and regulations for a division of the races has been sustained.

Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; Thompkins v. Missouri K. & T. R. Co. 52 L.R.A. (N.S.) 791, 211 Fed. 391.

Mr. Charles West, Attorney General of Oklahoma, also filed a brief for appellees:

A railway company may, in the absence of statutory authority, lawfully separate passengers while furnishing them equal accommodations.

Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980.

The railroads, if they in practice followed § 866 of the Oklahoma act, and provided a separate chair car, dining car, and sleeping car for negroes under the same circumstances as in case of whites, would not be violating the commerce act.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 165, 42 L. ed. 422, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409.

Whether as to interstate passenger traffic the rates, cars, services, and practices of the defendants were violative of the commerce act is not a question of which the circuit court had jurisdiction until after the Commission had rendered an order in the premises.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct.

Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

The right of action cannot arise out of the enabling act.

Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739; Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107, 34 Sup. Ct. Rep. 1.

A party who in this court seeks to strike down a state statute as violative of the Constitution must show that it injures him.

Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594.

Mr. Justice Hughes delivered the opinion of the court:

The legislature of the state of Oklahoma passed an act approved December 18, 1907 (Okla. Comp. Laws, 1910, §§ 860 et seq.), known as the "separate coach law." It provided that "every railway company . . . doing business in this state, as a common carrier of passengers for hire," should "provide separate coaches or compartments, for the accommodation of the white and negro races, which separate coaches or cars" should "be equal in all points of comfort and convenience" (§ 1); that at passenger depots there should be maintained "separate waiting rooms," likewise with equal facilities (§ 2); that the term "negro," as used in the act, should include every person of African descent, as defined by the state Constitution (§ 3); and that each compartment of a railway coach "divided by good and substantial wooden partition, with a door therein, should be deemed a separate coach" within the meaning of the statute (§ 4).

It was further provided that nothing contained in the act should be construed to prevent railway companies "from hauling sleeping cars, dining or chair cars attached to their trains, to be used exclusively by either white or negro passengers, separately but not jointly" (§ 7).

Other sections prescribed penalties both for carriers and for passengers failing to observe the law (§§ 5, 6). The act was to take effect sixty days after its approval (§ 12).

On February 15, 1908, just before the time when the statute, by its terms, was to become effective, five negro [159] citizens of the state of Oklahoma (four of whom are appellants here) brought this suit in equity against the Atchison, Topeka, & Santa Fe Railway Company, the St. Louis & San Francisco Railroad Company, the Missouri, Kansas, & Texas Railway Company, the Chicago, Rock Island, & Pacific Railway Company, and the Fort Smith & Western Railroad Company, to restrain these companies from making any distinction in service on account of race. On February 26, 1908,—after the act had been in operation for a few days,—an amended bill was filed seeking specifically to enjoin compliance with the provisions of the statute for the reasons that it was repugnant (a) to the commerce clause of the Federal Constitution, (b) to the enabling act under which the state of Oklahoma was admitted to the Union (act of June 16, 1906, chap. 3335, § 3, 34 Stat. at L. 267, 269), and (c) to the 14th Amendment. The railroad companies severally demurred to the amended bill, asserting that it failed to state a case entitling the complainants to relief in equity. The circuit court sustained the demurrers, and, as the complainants elected to stand upon their bill, final decree dismissing the bill was entered. This decree was affirmed by the circuit court of appeals (109 C. C. A. 110, 186 Fed. 966), and the present appeal has been brought.

The conclusions of the court below, as stated in its opinion, were, in substance:

1. That, under the enabling act, the state of Oklahoma was admitted to the Union "on an equal footing with the original states," and, with respect to the matter in question, had authority to enact such laws, not in conflict with the Federal Constitution, as other states could enact; citing, Permoli v. New Orleans, 3 How. 589, 609, 11 L. ed. 739, 748; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Bolin v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287. See also Coyle v. Smith, 221 U. S. 559, 573, 55 L. ed. 853, 860, 31 Sup. Ct. Rep. 688.

[160] 2. That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a state to require separate, but equal, accommodations for the two races. Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.

3. That the provision of § 7, above quoted, relating to sleeping cars, dining cars, and chair cars, did not offend against the 14th Amendment, as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as

compared with the demand on the part of the other.

4. That, in determining the validity of the statute, the doctrine that an act although "fair on its face" might be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the state itself (Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064) was not applicable, as there was no basis in the present case for holding that any discriminations by carriers which were unauthorized by the statute were practised under state authority.

5. That the act, in the absence of a different construction by the state court, must be construed as applying to transportation exclusively intrastate, and hence did not contravene the commerce clause of the Federal Constitution. Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 590, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 391, 45 L. ed. 244, 246, 21 Sup. Ct. Rep. 101; Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980.

6. That with respect to the existence of discriminations the allegations of the bill were too vague and uncertain to entitle the complainants to a decree.

In view of the decisions of this court above cited, there is no reason to doubt the correctness of the first, second, fourth, and fifth of these conclusions.

With the third, relating to § 7 of the statute, we are [161] unable to agree. It is not questioned that the meaning of this clause is that the carriers may provide sleeping cars, dining cars, and chair cars exclusively for white persons, and provide no similar accommodations for negroes. The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the attorney general of the state, in the brief filed by him in support of the law, urges that "the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic; or, sufficient profit to justify the furnishing of the facility; and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars, diners, nor sleepers, except when the market offered reasonably demands the facility." And in the brief of counsel for the appellees, it is stated that the members of the legislature "were undoubtedly familiar with the character and extent of travel of persons of African descent in the state of Oklahoma, and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel" in that state.

This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to [162] the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect, and this amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be "a multiplicity of suits," there being at least "fifty thousand persons of the negro race in the state of Oklahoma" who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. Williams v. Hagood, 98 U. S. 72, 74, 75, 25 L. ed. 51,

52; Marye v. Parsons, 114 U. S. 325, 328, 329, 29 L. ed. 205, 206, 5 Sup. Ct. Rep. 932, 962; Tyler v. Registration Ct. Judges, 179 U. S. 405, 406, 45 L. ed. 252, 253, 21 Sup. Ct. Rep. 206; Turpin v. Lemon, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. ed. 778, 781, 23 Sup. Ct. Rep. 498; Hooker v. Burr, 194 U. S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; Braxton County Ct. v. West Virginia, 208 U. S. 192, 197, 52 L. ed. 450, 451, 28 Sup. Ct. Rep. 275; Collins v. Texas, 223 U. S. 288, 295, 296, 56 L. ed. 439, 443, 444, 32 Sup. Ct. Rep. 286.

The allegations of the amended bill, so far as they purport [**163**] to show discriminations in the conduct of these carriers, are these:

"That notwithstanding the terms of said act of Congress and of the Constitution of the state of Oklahoma, the said above-named defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the state of Oklahoma, in this, to wit: that equal comforts, conveniences, and accommodations will not be provided for your orators and other persons of the negro race; that said passenger coaches are not constructed or maintained so as to enable persons of the negro race to be provided with separate and equal toilet and waiting rooms for male and female passengers of said negro race, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars, and dining car accommodations by providing for your orators and other persons of the negro race who may become passengers on said railroad, that separate waiting rooms with equal comforts and conveniences have been or are bound to be constructed by said defendants and each of them for your orators and other persons of the negro race desiring to become passengers on said railroad, and that said orators are not being and will not be provided with equal accommodations with the white race under the provisions of said act."

We agree with the court below that these allegations are altogether too vague and indefinite to warrant the relief sought by these complainants. It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; or that any one of the complainants has ever requested that accommodations be furnished to him in any sleeping cars, dining cars, or chair cars; or that any of these five companies has ever notified any one of [**164**] these complainants that such accommodations would not be furnished to him, when furnished to others, upon reasonable request and payment of the customary charge. Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction, and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.

Decree affirmed.

Mr. Chief Justice **White**, Mr. Justice **Holmes**, Mr. Justice **Lamar**, and Mr. Justice **McReynolds** concur in the result.

LOUISIANA RAILWAY AND NAVIGATION COMPANY, Plff. in Err.,
v.
MARTIN BEHRMAN, Mayor of the City of New Orleans.

(See S. C. Reporter's ed. 164-178.)

Error to state court — Federal question — impairing contract obligations — decision on non-Federal ground.

1. A judgment of the highest state court enjoining a railway company from constructing or operating a belt line rail-

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

way under a municipal ordinance which the railway company claims gives it contract rights that it avers are unconstitutionally impaired by a later ordinance is reviewable in the Federal Supreme Court, although the state court rests its decision upon the ground that any contract created by the earlier ordinance had become inoperative because of the impossibility of realization of a suspensive condition to which the contract was subject, where the whole object of the suit was to establish the right of the city to carry out the municipal scheme of construction and operation under the subsequent ordinance which conflicted with and repealed the earlier ordinance so far as it might be construed to give the railway company the particular privileges therein described, and this object was attained under the final judgment by which the municipal construction and operation were protected against the claim of contract right.

[For other cases, see Appeal and Error, 1376, in Digest Sup. Ct. 1908.]

Railway franchise — suspensive condition — event not happening.

2. All rights of a railway company under a municipal ordinance giving it the right to use the tracks of a belt line railway which another railway company had been authorized by the city to construct were terminated upon the latter's legally excusable failure to build, where such ordinance provided that the rights therein granted were upon condition that the grantee railway company should make a cash payment after operating over such tracks for thirty days, and that in case the other company failed "without legal excuse" to build the line, it should do so itself, such construction to be in lieu of the cash payment.

Railroads — approval of dedication for — condition.

3. The conditions subject to which the New Orleans dock board approved the dedication for belt line railway purposes of the portion of the proposed route under its jurisdiction, *viz.*, that the road should be "operated and controlled by a public commission," would be violated by a municipal ordinance under which the belt line tracks were to be constructed by a railway company, and upon completion turned over to the "immediate ownership of the city," and should be under the "control and management" of the public belt authority, where the ordinance further provided for arbitration of all controversies relating to the movement and handling of cars, trains, and traffic, between the railway company and the public belt authority, or any other company or companies to which the use of the tracks might be granted.

Railroads — construction — excuse for default.

4. A railway company under contract with a municipal corporation to build a belt line was not legally obligated to construct any portion of the line specified if, by reason of the successful opposition of a public board, it was precluded from building that portion of the proposed line which was within the jurisdiction of such board, where the city agreed to furnish a clear legal right of way for the entire construction, and by a later ordinance provided, in case the company should default "without legal excuse," for the construction of such line by another railway company to which should be returned all the securities deposited by it to secure performance of its obligation in case it should be prevented "from building said belt tracks or any portion of the same on account of the city not furnishing the right of way," or "by causes beyond its control," such company to have the right, in case the other company should only complete a part of the line, to use such portion as should be constructed.

[No. 49.]

Argued November 4 and 5, 1914. Decided November 30, 1914.

IN ERROR to the Supreme Court of the State of Louisiana to review a decree which affirmed a decree of the Civil District Court for the Parish of Orleans, in that state, enjoining a railway company from constructing and operating a belt line railway. Affirmed.

See same case below, 127 La. 775, 54 So. 25.

The facts are stated in the opinion.

Mr. R. E. Milling argued the cause, and, with Mr. M. J. Foster, filed a brief for plaintiff in error:

If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of U. S. Rev. Stat. § 709, as if it had been specifically referred to and the right directly refused.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211.

It has been the practice of this court whenever necessary to look at the record of proceedings of the inferior state court in connection with the proceedings of the highest court, in order to deduce therefrom the points decided by the latter.

Neilson v. Lagow, 12 How. 110, 13 L. ed. 914.

When a contract right springs from a legislative enactment, and that right has been taken away or abridged by subsequent legislation, on writ of error from the court of last resort of a state, the jurisdiction of the Supreme Court of the United States attaches, and this is true even when the state court rests its decision on the invalidity of the

prior statute, and ignores the subsequent enactment. The Supreme Court in such case is authorized to examine the record to determine the validity of the prior statute.

McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 377, 58 L. ed. 1001, 1006, 34 Sup. Ct. Rep. 627; Story, Const. 1391; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 54 L. ed. 144, 30 Sup. Ct. Rep. 40; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395.

A contract of a municipality granting the use of rail tracks (tracks existing and others to be constructed) for a monied consideration, and an alternative consideration requiring the company to construct the tracks not yet built in lieu of the money consideration in the event they are not built by the person already under contract to construct them, does not rest on a suspensive condition —a condition precedent; it is purely a commutative contract and controlled by the general law of contracts.

Gayden v. Louisville, N. N. O. & T. R. Co. 39 La. Ann. 269, 1 So. 792.

Mr. I. D. Moore argued the cause and filed a brief for defendant in error:

Where the state court bases its judgment entirely upon the effect and construction of the statutes claimed to create the contract, and upon grounds which would have been equally controlling if the latter acts had not been passed, the United States Supreme Court cannot review the judgment.

Kreiger v. Shelby R. Co. 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752.

The decision of a state court that an alleged contract never existed because of the want of compliance with a state statute, whereupon judgment is given wholly without reference to a subsequent statute which is alleged to have impaired the obligation of the contract, does not involve a Federal question.

Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

Before the Supreme Court of the United States can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

The state court cannot be held to have decided a question as to the impairment of the obligation of a contract unless it has given effect to subsequent state legislation claimed to have accomplished that result.

Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

A decision of a state court upholding a municipal tax on a bridge on the ground that the bridge company, by accepting its franchise from the city, voluntarily agreed that the bridge should be subject to taxation, rests upon a ground broad enough to dispose of the case without reference to the Federal question involved in the contention that the tax ordinances of the city impaired the obligations of its charter from the state, and of a contract which the bridge company entered into with a railroad company for the maintenance and operation of the bridge.

Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114.

Where the state court rested its judgment enforcing the payment of taxes on railway property, not upon the ground that such property was rendered taxable by any law passed subsequent to the company's charter, but that, under the terms of the charter itself, such property was taxable, the Supreme Court of the United States is without jurisdiction to review that judgment.

St. Paul, M. & M. R. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281.

Appellate jurisdiction by the United States Supreme Court cannot be sustained where the decision of the state court appealed from was made upon rules of general jurisprudence, or other grounds broad enough in themselves to sustain the judgment without considering a Federal question appearing in the case, but not necessarily involved.

New Orleans v. New Orleans Waterworks Co. supra.

A decision of a state court on an independent ground broad enough to sustain the judgment cannot be reviewed by the Supreme Court of the United States on the ground that a Federal question was involved.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

Where the supreme court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, which is broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

Hammond v. Connecticut Mut. L. Ins. Co. 150 U. S. 633, 37 L. ed. 1206, 14 Sup. Ct. Rep. 236; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Hopkins v. McLure, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; Beatty v. Benton, 135 U. S. 244, 34 L. ed. 124, 10 Sup. Ct. Rep. 747; Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; Delaware City, S. & P. S. B.

Nav. Co. v. Reybold, 142 U. S. 636, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290; Haley v. Breeze, 144 U. S. 132, 36 L. ed. 373, 12 Sup. Ct. Rep. 836; O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Connecticut ex rel. New York & N. E. R. Co. v. Woodruff, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976.

The determination by a state court of a Federal question adversely to plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States, if another question, not Federal, is also raised and decided against him, and the decision hereof is sufficient, notwithstanding the Federal question, to sustain the judgment.

Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Union Nat. Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 325, 41 L. ed. 177, 16 Sup. Ct. Rep. 1039.

It is not enough to give this court jurisdiction over the judgment of a state court, that the record shows that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the case, and that it was actually decided, or that judgment could not have been given without deciding it.

Moore v. Mississippi, 21 Wall. 636, 22 L. ed. 653; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Citizens' Bank v. Board of Liquidation (Louisiana ex rel. Citizens' Bank v. Board of Liquidation) 98 U. S. 140, 25 L. ed. 114; Endowment & Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; Marrow v. Brinkley, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Blount v. Walker, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

To give this court appellate jurisdiction under § 25 of the judiciary act (or U. S. Rev. Stat. § 709), two things should have occurred and should be apparent in the record: first, that some of the questions stated in the section did arise in the court below; and, second, that a decision was actually made thereon by the same court in the manner required by the section.

Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; M'Kinney v. Carroll, 12 Pet. 66, 9 L. ed. 1002; Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340.

Even though it does not conclusively appear to be the fact, yet, where the state court may properly have disposed of the case without deciding the Federal question, its judgment is not reviewable in the Supreme Court of the United States.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

When the state court gives no effect to a subsequent state law, and decides on grounds independent of it that the right claimed was not conferred by the contract, the United States Supreme Court has no jurisdiction.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530; Dower v. Richards, 151 U. S. 666, 38 L. ed. 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Bacon v. Texas, 163 U. S. 216, 41 L. ed. 136, 16 Sup. Ct. Rep. 1023.

Where the judgment of a state court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did base it upon the other ground, the Supreme Court will not take jurisdiction, even though it thinks the state court decided erroneously.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 26, 20 L. ed. 851; Dibble v. Bellingham Bay Land Co. 163 U. S. 69, 41 L. ed. 74, 16 Sup. Ct. Rep. 939; Meyer v. Richmond, 172 U. S. 100, 43 L. ed. 381, 19 Sup. Ct. Rep. 106.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error seeks to review the judgment of the state court upon the ground that it denied a Federal right [166] asserted under the contract clause of the Constitution. Art. 1, § 10.

The suit was brought by the mayor of the

city of New Orleans, in his official capacity, to restrain the Louisiana Railway & Navigation Company from proceeding under a municipal ordinance—No. 1997, New Council Series, dated September 4, 1903—to construct and operate tracks over a public belt railroad reservation, and from operating cars, etc., over public belt railroad tracks, and to have the ordinance, so far as it granted to that company such privileges of construction and operation, declared null and void. The facts, so far as it is necessary to state them, are these:

The authorities of the city of New Orleans devised the plan of establishing a public belt railroad along the river front. On March 1, 1899, the city adopted an ordinance (No. 15,080, C. S.) under which, in consideration of certain concessions, the Illinois Central Railroad Company built about 2 miles of the projected system, that is, from the upper limit of the city to the upper boundary of Audubon park. This was followed by ordinance No. 147, N. C. S., adopted August 7, 1900, which created a belt railroad board, composed of the mayor and certain city officials, to construct, control, and operate the belt railroad for the benefit of the city; and on August 12, 1902, the board of commissioners of the port of New Orleans, called the "dock board,"—a body exercising state authority over a part of the area to be traversed by the proposed road,—approved the dedication for the purpose stated. This approval was to remain in force only so long as the belt railroad was "operated and controlled by a public commission" in accordance with the provisions of ordinance No. 147.

On February 10, 1903, a further ordinance was adopted—No. 1615, N. C. S.—which, among other things, granted to the New Orleans & San Francisco Railroad Company [167] a right of way over the belt line and reservation from the upper limit of the city to Henderson street. The condition was that the company, at its own expense, should construct and dedicate to perpetual public use the tracks as projected from the end of the line already built, on the upper side of Audubon park, to Henderson street (a distance of about 5 miles), the construction to be completed before July 1, 1904. Other provisions looked to still further construction through contributions from other railroads. The validity of this ordinance was at once challenged in a suit brought by the mayor, on behalf of the city, which resulted in favor of the railroad company. Capdevielle v. New Orleans & S. F. R. Co. 110 La. 904, 34 So. 868. The terms of the ordinance, however, did not conform to the conditions upon which the dock board had consented to the building of the belt road, and, in a suit brought by that board against the railroad company, the carrying out of ordinance No. 1615 was restrained so far as it authorized the construction of the railroad upon the property subject to the board's jurisdiction. New Orleans v. New Orleans & S. F. R. Co. 112 La. 1011, 36 So. 837. Following this decision, it appears that the New Orleans & San Francisco Railroad Company abandoned the building of the belt line contemplated by the ordinance; no part of it was constructed thereunder.

On September 4, 1903, while the suit of the dock board was pending, and after the final decision in the Capdevielle suit, the city adopted ordinance No. 1997, N. C. S., —the ordinance here in question (127 La. pp. 784-792, 54 So. 25). Without passing now upon points in controversy, it may be said that this ordinance, reciting that under ordinance No. 1615 there had already been granted to the New Orleans & San Francisco Railroad Company the right to construct the belt line over the reservation from the place at which the rails then terminated to Henderson street, [168] granted to the Louisiana Railway & Navigation Company—the plaintiff in error—a right of way over "the double track belt line and reservation" to that point, upon stated terms and conditions, among which may be noted the following: That when the plaintiff in error had operated its equipment over the described belt tracks for thirty days, it should pay to the city the sum of $50,000; that in case the New Orleans & San Francisco Railroad company failed "without legal excuse" to build the described line to Henderson street, as provided in ordinance No. 1615, the plaintiff in error should build that line in place of the first-mentioned company—this construction to be in lieu of the payment of $50,000, and the belt tracks so built, as soon as completed to Henderson street, to be "turned over to the immediate ownership of the city of New Orleans," and to be under "the control and management of the public belt authority;" and, further, that in case the New Orleans & San Francisco Railroad Company should, from any cause, complete only a portion of the described tracks, the plaintiff in error should have the right to use so much of the described belt line as had been built, on payment of a proportionate part of the specified sum. This ordinance the plaintiff in error formally accepted on September 17, 1903.

The suit brought by the dock board against the New Orleans & San Francisco Railroad Company was decided by the supreme court of the state in May, 1904, and, in the October following, the city adopted

ordinance No. 2683, N. C. S., which made comprehensive provision for municipal construction and operation of the belt line system. All conflicting ordinances were repealed, and it cannot be doubted that this ordinance, if enforced, would make it impossible for the plaintiff in error to exercise the rights it might otherwise have under ordinance No. 1997. The belt board was reorganized by the establishment of a new public belt railroad commission, composed [169] of the mayor and sixteen "citizen taxpayers," to whom was confided the necessary administrative authority for carrying out the municipal scheme. This ordinance received the approval of the dock board on stated conditions, and, on July 1, 1905, the new undertaking was formally inaugurated. On November 10, 1905, the plaintiff in error deposited with a trust company, which was one of the fiscal agents of the city, $50,000 in securities in alleged compliance with its contract under ordinance No. 1997. The city, however, went on with its own plan, arranging for bank credits to enable it to carry on the work under ordinance No. 2683, and when, in May, 1906, the plaintiff in error attempted to begin construction under the earlier ordinance, it was stopped by the city authorities. Soon after, the present suit was instituted.

The petition of the mayor, alleging upon various grounds the invalidity of ordinance No. 1997, also averred the adoption of ordinance No. 2683, the irrevocable dedication thereby for the reservation of the public belt railroad, and the undertaking by the city, under that ordinance, of the work of construction. The plaintiff in error, in its answer, set up the unconstitutionality of the later ordinance as one impairing contractual obligations. At the beginning of the suit a preliminary injunction was granted, in accordance with the city's prayer, and the city proceeded with the construction of the public belt railroad, which has since been put in operation. In the court of first instance, judgment went "in favor of the plaintiff, Martin Behrman, in his official capacity of mayor of the city of New Orleans, and as ex-officio president of the public belt railroad commission of the city," declaring ordinance No. 1997, so far as it purported to grant the privileges in dispute, to be "illegal, void, and of no effect," and making the injunction permanent. This judgment was affirmed by the supreme court of the state upon the ground that the contract was "subject to a suspensive [170] condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken." 127 La. 775, 795, 796.

The defendant in error moves to dismiss, invoking the established rule that, where the state court gives no effect to the subsequent enactment, the jurisdiction of this court does not attach. Knox v. Exchange Bank, 12 Wall. 379, 383, 20 L. ed. 414, 415; Lehigh Water Co. v. Easton, 121 U. S. 388, 392, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 38, 39, 31 L. ed. 607, 614, 615, 8 Sup. Ct. Rep. 741; Central Land Co. v. Laidley, 159 U. S. 103, 111, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Bacon v. Texas, 163 U. S. 207, 216, 219, 41 L. ed. 132, 136, 137, 16 Sup. Ct. Rep. 1023; Fisher v. New Orleans, 218 U. S. 438, 440, 54 L. ed. 1099, 1100, 31 Sup. Ct. Rep. 57; Missouri & K. Interurban R. Co. v. Olathe, 222 U. S. 187, 190, 56 L. ed. 156, 158, 32 Sup. Ct. Rep. 47; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 639, 56 L. ed. 924, 928, 32 Sup. Ct. Rep. 577. We are of the opinion that the present case is not within this rule. It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guaranty. Jefferson Branch Bank v. Skelly, 1 Black, 436, 442, 443, 17 L. ed. 173, 177; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 144, 145, 17 L. ed. 571, 576, 577; Northwestern University v. Illinois, 99 U. S. 319, 321, 25 L. ed. 388, 389; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 492, 38 L. ed. 793, 795, 14 Sup. Ct. Rep. 968; Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 556, 58 L. ed. 721, 725, 34 Sup. Ct. Rep. 364; Russell v. Sebastian, 233 U. S. 195, 202, 58 L. ed. 912, 920, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282. [171] And, in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court. McCullough v. Virginia, 172 U. S. 102, 116, 43 L. ed. 382,

387, 19 Sup. Ct. Rep. 134; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 76, 77, 44 L. ed. 673, 679, 680, 20 Sup. Ct. Rep. 545; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 175, 54 L. ed. 144, 147, 30 Sup. Ct. Rep. 40; Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 376, 58 L. ed. 1001, 1006, 34 Sup. Ct. Rep. 627. In the present case, it is apparent that the whole object of the suit was to establish the right of the city to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privileges therein described. It was, as appears from the petition itself, to accomplish the purpose of the later enactment, and the building of the belt line thereunder, that the city asked the aid of the court's injunction in this suit; and it was through this protection that the municipal scheme of construction under the later ordinance was actually carried out. The final judgment completed and made permanent this protection, with respect to operation as well as construction, as against the claim of contract right. It must follow that this court has jurisdiction to determine whether that claim is well-founded; that is, whether there is a contractual obligation which the plaintiff in error is entitled to enforce without its being impaired by the operation of the subsequent provision having, by virtue of state authority, the force of state law.

It is the contention of the plaintiff in error that, although the proposed belt road to Henderson street was not built by the New Orleans & San Francisco Railroad Company, and although it be assumed that the failure of that company to build was legally excusable, and hence, that the obligation of the plaintiff in error to build in its stead did not arise, still there was an effective grant under ordinance No. 1997, and the plaintiff in error is entitled to [172] the use of the belt in the manner therein described upon the payment of $50,000.

We agree with the state court that this is not a proper interpretation of the ordinance.[1] Provision had already [173] been made for construction to the designated point by the New Orleans & San Francisco Railroad Company. Ordinance No. 1997 prefaced its grant by a recital of the right of construction which had been given to that company, [174] and it was expressly stated that the grant to the plaintiff in error was made "under the belt provisions of said ordinance No. 1615." It had been provided in the last-mentioned ordinance that the public authorities might give to other railroad companies the right to use the road thus to be constructed, on their making contributions which should go into a special fund for the further extension of the belt line system. It is manifest that the intent was to give to the plaintiff in error the described right to use the tracks thus to be laid. But it was also contemplated [175] that the New Orleans & San Francisco Railroad Company might fail to build, and that this failure might be "without legal excuse." In that event, it was agreed that the plaintiff in error should step into the place of the other company and assume the burden of construction "under the terms and conditions" of ordinance No. 1615, such construction to take the place of the pecuniary consideration for the use of the tracks. It was further apparent that the fulfilment of the plan of ordinance No. 1615 might be legally impossible, and hence that the failure of the New Orleans & San Francisco Railroad Company might be legally excused. In this event, the plaintiff in error did not undertake to build, and no right of construction was given to it. We cannot imply such a right. While we are to give to public grants a fair and reasonable interpretation (United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 979, 14 Sup. Ct. Rep. 11; Russell v. Sebastian, 233 U. S. 195, 205, 58 L. ed. 912, 921, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282), they are not to be extended by implication beyond their clear intent. The right of construction was given to the plaintiff in error in a particular contingency, and not otherwise; and the explicit provision for construction negatives an intention to bind the city to permit it in a case not specified. There was abundant reason for both expression and omission. The suit of the dock board was pending, and whether the New Orleans & San Francisco Railroad Company would be able to build, as provided in ordinance No. 1615, was undecided. If that company did build, the city was prepared to give, and, in that event, did give, to the plaintiff in error, the right of way upon the agreed payment; and if that com-

[1] "This ordinance, so far as it is material with respect to this question, is as follows:

"Section 3. Be it further ordained, etc., That, whereas, under ordinance No. 1615, N. C. S., the New Orleans & San Francisco Railroad Company, its successors or assigns, have been granted the right to construct, at their own cost and expense, the double track belt line over the belt reservation on the river front, from the present end of the public belt on the upper side of Audubon park to Henderson street, and under said ordinance the company dedicates said tracks to perpetual public use, therefore, under the belt provisions of said ordi-

pany failed to build "without legal excuse," the city was ready to provide, and in that event did provide, that the plaintiff in error should build in its stead. But if there were legal excuse for a failure of the New Orleans & San Francisco Railroad Company to build, it was plainly desirable that neither party should be bound. In that case, as the terms [176] of the ordinance show, the plaintiff in error was unwilling to assume the burden of construction, and the city, by not binding itself in that contingency, preserved its freedom to deal as it might seem best with the exigency that would thus arise. Ordinance No. 1997 did not obligate the city to build the belt road or any part of it; it did not bind the city to cause the road to be built by others. As we read the ordinance, it was intended to confer rights exclusively with reference to an existing plan of construction, and if that plan proved abortive, because of legal obstacles to its fulfilment, no right was conferred upon the plaintiff in error.

It is urged that the provisions of ordinance No. 1997 (§ 3, par. (c) that the belt tracks to be constructed by the plaintiff in error, as soon as they were completed to Henderson street, should be turned over to the "immediate ownership of the city," and should be under the "control and management" of the public belt authority, obviated the objection raised by the dock board with respect to ordinance No. 1615. But an examination of other provisions of the ordinance shows that this "control and management" was intended to be subject to certain limitations. Thus, it was provided in paragraph (f) that all controversies between the plaintiff in error and the public belt authority, or any other company or companies to which the use of the tracks might be granted, relating to the movement and handling of cars, trains, and traffic thereon, should be submitted to three arbitrators, one to be selected by the plaintiff in error, the second by the public belt authority, or by such other company or companies, as the case might be, and the third by the two thus chosen, and that the decision of any two of these arbitrators was to have the effect of an "amicable composition." We find no reason to doubt the correctness of the conclusion that the conditions, subject to which the dock board approved the dedication for belt road purposes of [177] the portion of the proposed route under its jurisdiction, would have been violated under the plan of ordinance No. 1997, as well as under that of ordinance No. 1615. And, further, it

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nance No. 1615, N. C. S., 'and with the limitations therein which recognize and preserve the present and future rights of the city of New Orleans over the projected public belt railroad,' the Louisiana Railway & Navigation Company is hereby granted a right of way over the double track belt line and reservation on the river front of the city of New Orleans, from the upper limits of the city of New Orleans to Henderson street, upon the following terms and conditions:

"(a) That, when said Louisiana Railway & Navigation Company shall have operated its engines, trains, and cars over said belt tracks, as provided in this ordinance, for a period of thirty days, the said company shall pay to the city of New Orleans the sum of Fifty Thousand Dollars ($50,000), . . . and when said company shall be ready to begin to operate its engines, trains, and cars as above provided, the said company shall deliver to the fiscal agent of the city of New Orleans, bonds or other securities, satisfactory to said fiscal agent, of the value of $50,000, the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have operated its engines, trains, and cars over said belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of $50,000 to said fiscal agent. . . .

"(b) That in consideration of the payment of the above sum, the Louisiana Railway & Navigation Company shall have the right to operate its own locomotives, cars, and equipment over the said public belt from the upper city limits to Henderson street. . . .

"(c) That in the event of the New Orleans & San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to build said belt tracks from the upper side of Audubon park to Henderson street, on or before July 1, 1904, the Louisiana Railway & Navigation Company shall build the same from the upper side of Audubon park to Henderson street, under the terms and conditions of paragraph 10 of § 2 of ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway & Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars, and traffic over said tracks under all the provisions and terms of said paragraph 10 of § 2 of ordinance No. 1615, N. C. S., said Louisiana Railway & Navigation Company assuming the obligation of the New Orleans & San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans & San Francisco Railroad Company, its successors or assigns, under said paragraph 10 of § 2 of said ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon park to Henderson street to be in lieu of the payment of $50,000, referred to in paragraph (a) of this section; provided, that said Louisiana Railway & Navigation Company shall complete the said tracks to Henderson street within one year from the time the city shall furnish the clear and undis-

is clear that the proviso in paragraph (c) which related to tracks to be constructed by the plaintiff in error did not change the event in which alone the plaintiff in error was entitled to construct them, and this was in case the New Orleans & San Francisco Railroad Company should fail to build "without legal excuse."

Thus far we have assumed that the New Orleans & San Francisco Railroad Company was legally excused from building. But it is insisted by the plaintiff in error that this is not the case. That is, it is said that the grant of the right to construct was divisible, and that, so far as the city was competent to provide for such construction, the New Orleans & San Francisco Railroad Company was bound to build the belt road, and, therefore, that its failure to build to this extent was "without legal excuse" within the meaning of the paragraph (c). But ordinance No. 1615 negatives this view. It explicitly provided for construction "from the end of the rails on the upper side of Audubon park to Henderson street," and that the city should furnish "a clear legal right of way for the construction of said tracks." We think that there is no basis whatever for the contention that the New Orleans & San Francisco Railroad Company was bound to construct a part of the belt road specified if, by reason of the successful opposition of the dock board, it was without power to build the remainder. And when the dock board prevailed in its suit, that company was entitled to abandon, as it did abandon, the undertaking. This was the event which was carefully excluded by ordinance No. 1997 in defining the contingency in which the plaintiff in error should build. The provision in paragraph (c) for the return of the securities which were to be deposited by the plaintiff in error as security for the performance of its obligation, in case [178] it should be prevented "from building said belt tracks or any portion of the same on account of the city not furnishing the right of way," or "by causes beyond its control," tends to support, rather than to oppose, the view that the undertaking was regarded as an entirety; for all the securities were to be returned although the prevention related to a portion of the route only. We are also referred to the provision (§ 3, par. (d) that, in the event that the New Orleans & San Francisco Railroad Company should, from any cause, complete "only a portion of the tracks" described, the plaintiff in error should have the right "to operate its own locomotives, cars," etc, "over such portion

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puted right of way, it being always understood that said Louisiana Railway & Navigation Company assumes all the obligations of the New Orleans & San Francisco Railroad Company under paragraph 10 of § 2 of said ordinance No. 1615, N. C. S.; and provided that, as soon as said belt tracks shall be completed to Henderson street, the same shall be turned over to the immediate ownership of the city of New Orleans, and to be under the control and management of the public belt authority; and provided, further, that said Louisiana Railway & Navigation Company shall, on July 1, 1904, deposit with the fiscal agent of the city of New Orleans, bonds or other securities satisfactory to said fiscal agent, of the value of $50,000, the same to be held in escrow as security for compliance by said company with the foregoing obligations, and to be returned to said company when said company shall have built and completed said belt tracks from the upper side of Audubon park to Henderson street; and provided, further, that in case said company shall be prevented from building said belt tracks, or any portion of the same, on account of the city not furnishing the right of way under the terms of ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said fiscal agent. . . .

"(d) That in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, shall, from any cause, complete only a portion of the tracks from the upper side of Audubon park to Henderson street, the Louisiana Railway & Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars, and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railway Company, its successors and assigns, and for such privilege shall pay to the city of New Orleans such proportion of the sum provided in clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway & Navigation Company bear to the whole length of the tracks from upper city limits to Henderson street.

. . . . . .

"(f) That all controversies between the Louisiana Railway & Navigation Company on the one side, and the Public Belt authority, or any other company or companies to which the city or her Public Belt authority may grant the use of said tracks and appurtenances on the other side, relative to the use of said tracks and appurtenances, or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover, shall be submitted to the arbitration of three disinterested persons, one to be selected by said Louisiana Railway & Navigation Company, the second by the Public Belt authority, or such other company or companies, as the case may be, and the third by the two thus chosen; and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition. . . ."

of the tracks" as had already been built, and as might be built by the first-mentioned company, for a proportionate part of the agreed payment. This clause, in view of the existing situation of the parties, was held by the state court to have reference to a contingency in which, the opposition of the dock board not having been successful, the railroad company had proceeded with its undertaking, and, having built a part of the tracks, had failed to complete them; and this construction is in harmony with the other provisions of the ordinance. But, in fact, the event described in paragraph (d) did not happen, as no part of the road was built; and this clause in no way aids the contention that the New Orleans & San Francisco Railroad Company was under legal obligation to undertake a partial construction if it became legally impossible to carry out its undertaking as a whole.

We conclude that the contract upon which the plaintiff in error relies was subject, in any aspect, to a supensive condition (Civil Code [La.] art. 2021), that the event in which the obligation was to arise did not happen, and hence, that the subsequent enactment was not open to the objection raised.

Judgment affirmed.

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[179] NEW YORK ELECTRIC LINES COMPANY, Plff. in Err.,
v.
EMPIRE CITY SUBWAY COMPANY (Limited).

(See S. C. Reporter's ed. 179-196.)

Error to state court — decision of Federal question — impairing contract obligations.

1. A judgment of a state court giving effect to a municipal ordinance which, it is contended, is an unconstitutional impairment of a previously existing contract with the city, is reviewable by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 1376-1392, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — impairing contract obligations.

2. On a writ of error to a state court presenting the question of impairment of contract obligations, the Federal Supreme Court will determine for itself whether a contract existed and whether its obligation has been impaired.

[For other cases, see Appeal and Error, 2240-2248, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — corporate franchises.

3. The acceptance of a permit granted by a municipal corporation under legislative authority to place wires in the city streets creates a contract which cannot thereafter constitutionally be revoked or impaired by municipal resolution or ordinance, unless such franchise is lost by misuser or nonuser.

[For other cases, see Constitutional Law, 1201-1213, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — revoking unexercised franchise.

4. The franchise created by the acceptance of a permit granted by a municipal corporation under the authority of N. Y. Laws 1881, chap. 483, to lay electric conductors in the public streets, may be revoked for nonexercise, without unconstitutionally impairing any contract obligations, where, for a long period of years after the final judicial determination of the validity and controlling authority of the state legislation authorizing a comprehensive scheme of electrical subway construction, the grantee made no attempt to secure space in these subways, or to build conduits, or to place its wires under the city streets, treating its rights as susceptible of practically indefinite retention unused.

[For other cases, see Constitutional Law, 1201-1213, in Digest Sup. Ct. 1908.]

[No. 63.]

Argued November 5 and 6, 1914. Decided November 30, 1914.

IN ERROR to the Supreme Court of the State of New York in and for the County of New York to review a judgment affirmed by the Appellate Division, First Department, and by the Court of Appeals, denying a writ of mandamus to compel a subway company to lease space in its conduits to an electric company. Affirmed.

See same case below in appellate division, 140 App. Div. 934, 125 N. Y. Supp.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for the purpose of

1133; in court of appeals, 201 N. Y. 321, L.R.A. 1915, —, 94 N. E. 1056.

The facts are stated in the opinion.

Messrs. Alton B. Parker and J. Aspinwall Hodge argued the cause, and, with Mr. Henry A. Gildersleeve, filed a brief for plaintiff in error:

Relator's permit of 1883, from the city, was and is an irrevocable franchise, contract, and property, not to be impaired by state law, nor taken without due process of law.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Detroit v. Detroit Citizens' R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Africa v. Knoxville, 70 Fed. 729, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Morristown v. East Tennessee Teleph. Co. 53 C. C. A. 132, 115 Fed. 304; People ex rel. Davis v. Sturtevant, 9 N. Y. 273, 59 Am. Dec. 536; Milhau v. Sharp, 27 N. Y. 611; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 28 N. E. 525; People ex rel. New York Edison Co. v. Willcox, 207 N. Y. 86, 45 L.R.A.(N.S.) 629, 100 N. E. 705; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Ghee v. Northern Union Gas Co. 158 N. Y. 510, 53 N. E. 692; Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538; Rochester v. Rochester R. Co. 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953; New York v. Bryan, 196 N. Y. 158, 89 N. E. 467.

While performance of some substantial part of the work (contemplated by the permission sufficient to create a property right and form a consideration for the contract) was not necessary to create a right of property nor a consideration for the contract, nevertheless there was such performance, and there would have been full performance, but for the acts of the state and city.

New York v. Bryan, 196 N. Y. 165, 89 N. E. 467; Rochester v. Rochester R. Co. 182 N. Y. 119, 70 L.R.A. 773, 74 N. E. 953; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572.

It is too late to question the following well-established propositions:

(a) It is sufficient if it appears from the record "by clear and necessary intendment" that the Federal question must have been passed upon.

Crowell v. Randell, 10 Pet. 368, 398, 9 L. ed. 458, 470; Furman v. Nichol, 8 Wall. 44, 56, 19 L. ed. 370, 375; Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; Curran v. Arkansas, 15 How. 304, 320, 14 L. ed. 705, 712.

(b) It is sufficient if it appears from the opinion of the state court that the Federal question was passed upon, even though that does not appear elsewhere in the record.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 116, 30 L. ed. 342, 345, 7 Sup. Ct. Rep. 108; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34.

(c) Any doubt may be resolved by a certificate of the state court, signed by its presiding justice, or by the recitals in the remittitur.

Assuming that the judgment was affirmed upon the ground stated by relator's counsel, it remains that it is for this court to determine for itself as to the existence and meaning of the alleged contract, in order to determine the question whether the subsequent legislation has impaired the obligations thereof.

Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 406, 46 L. ed. 1219, 1223, 22 Sup. Ct. Rep. 866; Muhlker v. New York & H. R. Co. 197 U. S. 544, 570, 49 L. ed. 872, 877, 25 Sup. Ct. Rep. 522; Sullivan v. Texas, 207 U. S. 416, 423, 52 L. ed. 274, 277, 28 Sup. Ct. Rep. 215; Douglas v. Ken-

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showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to Home for Incurables v. New York, 63 L.R.A. 329.

As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers' & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

On privilege of using streets as a contract within the constitutional provisions against impairing the obligation of contracts—see note to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142.

tucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199.

By reversing its own construction of the relator's contract, the state of New York has impaired the obligation of the contract of the relator with the city and state.

Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Louisiana v. Pilsbury, 105 U. S. 278, 294, 26 L. ed. 1090, 1095.

If there was any forfeiture which the state, and the city, as its agent, could waive, then, we submit, they did so waive it.

Peck v. Burr, 10 N. Y. 294; Los Angeles v. Los Angeles City Water Co. 177 U. S. 570, 576, 44 L. ed. 892, 894, 20 Sup. Ct. Rep. 736; Atty. Gen. v. Petersburg & R. R. Co. 28 N. C. (6 Ired. L.) 456; Commercial Electric Light & P. Co. v. Tacoma, 17 Wash. 670, 50 Pac. 592; Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117; 2 Cooley, Taxn. p. 1521; 2 Cook, Corp. § 634; Joyce, Electric Law, § 210; Angell & A. Corp. §§ 776, 777, 803–806; American Emigrant Co. v. Iowa R. Land Co. 52 Iowa, 323, 3 N. W. 88; Audubon Co. v. American Emigrant Co. 40 Iowa, 460; Simplot v. Dubuque, 49 Iowa, 630; Adams County v. Burlington & M. R. Co. 39 Iowa, 507; Brandirff v. Harrison County, 50 Iowa, 164.

Mr. **Edmund L. Mooney** argued the cause, and, with Messrs. Charles T. Russell and Frederick A. Card, filed a brief for defendant in error:

That the repugnancy of the revoking resolution of the board of estimate to the Constitution of the United States is the only possible Federal question involved is apparent from the fact that its repugnancy to the Constitution or laws of the state of New York would not raise or present a Federal question.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639.

Unless the face of the record shows that a Federal question was raised and was necessarily involved, this court will not look into the opinion, but will dismiss the appeal.

Moore v. Mississippi, 17 Wall. 636, 22 L. ed. 653; Citizens' Bank v. Board of Liquidation, 98 U. S. 140, 25 L. ed. 114; Otis v. Oregon S. S. Co. 116 U. S. 548, 29 L. ed. 719, 6 Sup. Ct. Rep. 523.

In order to be considered by this court, the Federal question must have been raised in the state court before its decision of the cause.

Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617.

The record must show either expressly or by necessary intendment that the Federal question was raised in the state court.

The Victory, 6 Wall. 382, 18 L. ed. 848; New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916; Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

Also that the state court knew or ought to have known that the validity of the state law was challenged as repugnant to the Constitution or the laws of the United States.

Endowment Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

Upon the record, it appears that the alleged repugnancy of the revoking resolution to the Constitution of the United States was first raised in the assignment of errors on the application for the writ of error to review the judgment of the court of appeals. That was too late.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

From the opinion as a whole, and reasonably considered, all that the court did or intended to do, apparently was to determine the scope and validity of the resolution of revocation under the Constitution and laws of the state of New York, and not in reference to the laws or Constitution of the United States. The statement in the moving papers for the mandamus that the resolution of the board of aldermen of 1883 was irrevocable did not necessarily refer to this effect under the Constitution of the United States, but that statement, as well as the decision of the court as to its revocability, might and did properly refer to the state law and Constitution.

Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Seeberger v. McCormick, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

If it be considered that a Federal question was raised and decided, its decision was not necessary; and, hence, this court has no jurisdiction to review the judgment.

Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 295, 35 L. ed. 193, 194, 11 Sup. Ct. Rep. 528; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L.

ed. 415, 21 Sup. Ct. Rep. 256; Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639.

Where the statute provides that a corporation may use the streets of a city upon the consent of the municipal authorities, a consent so granted does not become a contract until the corporation has begun to do the thing required.

Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. Rep. 866, affirming 42 Fla. 462, 28 So. 810.

Such a permission would only become irrevocable provided it were acted upon by the person or corporation to whom it was given.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Postal Teleg. Cable Co. v. Baltimore, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356; Galveston City R. Co. v. Galveston City Street R. Co. 63 Tex. 529; Chicago City R. Co. v. People, 73 Ill. 541; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 103, 37 L. ed. 380, 385, 13 Sup. Ct. Rep. 485; Harshman v. Bates County, 92 U. S. 569, 23 L. ed. 747; 3 Kent, Com. *458; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Los Angeles R. Co. v. Los Angeles, 152 Cal. 242, 15 L.R.A.(N.S.) 1272, 125 Am. St. Rep. 54, 92 Pac. 490, affirmed in 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

The permission or secondary franchise was lost by nonuser and abandonment.

Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Delaware, L. & W. R. Co. v. Oswego, 92 App. Div. 555, 86 N. Y. Supp. 1027.

Mr. Alfred B. Cruikshank filed a brief for Clifford L. Middleton as *amicus curiæ:*

The revocation on May 11, 1906, of the aldermanic permit of 1883, by the New York board of estimate and apportionment, cannot be held to be an impairment of any existing contract between the New York Electric Lines Company and the city of New York, because no such contract is established by the record here.

Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; De Haro v. United States, 5 Wall. 599, 18 L. ed. 681.

The proposition that this court will examine for itself the question whether there was in fact a contract which has been impaired by state legislation is modified by the rule which forbids this court to examine disputed questions of fact in the first instance.

Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; Gardner v. Bonestell, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679.

But, assuming that such a contract as is claimed here had been in fact made between the city of New York and the plaintiff in error, and broken by the city, the remedy, under the circumstances, would be for money damages only; it certainly would not be mandamus against the subway company.

Memphis v. Brown, 20 Wall. 289, 22 L. ed. 264.

At no time since the permit was granted could plaintiff have maintained a suit against the city for specific performance of its alleged rights to lay wires in the streets of New York. Such a suit would have been dismissed on the ground that the remedy, if any, was at law for damages on the grounds above stated. And if so, therefore, *a fortiori*, mandamus will surely not lie against this private corporation for the same object. Such a suit would also have been dismissed if brought in 1910, when this proceeding was instituted, on the ground of the gross laches of the plaintiff in error in bringing the same, and because of the change in circumstances since its right, if any, accrued.

Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; United States v. Noe, 23 How. 312, 16 L. ed. 462; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. ed. 955, 3 Mor. Min. Rep 291.

The writ of mandamus is not an appropriate remedy in this case. The writ of mandamus is even farther than a suit for specific performance from being an appropriate remedy for the breach of contract alleged by plaintiff in error here. Mandamus also does not lie where the party aggrieved has another adequate remedy.

The Secretary v. McGarrahan (Cox v. United States) 9 Wall. 298, 19 L. ed. 579; Ex parte Virginia Comrs. (Ex parte Barksdale) 112 U. S. 177, 28 L. ed. 691, 5 Sup. Ct. Rep. 421.

And the writ is only granted where the right is clearly established and the duty peremptory.

United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97.

Grants of public franchises are to be interpreted most strongly against the grantee and in favor of the grantor.

Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 129, 51 L. ed. 399, 405, 27 Sup.

Ct. Rep. 202; Stein v. Bienville Water Supply Co. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; Pennsylvania R. Co. v. Canal Comrs. 21 Pa. 9; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; Joyce, Franchises, § 254.

The license became extinct after being dormant for more than a reasonable time. This permit was not in its terms or in its nature eternal. No time was fixed for performance, but, in the nature of things, like any other license, it was intended to be performed within a reasonable time.

Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410; Hill v. Hill, 113 Mass. 103, 18 Am. Rep. 455; Parsons v. Camp, 11 Conn. 529.

That the licensee may abandon the license by neglect to avail himself of it is well settled.

Curtiss v. Hoyt, 19 Conn. 169, 48 Am. Rep. 149.

By acting for over twenty years as though it had no claim of a franchise to lay wires in the subways the Lines Company abandoned such claim.

Cumberland Teleph. & Teleg. Co. v. Evansville, 74 C. C. A. 368, 143 Fed. 238.

Disuse of a franchise or an easement for a long period constitutes an abandonment thereof.

Henderson v. Central Pass. R. Co. 21 Fed. 358; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Corning v. Gould, 16 Wend. 531; People ex rel. Nelson v. Marsh, 82 App. Div. 571, 81 N. Y. Supp. 579, affirmed in 178 N. Y. 618, 70 N. E. 1107.

A license, whether granted by writing or by parol, may be revoked at any time without formal notice to the licensee, by the doing of any act by the licensor evidencing an election to revoke the license.

Hyde v. Graham, 1 Hurlst. & C. 593, 32 L. J. Exch. N. S. 27, 8 Jur. N. S. 1229, 7 L. T. N. S. 563, 11 Week. Rep. 119; Coleman v. Foster, 1 Hurlst. & N. 37, 4 Week. Rep. 489; Wood v. Ledbitter, 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161, 16 Eng. Rul. Cas. 49; Eckert v. Peters, 55 N. J. Eq. 379, 36 Atl. 491; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Jackson ex dem. Hull v. Babcock, 4 Johns. 418; Cronkhite v. Cronkhite, 94 N. Y. 323; Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Wilson v. St. Paul, M. & M. R. Co. 41 Minn. 56, 4 L.R.A. 378, 42 N. W. 600; Kamphouse v. Gaffner, 73 Ill. 453, 2 Mor. Min. Rep. 257; Eggleston v. New York & H. R. Co. 35 Barb. 162; Bruley v. Garvin, 105 Wis. 625, 48 L.R.A. 839, 81 N. W. 1038; Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble, 112 Mich. 4, 70 N. W. 319; Taylor v. Gerrish, 59 N. H. 569.

The relator, Lines Company, tacitly and openly acquiesced in the virtual annulment by the governmental establishment of the subway system in 1886 of any claim it might otherwise have had to lay or operate telephonic wires in the city subways. The city and state authorities having by the governmental establishment of the subway system in 1885 and 1886 assumed to annul or revoke all outstanding permits for laying wires, such action became binding on the plaintiff in error long before 1910, when it began this proceeding, because of its failure to protest and its apparent acquiescence.

Gregg v. Von Phul, 1 Wall. 274, 17 L. ed. 536.

This whole controversy was passed upon in this court and in the New York state courts long prior to this proceeding, and decisions were rendered adverse to the New York Electric Lines Company both in New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880, and in People ex rel. New York Electric Lines Co. v. Ellison, 188 N. Y. 523, 81 N. E. 447.

See also, Griffin v. Long Island R. Co. 102 N. Y. 449, 55 Am. Rep. 824, 7 N. E. 735; Lorillard v. Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470, 25 N. E. 292; Stockton v. Ford, 18 How. 418, 15 L. ed. 395; Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650; Beloit v. Morgan, 7 Wall. 619, 19 L. ed. 205; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

The questions attempted to be raised upon this writ of error were not necessarily controlling in the state courts, and the decision may have gone against the plaintiff in error on other questions besides the Federal question which it attempts to present here.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

Mr. Justice Hughes delivered the opinion of the court:

This is a writ of error to review the denial by the state court of an application for a writ of peremptory mandamus directing the Empire City Subway Company (Limited) to lease space in its conduits in the city of New York to the plaintiff in error.

In the year 1884, the legislature of the state of New York required that "all telegraph, telephonic, and electric light wires" in certain cities—New York and Brooklyn—should be placed under the surface of the streets (Laws of 1884, chap. 534). Under the authority of a statute passed in the next year (Laws of 1885, chap. 499,

amended by Laws of 1886, chap. 503), the board of commissioners of electric subways adopted a plan by which the city of New York should enter into a contract with a company to construct the necessary subways, etc., which other companies operating electrical wires should be compelled to use, paying therefor a reasonable rent. Under contracts made accordingly and ratified by the legislature (Laws of 1887, chap. 716), subways, etc., were constructed by the Consolidated Telegraph & Electrical Subway Company. The board first mentioned was succeeded by the board of electrical control (Laws of 1887, chap. 716); and, in 1890, the subways, conduits, and ducts for low tension conductors, which had been thus provided, were transferred to the Empire City Subway Company (Limited), the defendant [186] in error. The latter company, by contract with the board and the city, made in 1891, under legislative authority (Laws of 1891, chap. 231), agreed to build, maintain, and operate subways, etc., as specified—it being provided that spaces therein, upon application, should be leased "to any company or corporation having lawful power to operate telegraph or telephone conductors in any street" in the city of New York.

The plaintiff in error, the New York Electric Lines Company, claiming to be entitled to space in these subways, made application therefor on or about June 10, 1910. The request was refused and the present proceeding for a peremptory mandamus was brought. The assertion of right rested upon a permission granted by the city of New York, through its common council, to the plaintiff in error, on April 10, 1883, to lay electrical conductors in the city's streets. This permission, the city, by its board of estimate and apportionment, which had succeeded to the powers of the former common council in the matter, had formally revoked by a resolution adopted on May 11, 1906, reciting that whatever rights the company had secured under the permission in question had long since been forfeited by nonuser. The court of appeals of the state, holding that the board of estimate and apportionment had this power of revocation, and had duly exercised it, affirmed an order refusing the writ of mandamus. 201 N. Y. 321, L.R.A.1915, —, 94 N. E. 1056. The plaintiff in error insists that the resolution thus sustained was an unconstitutional impairment of the obligation of its contract with the city.

We think that it sufficiently appears that this question was raised in the state court, and as the state court gave effect to the repealing resolution the case is properly here. It is therefore the duty of this court to determine for itself whether a contract existed and whether its obligation has been impaired. Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; [187] St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 551, 57 L. ed. 633, 638, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 556, 58 L. ed. 721, 725, 34 Sup. Ct. Rep. 364; Louisiana R. & Nav. Co. v. Behrman [235 U. S. 164, ante, 175, 35 Sup. Ct. Rep. 62].

The plaintiff in error was incorporated in the year 1882, under a general law of the state of New York (Laws of 1848, chap. 265, as amended by Laws of 1853, chap. 471). Its certificate of incorporation stated, among other things, that it was incorporated for the purpose of "owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements of the streets . . . of the cities of New York and Brooklyn," and "for the purpose of owning franchises for laying and operating the said lines of electric conductors." Chapter 483 of the Laws of 1881 had authorized any company so incorporated "to construct and lay lines of electrical conductors underground in any city," provided that it "first obtain from the common council" of such city the "permission to use the streets" for the purposes set forth. The permission in question, which, as already stated, was granted by the common council of the city of New York, on April 10, 1883, was (omitting parts not here material) as follows:

"Resolved, that permission be and hereby is granted to the New York Electric Lines Company, to lay wires or other conductors of electricity, in and through the streets, avenues, and highways of New York city, and to make connections of such wires or conductors underground by means of the necessary vaults, test boxes, and distributing conduits, and thence above ground with points of electric illuminations or of telegraphic or telephone signals in accordance with the provisions of an ordinance . . . approved . . . December 14, 1878."

It was also resolved that the company should not [188] "transfer or dispose of the franchise hereby granted without the further authority of the common council."

On April 24, 1883, the plaintiff in error presented to the common council, and the latter spread upon its minutes, a formal

acceptance of the permission, which, after the recitals, states:

"Now, therefore, the said New York Electric Lines Company by these presents accepts the said franchise as contained in the ordinance and resolutions adopted by the honorable the board of aldermen, April 10, 1883, and agrees to, assumes, and obligates itself in the observance of all the requirements, provisions, restrictions, conditions, and limitations contained in the said last-mentioned ordinance as adopted April 10, 1883, as well also as to the provisions, conditions, and obligations of said general ordinance approved by the mayor December 14th, 1878."

The ordinance of 1878, referred to, regulated the method of laying wires under the streets, and provided that within six months after the grant of permission, grantees should file with the county clerk "maps, diagrams, and tabular statements indicating the amount and position of the spaces proposed to be occupied by them." In May, 1883, the plaintiff in error, in asserted compliance with the ordinance, filed a map, diagrams, and statement. It is alleged in the affidavits presented on the application for mandamus that the plaintiff in error secured inventions and patent rights, that it had an office and factory, that it prosecuted experimental work in relation to its project, and expended in this way large sums of money. But, in the actual construction of conduits or laying of wires, nothing was done prior to the legislation of 1885 and 1886, which, as we have seen, provided for a comprehensive plan for the building of subways in which electrical conductors should be placed.

Section 3 of the act of 1885 expressly made it obligatory upon any company "operating or intending to operate electrical [189] conductors," and desiring or being required to place its conductors underground, to file with the board of commissioners a "map or maps, made to scale," showing the proposed plan of construction of its underground electrical system, and "to obtain the approval by said board of said plan" before any underground conduits should be constructed. The plaintiff in error did not submit a plan to the board as required by the statute. In July, 1886, it applied to the commissioner of public works for a permit to make the necessary excavations in the streets for the purpose of laying conductors, and, on the application being denied, petitioned for a writ of peremptory mandamus to direct the commissioner to grant it. It was insisted in its petition in that proceeding that it had "never operated or intended to operate electrical conductors," its intention having always been "to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any" of them; that the acts of 1885 and 1886 (above mentioned), relating to the construction of subways, did not apply to the plaintiff in error; and that, if they were applicable, they violated the Federal Constitution, being an impairment of its contract with the city, and operating to deprive the plaintiff in error of its property without due process of law. The state court held that the statutes in question were applicable to the plaintiff in error, and were constitutional, and refused the mandamus. People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820.

This court affirmed the judgment (id. 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880), saying (pp. 187, 188):

"In no sense of the term do we think it can be safely averred that the acts of 1885 and 1886 are not applicable to the relator. . . . Neither can it be said that the acts of 1885 and 1886 have a retroactive effect, at least, so far as the relator is concerned, since whatever rights it obtained under the ordinance of 1883, which it accepted [190] as the basis of the contract it claims to have entered into, were expressly subject to regulation, in their use, by the highest legislative power in the state, acting for the benefit of all interests affected by those rights, and for the benefit of the public generally, so long as the relator's essential rights were not impaired or invaded. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Stein v. Bienville Water Supply Co. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892."

And conceding, for the purpose of the discussion, but "without deciding," that the plaintiff in error had a contract with the city "for the laying of its wires, and the construction of its underground electrical system," this court reached the conclusion that its rights had in no way been impaired by the legislation under review.

This decision was rendered in May, 1892. Meanwhile, pursuant to the statutes above mentioned, a plan of construction had been adopted by the board charged with that duty, subways had been built, and the defendant in error had entered into its contract to maintain and operate those for low tension conductors, as specified, including telegraph and telephone conductors. But for fifteen years after the final decision in the case cited no application was made by the plaintiff in error for space in these subways. The first application for

such space was made in June, 1907, and was not granted.

Nor, during this long period, was any attempt made by the plaintiff in error either to build conduits or to place wires under the city's streets, save that in December, 1905, it applied to the commissioner of water supply, gas, and electricity for a permit to open the streets for that purpose, and, on its being denied, a proceeding was begun to obtain a peremptory writ of mandamus. This was refused, and the order to that effect was affirmed by the court of appeals of the state. People ex rel. New York Electric Lines Co. v. Ellison, 188 N. Y. 523, 81 N. E. 447. The pertinent legislation and the subway contracts were reviewed, and [191] the requirement that electrical conductors should be placed in conduits constructed in accordance with the adopted plan, instead of the plaintiff in error being permitted to build its own subways for such conductors, was sustained. In arriving at this result, it was again assumed that the plaintiff in error had a continuing right under the city's permission, but this question was expressly reserved (id. p. 527). A writ of error sued out from this court was dismissed on motion of the plaintiff in error. 214 U. S. 529, 53 L. ed. 1069, 29 Sup. Ct. Rep. 695.

It was about the time when the last-mentioned proceeding was instituted that the city's permission was revoked (May 11, 1906); and the state court, in its opinion in the present case, said that the question "remaining to be determined" was whether "the relator, under the resolution of the common council of April, 1883, has the right, as a matter of law, to have its wires inserted in the ducts of the Empire City Subway Company, notwithstanding the revocation of such resolution." Did a "bare acceptance" of the permission operate to vest an irrevocable franchise? 201 N. Y. p. 329, L.R.A.1915, —, 94 N. E. 1056. This question was answered in the negative in the view that such a permission is "a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed," as contemplated by the permission, "sufficient to create a right of property and thus form a consideration for the contract."

The plaintiff in error challenges this view, insisting that, by virtue of the city's permission, it is the grantee of an irrevocable franchise in the city's streets; that this franchise was derived from the state; that when the consent of the city was given, as provided in the statute, the grant became immediately operative and could not thereafter be revoked or impaired by municipal resolution or ordinance; that the granted right, however named, is property,—and, as such, is inviolable; and that this position is [192] supported by numerous decisions both of the state court and of this court, which are cited in the margin.[1] Thus, in Ghee v. Northern Union Gas Co. 158 N. Y. 510, 513, 53 N. E. 692, referring to the legal effect of the consent of the municipal authorities under a statute empowering the corporation to lay gas conduits in streets, on such consent, the court said: "It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the state, but the act of the local authorities, who represent the state by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise." And in Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 659, 56 L. ed. 934, 938, 32 Sup. Ct. Rep. 572, where a corporation was authorized to erect poles, etc., over the streets with the consent of the general council of the city, it was held that the charter franchises became "fully operative" when the city's consent

[1] Milhau v. Sharp, 27 N. Y. 611, 620, 84 Am. Dec. 314; People v. O'Brien, 111 N. Y. 1, 38, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 520, 28 N. E. 525; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 532, 47 N. E. 787; Ghee v. Northern Union Gas Co. 158 N. Y. 510, 513, 53 N. E. 692; Rochester v. Rochester R. Co. 182 N. Y. 99, 119, 70 L.R.A. 773, 74 N. E. 953; New York v. Bryan, 196 N. Y. 158, 164, 165, 89 N. E. 467; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 660, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 680, 681, 29 L. ed. 525, 527, 528, 6 Sup. Ct. Rep. 273; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 394, 46 L. ed. 592, 610, 22 Sup. Ct. Rep. 410; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 658, 663, 56 L. ed. 934, 938, 940, 32 Sup. Ct. Rep. 572; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 552, 57 L. ed. 633, 639, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 65, 57 L. ed. 1389, 1393, 33 Sup. Ct. Rep. 988; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 90, 91, 57 L. ed. 1400, 1406, 1407, 33 Sup. Ct. Rep. 997; Russell v. Sebastian, 233 U. S. 195, 204, 58 L. ed. 912, 921, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282.

was obtained. "Such a street franchise has been called by various names,—an incorporeal hereditament, an interest in land, an easement, a right of way,—but, howsoever designated, it is property." Id. p. 661. Again, in the recent case of Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 65, 57 L. ed. 1389, 1393, 33 Sup. Ct. Rep. 988, it was said: "That an [193] ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases." See also Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 91, 57 L. ed. 1400, 1406, 33 Sup. Ct. Rep. 997. These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfil the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise, when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities,—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made, and there was nothing but a license, which might be withdrawn at pleasure. Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 74, 18 L. ed. 137, 142; Pearsall v. Great Northern R. Co. 161 U. S. 646, 663, 667, 40 L. ed. 838, 844, 845, 16 Sup. Ct. Rep. 705. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance. The case of Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. Rep. 866, to which the defendant in error refers, is not opposed. There the complainant, upon the ground of an exclusive privilege, sought to enjoin a municipality from operating its own electric light plant; although ten years had elapsed since the complainant's grant, the complainant had done nothing whatever to establish an electric light business, and under the [194] express terms of the statute the exclusive privilege had not attached (id. p. 410).

But, while the grant becomes effective when made and accepted in accordance with the statute, and the grantee is thus protected in starting the enterprise, it has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent, or that the grantee is duly proceeding to perform. And when it is said that there is vested an *indefeasible* interest, easement, or contract right, it is plainly meant to refer to a franchise not only granted, but exercised in conformity with the grant. (See cases cited supra.) It is a tacit condition annexed to grants of franchises that they may be lost by misuser or nonuser. Terrett v. Taylor, 9 Cranch, 43, 51, 3 L. ed. 650, 653; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 580, 28 L. ed. 1084, 1087, 5 Sup. Ct. Rep. 681; Given v. Wright, 117 U. S. 648, 656, 29 L. ed. 1021, 1024, 6 Sup. Ct. Rep. 907. The condition thus implied is, of course, a condition subsequent. The same principle is applicable when a municipality under legislative authority gives the permission which brings the franchise into being; there is necessarily implied the condition of user. The conception of the permission as giving rise to a right of property in no way involves the notion that the exercise of the franchise may be held in abeyance for an indefinite time, and that the right may thus be treated as a permanent lien upon the public streets, to be enforced for the advantage of the owner at any time, however distant. Although the franchise is property, "it is subject to defeasance or forfeiture by failure to exercise it (People v. Broadway R. Co. 126 N. Y. 29, 26 N. E. 961), or by subsequent abandonment after it has been exercised (People v. Albany & V. R. Co. 24 N. Y. 261, 82 Am. Dec. 295)." If "no time is prescribed, the [195] franchise must be exercised within a reasonable time." New York v. Bryan, 196 N. Y. 158, 164, 89 N. E. 467.

It follows that where the franchise has not been exercised within a reasonable time in accordance with the condition which inheres in the nature of the grant, its revocation upon this ground cannot be regarded as an impairment of contractual obligation. The privileges conferred may be withdrawn by such methods of procedure as are consistent with established legal

principles. This rule, frequently recognized in cases where franchises have been abused or misemployed (see Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 580, 28 L. ed. 1084, 1087, 5 Sup. Ct. Rep. 681; Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 156, 179, 33 L. ed. 573, 582, 10 Sup. Ct. Rep. 316; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 347, 46 L. ed. 936, 942, 22 Sup. Ct. Rep. 691; Columbus v. Mercantile Trust & D. Co. 218 U. S. 645, 663, 54 L. ed. 1193, 1199, 31 Sup. Ct. Rep. 105; Dill. Mun. Corp. 5th ed. § 1311), must also be applicable where they have been neglected, that is, have not been used in due time. Whether in such cases, where there has been a municipal permission for use of streets, the state shall proceed directly by quo warranto, or whether it shall authorize the municipality to pass a resolution or ordinance of repeal or revocation, leaving the propriety of its course to be determined in an appropriate legal proceeding in which the default of the grantee may be adjudicated, is a question of state law with which we are not concerned. The resolution in such case serves to define the attitude of the public authorities, and to revoke the permission where sufficient ground exists for such revocation. Whether there has been such a misuse or nonexercise of the franchise as to warrant its withdrawal is a matter for judicial consideration.

In the present case, the plaintiff in error, insisting upon its continuing right, despite the resolution of revocation, applied for a peremptory writ of mandamus to compel the Subway Company—a quasi public instrumentality—to furnish the desired space in its conduits. It had been [196] held by the state court that this was an available remedy where a company had "lawful power" to operate its conductors in the city's streets, and had been denied the space which the Subway Company by its contract with the city had agreed to give. Re Long Acre Electric Light & P. Co. 188 N. Y. 361, 80 N. E. 1101. The question of "lawful power" of the plaintiff in error was considered and the application refused. It is true that it was stated that there was a license only which, by reason of nonperformance, had not ripened into a contract right, but it is equally true that the nonperformance shown was available to defeat that right, assuming it to have been created at the time of the grant, and to make the resolution of revocation—which the state court has held was adopted under state authority—entirely proper.

For a long period of years after the final determination of the validity of the statutes authorizing a comprehensive scheme of subway construction, and after the contract with the Subway Company had been made, the plaintiff in error made no attempt to secure space and to exercise the franchise now claimed. It treated that right as susceptible of practically indefinite retention unused. In the circumstances disclosed, its excuses are unavailing. The right conferred, assuming it to be a contract right, was to be used within a reasonable time or lost. In view of the state of the case as to nonexercise, it cannot be said that its constitutional right has been infringed.

Judgment affirmed.

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[197] SIOUX REMEDY COMPANY, Plff. in Err.,

v.

F. M. COPE and D. C. Cope.

(See S. C. Reporter's ed. 197-205.)

Commerce — state regulation — foreign corporations — interstate sales — enforcing payment.

1. The right of a foreign corporation to demand and enforce payment for goods sold in interstate commerce, if not a part of such commerce, is so directly connected with it, and is so essential to its existence and continuance, that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden on interstate commerce.

[For other cases, see Commerce, IV., in Digest Sup. Ct. 1908.]

Commerce — state regulation — foreign corporations — interstate sales — enforcing payment.

2. Interstate commerce is unconstitutionally burdened by the provisions of S. D. Rev. Codes 1903, §§ 883, 885, under which, as construed by the highest state court, the right of a foreign corporation to enforce payment in a South Dakota court of the purchase price of merchandise which the corporation has lawfully sold within the state in interstate commerce is condi-

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NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On recognition or exclusion of foreign corporations—see note to Cone Export & Commission Co. v. Poole, 24 L.R.A. 289.

On exclusion of foreign corporation as interference with interstate commerce—see note to Kindel v. Beck & P. Lithographing Co. 24 L.R.A. 311.

On enforceability in Federal court of contract made by a foreign corporation which had not complied with the conditions of doing business within the state—see note to David Lupton's Sons Co. v. Automobile Club, 56 L. ed. U. S. 1177.

tioned upon compliance with the requirements of those sections that a foreign corporation, before it can sue in the local courts, must first appoint a resident agent upon whom process may be served in any action against it, and must file a copy of such appointment and a copy of its charter, and pay the incidental filing and recording fees.

[For other cases, see Commerce, IV., in Digest Sup. Ct. 1908.]

[No. 37.]

Submitted March 13, 1914. Decided November 30, 1914.

IN ERROR to the Circuit Court of Turner County, in the State of South Dakota, to review a judgment affirmed by the Supreme Court of the state, dismissing an action by a foreign corporation to enforce payment of the purchase price of merchandise sold in interstate commerce. Reversed and remanded for further proceedings.

See same case below, 28 S. D. 397, 133 N. W. 683.

The facts are stated in the opinion.

Messrs. **Joe Kirby, C. E. More, and A. W. Bulkley** submitted the cause for plaintiff in error:

The state of South Dakota cannot deny that the plaintiff in error had the right to sue in its courts, because the denial of such a right is an interference with and a burden upon interstate commerce.

International Texbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Wilson-Moline Buggy Co. v. Hawkins, 223 U. S. 713, 56 L. ed. 625, 32 Sup. Ct. Rep. 520; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216; Hunter W. Finch & Co. v. Zenith Furnace Co. 245 Ill. 586, 92 N. E. 521; Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, 137 Am. St. Rep. 322, 92 N. E. 248; Alpena Portland Cement Co. v. Jenkins & R. Co. 244 Ill. 354, 91 N. E. 480; Frank Simpson Fruit Co. v. Atchison, T. & S. F. R. Co. 245 Ill. 596, 92 N. E. 524; Havens & G. Co. v. Diamond, 93 Ill. App. 557; Cone Export & Commission Co. v. Poole, 41 S. C. 70, 24 L.R.A. 289, 19 S. E. 203; M. B. Faxon Co. v. Lovett Co. 60 N. J. L. 128, 36 Atl. 692; George R. Barse Live Stock Co. v. Range Valley Cattle Co. 16 Utah, 59, 50 Pac. 630; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Woessner v. H. T. Cottam & Co. 19 Tex. Civ. App. 611, 47 S. W. 678; L. Miller & Co. v. Goodman, 91 Tex. 41, 40 S. W. 718; Christian v. American Freehold Land Mortg. Co. 89 Ala. 198, 7 So. 427; United States Gypsum Co. v. Gleason, 135 Wis. 539, 17 L.R.A.(N.S.) 906, 116 N. W. 238; Iowa Falls Mfg. Co. v. Farrar, 19 S. D. 632, 104 N. W. 449; Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989.

A traveling salesman for a foreign corporation, engaged in soliciting orders, is not doing business in the state.

Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Stratford v. Montgomery, 110 Ala. 619, 20 So. 127; Wrought Iron Range Co. v. Campen, 135 N. C. 506, 47 S. E. 658; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Dixie Cotton Felt Mattress Co. v. Stearns & F. Co. 107 C. C. A. 501, 185 Fed. 431; Ex parte Massey, — Tex. Crim. Rep. —, 92 S. W. 1083; Re Kinyon, 9 Idaho, 642, 75 Pac. 268, 2 Ann. Cas. 699; Menke v. State, 70 Neb. 669, 97 N. W. 1020; Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616; Gunn v. White Sewing Mach. Co. 57 Ark. 24, 18 L.R.A. 206, 4 Inters. Com. Rep. 309, 38 Am. St. Rep. 223, 20 S. W. 591; Bruner v. Kansas Moline Plow Co. 7 Ind. Terr. 506, 104 S. W. 816; Flint & W. Mfg. Co. v. McDonald, 21 S. D. 526, 14 L.R.A.(N.S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684; Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844; Elwell v. Adder Mach. Co. 136 Wis. 82, 116 N. W. 882; Craig v. A. Leschen & Sons Rope Co. 38 Colo. 115, 87 Pac. 1143; Underwood Typewriter Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664; Three States Buggy & Implement Co. v. Com. 32 Ky. L. Rep. 385, 105 S. W. 971; W. B. Mearshon & Co. v. Pottsville Lumber Co. 187 Pa. 12, 67 Am. St. Rep. 560, 40 Atl. 1019; Coit & Co. v. Sutton, 102 Mich. 324, 25 L.R.A. 819, 4 Inters. Com. Rep. 768, 60 N. W. 690; S. A. Maxwell & Co. v. Edens, 65 Mo. App. 439; Toledo Commercial Co. v. Glen Mfg. Co. 55 Ohio St. 217, 45 N. E. 197; Milan Mill. & Mfg. Co. v. Gorten, 93 Tenn. 590, 26 L.R.A. 135, 4 Inters. Com. Rep. 851, 27 S. W. 971; Beard v. Union & American Pub. Co. 71 Ala. 60; Havens & G. Co. v. Diamond, 93 Ill. App.

557; Brunswick-Balke-Collender Co. v. Kraus, 132 Mo. App. 328, 112 S. W. 20; H. K. Mulford Co. v. Curry, — Cal. —, 125 Pac. 236.

Selling goods in bulk, original packages, or articles is protected by the commerce clause of the Federal Constitution.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Wrought Iron Range Co. v. Campen, 135 N. C. 506, 47 S. E. 658; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Stratford v. Montgomery, 110 Ala. 619, 20 So. 127; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

The keeping of an office in the state for the purpose of transacting business of a foreign corporation, which is merely incidental, is not doing business in the state.

Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; McCall v. California, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Texas & P. R. Co. v. Davis, — Tex. Civ. App. —, 54 S. W. 381.

Consigning goods to a dealer or representative in another state is not doing business in a foreign state.

Allen v. Tyson-Jones Buggy Co. 91 Tex. 22, 40 S. W. 393, 714; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1, 212 U. S. 577, 53 L. ed. 658, 29 Sup. Ct. Rep. 686; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Stratford v. Montgomery, 110 Ala. 619, 20 So. 127; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649.

Even in the state of Kansas, upon whose decisions and laws the supreme court of South Dakota relies for support of the decision in the case at bar, it has been held that a foreign corporation may maintain a suit on a transaction which might occur while it was doing business in the state, suit being brought after it had withdrawn from the state, or upon a note taken by assignment from some third party, and suit maintained in the name of the foreign corporation. Such is the rule in:

Boggs v. O. S. Kelley Mfg. Co. 76 Kan. 9, 15 L.R.A.(N.S.) 461, 90 Pac. 765; Dempster Mill Mfg. Co. v. Falkenberg, 78 Kan. 212, 95 Pac. 1045; Standard Stock Food Co. v. Jasper, 76 Kan. 926, 92 Pac. 1094.

Messrs. Charles O. Bailey and John H. Voorhees submitted the cause for defendants in error. Messrs. Alan Bogue, Jr., Andrew S. Bogue, Peter G. Honegger, and Theodore M. Bailey were on the brief:

An action to recover a judgment on a claim for the value or purchase price of merchandise sold in an interstate commerce transaction is not a transaction in interstate commerce, or a part of a transaction in interstate commerce, or a matter or subject of such commerce.

Judson, Interstate Commerce, 2d ed. § 8, p. 15; Nelms v. Edinburg-American Land Mortg. Co. 92 Ala. 157, 9 So. 141.

Clearly, it is in the power of the state of South Dakota to exact from the plaintiff the compliance with the reasonable requirements of its foreign corporation laws before according to the plaintiff the use of its courts to enforce its contracts entered into within the state of South Dakota, or to secure a judgment for the value of goods which may have been sold and shipped in interstate commerce under such contracts.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992.

The statute is valid though it may affect interstate commerce.

State Tax on R. Gross Receipts, 15 Wall. 284, 293, 21 L. ed. 164, 167; Ashley v. Ryan, 153 U. S. 436, 444, 38 L. ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206; David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 56 L. ed. 1177, 32 Sup. Ct. Rep. 711, Ann. Cas. 1914A, 699; Mahar v. Harrington Park Villa Sites, 204 N. Y. 231, 38 L.R.A.(N.S.) 210, 97 N. E. 587; Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; Johnson v. New York Breweries Co. 101 C. C. A. 639, 178 Fed. 513; Flint & W. Mfg. Co. v. McDonald, 21 S. D. 526, 14 L.R.A.(N.S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684; United States Fidelity & G. Co. v. Kentucky, 231 U. S. 394, 58 L. ed. 283, 34 Sup. Ct. Rep. 122; New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. Rep. 167.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is an action by an Iowa corporation to enforce payment of the purchase price, amounting to $80, of merchandise sold in interstate commerce under a written contract which was made in South Dakota, and required that the merchandise be shipped by the plaintiff from its place of business in Iowa to the defendants at their place of business and residence in South Dakota. The action was brought in a court of the latter state, and the defendants interposed a plea to the effect that the action could not be maintained because, as was the fact, the plaintiff had not complied with a South Dakota statute prescribing conditions upon which corporations of other states would be permitted to sue in the courts of that state. The plea was sustained and the action dismissed. An appeal to the supreme court of the state resulted in a judgment of [**200**] affirmance,[1] from which one member of the court dissented. 28 S. D. 397, 133 N. W. 683.

In that court it was contended that the statute upon which the plea was grounded is, when applied in a case like this, repugnant to the commerce clause of the Constitution of the United States.

The statute (Rev. Civ. Code 1903) declares (§ 883) that no corporation created under the laws of any other state or territory, for other than religious and charitable purposes, "shall transact any business within this state, or acquire, hold, and dispose of property, real, personal, or mixed, within this state, or sue or maintain any action at law or otherwise in any of the courts of this state," until it shall have filed in the office of the secretary of state an authenticated copy of its charter or articles of incorporation, and also (§ 885) that "no action shall be commenced or maintained in any of the courts of this state by such corporation on any contract, agreement, or transaction made or entered into in this state by such corporation," unless it shall have appointed a resident agent upon whom process may be served in any action to which it may be a party, and shall have filed an authenticated copy of such appointment in the office of the secretary of state and of the register of deeds of the county where the agent resides. The corporation is also required to pay the fees, amounting to about $25, for filing and recording these instruments.

The supreme court of the state construed the statute as requiring a foreign corporation to subject itself to the jurisdiction of all the courts of the state as a condition to invoking the aid of any one of them, and as embracing [**201**] actions to enforce contracts directly arising out of and connected with interstate commerce equally with actions having no relation to such commerce; and after so construing the statute, the court held it to be a reasonable exercise of the police power of the state and in no wise repugnant to the commerce clause of the Constitution of the United States. In two earlier cases the court had taken a different view of the statute (Rex Buggy Co. v. Dinneen, 23 S. D. 474, 122 N. W. 433; Sioux Remedy Co. v. Lindgren, 27 S. D. 123, 130 N. W. 49), but in the opinion rendered in this case they were disapproved.

Recognizing that it was within the province of the supreme court of the state to construe the statute, and to depart from prior decisions upon the subject, if deemed untenable, we accept the construction applied in this case, and confine our attention to the Federal question whether, as so construed, the statute, by its necessary operation, materially or directly burdens interstate commerce.

Through a long series of decisions dealing with the scope and effect of the commerce clause it has come to be well settled that a state, while possessing power to adopt reasonable measures to promote and protect the health, safety, morals, and welfare of its people, even though interstate commerce be incidentally or indirectly affected, has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or, by the imposition of conditions, to fetter their right to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection. Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 401, 402, 410, 57 L. ed. 1511, 1542, 1543, 1546, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, and cases cited; Barrett v. New York, 232 U. S. 14, 31, 58 L. ed. 483, 490, 34 Sup. Ct. Rep. 203, and cases cited. And so the solution of the question here presented lies within narrow lines.

The contract and sale out of which the action arose [**202**] were transactions in inter-

[1] At the time of the allowance of the present writ of error the record had been sent to the circuit court of Turner county, and so the writ was directed to that court. See Gelston v. Hoyt, 3 Wheat. 246, 304, 4 L. ed. 381, 396; Atherton v. Fowler, 91 U. S. 143, 146-149, 23 L. ed. 265-267; Polleys v. Black River Improv. Co. 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

state commerce, and entirely legitimate notwithstanding the plaintiff's noncompliance with the state statute. International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41; Flint & W. Mfg. Co. v. McDonald, 21 S. D. 526, 14 L.R.A.(N.S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684. After delivery of the merchandise according to the contract, the plaintiff was lawfully entitled to the purchase price. The defendants were likewise obligated to pay it. And by reason of their refusal the plaintiff had a right of action on the contract. Thus much was recognized by the supreme court of the state and is now conceded by counsel for the defendants. But it was held by that court, and is here contended, that while the state could not make noncompliance with the statute a ground for forbidding or invalidating sales in interstate commerce, it could make such noncompliance a ground for preventing the maintenance of any action in the courts of the state, based upon such a sale; in other words, that the state, although unable to condition the right to make the sale or its validity upon a compliance with the statute, could so condition the right to sue for the purchase price in the courts of the state.

The argument advanced in support of this position is, first, that the right to demand and enforce payment for merchandise sold in interstate commerce is no part of such commerce, and therefore may be encumbered without burdening the latter; second, that a state may impose such conditions as it deems appropriate upon the right of foreign corporations to sue in its courts; and, third, that in any event the conditions imposed by the statute are not unreasonable or burdensome. The supreme court of the state sustained the second and third points and passed the other without comment.

Of the first point it is enough to say that the right to demand and enforce payment for goods sold in interstate commerce, if not a part of such commerce, is so directly [203] connected with it and is so essential to its existence and continuance that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden upon interstate commerce. The form or mode of imposing the conditions is not nearly so important as their necessary and practical operation, for, as was said in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190: "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

It may be conceded in a general way that a state may restrict the right of a foreign corporation to sue in its courts. Bank of Augusta v. Earle, 13 Pet. 519, 589-591, 10 L. ed. 274, 308, 309; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92. And in the same general way it may be conceded that a state may restrict the right of such corporations to engage in business within its limits. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. But the power so to deal with these subjects, like all other state powers, can only be exerted within the limitations which the Constitution of the United States places upon state action. Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 30, 25 L. ed. 989, 992; Blake v. McClung, 172 U. S. 239, 256, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34; Western U. Teleg. Co. v. Kansas, supra, p. 33; Southern R. Co. v. Greene, 216 U. S. 400, 413, 54 L. ed. 536, 540, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247. One of these limitations is that before indicated, arising from the commerce clause, whose operation, as this court has said, is such that a corporation authorized by the state of its creation to engage in interstate commerce "may not be prevented by another state from coming into its limits for all the legitimate [204] purposes of such commerce." Western U. Teleg. Co. v. Kansas, supra, p. 27. We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the states and the commerce itself seriously crippled.

We are thus brought to the question whether the particular conditions imposed by this statute can be sustained when applied to rights of action like that disclosed

in the present case. Without doubt a foreign corporation seeking to enforce such a right in the courts of a state may be required to conform to the prevailing modes of proceeding in those courts, and to submit to the usual rules respecting costs, the giving of security therefor (see Blake v. McClung, 172 U. S. 239, 256, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165), and the like. But incidents of this character commonly attending litigation may be put out of view, for it is with something quite different that we are here concerned. The conditions which the statute imposes are: First, that the company shall file in the office of the secretary of state an authenticated copy of its charter or articles of incorporation; second, that it shall appoint a resident agent upon whom process may be served in any action against it, and shall file a copy of such appointment in the office of the secretary of state and of the register of deeds of the county where the agent resides; and, third, that it shall pay the fees incident to filing and recording these instruments, approximating $25. It will be perceived that these are the conditions upon which many of the states permit foreign corporations to engage in business [205] within their limits when no constitutional limitation is involved; that is, when the character of the business is such that the state is free to exclude such corporations or to admit them upon terms acceptable to it. But here the conditions are sought to be applied in a different way and to a different situation falling within the reach of the commerce clause. Out of this arises the question of their validity. We think the mere statement of the conditions shows that they have no natural or reasonable relation to the right to sue which they are intended to restrict. They have no bearing upon the merits or any question of procedure or costs, are not directed against any abusive use of judicial process, and are plainly onerous. The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the supreme court of the state has said, it requires the corporation to subject itself to the jurisdiction of the courts of the state in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the state by whosoever chooses to sue it there. If one state can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause.

These views require that the judgment be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

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[206] L. S. SKELTON, Plff. in Err.,
v.
WILLIAM H. DILL.

(See S. C. Reporter's ed. 206-210.)

Indian allotments — restrictions on alienation.

The restrictions upon alienation by the heirs of an Indian allottee, made by § 16 of the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), apply only to allotments made to living citizens in their own right, and not to allotments made on behalf of deceased persons, under the authority of § 28 of the original agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), or of §§ 7, 8, of the supplemental agreement, in none of which is there any suggestion of a restriction upon alienation.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 56.]

Submitted November 5, 1914. Decided November 30, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Okfuskee County, in that state, in favor of plaintiff in an action of ejectment. Reversed and remanded for further proceedings.

See same case below, 30 Okla. 278, 119 Pac. 267.

The facts are stated in the opinion.

Messrs. **Charles J. Kappler** and **Charles H. Merillat** submitted the cause for plaintiff in error.

No appearance for defendant in error.

Mr. Justice **Van Devanter** delivered the opinion of the court:

Whether an allotment of lands in the Creek Nation, which was made on behalf of Archie Hamby, a Creek child then deceased, passed the lands to his heirs free from restrictions upon alienation, is the Federal question in this case. The facts out of which the question arises are these: Archie Hamby was born in February, 1900, and

died in [207] July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such in 1895, and his father was a white man, not entitled to enrolment. Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this, by operation of law, vested the title in his heirs. In September, 1905, after the allotment was made, his parents, acting through an attorney in fact, appointed a few days before, executed and delivered to L. S. Skelton a warranty deed for the lands, and in July, 1906, the parents, apparently ignoring the deed to Skelton, executed and delivered to S. M. Wilson a similar deed. Whatever rights Wilson acquired under his deed subsequently passed to William H. Dill.

The action in the court of first instance was in ejectment, and was brought by Dill against Skelton, who had gone into possession under his deed. Dill prevailed and the judgment was affirmed by the supreme court of the state, which held that when the deed to Skelton was made the lands were subject to restrictions upon alienation which rendered the deed void, and that at the time of the deed to Wilson, under which Dill was claiming, the restrictions had been removed, thereby rendering that deed valid. 30 Okla. 278, 119 Pac. 267.

The allotment was made under the act of March 1, 1901, 31 Stat. at L. 861, chap. 676, as modified and supplemented by the act of June 30, 1902, 32 Stat. at L. 500, chap. 1323. These acts embodied and adopted a plan for allotting and distributing the lands and funds of the Creek Nation in severalty among its citizens, and to that end required that an enrolment be made by the Commission to the Five Civilized Tribes of all citizens who were entitled to participate in the allotment and distribution. It being necessary to fix a date [208] as of which the enrolment should be made, the original act provided, in § 28, that the enrolment should embrace all qualified citizens who were living on April 1, 1899, and all children born to such citizens up to and including July 1, 1900, and living on that date. The supplemental act changed the latter date by declaring, in §§ 7 and 8, that the enrolment should include all children born up to and including May 25, 1901. Evidently anticipating that participation in the allotment and distribution might in some instances be cut off by death, Congress made provision for such a contingency. Thus the original act declared, in § 28: "And if any such citizen has died since that time [April 1, 1899], or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs . . . and be allotted and distributed to them accordingly." And the supplemental act provided, in §§ 7 and 8: "And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly."

Both parties are claiming under deeds from the father and mother, so we pass the question of who were the true heirs of the deceased child, observing only that under § 6 of the supplemental act, in the circumstances before stated, the mother was and the father was not a lawful heir.

In immediate connection with the provisions respecting allotments to living citizens in their own right, the original act contained a provision (§ 7) imposing various restrictions upon the alienation of the allotted lands. But, aside from its relation to other parts of the act, that provision need not be noticed, for it was superseded by § 16 of the supplemental act, which reads as follows:

[209] "Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs, before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any encumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. Selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any

reason such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901; but if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done, the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Whether these restrictions were intended to apply only to allotments made to living citizens in their own right, or to apply as well to allotments made on behalf of deceased members, is the question for decision. The supreme court of the state, when passing upon this case, held [210] them applicable to both classes of allotments, but in the later case of Rentie v. McCoy, 35 Okla. 77, 128 Pac. 244, reached the other conclusion, as did also the district court for the eastern district of Oklahoma in Reed v. Welty, 197 Fed. 419. We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of § 16 of the supplemental act lend themselves to that view, but in those sections of both acts which deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate, and reflects a corresponding difference in purpose. In Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right, but not to allotments on behalf of members then deceased. We do not perceive anything in the acts relating to the Creek lands which calls for a different conclusion.

The judgment must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

[211] MINIDOKA & SOUTHWESTERN RAILROAD COMPANY and Utah Construction Company, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 211-219.)

Public lands — rights before patent — grant for railroad right of way — reclamation lands.

Homesteaders without patents, but lawfully in possession of irrigable land in a reclamation area, were empowered to grant a right of way over their settlements to a railway company by U. S. Rev. Stat. § 2288, U. S. Comp. Stat. 1901, p. 1385, which, as amended by the act of March 3, 1905 (33 Stat. at L. 991, chap. 1424, U. S. Comp. Stat. Supp. 1911, p. 592), gives any bona fide settler the right to convey by warranty against his own act any part of his claim for a railway right of way; and such right was not in any way affected by the provisions of the reclamation act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1911, p. 662), that when the Secretary of the Interior determines upon an irrigation project he must define its limits, and "withdraw the irrigable lands therein from all forms of settlement except under the homestead law," and that all settlements therein shall be "subject to the limitations, charges, terms, and conditions" provided in that act to meet the special conditions of lands constituting an irrigation plant.

[For other cases, see Public Lands, I. f, 2, in Digest Sup. Ct. 1908.]

[No. 19.]

Argued October 29 and 30, 1914. Decided November 30, 1914.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which, reversing a decree of the Circuit Court for the District of Idaho, Central Division, held that homesteaders without patents could not grant to a railway company a right of way over land within a reclamation area. Reversed, and decree of Circuit Court affirmed.

See same case below, 111 C. C. A. 323, 190 Fed. 491.

The facts are stated in the opinion.

Messrs. Henry W. Clark and A. A. Hoehling, Jr., argued the cause, and, with Mr. P. L. Williams, filed a brief for appellants:

Lands which have been entered by homestead or other settlers under the public land

NOTE.—As to land grants to railroads, generally—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

laws are not public lands within the meaning of the general right-of-way act.

Bardon v. Northern P. R. Co. 145 U. S. 535, 538, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 856; Barker v. Harvey, 181 U. S. 481, 490, 45 L. ed. 963, 968, 21 Sup. Ct. Rep. 690; Northern Lumber Co. v. O'Brien, 204 U. S. 190, 196, 51 L. ed. 438, 440, 27 Sup. Ct. Rep. 249; United States v. Buchanan, 232 U. S. 73, 58 L. ed. 511, 34 Sup. Ct. Rep. 237; Union P. R. Co. v. Harris, 215 U. S. 386, 54 L. ed. 246, 30 Sup. Ct. Rep. 138; Re Montana C. R. Co. 25 Land Dec. 250; Re Santa Fe, P. & P. R. Co. 22 Land Dec. 685; Re Kern Valley Water Co. 15 Land Dec. 577.

The right of way granted by homestead settlers under the authority of U. S. Rev. Stat. § 2288, U. S. Comp. Stat. 1901, p. 1385, is complete and perfect. The statute itself operates as the consent of the government to subject its interest in the land to the right of way.

Alexander v. Kansas City, Ft. S. & M. R. Co. 138 Mo. 464, 40 S. W. 104; Jamestown & N. R. Co. v. Jones, 7 N. D. 619, 76 N. W. 227; Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568; Dakota C. R. Co. v. Downey, 8 Land Dec. 115; Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636.

Assistant Attorney General Knaebel argued the cause, and, with Mr. W. W. Dyar, filed a brief for appellee:

The act of March 3, 1873, merely authorizes the settler to relinquish in part the privileges which he enjoys under the settlement law; not to convey the title or to impair in any way the interest of the government.

Davis v. Foreman, 14 Land. Dec. 152; Eimer v. Wellsand, 93 Minn. 447, 101 N. W. 612.

As to lands which, like the lands of reclamation projects, are affected by a special public interest, the act of March 3, 1873, if applicable at all, should be construed as a means of securing the consent of the settler to the uses mentioned, but not to permit those uses in the absence of governmental approval.

Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. ed. 264, 271; Scott v. Carew, 196 U. S. 100, 49 L. ed. 403, 25 Sup. Ct. Rep. 193.

Where, as was suggested in Union P. R. Co. v. Harris, 215 U. S. 386, 388, 54 L. ed. 246, 247, 30 Sup. Ct. Rep. 138, it is "apparent either from the context or from the circumstances attending the legislation" that this term "public lands" was meant to include lands subject to private claims, as well as those that are not, the term will have the broader scope, the question being purely one of legislative intention.

See United States v. Blendaur, 63 C. C. A. 636, 128 Fed. 910.

In the right-of-way act the words "public lands" are used in two places. In § 1 a right of way is granted over "the public lands," and in § 3 the territorial legislatures are authorized to provide for the manner in which "private lands and possessory claims on the public lands of the United States" may be condemned. It is beyond question that "possessory claims," as here used, include claims evidenced by entries as well as mere squatter rights.

Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728; Enoch v. Spokane Falls & N. R. Co. 6 Wash. 393, 33 Pac. 966; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; Larsen v. Oregon R. & Nav. Co. 19 Or. 240, 23 Pac. 974.

In Washington & I. R. Co. v. Osborn, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219, this court, construing this act, held that Osborn, a settler on unsurveyed land, who intended at the proper time to claim a pre-emption right, could not be dispossessed by a railroad company without proper compensation. The court, on the authority of Buxton v. Traver, 130 U. S. 232, 235, 32 L. ed. 920, 921, 9 Sup. Ct. Rep. 509, held that the settler, even though he had erected very valuable improvements, had not acquired any right whatever, as against the United States.

[215] Mr. Justice Lamar delivered the opinion of the court:

The Minidoka & Southwestern Railroad Company was authorized by its charter to build its road along a line which ran through the Minidoka Irrigation Project in the state of Idaho. Homesteaders, without patents, but lawfully in possession of irrigable land within the reclamation area, granted rights of way over their settlements to the railroad company.

When the company began to build, the United States sought to enjoin the work on the ground that a railroad could not be built across lands within a reclamation area without the consent of the government. It was also claimed that the necessary embankments, excavations, bridges, and culverts, would interfere with the success of the irrigation works. The company answered and relied on the conveyances from the homesteaders. After a hearing the circuit court denied the injunction, but made provision that the culverts should be so built as not to interfere with the flow of water through the canals and ditches (176 Fed. 762). This decree was reversed by the circuit court of

appeals (111 C. C. A. 323, 190 Fed. 491) on the ground that the lands in the reclamation area, though in possession of settlers, were public lands within the meaning of the right of way act (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), and that before its road could be built through the Minidoka Irrigation Works the company must obtain the consent of the Secretary of the Interior. From that decree an appeal was taken to this court.

It has always been the policy of the government to encourage the building of railroads in the Western states, and many land grants have been made by it to aid in their construction. Congress has also provided a means by which those companies having no such grants could acquire rights of way over any portion of the public land by filing a map of definite location and securing its approval [216] by the Secretary of the Interior (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568). This law, however, by its very terms, applies only to "public lands," and hence cannot be construed to empower the Secretary to authorize the building of roads across lands which had been segregated from the public domain by the entry and possession of homesteaders or pre-emptors. Bardon v. Northern P. R. Co. 145 U. S. 538, 36 L. ed. 809, 12 Sup. Ct. Rep. 856; United States v. Buchanan, 232 U. S. 76, 58 L. ed. 514, 34 Sup. Ct. Rep. 237, and cases cited. On the other hand, settlers without patent were not in a position to make deeds to rights of way, not only because they had no title, but also because they were prohibited from alienating such land before final proofs. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, p. 1390. The consequence was that neither the government nor the homesteaders could make such grants, and as the company could not build without an assured title to its right of way, it was practically impossible to construct railroads through territory which consisted partly of public lands and partly of that which was in the possession of settlers. But it was greatly to their interest and to that of the government that such a highway should be constructed, and in order to meet the difficulty, Congress, on March 3, 1873 [17 Stat. at L. 602, chap. 266] (Rev. Stat. § 2288, U. S. Comp. Stat. 1901, p. 1385), passed an act providing that any bona fide settler might convey by warranty against his own act "any part of his claim for church, school, and cemetery purposes and for a right of way for railroads." Under this act the appellant could have constructed its road along the strip conveyed to it by the homesteaders unless, as claimed by the government, the provisions of Rev. Stat. § 2288, as amended (33 Stat. at L. 991, chap. 1424, U. S. Comp. Stat. Supp. 1911, p. 592), have been repealed as to lands within irrigation projects and the completed Minidoka Irrigation Works.

Counsel for the United States contend that the reclamation act (32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1911, p. 662) requires that when an irrigation project is undertaken the Secretary of the Interior shall define its limits and withdraw all the [217] irrigable land therein from the public domain and from the operation of the general land laws. It is argued that when thus withdrawn the irrigation area constitutes a unit in which the United States has such a special interest as to require that it shall be subject to the supervision of the Secretary,—he, in order to secure the success of the undertaking, having it in his power to decide whether a railroad should be built, and if so, along what line and across what lots it should be constructed. It is also argued that settlers having no patents ought not to be in a position to grant a right of way over lands which they do not own and may never acquire, and thereby impose a burden upon the claim if it should afterwards come into the hands of other homesteaders.

These considerations, however, have not induced Congress to change its policy of encouraging the construction of railroads along routes designated by charters and over land in the possession of settlers. Neither have they induced Congress to confer upon the Secretary the power to grant rights of way through irrigation lands in the possession of homesteaders.

It is true that the reclamation act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1911, p. 662), provides that when the Secretary of the Interior determines upon an irrigation project he must define its limits and "withdraw the irrigable lands therein from all forms of settlement, except under the homestead law," and all settlements therein shall be "subject to the limitations, charges, terms, and conditions provided in the reclamation act," And it is further true that the provisions of this statute do, in several important respects, modify the homestead law. The Secretary can limit the size of the homestead to 10 acres, instead of 160 acres, permitted by the general law. The settler, instead of being entitled to receive a patent at the end of five years on compliance with the statutory conditions (Rev. Stat. §§ 2289-2291, U. S. Comp. Stat. 1901, pp. 1388-1390), is not permitted to make final proof and [218] receive a patent until he has reclaimed one half of the irrigable area for agricultural purposes, and has also paid his proportionate share of the cost of

the irrigation system in instalments,—the last of which may not mature for ten years after entry.

There are, possibly, other provisions to meet the special conditions of lands constituting an irrigation plant. But except as modified by the specific terms of the reclamation act, such lands are distinctly made subject to entry under the provisions of the homestead law, and all of the homesteaders' rights therein are the same as if the settlement had been located outside of the limits of irrigation works. One of the privileges, not affected by the reclamation act, is that which permits the homesteader, without patent, but in lawful possession, to grant to a railroad company a right of way across his claim; and whatever reason there was for conferring this right upon those who entered land in a sparsely settled section is doubly operative as to land located within the more thickly populated reclamation areas. Manifestly this is true as to so much as may be needed for churches and schoolhouses. It is equally so as to rights of way for railroads and other public utilities needed by the numerous residents living within the irrigation areas.

An act passed since the reclamation act of 1902 serves, if possible, to make clearer the fact that Congress did not intend to deprive settlers on these or any other class of lands from granting railroad rights of way. For on March 3, 1905 (33 Stat. at L. 991, chap. 1424, U. S. Comp. Stat. Supp. 1911, p. 592), after the establishment of the Minidoka project, Congress amended Rev. Stat. § 2288, U. S. Comp. Stat. 1901, p. 1385, so as to provide that "any bona fide settler under the pre-emption, homestead, *or other settlement law*, shall have the right to transfer by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephone, canals, reservoirs, or ditches. . . ." These [219] privileges were renewed and extended by this act because of the public benefits to be derived from such utilities. When, therefore, the Minidoka & Southwestern Railroad Company, in 1909, secured grants to the continuous strip through the reclamation area, the company, by virtue of these public statutes and the private grants, was authorized to construct its road not only across the agricultural lands, but over the intervening ditches and canals. For, while the latter formed a part of the irrigation unit, they were also particularly appurtenant to the lands through and along which they ran.

These various acts of Congress operated to give its consent, in advance, to the construction of such a highway and instrumentality of commerce, notwithstanding any interest the United States may have had in the lands described in the deeds from the homesteaders to the railroad company.

The decree of the Circuit Court of Appeals is reversed, and that of the Circuit Court for the District of Idaho is affirmed.

GEORGE G. HENRY, Appt.,
v.
WILLIAM HENKEL, United States Marshal for the Southern District of New York.

(See S. C. Reporter's ed. 219-230.)

Habeas corpus — existence of ordinary remedy.

Relief by habeas corpus will not be granted by the Federal courts to a person held in custody to await an order for his removal under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, to the District of Columbia, for trial on an indictment charging him with refusing, contrary to §§ 101-104 (U. S. Comp. Stat. 1901, pp. 54, 55), to make the disclosure and furnish the information demanded by a congressional committee as the basis for legislation, although he asserts, as showing a lack of jurisdiction, that the House resolution under which the committee acted did not authorize an inquiry into the matter about which he refused to testify; that the facts charged do not constitute an offense under the statutes, or, if so, that the statutes are void; but this and all other controverted issues in the case are primarily for the determination of the trial court.

[For other cases, see Habeas Corpus, I. b, 3, in Digest Sup. Ct. 1908.]

[No. 216.]

Argued February 24 and 25, 1914. Decided November 30, 1914.

APPEAL from the District Court of the United States for the Southern District

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NOTE.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; Glass v. The Betsey, 1 L. ed. U. S. 489; United States v. Hamilton, 1 L. ed. U. S. 490; Ex parte Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Pearce v. Texas, 39 L. ed. U. S. 164.

On removal to another Federal district for trial of persons there charged with an offense against the United States—see note to Greene v. Henkel, 46 L. ed. U. S. 177.

of New York to review a decree refusing relief by habeas corpus to a person held in custody to await an order for his removal to the District of Columbia for trial. Affirmed.

See same case below, 207 Fed. 805.

The facts are stated in the opinion.

Mr. John C. Spooner argued the cause, and, with Messrs. Paul D. Cravath, John D. Lindsay, and Stuart McNamara, filed a brief for appellant:

The government's extraordinary position, when analyzed, amounts to this: The defendant may be permitted a hearing before the commissioner; but if, in such hearing, he admits his identity and that he committed the acts charged, he has no further rights. He must be removed as a matter of routine. He cannot show that the acts charged constitute no offense, or that the evidence given before the commissioner fails to show the commission of any offense. To state this proposition is to refute it.

Greene v. Henkel, 183 U. S. 249, 261, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218.

If the evidence before the commissioner fails to show any offense, the commissioner has no jurisdiction to commit the accused, and the latter is illegally deprived of his liberty.

Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430; Pereles v. Weil, 157 Fed. 419.

Solicitor General Davis argued the cause, and, with Mr. W. C. Herron, filed a brief for appellee:

The points attempted to be made by appellant are not open in this proceeding.

Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569; Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753; Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; Re Chapman, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497, 33 Sup. Ct. Rep. 240; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430.

Mr. Justice Lamar delivered the opinion of the court:

In the 62d Congress, the House of Representatives (H. R. 429, 504) adopted a resolution authorizing the members of the committee on banking and currency to investigate and make a report as to the financial affairs and activities of national banks, interstate corporations, and groups of financiers as a basis for remedial and other legislative purposes. To that end the committee was authorized to send for persons and papers and to swear witnesses.

Among those summoned and sworn was the appellant, George G. Henry, who was examined at length as to many matters relating to the formation of syndicates and the flotation of stock. He testified that he was a member of the firm of Salamon & Company, bankers in New York, who were accustomed to form syndicates for the acquisition and sale of blocks of stock and to grant participation therein to trust companies and national banks—their directors and corporate officers also being frequently members of the same syndicate. In reference to one of these transactions he testified that Salamon & Company had agreed to pay $8,215,262 for $22,500,000 preferred and common stock in a California oil company; thereupon Salamon & Company, Lewisohn Brothers, Hallgarten & Company, bankers in New York, together with a fourth banking firm (whose name witness did not disclose) had then formed a syndicate for acquiring and disposing of this [225] $22,500,000 of oil stock. He testified how the shares were allotted, and that 12½ per cent went to the unnamed persons in the banking group; that in the subsequent disposition of the stock a number of shares were required by 15 individuals, some of whom were officers of national banks located in New York, Chicago, and Detroit. Other shares were allotted to those who were officers in trust companies in New York and Chicago. Letters were written offering to allot part of this oil stock to the New York syndicate, but before acceptance of the allotment all of the stock had been sold at a profit of nearly $500,000, a part of which went to the members of the New York syndicate (officers of banks), even though they had not previously accepted the allotment. They thus, in effect, received a present of their share of the profits. He was asked to give the names of those composing the New York syndicate, but claimed to have the right under the Constitution to decline to answer the question, saying also that he "did not want to disclose the names of the participants in the New York syndicate, although he understood it to be the wish of the subcommittee that he should, for the reason that he would consider it dishonorable to reveal the names of his customers unless compelled to do so."

The committee ordered the fact of his refusal to answer to be reported to the House for action—majority and minority reports being made. After discussion, the House of Representatives directed that the

facts should be laid before the grand jury of the District of Columbia. That body returned an indictment against Henry, charging him with refusing to answer questions propounded by the committee. Rev. Stat. §§ 101-104; U. S. Comp. Stat. 1901, pp. 54, 55. A warrant issued and Henry was arrested in New York, and when taken before the commissioner demanded an examination.

On the hearing and before the introduction of any testimony, he moved for his discharge on the ground that [226] the commissioner was without jurisdiction, since it appeared on the face of the complaint that petitioner was not charged with any offense against the United States.

The motion was denied, and, it having been admitted that Henry was the person described in the indictment, the government introduced the bench warrant and a certified copy of the indictment as sufficient proof of probable cause.

The petitioner then offered in evidence the resolution defining the scope of the inquiry, with a transcript of his testimony before the committee—including the question which he refused to answer and his reasons therefor. Copies of the majority and minority reports to the House were also incorporated in the record. After argument the commissioner ordered Henry to be held in custody until the district judge could issue a warrant for his removal to the District of Columbia under the provisions of Revised Statutes, § 1014, U. S. Comp. Stat. 1901, p. 716.

Thereupon Henry applied to the district judge for a writ of habeas corpus, and on the hearing introduced all of the testimony that had been submitted to the commissioner, and asked for his discharge on grounds similar to those which had been presented to the committing magistrate.

After argument the district judge discharged the writ, and an appeal was entered to this court, where petitioner's counsel, renewing the objections made in the district court, insist that the resolution did not authorize an inquiry as to the matter about which Henry refused to testify; that the facts charged do not constitute an offense under the statute; or, if so, that the statute is void. On the authority of Re Chapman, 166 U. S. 668, 41 L. ed. 1158, 17 Sup. Ct. Rep. 677; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377, and other cases they insist that in the trial of contested elections, in cases involving the expulsion of members, or other quasi judicial proceedings, the House or Senate may, like any other [227] court, compel material and noncriminatory disclosures. But they argue that, in view of the provisions of the 4th Amendment to the Constitution, neither House can compel a citizen to disclose his private affairs as a basis for legislation,—particularly where, as in the present case, the witness was not contumacious, but had fully and freely answered all material questions; had disclosed the fact that national banks and their officers were often members of the same syndicate, and had only refused to give the names of certain bank officials when the names themselves could not by any possibility be of assistance in shaping legislation. They therefore contend that the papers show on their face that there was no jurisdiction to issue the warrant on which he was held, and that Henry should not be subjected to the hardship of being removed to the District of Columbia to stand trial upon an indictment which affirmatively shows that no crime has been committed.

The government, on the other hand, insists that Rev. Stat. § 104, U. S. Comp. Stat. 1901, p. 55, is constitutional, and that Congress may provide for the punishment of witnesses who, in answer to a question propounded by its authority, fail to make noncriminatory disclosures and furnish information deemed necessary as a basis for legislation.

These important and far-reaching questions, though elaborately argued, should not be decided on this record, in view of the rule, relied on by the government, that such issues must primarily be determined by the trial court.

The petitioner, however, relying specially on Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218; Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430, claims that, as this is a removal case, with the special hardships attendant thereon, it is to be distinguished from those in which the foregoing rule has been announced.

When a person under arrest applies for discharge on [228] writ of habeas corpus the issue presented is whether he is unlawfully restrained of his liberty. Rev. Stat. § 752, U. S. Comp. Stat. 1901, p. 592. But there is no unlawful restraint where he is held under a valid order of commitment, so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ and of the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised in habeas corpus proceedings. In cases which involve a conflict of jurisdiction between state and Federal authorities, or where the treaty rights and obligations of the United States

are involved, and in that class of cases pointed out in Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; Re Loney, 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584, the court hearing the application will carefully inquire into any matter involving the legality of the detention, and remand or discharge, as the facts may require. But, barring such exceptional cases, the general rule is that, on such applications, the hearing should be confined to the single question of jurisdiction, and even that will not be decided in every case in which it is raised. For otherwise the "habeas corpus courts could thereby draw to themselves, in the first instance, the control of all prosecutions in state and Federal courts." To establish a general rule that the courts on habeas corpus, and in advance of trial, should determine every jurisdictional question, would interfere with the administration of the criminal law and afford a means by which, with the existing right of appeal, delay could be secured when the Constitution contemplates that there shall be a speedy trial, both in the interest of the public, and as a right to the defendant.

The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after [229] conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, state or Federal, on which the charge was based. In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant state for trial upon an indictment alleged to be void.

But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted, he will be discharged. If they are overruled and he is convicted, he has his right of review (Kaizo v. Henry, 211 U. S. 148, 53 L. ed. 125, 29 Sup. Ct. Rep. 41). The rule is the same whether he is committed for trial in a court within the district, or held under a warrant of removal to another state. He cannot, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction, and demanding a ruling thereon in habeas corpus proceedings. Glasgow v. Moyer, 225 U. S. 420, 53 L. ed. 125, 29 Sup. Ct. Rep. 41; Re Gregory, 219 U. S. 210, 55 L. ed. 184, 31 Sup. Ct. Rep. 143; Ex parte Simon, 208 U. S. 144, 52 L. ed. 429, 28 Sup. Ct. Rep. 238; Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497, 33 Sup. Ct. Rep. 240; Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459; Hyde v. Shine, 199 U. S. 63, 50 L. ed. 91, 25 Sup. Ct. Rep. 760; Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; Riggins v. United States, 199 U. S. 551, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734.

The last of these decisions is particularly in point, not only because of the applicability of its reasoning to the [230] present case, but because of the fact that the writ was there denied, even though the statute, on which the charge was based, was ultimately held to be void. Royall v. Virginia, 121 U. S. 104, 30 L. ed. 883, 7 Sup. Ct. Rep. 826; 116 U. S. 579, 583, 29 L. ed. 737, 738, 6 Sup. Ct. Rep. 510; 125 U. S. 697, 31 L. ed. 855, 8 Sup. Ct. Rep. 1392.

The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute making an offense of the acts charged. In such case the committing court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218. But the presumption is in favor of the validity of every act of Congress, and it would not be proper for the committing magistrate to treat as invalid a statutory declaration of what should constitute an offense, except in those rare and extreme cases in which the act was plainly and palpably void.

Neither the issue nor the basis of the decision is changed when the person held under the warrant applies to a district judge for discharge on writ of habeas corpus. So, likewise, the same issue and the same rule of decision must govern when the case is here on appeal from the order of the habeas corpus tribunal. It follows, therefore, that this court should not on this

record pass on the jurisdictional questions presented. They, like all other controverted issues in the case, are for the determination of the courts of the District of Columbia when the defendant is therein put to his trial.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[231] UNITED STATES, Plff. in Err.,
v.
WILLIAM C. NIXON, W. B. Biddle, and Thomas H. West, Receivers of the St. Louis & San Francisco Railroad Company.

(See S. C. Reporter's ed. 231–236.)

Receivers — liability as carrier — transporting cattle from quarantine district.

1. Receivers operating a railway are common carriers within the meaning of the act of March 4, 1913 (37 Stat. at L. 831, chap. 145, Comp. Stat. 1913, § 8706), making all the provisions of the original cattle quarantine act of March 3, 1905 (33 Stat. at L. 1264, chap. 1496, U. S. Comp. Stat. Supp. 1911, p. 1351), "apply to any railroad company or other common carrier whose road or line forms any part of a route over which cattle or other live stock are transported in the course of a shipment" from a quarantine state to any other state.

[For other cases, see Receivers, IV. b, in Digest Sup. Ct. 1908.]

Appeal — review by government in criminal case — overlooking controlling statute.

2. The meaning of the statute on which, as a matter of law, the indictment is founded, may be misconstrued within the meaning of the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704), allowing a direct writ of error from the Federal Supreme Court to a judgment of a district court sustaining a demurrer to an indictment when based upon the "construction of the statute upon which the indictment was founded," not only by misinterpreting the language of such statute, but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

NOTE.—On validity and construction of statutory regulations as to infected animals —see notes to Grimes v. Eddy, 26 L.R.A. 638, and Adams v. Milwaukee, 43 L.R.A.(N.S.) 1066.

On review by Federal government in criminal case—see note to United States v. Stevenson, 54 L. ed. U. S. 153.

[No. 427.]

Argued and submitted October 22, 1914.
Decided November 30, 1914.

IN ERROR to the District Court of the United States for the Western District of Missouri to review a judgment sustaining a demurrer to an indictment charging the receivers of a railway company with transporting cattle from a quarantine district in one state to another state. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Underwood argued the cause and filed a brief for plaintiff in error:

If given its usual legal meaning, the term "common carrier" includes receivers.

Eddy v. Lafayette, 163 U. S. 456, 464, 41 L. ed. 225, 228, 16 Sup. Ct. Rep. 1082; Alderson, Receivers, § 298; Hutchinson, Carr. (1906) § 77; High, Receivers, 4th ed. § 398; Beach, Receivers, 2d ed. § 382; McNulta v. Lochridge, 141 U. S. 327, 331, 35 L. ed. 796, 799, 12 Sup. Ct. Rep. 11; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Texas & P. R. Co. v. Cox, 145 U. S. 593, 601, 36 L. ed. 829, 832, 12 Sup. Ct. Rep. 905; Beers v. Wabash, St. L. & P. R. Co. 34 Fed. 247; Evans v. Union P. R. Co. 6 Inters. Com. Rep. 527; United States v. Ramsey, 42 L.R.A.(N.S.) 1031, 116 C. C. A. 568, 197 Fed. 148.

Statutes in derogation of the common law, and penal statutes, are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg Rep. 412.

When the mischief to be redressed by this statute is considered, it is apparent that the remedy, to be effective, must apply to all carriers, whether they be operated by their own officers or by receivers.

Bird v. United States, 187 U. S. 118, 47 L. ed. 100, 23 Sup. Ct. Rep. 42; Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511.

Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver; and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judg-

ments against him as receiver are payable only from the funds in his hands.

McNulta v. Lochridge, 141 U. S. 327, 332, 35 L. ed. 796, 800, 12 Sup. Ct. Rep. 11.

The receivers of a railroad personify the receivership, and are an independent carrier (Southern Exp. Co. v. Western North Carolina R. Co. 99 U. S. 191, 25 L. ed. 319), just as the Adams Express Company, a "single partnership," was held to personify the partnership, to fall within the term "common carrier," and to be liable to fine only, although the act under consideration provided for imprisonment and fine.

United States v. Adams Exp. Co. 229 U. S. 381, 389, 57 L. ed. 1237, 1240, 33 Sup. Ct. Rep. 878.

In this case a fine alone would be imposed, which would be against the receivers in their official capacity and payable out of receivership funds, just as in the case of criminal prosecutions of corporations, where, although both fine and imprisonment are authorized, only a fine can be imposed.

United States v. Union Supply Co. 215 U. S. 50, 54 L. ed. 87, 30 Sup. Ct. Rep. 15.

Messrs. **W. F. Evans** and **W. S. Cowherd** submitted the cause for defendant in error:

The only question before this court is the construction of the quarantine act of March 3, 1905, unaffected by the so-called amendment of March 4, 1913.

United States v. George, 228 U. S. 14, 18, 57 L. ed. 712, 714, 33 Sup. Ct. Rep. 412.

This court has held, in the case of United States v. Baltimore & O. S. W. R. Co. 222 U. S. 8, 56 L. ed. 68, 32 Sup. Ct. Rep. 6, that the quarantine act should not be extended to connecting carriers, and should receive a strict construction. Under a strict construction of the act, receivers are not included in the term common carrier.

The construction placed upon the indictment by the district court is binding upon this court.

United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

Mr. Justice **Lamar** delivered the opinion of the court:

The grand jury for the western division of the western district of Missouri returned an indictment against the St. Louis & San Francisco Railroad Company and its receivers, charging that on August 16, 1913, Nixon, Biddle, and West, as receivers of said company, were operating the property and business of said corporation as a common carrier of freight, and unlawfully transported cattle from a quarantine district in Oklahoma to Kansas City, Missouri, without compliance with the rules and regulations established by the Secretary of Agriculture.

Both the indorsement and caption to this indictment described it as being for "violation of §§ 2 and 4 of the act of March 3, 1905 (33 Stat. at L. 1264, chap. 1436, U. S. Comp. Stat. Supp. 1911, p. 1351)." Those sections of that act provide that "no railroad company . . . shall transport from any quarantine state . . . to any other state any cattle . . . " except "in compliance [233] with regulations promulgated by the Secretary of Agriculture."

The defendants demurred on the ground "that the indictment does not charge any offense for which receivers herein can be held." The court treated the indictment as founded on the act of 1905, imposing a penalty upon railroad companies, and after argument sustained the demurrer, filing a memorandum in which he held that, under the ruling in United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609, the statute did not create an offense for which receivers could be punished.

The case is here under the criminal appeals act [34 Stat. at L. 1246, chap. 2564] on a writ of error in which the government excepts generally to the quashing of the indictment and specially to the court's construction of this act of 1905.

In view of the decision in United States v. Harris, the judgment of the court below would necessarily have to be affirmed if the case was to be determined solely by the provisions of the quarantine act of 1905, which imposes a penalty for the transportation of cattle by a railroad company. But a receiver is not a corporation, and, therefore, not within the terms of a statute applicable to railroad companies, even though cattle from an infected district transported by him would be as likely to transmit disease as if they had been shipped over the same line while it was being operated by the company itself. And, no doubt in recognition of this fact, and in order to make the remedy as broad as the evil sought to be cured, Congress, by the act of March 4, 1913 (37 Stat. at L. 831, chap. 145), made all of the provisions of the original quarantine act of 1905 "*apply to any railroad company or other common carrier whose road or line forms any part of a route over which cattle or other live stock are transported in the course of a shipment*" *from a quarantine state to any other state.*

The statute, as thus amended, applied to transportation of live stock over short lines belonging to private individuals [234] or to lumber companies hauling freight for hire; to roads operated by trustees under power contained in a mortgage; and also to the

more common case where a railroad was being operated by a receiver acting under judicial appointment. For in so far as he transports passengers and property he is a common carrier with rights and civil responsibility as such (Eddy v. Lafayette, 163 U. S. 464, 41 L. ed. 228, 16 Sup. Ct. Rep. 1082; Hutchinson, Carr. § 77). And there is no reason suggested why a receiver, operating a railroad, should not also be subject to the penal provisions of a statute prohibiting any common carrier from transporting live stock by rail from a quarantine district into another state. Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; United States v. Ramsey, 42 L.R.A.(N.S.) 1031, 116 C. C. A. 568, 197 Fed. 144.

But it is said that the amendment, buried in the agricultural appropriation act of 1913, was unknown to the grand jury when the indictment was found, and was not construed in deciding the motion to quash. And it is contended that, inasmuch as the criminal appeals act only authorizes a review of a decision in so far as it was "based upon the . . . construction of the statute upon which the indictment was founded" (34 Stat. at L. 1246, chap. 2564), the correct ruling that receivers are not within the act of 1905 ought not to be reversed because it now appears that they are within the terms of the act of 1913, which was not brought to the attention of the district judge, and was not therefore construed by him in fact. It is pointed out that while there is a general assignment that the court erred in quashing the indictment, yet the government itself specifically complains of the court's construction of the act of 1905 —not the act of 1913. And to emphasize the fact that the indictment was not founded on the amendment, attention is called to the fact that entries on the back and in the caption of the indictment described it as being for "violation of §§ 2 and 4 of the act of March 3, 1905 (33 Stat. at L. 1264, chap. 1496, U. S. Comp. Stat. Supp. 1911, p. 1351)," [235] which apply to railroad companies, and not to receivers.

These entries are useful and convenient means of reference, and in case of doubt might possibly be of some assistance in determining what statute was alleged to have been violated. But these entries form no part of the indictment (Williams v. United States, 168 U. S. 389, 42 L. ed. 512, 18 Sup. Ct. Rep. 92) and neither add to nor take from the legal effect of the charge that the receivers, while operating the business of the corporation as a common carrier, transported cattle "contrary to the form of the statute in such cases made and provided." What was that statute and on what statute the indictment was founded was to be determined as a matter of law from the facts therein charged.

There is no claim that it was quashed because of any defect in matter of pleading, and that being true, the ruling on the demurrer that "the indictment does not charge any offense for which the receivers can be held" necessarily involved a decision of the question as to whether there was any statute which punished the acts therein set out. In determining that question it was necessary that the indictment should be referred, not merely to the act mentioned in argument, but to any statute which prohibited the transportation of cattle by the persons, in the manner, and on the date charged in that indictment. For the reasons already pointed out it was a misconstruction of the act of 1913, to which the indictment was thus legally referred, to hold that receivers acting as common carriers were not within its terms.

Nor can a reversal be avoided by the claim that the act of 1913, though applicable to the facts charged in the indictment, had not been construed by the court. For within the meaning of the criminal appeals act (34 Stat. at L. 1246, chap. 2564) the statute on which, as matter of law, an indictment is founded, may be misconstrued not only by misinterpreting [236] its language, but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms. It is "a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it." United States v. Patten, 226 U. S. 535, 57 L. ed. 338, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141. It would, of course, be fairer to the trial judge to call his attention to the existence of the act on which the indictment was based (United States v. George, 228 U. S. 18, 57 L. ed. 714, 33 Sup. Ct. Rep. 412). Yet an indictment must set out facts, and not the law; and when he sustained the demurrer on the ground that the shipment therein stated did not constitute a crime of which the receivers could be convicted, he in legal effect held that they were not liable to prosecution if, while operating a road as common carrier, they hauled live stock from a quarantine state to another. In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the criminal appeals act (34 Stat. at L. 1246, chap. 2564). If that were not so the right of the government could in any case be defeated by entering a general order of dismissal, without referring to the stat-

ute which was involved, or without giving the reasons on which the decision was based.

The error can no more be cured by the fact that the existence of the statute was not called to the attention of the court than the receivers, on the trial before the jury, could excuse themselves by proof that they did not know of the passage of the amendment which made it unlawful for them to transport cattle by rail from a quarantine state in interstate commerce.

Judgment reversed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[237] UNITED STATES, Plff. in Err.,
v.
HERMAN A. SALEN.

(See S. C. Reporter's ed. 237-251.)

Duties — criminal prosecution — false statement in declaration.

The concealment by an agent consignee of imported goods of extraneous evidentiary facts not proper to be included in the invoice, account, and bill of lading attached to his declaration, but which, if brought to the attention of the collector, would have excited the latter's suspicion, and have induced him to institute a special inquiry as to the value of the merchandise mentioned in the account and invoice, is not a violation of the provisions of the act of August 5, 1909 (36 Stat. at L. 11, 95, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 899), § 28, making it a felony for an agent consignee to state falsely in his declaration that "nothing has been on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed whereby the United States may be defrauded of any part of the duties lawfully due on the said goods, wares, and merchandise."

[For other cases, see Duties, XII. e, in Digest Sup. Ct. 1908.]

[No. 506.]

Argued October 23, 1914. Decided November 30, 1914.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to an indictment for making false statements in the sworn declaration of an agent consignee of imported goods. Affirmed.

Statement by Mr. Justice Lamar:

Salen was indicted for making false statements in the sworn declaration required of consignees by the Tariff act of 1909. (36 Stat. at L. 93, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 899.) The first five counts charged that, in entering laces in February, 1910, [238] and January and February, 1913, he had falsely sworn that the consular invoices attached were the only invoices covering the shipments, when he well knew that there were others in existence. The court overruled the demurrer to these counts and they are not involved in this case.

The sixth count related to a declaration made by Salen on March 17, 1913, in making an entry of foreign laces covered by consular invoice No. 7893. Salen was therein charged with having fraudulently concealed from the collector the existence of certain material facts, and thereby had falsified the required statement in the sworn declaration "that nothing has been on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty due on said goods." This count sets out at great length and in narrative form certain evidentiary facts which may be thus summarized:

Salen was the New York agent and primary consignee of Goetz, a French exporter, who, for eight years, had been shipping laces to Salen for sale and delivery to Robinson, the purchaser and ultimate consignee.

When the last consignment arrived in New York, Salen presented the declaration to the collector, attaching thereto, as required by law, the bill of lading; a list or entry account of the goods; and the consular invoice No. 7893. He paid the duty assessed on the basis of the foreign values as given in the invoice, and thereupon removed the goods and delivered them to Robinson, the purchaser. This count of the indictment further charged that Salen knew that the foreign values had been falsely and fraudulently stated in the previous invoices; that such foreign values named in those invoices were uniformly greatly below the prices at which the laces were sold in the United States; that, in making the declaration as to the shipment represented by consular invoice No. 7893, [239] Salen concealed the fact that it was one of the series of shipments in which Goetz and Robinson had fraudulently concealed the great and uniform discrepancy between the foreign values named in the invoices and the prices at which the lace was sold in the United States.

It was charged that this concealment was the suppression of a fact by which the United States may have been defrauded of its lawful duty, for if Salen had communicated the facts, the collector would have called for a reappraisement of the laces,

and their undervaluation would have been disclosed.

The defendant demurred on the ground that there was no positive averment that the goods were undervalued, but only an argumentative statement of facts the existence of which did not raise the legal conclusion that there was any undervaluation, and that the count failed to charge facts sufficient to constitute an offense under subsection 6 of § 28 of the act of August 5, 1909, or any other statute of the United States. The demurrer was sustained on the ground that the facts stated did not constitute an offense under the statute, and the case was then brought here by the government under the criminal appeals act.

Assistant Attorney General Warren argued the cause and filed a brief for plaintiff in error:

In construing the act in question, it is the duty of this court to give effect to the manifest intention of the customs law,—to require of the importer the observance of a high degree of good faith toward the government.

United States v. Campbell, 10 Fed. 816; United States v. Leng, 18 Fed. 15; United States v. De Rivera, 73 Fed. 679; Bollinger's Champagne, 3 Wall. 560, 564, 18 L. ed. 70, 79; Cliquot's Champagne, 3 Wall. 114, 145, 18 L. ed. 116, 121; United States v. 26 Bales of Rubber, 3 Ware, 210, Fed. Cas. No. 16,570.

If Salen knew certain facts which would have influenced any ordinarily reasonable man acting as collector, in investigating or ordering an investigation or appraisement or reappraisement of values, and if Salen concealed such knowledge on his part, then he certainly concealed "something" and swore falsely when he made oath that "nothing" was concealed or suppressed by him.

United States v. Cargo of Sugar, 3 Sawy. 51, Fed. Cas. No. 14,722.

The importer's duty of disclosure to the government is an obligation *uberrimæ fidei*, as broad as that imposed upon the insured in marine insurance.

Sun Mut. Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 509, 27 L. ed. 337, 345, 1 Sup. Ct. Rep. 582; Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 516, 9 L. ed. 512, 516.

Information as to whether an importer had been engaged in a long line of prior revenue frauds was clearly such as would aid the appraisers in ascertaining the value of the shipment in question, as it would put them upon close scrutiny of the invoice, and other facts surrounding it.

United States v. Doherty, 27 Fed. 733; United States v. One Bag of Crushed Wheat, 166 Fed. 562.

Whether Salen's suppression of his knowledge of prior fraudulent shipments constitutes a suppression of "nothing" may also be tested by considering whether evidence that Salen knew of prior frauds in undervaluation would be admissible if he should be indicted for perjury in swearing to the present declaration that the invoice produced by him exhibits the actual market value, etc.

United States v. Wood, 14 Pet. 430, 10 L. ed. 527; Taylor v. United States, 3 How. 197, 207, 208, 11 L. ed. 559, 563, 564.

It is not necessary to allege in the indictment, or to prove, that the United States was actually defrauded of duties. It is only necessary to allege facts calculated to deprive, or of a character which might deprive, the United States of such duties.

United States v. 66 Cases of Cheese, 163 Fed. 367; United States v. 20 Boxes of Cheese, 163 Fed. 369; United States v. 19 Bales of Tobacco, 112 Fed. 782; Bollinger's Champagne, 3 Wall. 560, 18 L. ed. 79.

If Salen, knowing its falsity, made a statement in the present case that he had concealed nothing whereby the United States might be defrauded of any part of the duty lawfully due, he is guilty, irrespective of any further intent to defraud.

United States v. Fawcett, 86 Fed. 900.

Mr. Marion Erwin argued the cause, and, with Mr. Frederick M. Czaki, filed a brief for defendant in error:

A disclosure of things relating to values at other times and places, not required to be disclosed by the forms prescribed,—such as the value or selling price in this country—is not within the purview of the statute, and hence cannot be made the basis of forfeiture, much less of criminal prosecution for suppression. They are not "material" to the declaration.

United States v. Wood, 14 Pet. 430, 10 L. ed. 527; United States v. Auffmordt, 122 U. S. 197, 30 L. ed. 1182, 7 Sup. Ct. Rep. 1182.

The suppression charged must be of some fact within the scope of the things required to be disclosed by the form of declaration prescribed, and which by fair intendment should be fairly stated in the entry and invoice. It is not enough that there should be merely an omission to state extraneous facts which might be sufficient to excite the collector's and appraiser's suspicions, and where neither actual undervaluation or intent to undervalue the goods is charged.

United States v. Doherty, 27 Fed. 731; United States v. Calhoun, 184 Fed. 504; G. Gulbenkian & Co. v. United States, 83 C. C. A. 40, 153 Fed. 858.

The importer is not guilty of a criminal offense, even though the entry is based upon invoices in which the consignor has falsely and fraudulently misstated the cost or

values, unless the importer knows or believes that they are so false and fraudulent, and even though the use of such false entry and invoice should result in depriving the United States of a portion of its duties.

United States v. 1150¼ Pounds of Celluloid, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 633; 581 Diamonds v. United States, 60 L.R.A. 595, 56 C. C. A. 122, 119 Fed. 560; United States v. Bishop, 60 C. C. A. 123, 125 Fed. 181; United States v. 99 Diamonds, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 961; United States v. 75 Bales of Tobacco, 77 C. C. A. 353, 147 Fed. 127; United States v. One Silk Rug, 86 C. C. A. 178, 158 Fed. 976.

There is no averment in the indictment that the things alleged to have been suppressed were material to the declaration. This is a fatal defect, unless the materiality appears from the averments.

Markham v. United States, 160 U. S. 325, 40 L. ed. 443, 16 Sup. Ct. Rep. 288.

There can be no fraud without a representation, express or implied, where there is a duty or obligation imposed upon the party to speak.

Black's Law Dict.; 20 Cyc. 10; 19 Cyc. 403, 404.

Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion.

Hawaii v. Mankichi, 190 U. S. 197, 214, 47 L. ed. 1016, 1021, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465.

Words used in a statute by which they are not defined are given the same meaning as at common law.

Swearingen v. United States, 161 U. S. 446–451, 40 L. ed. 765, 766, 16 Sup. Ct. Rep. 562; Keeck v. United States, 172 U. S. 434–446, 43 L. ed. 505–510, 19 Sup. Ct. Rep. 254.

Limiting words must be read in where omitted, to conform to the clauses *in pari materia*, when the scope and purpose of the whole act shows that such limitation was intended.

Bend v. Hoyt, 13 Pet. 273, 10 L. ed. 159; 1 Kent, Com. 461; Lawrence v. Allen, 7 How. 793, 12 L. ed. 917; Brown v. Duchesne, 19 How. 183, 15 L. ed. 595; Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 21 L. ed. 841; Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376; Petri v. Commercial Nat. Bank, 142 U. S. 644, 650, 35 L. ed. 1144, 1146, 12 Sup. Ct. Rep. 325; McKee v. United States, 164 U. S. 287–293, 41 L. ed. 437–439, 17 Sup. Ct. Rep. 92; Smith v. People, 47 N. Y. 331; Endlich, Interpretation of Statutes, § 378, p. 528; Morris v. Mellin, 6 Barn. & C. 446; Bennett v. Daniel, 10 Barn. & C. 500; *Bryan* v. Child, 1 Lowndes, M. & P. 429; Myers v. Veitch, L. R. 4 Q. B. 649; Rex v. River Tone, 1 Barn. & Ad. 561.

So much of the sixth count as charges the suppression of a "belief" in the happening of a future event is argumentative, uncertain, hypothetical, and duplicitous, and was properly treated by the trial court as surplusage.

United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; 19 Cyc. 394.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

This writ of error raises the question as to whether the suppression clause in the declaration required to be made by agent consignees of imported goods (36 Stat. at L. 95, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 902) relates to the omission of matter proper to be included in the invoice and account attached, or to independent facts which, if brought to the attention of the collector, [245] would have excited his suspicion and induced him to institute a special inquiry as to the value of the merchandise mentioned in the account and invoice.

No case directly in point has been cited; but counsel have traced the history of the clause from the act of 1799, which required only one form of declaration from all importers, through the subsequent statutes, which, like the tariff act of 1909, provide for slightly different forms, according as the entry is made by owner, manufacturer, consignee, or agent. (1 Stat. at L. 656, chap. 22; 3 Stat. at L. 730, chap. 21; 22 Stat. at L. 524, chap. 121; 26 Stat. at L. 132, chap. 407, U. S. Comp. Stat. 1901, p. 1890; 36 Stat. at L. 93, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 899.) Under the act of 1799 every importer had to attach the consular invoice and entry account and swear that he "had not in the said entry or invoice concealed or suppressed anything" whereby the government might be defrauded of its duty. This clause is still retained in the form required to be signed by owner and manufacturer. Where the goods are entered by an agent consignee he makes declaration that "nothing has been on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise." Much of the argument was addressed to the effect of this difference in the language in the respective forms of the several declarations. 36 Stat. at L. 93–95, chap. 6; U. S. Comp. Stat. Supp. 1911, pp. 899–902.

Counsel for Salen insist that this difference is due to the fact that the suppression

clause in the consignee's declaration was included in a sentence all the terms of which related to invoice and entry. The declaration to be signed by owner and manufacturer (36 Stat. at L. 94, 95, chap. 6, U. S. Comp. Stat. Supp. 1911, pp. 900, 902) was in two sentences, and as the last of the two contained the suppression clause, it was necessary, from a grammatical point of view, to mention invoice and account as antecedents. It is argued that the owner's statement conveyed the same meaning as was otherwise expressed in [246] the suppression clause of the consignee's declaration. On the other hand, the government contends that the difference in phraseology indicated an intent to require the consignee to disclose matters as to which no requirement was made where the goods were entered by owner or manufacturer.

Congress, of course, could have legislated in the same statute so as to make a distinction between consignor and consignee. But no satisfactory reason is given why Congress should have imposed no penalty upon an owner for concealing a great and uniform difference between invoice values and selling prices, while at the same time making the agent guilty of a felony for suppressing exactly the same fact. The moral quality of the act was the same whether the concealment was by owner or agent; the result to the government was the same, and all doubtful or ambiguous language in a statute covering the same subject should be construed on the natural supposition that Congress required identity of disclosures and provided identity of punishment for identity of concealment.

In arriving at the meaning of the clause on which this indictment is founded it may be helpful to consider the purpose of the statute, in the light of the customs regulations applicable to the entry of foreign merchandise at a domestic port.

Foreign value is the basis on which ad valorem duties are imposed (36 Stat. at L. 101, subsec. 18, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 914), and Congress has made various provisions to enable collectors and appraisers to obtain information as to such foreign values. To that end it authorizes them to examine all importers or consignees under oath, so as to secure from them a statement of any facts which might shed light on the amount of duty to be paid. Any false statement made on such examination subjects them to indictment and punishment as for a felony (26 Stat. at L. 139, §§ 16, 17, chap. 407).

[247] But the documents attached to the declaration are the primary source of information as to value. They consist of a consular invoice [prepared by the consignor, showing a list of the goods and their foreign value at the date of exportation]; an entry or account [prepared by the consignee, showing marks, numbers, contents, quantity, invoice value, dutiable value, and the rate of duty of the goods. Customs Regulations 217]; and also the bill of lading [prepared by the master of the vessel]. If these three papers, prepared by three different persons, have been truly and correctly made, they contain all the information needed to assess the duties. In view, therefore, of the importance of these documents, the statute makes specific provisions by which they are to be verified, and, as will appear from an analysis of the declaration (36 Stat. at L. 93, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 899), the consignee states in the first sentence[1] of the declaration:

[248] "(1) That he is the consignee of the merchandise described in the annexed *entry and invoice;*

"(2) that the *invoice* and *bill of lading* are the true and only *invoice* and *bill of lading;*

"(3) that they are in the state in which they were actually received by him;

"(4) that he does not know or believe in the merchandise described in the annexed *lading;*

"(5) that the *entry* delivered to the collector contains a just and true account of the merchandise according to the *invoices;*

"(6) that nothing has been suppressed by him, or, to his knowledge, on the part of any other person, whereby the United States may be defrauded of any part of the duty lawfully due on the merchandise;

"(7) that the *said invoice* and the declaration therein are in all respects true, and were made by the person by whom they purport to have been made;

"(8) that if at any time he discovers any error in the [249] *said* invoice or in the account *now rendered,* he will immediately make the same known to the collector, . . ."

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[1] Declaration of Consignee, Importer, or Agent, where Merchandise Has Been Actually Purchased.

I, ———— ————, do solemnly and truly declare that I am the consignee, importer, or agent of the merchandise described in the annexed entry and invoice; that the invoice and bill of lading now presented by me to the collector of ———— are the true and only invoice and bill of lading *by me received of all* the goods, wares, and merchandise imported in the ————, whereof ———— is master, from ————, for account of any person whomsoever for whom I am authorized to enter the same; that the said invoice and bill of lading *are in the state in which they were actually* received by me, and that I do not know or believe in the existence of any

It will be seen that the declaration was not only intended to secure an affirmative statement as to the genuineness of the documents and of the correctness of what was actually therein set out, but the consignee was also required to make a negative averment that nothing had been suppressed or concealed by himself or, so far as he knew, by anyone else,—that is, nothing had been suppressed or concealed in the account [prepared by the consignee]; in the consular invoice [prepared by the exporter]; or in the bill of lading [prepared by the master of the vessel]. Seven of the eight clauses distinctly related to documents. To say that the sixth clause in this enumeration was intended to embrace undefined extraneous matter would be to suddenly depart from the particular to the general, and back again from the general to the particular: —from the particular subject of documents, to which the attention of the affiant had been specially directed by the first five clauses, into a general field of wide and indefinite scope; and—in the seventh clause —again to return to the particular subject of documents. Such an interpretation would give an exceedingly liberal construction to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context, and violate the settled rule that words which, standing alone, might have a wide and comprehensive import, will, when joined with those defining specific acts, be interpreted in their narrower sense, and understood to refer to things of the same nature as those described in the associated list, enumeration, or class. *Cf.* Virginia v. Tennessee, 148 U. S. 519, 37 L. ed. 543, 13 Sup. Ct. Rep. 728; United States v. Chase, 135 U. S. 258, 34 L. ed. 118, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649; Neal v. Clark (Neal v. Scruggs) 95 U. S. 708, 24 L. ed. 587.

The fact that, under this rule, the general language of the suppression clause is to be restricted to the documents to which all the other clauses in the sentence refer, [250] does not, of course, mean that Congress has deprived the collector of the means of obtaining information as to extraneous facts that might assist him in passing upon questions of value, or in determining whether there had been any violation of the tariff law.

But the method by which that information is to be obtained is the examination of the owner, consignee, or agent under oath. 26 Stat. at L. 139, chap. 407; 36 Stat. at L. 100, subsecs. 15, 16, chap. 6, U. S. Comp. Stat. Supp. 1911, pp. 919, 920; Customs Regulations, 1908, § 865. The very fact that provision is made for such examination is itself a clear indication that there may be material matter, not proper for inclusion in the declaration, but which might still be important in the assessment of the duty. But to say that in signing the statutory form of declaration consignee should in effect answer specific questions and at the same time be required, on peril of committing a felony, to disclose extraneous evidentiary facts as to which no direct question was asked, and to which his attention was not directed, is to make the declaration serve a purpose for which it was not intended, and spread a net that might catch the unwary as well as the fraudulent consignee. United States v. Reese, 92 U. S. 221, 23 L. ed. 565. For, under the contention of the plaintiff in error, it is not necessary that Salen should have intended to defraud, or that the government should have been actually defrauded. The crime was committed if the

other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise, according to the said invoice and bill of lading; that nothing has been on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purport to have been made; and that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly declare that to the best of my knowledge and belief (insert the name and residence of the owner or owners) is (or are) the owner (or owners) of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits *the actual cost* at the time of exportation to the United States in the principal markets of the country from whence imported of the said goods, wares, and merchandise, and includes and specifies the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, which are not otherwise specially subject to duty under any paragraph of the tariff act, and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition, packed ready for shipment to the Unted States, and no other or discount, bounty, or drawback but such as has been actually allowed on the same.

United States "may have been defrauded." So that even if the foreign value on which the duty was assessed had been truly stated in the declaration, the consignee would yet be guilty of a felony if he failed to call attention to facts which would have excited the collector's suspicion and induced him to demand a reappraisement. Such an interpretation of the statute is not only contrary to the rule which restricts the operation of the suppression clause to the particular matters enumerated in all other parts of the printed declaration, but would fix no standard by which to draw [251] the line between innocent silence and felonious concealment.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

PEOPLE OF PORTO RICO, Appts.,
v.
PIERRE EMMANUEL, Baron du Laurens d'Oiselay.

(See S. C. Reporter's ed. 251–261.)

Appeal — from Porto Rico district court — scope of review.

1. The jurisdiction of the Federal Supreme Court on an appeal from the district court for Porto Rico which was governed by the act of April 12, 1900 (31 Stat. at L 77, 85, chap. 191), § 35, Comp. Stat. 1913, § 1221, measuring such jurisdiction by the power conferred upon the former court to review judgments of the territorial supreme courts, is confined to determining whether the facts found by the supreme court of Porto Rico support its judgment, or whether there was material and prejudicial error in the admission or rejection of evidence, manifested by exceptions duly certified.

[For other cases, see Appeal and Error, III. d, 5: 4286–4295; 4879–4888, in Digest Sup. Ct. 1908.]

Appeal — mode of review — error or appeal.

2. In legal as well as equitable actions the proceedings to review in the Federal Supreme Court a judgment of the district court for Porto Rico under the act of April 12, 1900 (31 Stat. at L. 77, 85, chap. 191), § 35, measuring such appellate jurisdiction by the power possessed by the former court to review judgments of the territorial supreme courts, must be by appeal unless there was trial by jury, in view of the provisions of the act of April 7, 1874 (18 Stat. at L. 2, chap. 80), § 2, Comp. Stat. 1913, § 1652, that the appellate jurisdiction of the Federal Supreme Court over the judgments and decrees of territorial supreme courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

Limitation of actions — tort by government official.

3. The one-year limitation prescribed by Porto Rico Civil Code, 1902, § 1869, for actions to demand civil liability "for obligations arising from the fault or negligence mentioned in § 1803" governs an action founded upon § 1804 (imposing upon the principal with respect to the acts of representatives the same obligation as imposed by § 1803), by which an owner of real property seeks to recover from the government of Porto Rico the damages sustained by him through the deprivation of his right to use and enjoy the property by the deliberate but unauthorized registry of the land by the insular authorities in the name of the People of Porto Rico, whereby his tenants were induced to refuse to pay him his usual rents.

[For other cases, see Limitation of Actions, III. f, in Digest Sup. Ct. 1908.]

[No. 4.]

Argued and submitted October 23, 1914.
Decided November 30, 1914.

APPEAL from the District Court of the United States for Porto Rico to review a judgment awarding an owner of real property the damages resulting from the unauthorized registry of his land in the name of the People of Porto Rico. Reversed.

See same case below, 5 Porto Rico, Fed. Rep. 89, 362.

The facts are stated in the opinion.

Mr. Samuel T. Ansell argued the cause, and Mr. Foster V. Brown, Attorney General of Porto Rico, and Mr. Paul Charlton, filed a brief for appellants:

Bills of exception may be filed at any time during the statutory period of two years, by the entering of *nunc pro tunc* orders, as of the time within the term at which the judgment was rendered.

Koewing v. Wilder, 61 C. C. A. 312, 126 Fed. 474; Talbot v. Press Pub. Co. 80 Fed. 567; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150.

An appeal is the proper method of reviewing a case at law tried before the court without the intervention of a jury.

Idaho & O. Land Improv. Co. v. Bradbury,

NOTE.—On appellate jurisdiction of Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

132 U. S. 513, 33 L. ed. 436, 10 Sup. Ct. Rep. 177; Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; Cannon v. Pratt, 99 U. S. 619, 25 L. ed. 446; Gray v. Howe, 108 U. S. 12, 27 L. ed. 634, 1 Sup. Ct. Rep. 136; Murphy v. Ramsey, 114 U. S. 35, 29 L. ed. 54, 5 Sup. Ct. Rep. 747; United States v. Hailey, 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1049; Thompson v. Ferry, 180 U. S. 484, 45 L. ed. 633, 21 Sup. Ct. Rep. 453; Armijo v. Armijo, 181 U. S. 558, 45 L. ed. 1000, 21 Sup. Ct. Rep. 707.

Mr. Felix Frankfurter also filed a brief for appellants:

Is the government of Porto Rico, under the circumstances of this case, liable for the tortious act of an agent from which it derived no benefit whatever?

Langford v. United States, 101 U. S. 341, 25 L. ed. 1010; Belknap v. Schild, 161 U. S. 10, 17, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443.

The appearance of the attorney general in one suit could not operate as a blanket waiver of exemption from suit in a totally different action.

Kawananakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834, 27 Sup. Ct. Rep. 526; Carr v. United States, 98 U. S. 433, 25 L. ed. 209; Stanley v. Schwalby, 162 U. S. 255, 269, 270, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754.

The bill of exceptions is properly here.

Hume v. Bowie, 148 U. S. 245, 253, 37 L. ed. 438, 440, 13 Sup. Ct. Rep. 582; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 556, 32 L. ed. 508, 512, 9 Sup. Ct. Rep. 150; Koewing v. Wilder, 61 C. C. A. 312, 126 Fed. 472; Talbot v. Press Pub. Co. 80 Fed. 567.

Being an action tried without a jury, appeal, and not writ of error, is the proper mode of review.

Garzot v. Rios de Rubio, 209 U. S. 283, 52 L. ed. 794, 28 Sup. Ct. Rep. 548; Murphy v. Ramsey, 114 U. S. 15, 35, 29 L. ed. 47, 54, 5 Sup. Ct. Rep. 747; Rosaly v. Graham, 227 U. S. 584, 57 L. ed. 655, 33 Sup. Ct. Rep. 333.

Mr. Federico Degetau submitted the cause for appellee:

The bill of exceptions in this appeal was settled and signed after the term had elapsed in which the motion for new trial was denied, without there existing, nor having been alleged, any extraordinary circumstances, or any agreement between the parties to extend the term.

Rose's Code of Fed. Proc. p. 1537, § 1932; Morse v. Anderson, 150 U. S. 156, 37 L. ed. 1037, 14 Sup. Ct. Rep. 43; Brown v. Clarke, 4 How. 4, 11 L. ed. 850.

The express order of the court, transmitted by wireless telegraph, extending ninety days the time for settling the bill of exceptions, was given after the term had elapsed.

Judson v. Courier Co. 25 Fed. 705; 2 Cyc. 800; Muller v. Ehlers, 91 U. S. 249, 23 L. ed. 319; Van Loon v. Lyons, 61 N. Y. 22; 22 Cyc. 661; Missouri, K. & T. R. Co. v. Russell, 9 C. C. A. 108, 19 U. S. App. 641, 60 Fed. 501; 3 Cyc. 42; 29 Cyc. 1520.

The orders of the court given on June 13, 1910, and entered *nun pro tunc* as of date of April 9, 1910, cannot validate the nullity of such proceedings.

Credit Co. v. Arkansas C. R. Co. 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; Klein v. Southern P. Co. 140 Fed. 213; 29 Cyc. 1516; Tynan v. Weinhard, 153 Ill. 598, 38 N. E. 1014; State ex rel. Gordon Hardware Co. v. Langley, 13 Wash. 636, 43 Pac. 875; State ex rel. Mohler v. Kinkade, 25 Ohio C. C. 657.

The entire transcript of testimony was offered as the bill of exceptions, and made a part of the record as such, although it contains much immaterial matter, as it contains all the evidence, and was objected and excepted to for that reason by counsel for appellee.

Hickman v. Jones, 9 Wall. 197, 19 L. ed. 551; Springfield F. & M. Ins. Co. v. Sea, 21 Wall. 158, 22 L. ed. 511; Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; Taylor, Jurisdiction, p. 240.

The orders given by the court on June 13, 1910, entered *nunc pro tunc* as of date of April 9, to the effect that the bond served as a supersedeas, cannot annul the provisions of the Revised Statutes of the United States.

Sage v. Central R. Co. 93 U. S. 412, 23 L. ed. 933; Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810; Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co. 146 U. S. 54, 36 L. ed. 885, 13 Sup. Ct. Rep. 13.

No appeal lies from the final judgment in a case at law tried before a Federal court, but it should be reviewed, if at all, by a writ of error.

Chase v. United States, 155 U. S. 489, 39 L. ed. 234, 15 Sup. Ct. Rep. 174; Bevins v. Ramsey, 11 How. 185, 13 L. ed. 657; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502; Bondurant v. Watson, 103 U. S. 278, 26 L. ed. 447.

Mr. Justice Pitney delivered the opinion of the court:

This action was commenced July 23, 1908, in the United States district court for Porto Rico by Pierre Emmanuel, Baron du Laurens d'Oiselay, a citizen of the Republic of France and a resident thereof, against the People of Porto Rico. His complaint alleged that he was the owner of an estate composed of 4,133 cuerdas of land situate in the municipality of Lares, acquired by him as a legacy from the Duchess de Mahon Crillon, who died in France in April, 1899;

that, until the year of her death, the Duchess had been paying the taxes and receiving from her colonists a considerable annual income; that on September 4, 1900, the defendant, through the treasurer of Porto Rico, decided that said property belonged to the treasury of Porto Rico, and ordered, among other things, that the Duchess [253] be immediately eliminated from the assessment of the property, that the "terratenientes" (landholders or colonists) be made to appear in the assessments instead of the Duchess, and "that they proceed to deliver the deeds or titles of concessions that they might possess which gave them the right to the use and fruits of the land to be sent to the treasury;" and that by these means defendant "wrongfully deprived your plaintiff of his ownership over said property and its rents, the said property having been recorded in the name of the People of Porto Rico, the defendant herein, without having heard your petitioner, or even summoned him to be heard;" that, in view of this action, plaintiff, after having vainly tried to obtain satisfaction from defendant, was obliged to establish the validity of his titles before the courts; that he instituted a suit in the district court of San Juan on January 30, 1901, against the defendant, and that court on August 1, 1902, decided that the lands referred to were the property of plaintiff, and ordered that the inscription made in the registry in the name of the People of Porto Rico be canceled; that the People took an appeal to the supreme court of Porto Rico, and that court affirmed the decisions and confirmed the findings of the district court by its opinion of May 23, 1904 (2 Castro P. R. Dec. 103; 7 P. R. R. 216); that after the question of title was decided, the People of Porto Rico did nothing to put plaintiff in possession of the property, the colonists were not willing to again pay rents to him, and he was obliged to resort to the courts to be put in possession of the lands; that by such litigation he did obtain possession, but that he was entitled to recover from defendant the fruits of which he had been deprived by defendant's action from the time he was unjustly deprived of his ownership until his property was delivered back to him: the period mentioned being from September, 1900, to December, 1905.

[254] By demurrer and answer the People of Porto Rico interposed a number of defenses, and, among others, that the action was prescribed by virtue of the provisions of § 1869 of the Civil Code.

The cause came on for trial on the merits before the court without a jury, pursuant to a stipulation of the parties, with the result that judgment was rendered in favor of plaintiff for $7,450. 5 Porto Rico Fed. Rep. 89. A motion for a new trial was denied (5 Porto Rico Fed. Rep. 362), and defendant appealed to this court.

In view of appellee's motion to dismiss, we may begin by saying that at the time the appeal was taken the act of April 12, 1900, known as the Foraker act, was in force (31 Stat. at L. 77, 85, chap. 191), by § 35 of which it was enacted that "writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States," etc. Writs of error and appeals from the supreme courts of the territories were regulated by the act of April 7, 1874 (Stat. at L. 27, chap. 80), by the 1st section of which the separate exercise of the common-law and chancery jurisdictions in the territorial courts was dispensed with, and the several codes and rules of practice adopted in the territories respectively, in so far as they authorized a mingling of said jurisdictions or a uniform course of proceeding in all cases, whether legal or equitable, were confirmed; and by the 2d section it was enacted: "That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed [255] or may hereafter prescribe: Provided, that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Under this system (since superseded by § 244 of the Judicial Code of March 3, 1911, 36 Stat. at L. 1087, 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 229), our jurisdiction was, and in the present case is, confined to determining whether the facts found by the supreme court of Porto Rico support its judgment, and whether there was material and prejudicial error in the admission or rejection of evidence manifested by exceptions properly certified. In the absence of a bill of exceptions, questions respecting the admissibility of evidence are, of course, excluded from our consideration,

and the review is confined to what appears upon the face of the pleadings and the findings. Rosaly v. Graham y Fraser, 227 U. S. 584, 590, 57 L. ed. 655, 657, 33 Sup. Ct. Rep. 353, and cases cited.

The motion to dismiss is in part based upon the ground that the bill of exceptions herein was not settled and signed until after the expiration of the term in which the new trial was denied, and that certain orders of the court, relied upon by appellant as extending the time for settling the exceptions, have no legal validity. We have examined the grounds upon which this contention rests, and have reached the conclusion that it must be overruled. We spend no further time upon it, since, in the view we take of the merits, the rulings on evidence shown by the bill of exceptions may be disregarded.

The motion to dismiss is based upon the further ground that the case, being an action at law, should have been brought to this court by writ of error, and not by appeal. But the provisions of the act of 1874, above mentioned, [256] render it clear that in legal as well as in equitable actions the proceedings for review must be by appeal, unless there was a trial by jury. The motion to dismiss is therefore denied.

Coming to the merits, the facts certified are as follows: In the year 1900, shortly after the American occupation of Porto Rico, the then treasurer of the Island, Mr. J. H. Hollander, reached the conclusion that the land in question did not belong to plaintiff, who claimed to have inherited it from the Duchess de Mahon Crillon of France, but was public property, and he therefore, as treasurer, caused the tenants living upon the land to be so notified and the property to be registered in the registry of property as belonging to the People of Porto Rico. Plaintiff protested vigorously against this, but without immediate result. In a short time, however, he produced such evidence of title to Mr. Hollander that the latter wrote him that he had better begin a suit against the People of Porto Rico and have the matter judicially determined. Plaintiff did file such a suit in the district court at San Juan. The attorney general of the island and his assistant appeared and contested the action, but the decision was for the plaintiff. The attorney general, on the part of the People, took an appeal to the supreme court of the island, and that court, in June, 1904, decided in favor of the plaintiff, affirming the decision of the lower court. 2 Castro P. R. Dec. 103; 7 P. R. R. 216. From the time Mr. Hollander registered the property in the name of the People of Porto Rico until plaintiff was again put in possession of the land in the latter part of the year 1905, the tenants refused to pay rent to plaintiff, and the entire sum was lost to him except a few hundred pesos which he managed to collect after much expensive litigation against the tenants. The court found that Mr. Hollander was a special agent of the state for the purpose of the transactions in question, within the meaning of § 1804 of the [257] Civil Code of 1902; and further, that his action was ratified by the government of Porto Rico by refusing to restore plaintiff's land to him, by requesting and obliging him to bring a suit to establish his rights, and then by defending this suit to final judgment and appealing from that judgment to the supreme court of the island. That the government of the island never actually received any rent, profit, or usufruct from the land or any portion of it; but that it injured plaintiff by depriving him of the right to the use and enjoyment of his property for about five years, in consequence of the deliberate but unauthorized registry of the land in the name of the People of Rorto Rico, and by that action inducing his tenants to thereafter desist and refuse, as they did, from paying him his usual rents. The court found that the insular authorities caused damage to the plaintiff in at least the sum of $7,450, and for this amount judgment was entered, as already mentioned. It will be observed that there is nothing to show that the government of Porto Rico, through its officers or otherwise, was at any time in possession of any part of the lands in question, and there is a distinct finding that the government itself never actually received any rent, profit, or usufruct from the land or any portion of it.

We have recently decided that the government of Porto Rico is of such nature as to come within the general rule exempting a government, sovereign in its attributes, from being sued without its consent (Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 57 L. ed. 507, 33 Sup. Ct. Rep. 352). Upon the face of the present record it may be questionable whether defendant fairly raised in the pleadings the question of its general immunity from action, or whether, on the other hand, its pleadings, construed as a whole, did not rather amount to a consent to litigate the merits. But upon the facts as pleaded and found we think the learned judge of the district court very properly held that if plaintiff can legally recover, it must be by virtue of § 1804 of the Civil Code, which is cited also [258] as manifesting the government's consent to be sued. The section must be read together with §

1803, with which it is inseparably connected. Both are set forth in the margin.[1]

[259] Assuming, however, that the facts certified in the findings, taken by themselves, show a liability on the part of the People of Porto Rico under these sections, still defendant, both by demurrer and by answer, set up prescription by virtue of the provisions of § 1869 of the Civil Code. That section, which is one of a series of sections relating to the prescription of actions, reads as follows:

"Section 1869—The following prescribe in one year:

"1.—Actions to recover or retain possession.

"2.—Actions to demand civil liability for grave insults or calumny, and for obligations arising from the fault or negligence mentioned in § 1803, from the time the aggrieved person had knowledge thereof."

It seems to us clear that an action against the state, based upon the pertinent clause of § 1804, is an action to demand civil liability "for obligations arising from the fault or negligence mentioned in § 1803," within the meaning of § 1869. Section 1804 by its very terms imposes upon the principal, with respect to the acts of the representative, not any different obligation, but the same obligation imposed by the preceding section. We say this, notwithstanding the somewhat peculiar form of expression in that part of § 1804 which exempts the state from liability when the damage is caused by the official to whom properly it pertained to do the act performed, *viz.;* the clause, "in which case the provisions of the preceding section shall be applicable." This cannot reasonably be interpreted as excluding the liability of the state under § 1803 in other cases, but is evidently intended to impose upon the official himself, in respect to damages [260] caused in the performance of his ordinary duties, a personal liability under the provisions of § 1803, leaving the state liable in the sense of that section when it acts through a special agent. No reason is suggested for limiting the prescription to one year in the case of a default or negligence attributable to defendant personally, and leaving the action unlimited when it is attributable to the fault of defendant's representative or agent.

Section 1869 being thus found to be applicable to such an action as the present, it only remains to ascertain and compare the pertinent dates. From his complaint herein and from the findings of the trial court it is plain that plaintiff had full knowledge of the wrongful acts of defendant's representative at least as soon as the time of the commencement of his former action against the People of Porto Rico, which was on January 30, 1901, and that the damage resulting from that wrongful

[1] "Section 1803. A person who, by an act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done.

"Section 1804. The obligation imposed by the preceding section is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

"The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

"Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

"Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

"The state is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding section shall be applicable.

"Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

"The liability referred to in this section shall cease when the persons mentioned therein prove that they employed all the diligence of a good father or [*sic*] a family to avoid the damage."

These sections are taken from Articles 1902 and 1903 of the Spanish Code of 1889, where the clause respecting the responsibility of the state reads as follows: "El estado es responsable en este concepto cuando obra por mediación de un agente especial; pero no cuando el daño hubiese sido causado per el funcionario á quien propiamente corresponda la gestión practicada, en cuyo caso será aplicable lo dispuesto en el articulo anterior."

It was suggested upon the argument that a more satisfactory translation into English than that adopted in the Porto Rican Code is as follows: "The state is liable in this respect when it acts through the medium of a special agent, but not when the damage was caused by an official to whom the action taken properly pertained, in which case the provisions of the preceding article apply." In Walton's "Civil Law in Spain," p. 458, the following version is given: "The state is liable, in this sense, when it acts through a special agent, but not when the damage has been caused by the official to whom properly it pertains to do the act already done, in which case the provision of the preceding article shall apply." And see interpretation by Supreme Court of Spain in decision of May 18, 1904, 98 Jur. Civ. 390.

conduct, and to recover which his present action is brought, was complete before the end of the year 1905. Evidently the damage was of such a character as to carry notice with it. As already mentioned, the present action was commenced in July, 1908. There is nothing in the record or the findings to explain or excuse this delay or to interrupt the prescription.

We are not advised of the grounds upon which the court below overruled the plea of prescription. In its opinion it simply said: "We are also of the belief that, under the circumstances, the court ought not to hold that the claim is barred by the one year statute of limitations, and of course no other is applicable to the facts." Counsel for appellee has not suggested any ground for avoiding the prescription—indeed, has made no argument upon the subject. We deem it clear that § 1869 applies, and that the action is therefore prescribed, and it follows that the judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

[261] Under the facts of the case it is unnecessary to consider whether the period of prescription began to run when plaintiff first had knowledge of the alleged wrongful acts of Hollander, or only when he had knowledge of the damage consequent thereon. Upon this point, therefore, we express no opinion.

Judgment reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, Plff. in Err.,

v.

CLARENCE RUPP.

(See S. C. Reporter's ed. 261-275.)

Constitutional law — due process of law — service of process — waiver.

1. No infringement of the due process of law clause of U. S. Const. 14th Amend. results from the ruling of a state court that the defendant, by permitting a judgment in his favor to be reviewed on the merits at the instance of plaintiff in the action, without interposing a cross appeal to call in question the decision of the trial court overruling a motion to quash the return upon the summons, waived its objection to the jurisdiction of the court over it, and could not have any benefit of that objection upon a second appeal by it from a judgment for plaintiff.

[For other cases, see Constitutional Law, 720-724, in Digest Sup. Ct. 1908.]

Statutes — full faith and credit.

2. The ruling of a Kentucky court that insurance written in that state by an Illinois life insurance corporation was not affected by the provisions of Ill. act of June 22, 1893, § 9, that life insurance companies incorporated under that act shall not issue policies upon the life of any person in which the beneficiary named has no insurable interest, does not deny the full faith and credit to which such statute, under U. S. Const. art. 4, § 1, and U. S. Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677, is entitled, where the court's attention was not called to any decision by the Illinois courts placing a different construction, or, indeed, any construction, upon that section.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1913 Supp.]

Error to state court — scope of review — non-Federal question — full faith and credit.

3. No question under the full faith and credit clause of U. S. Const. art. 4, § 1, open to review in the Federal Supreme Court on writ of error to a state court, is presented where the controversy turns merely upon the interpretation or construction of a statute of a sister state, the validity of such statute not being questioned.

[For other cases, see Appeal and Error, 1969-1980, 2249-2251, in Digest Sup. Ct. 1908.]

[No. 50.]

Submitted November 5, 1914. Decided November 30, 1914.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judg-

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NOTE.— As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon. 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436, and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what service of process is sufficient, generally—see note to Pinney v. Province Loan & Invest. Co. 50 L.R.A. 577.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

the rate which would have been applicable on a through shipment from an Ohio river point to the same point of destination, or it must be treated by a fiction as one moving from an Ohio river point to the same destination. If the first, then clearly the allowance made of a rate from Nashville to the point of destination was a lesser charge for the longer distance hauled as to such grain than was charged for the shorter distance as to any other grain moving from Nashville to intermediate points, or from such points to places further on, and came clearly within the grasp of the 4th section. If, on the other hand, it be imagined to be a shipment from the Ohio river crossing to the point of destination, upon the theory that the traffic before stoppage at Nashville originated at the Ohio river point, then exactly the same conditions would be reproduced, since the charge as the result of the reduction made was the equivalent of a lesser rate for the longer than for the shorter distance, which, as we have stated, was the prevailing system from Ohio river crossings to points of destination in the southeast.

It is true that in argument it was said that the question here is whether there was a preference or discrimination under the 2d and 3d sections of the act, and not an inquiry under the 4th section, and that a distinction between the various sections has been recognized. It has, indeed, been held that the provisions of the 2d, 3d, and 4th sections of the act, being *in pari materia*, required harmonious construction, and therefore they [326] should not be applied so that one section destroyed the others, and consequently that a lesser charge for a longer than for a shorter distance permitted by the 4th section could not, for such reason, be held to be either a preference or discrimination under the 2d or 3d sections. Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516. But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction, and indeed is in direct conflict with all three of the sections,—a result clearly arising in the case before us in consequence of the amendment of § 4. Indeed, when the evil which it may be assumed conduced to the adoption of the amendment of the 4th section and the remedy which that amendment was intended to make effective are taken into view (see Intermountain Rate Cases, supra), it would seem that the case before us cogently demonstrates the applicability of the amendment to the situation. And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined by the substance of things, and not by names, for if that were not the case, the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose.

It follows from what we have said that the court below was wrong in enjoining the order of the Commission, and, on the contrary, should have dismissed the complaint. The case will therefore be appropriately remanded to enable a decree to that effect to be entered, without prejudice, however, to the right of the carriers to apply to the Commission to be relieved from the operation of the provisions of the 4th section, if they are so advised.

Reversed.

Mr. Justice Pitney concurs in the result.

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[327] UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF ALEXANDER BRYANT COMPANY, Plff. in Err.,

v.

NEW YORK STEAM FITTING COMPANY and the Title Guaranty & Surety Company.

(See S. C. Reporter's ed. 327-342.)

Appeal — from district court — jurisdiction below.

1. A judgment of a Federal district court is reviewable in the Federal Supreme Court under the Judicial Code, § 238, as involving the jurisdiction of the lower court, where the controversy between the parties must have been understood by the referee and the district court to involve the jurisdiction of that court, and both referee and court, in the decision of the issue thus presented, dismissed the action, although they may have erred in so doing.

[For other cases, see Appeal and Error, 895-914, in Digest Sup. Ct. 1908.]

Bonds — of public contractor — notice — time of publication.

2. The requirement in the provisos of the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1913, § 6923), that the last publication of notice to creditors of a suit brought by a creditor upon the bond of a public contractor must

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

be "at least three months before the time limited therefor," is not jurisdictional, but is directory only, and cannot be construed as cutting down the limitation of one year from the complete performance of the contract and final settlement thereof prescribed for such suits by another proviso in the statute, although giving the entire year for the commencement of such action may preclude the opportunity for intervention given by still another proviso, which declares that only one action shall be brought, in which any creditor may file his claims and be made a party thereto "within one year from the completion of the work, and not later."

[For other cases, see Bonds, I., in Digest Sup. Ct. 1908.]

[No. 67.]

Argued November 9, 1914. Decided December 7, 1914.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment which dismissed an action by a creditor on the bond of a public contractor. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. George B. Class argued the cause and filed a brief for plaintiff in error:

When one section of a statute treats specifically and solely of a matter, that section prevails in reference to that matter.

Long v. Culp, 14 Kan. 412.

When the first section of a statute conforms to the obvious legislative intent, it is not rendered inoperative by any later section which may appear inconsistent with that intent.

State ex rel. Patterson v. Bates, 96 Minn. 110, 113 Am. St. Rep. 612, 104 N. W. 709; Hall v. State, 39 Fla. 637, 23 So. 119.

A later clause which is obscure and incoherent will not prevail over an earlier one which is clear and explicit.

Endlich, Interpretation of Statutes, § 183.

The third proviso is directory, and not mandatory or jurisdictional.

1 Sutherland, Stat. Constr. pp. 1114–1116, 1138.

Statutes are to be construed so as to effectuate legislative intent.

United States v. Freeman, 3 How. 556, 11 L. ed. 724; Durousseau v. United States, 6 Cranch, 307, 3 L. ed. 232.

This act substitutes the bond in place and stead of the ordinary mechanics' lien, which may be filed against other than Federal buildings, and as such should be most liberally construed for the protection of materialmen.

United States use of Vermont Marble Co. v. Burgdorf, 13 App. D. C. 506; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168.

The controlling case of Vermont Marble Co. v. National Surety Co. 213 Fed. 429, holds that the 3d proviso of the act is not intended to change the period of limitation within which the claims of subcontractors, etc., may be asserted in a suit on the bond, but that the provision is directory only, and that, where claims were asserted within the six months specified, it was immaterial that the notice was not published three months and three weeks prior to the expiration of the year within which suit might be instituted.

Defendants should not be permitted to assert provisions of the act intended for the benefit of creditors, in order to extinguish their own liability to such creditors upon the bond given for their benefit.

Van Rensselaer v. Kearney, 11 How. 326, 13 L. ed. 715.

Defendants are estopped from pleading insufficiency of notice under the circumstances.

5 Enc. U. S. Sup. Ct. Rep. 590; Catts v. Phalen, 2 How. 376, 11 L. ed. 306; United States v. Girault, 11 How. 22, 30, 13 L. ed. 587, 591; Shutte v. Thompson, 15 Wall. 151, 21 L. ed. 123; Mutual L. Ins. Co. v. Hill, 193 U. S. 551–560, 48 L. ed. 788–794, 24 Sup. Ct. Rep. 538; Carey v. Brown, 92 U. S. 171, 23 L. ed. 469; Fackler v. Ford, 24 How. 322, 16 L. ed. 690; Randon v. Toby, 11 How. 493–518, 13 L. ed. 784–795.

The principle of equitable estoppel is that, where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he will not, in a court of justice, be permitted to avail himself of that advantage.

5 Enc. U. S. Sup. Ct. Rep. 938; Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; Dair v. United States, 16 Wall. 1, 21 L. ed. 491.

To illustrate the great lengths to which the Federal courts go in applying this equitable doctrine of estoppel, attention is directed to the case of Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

Mr. John R. Halsey argued the cause, and, with Mr. Adrian T. Kiernan, filed a brief for defendants in error:

Compliance with the requirements of the 3d proviso of the act is a limitation upon the liability to the plaintiff.

United States use of Hollinger v. Stannard, 206 Fed. 326; United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550.

The provision that the creditor's action

shall be brought in the circuit court in the district in which the contract was to be performed is not for the protection of the surety, but obviously for the convenience of the other creditors. But the surety is allowed to raise the objection.

United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44.

The motion to dismiss the writ of error should be granted.

Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 177, 55 L. ed. 163, 164, 31 Sup. Ct. Rep. 185.

Mr. Justice McKenna delivered the opinion of the court:

The United States, suing for the use of the Alexander Bryant Company, plaintiff in error, was plaintiff in the court below, and the defendants in error defendants.

The complaint alleged the following facts: The New York Steam Fitting Company entered into a contract with the United States for the mechanical equipment of the New York custom house at New York. It gave bond for the faithful performance of its contract with defendant in error the Title Guaranty & Surety Company, as surety. One of the conditions of the bond was that the Steam Fitting Company would, among other things, promptly make a payment to all persons supplying it labor and material in the prosecution of the work contemplated by the contract of the Steam Fitting Company with the United States.

The bond was accepted and the work undertaken and duly completed on or about February 19, 1908, the Alexander Bryant Company having, in pursuance of a contract with the Steam Fitting Company, furnished all the materials and performed all of the work, upon which there is a balance due to the Bryant Company of $5,431.18. Under the terms of the agreement between it and the Steam Fitting Company it should have been paid as the government paid the former; and as final payment was made by the government February 15, 1908, interest is demanded.

No action, it is alleged, had been brought by the United States against defendant within six months after, nor had one year elapsed since, the performance and final settlement [331] of the contract by the New York Steam Fitting Company prior to the commencement of this action.

It is alleged that, in pursuance of the requirements of the act of Congress of August 13, 1894 (28 Stat. at L. 278, chap. 280), as amended February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1913, § 6923), under and by virtue of which this action is brought, complainant served personal notice of the pendency of this action upon all known creditors, informing them of their right to intervene as the court might order, and in addition thereto published the notice in a newspaper of general circulation in the city, county, and state of New York for three successive weeks, the last publication of which was three months before the time limited therefor as in the acts of Congress provided.

A bill of particulars was furnished defendants, of which the following is a copy:

"The plaintiff as and for a bill of particulars, demanded by the Title Guaranty & Surety Company herein avers —

"That, pursuant to the requirements of the acts of Congress under which this action is brought, the plaintiff herein made personal service of notice of the pendency of this action upon all known creditors of the New York Steam Fitting Company as follows:

"On Messrs. Peet and Powers, November 21st, 1908; on Hermann & Grace, November 21st, 1908; on Henry R. Worthington, November 19th, 1908; on John Simmons Company, November 20th, 1908; on Cutler Hammer Company, November 19th, 1908; on Rob't A. Keasby Company, November 20th, 1908.

"That under date of November 21st, 1908, Messrs. Hardy & Shellabarger, attorneys for New York Steam Fitting Company and the Title Guaranty & Trust Company of Scranton, Pennsylvania (now the Title Guaranty & Surety Company), stipulated with the attorney for the plaintiff as follows:

" 'It is hereby consented on the part of the defendants [332] that defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the statute, provided no more such notices are sent.'

"That on the 5th day of November, 1908, and on each day thereafter to and including November 25th, 1908, there was published in the New York press of New York city, New York, a notice of the pendency of this action, addressed to all known creditors of the defendant, the New York Steam Fitting Company. Attached hereto and forming a part of this bill of particulars is a copy of the form in which personal notice of the pendency of this action was served upon all known creditors of the New York Steam Fitting Company, and a copy of the notice which was given by publication in the New York press to aforesaid creditors. Dated, New York, December 7th, 1909."

Copies of the notices are inserted in the

margin.[1] It [333] was stipulated that certain of the creditors who were served with personal notice appeared in the action and filed pleas of intervention. The action was subsequently discontinued as to them, they having been settled with by the Surety Company.

The answer of the Surety Company is unimportant except so far as it raises the issue, which is the crux of the case, whether the action was brought in time, or whether proper notice of it was given to other creditors.

The answer of the Steam Fitting Company is also unimportant.

The case, by consent of the parties, was referred to a referee, upon whose report judgment was to be entered "as if said cause had been heard before the court."

The referee found and reported the basic facts of liability of the Surety Company, but found besides that the action was not commenced in time, as provided by the acts of Congress, nor was notice given to creditors as required, and therefore directed a judgment dismissing the complaint. A judgment was subsequently entered by the court after motion for a new trial was denied by the referee.

The following facts appear from the report of the referee: The date of final settlement between the United States and the Steam Fitting Company was February 19, 1908, and to show compliance with the provisions of the act of Congress set out below, the Bryant Company [334] offered evidence of the publication of notice to creditors in the New York press, beginning November 5, 1908, and also introduced in evidence a stipulation between it and the defendants made November 21, 1908, by which defendants' time to move of plead was extended, and by which it was stipulated as follows:

"It is hereby consented on the part of the defendants that defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the statute, provided no more such notices are sent."

Prior to the execution of the stipulation the Bryant Company had personally served all known creditors with notice in the form hereinbefore given. Notwithstanding the stipulation, notice by publication continued for the full twenty-one days, to and including November 25, 1908.

The Surety Company moved to strike out the evidence of publication as incompetent, irrelevant, and immaterial on the grounds: (1) That there was no order of the court obtained for the giving of the notice. (2) That under the act of Congress the last publication of such a notice must expire three months before the end of the year after the final completion of the contract; that is, on November 18th, 1908, whereas the last publication of the notice offered in evidence was on November 25, 1908, seven days beyond the time.

The motion was based on certain provisos of the act of Congress already referred to. The act is entitled, "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." It provides for the execution of a bond by any person entering into any formal contract with the United States for any public work, and that in any action instituted by the United States any person who has furnished materials or labor to

[1] "Please take notice that the above-named Alexander Bryant Company has commenced an action in the name of the United States of America under the provisions of the act of Congress of August 13th, 1894 (as amended by act of Congress of February 24th, 1905), to recover a judgment against the defendant New York Steam Fitting Company and its surety, the Title Guaranty & Trust Company of Scranton, Pennsylvania, for a sum of money alleged to be due and owing to the aforesaid Alexander Bryant Company for work, labor, materials, and services furnished as subcontractors under the contract and bond entered into by the New York Steam Fitting Company for the mechanical equipment of the new customhouse at New York city, New York, in which bond the defendant, the Title Guaranty & Trust Company of Scranton, Pennsylvania, is joined as surety.

"As required by the express provisions of the aforementioned acts of Congress, and as one of the creditors of the New York Steam Fitting Company, under aforesaid contract, you are hereby notified of your right to intervene and be made an additional party plaintiff in this action, as the court may order, so as to have the rights and claims of any and all existing creditors under said contract and bond adjudicated in one and the same action.

"Dated, New York, Nov. 2d, 1908."

"Pursuant to the requirements of an act of Congress of August 13th, 1894, and of February 24th, 1905, amendatory thereof, notice is hereby given to all creditors of the above named defendant New York Steam Fitting Company under the contract between the plaintiff and the said last-named defendant (and the codefendant as their surety) for work incident to the construction of the customhouse, that the above entitled action has been instituted upon the bond of the defendant-contractor, and against said surety, and that any creditor may file his claim in this action and be made a party herein as in said acts of Congress provided.

"New York, October 16th, 1908."

Both notices were signed by plaintiff's attorney.

the contractor may intervene and become a party to the action. If no action be brought by the United States within six months from the completion and final settlement [335] of the contract, then any person furnishing materials or labor may bring suit in the name of the United States in the circuit court of the United States [now district court] in the district in which the contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere, for his or their use and benefit, against the contractor and his sureties.

The provisos are as follows:

"Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after performance and final settlement of said contract, and not later:

"And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. . . .

"Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

It was admitted that no court order was obtained specifying the kind of notice to be given creditors, or giving directions as to publication.

The referee decided that an order of the court was necessary, and that "the publication proved did not come within the time limit of the statute."

The argument of the referee was that the conditions [336] of suit by the creditors of a contractor were (1) the omission of the United States to sue within six months from the completion and final settlement; (2) an action by a creditor must be commenced within one year after such performance and final settlement; (3) only one action can be brought, in which any creditor may file his claim and be made a party thereto within one year from the completion of the work under said contract, and not later; (4) personal notice must be given to known creditors, and in addition notice by publication, the last publication to be at least three months before the time limited therefor. In other words, and succinctly, the referee held that the time for a suit by creditors must be within one year from the complete performance of the contract and its final settlement, and as there could be only one action, this time was the limit within which other creditors could file their claims, and that notice to them, whether personal or by publication, must be in such time as to enable this to be done. He held further that this was a jurisdictional requirement. In this ruling the district court concurred and certified "that the jurisdiction of the court over the persons and subject-matter in this action is in issue," and that this was done in accordance with the provisions of § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215].

Defendants in error, however, move to dismiss the writ of error on the ground "that no question as to the jurisdiction of the court below to hear and determine the cause is in issue."

Under § 238 of the Judicial Code a case may be brought here directly from a district court if the jurisdiction of the court was in issue, that question alone to be certified.

The present case satisfies this requirement. The controversy between the parties must have been understood by the referee and the district court to involve the jurisdiction of the court. Indeed, such was the explicit contention of the Surety Company, and both referee and [337] court in the decision of the issue thus presented dismissed the action. The Bryant Company combated the conclusion and still combats it. The issue of jurisdiction was and is, therefore, plainly marked. It may be that the referee and the court were in error in their decision, but this could not be asserted or demonstrated except by proceedings in error, to be taken as prescribed by law, and to this court. We cannot make the possible error of the court a ground for refusing to review it. The right of review is given to correct the error, if error there be, and the decision of the question involved is given to this court by § 238 of the Judicial Code. We are brought, therefore, to the consideration of the correctness of the ruling.

The act of Congress is undoubtedly ambiguous. Indeed, considering the letter only of the three provisos with which we are concerned, they absolutely repel accommodation. We must try, however, to give coherence to them, and accomplish the intention of Congress. The act is intended to be highly remedial. Its purpose is simple and beneficial. It is to give a remedy to materialmen and laborers on the bond of

the original contractor, and a reasonable time to enforce it, and in a single proceeding to unite all claimants. It, however, imposes a limitation of time on all claimants, the time beginning to run from the same event. From this the complexity in the construction of the act arises.

By the first proviso of the act a creditor cannot institute suit until after the complete performance of the contract and its final settlement; but after such events he may do so (the United States not having sued) within one year from their fulfilment. This is clear enough. The next proviso introduces ambiguity. "Only one action shall be brought," is its provision, in which "any creditor may file his claim . . . and be made a party thereto *within one year from the completion of the work, and not later*." The words in italics are disturbing. "This [338] right to intervene and file a claim, conferred by the statute, presupposes an action duly brought under its terms." United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 163, 58 L. ed. 893, 897, 34 Sup. Ct. Rep. 550. But by its terms the instituting creditor has one year from the designated events to commence his action. If he file it on the last day of the designated time, what then becomes of the rights of other creditors who must file their claim within the same limit of time, and not later? The question is not easy to answer and any answer may be disputed. It presents a puzzle for judicial resolution apparently insolvable.

There is more ambiguity when we bring forward the next, and third, proviso. Notice of the suit must be given to creditors personally if they be known, and by publication besides, informing them "of their right to intervene as the court may order." Passing what the quoted words may mean, and coming to the requirement of notice, it is provided that it must be "for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

This seemingly brings us to an impasse. How can the instituting creditor (so called for convenience) have a year to commence his suit and yet give the notice required?—and it is to be remembered that the intervening creditor must file his claim also within a year.

The Surety Company sees the difficulty and seizes it to press its contention that the year's time for bringing suit is not an authorization of such time, but a permission, and must be availed of so as to permit of the notice to creditors provided for; in other words, that the time in which to bring suit or file a claim, which is explicitly given, is cut down by the provision for notice; that is, the instituting creditor is given not one year from the indicated events to institute a suit, but one year to institute suit and serve notice of it, which notice must precede the expiration of the year by at least three months and three weeks. This [339] limitation of time is brought about, it is contended, with all of its embarrassment to the creditor who institutes the suit and to the creditors who may want to intervene in it, by the third proviso, which is made all-dominating, bending the other provisions to it, and made even a jurisdictional condition of suit against the sureties of the contractor.

There are grounds for the contention, but there are opposing grounds, which, we think, are supported by the better reason, all things considered. As we have said, the act of Congress is highly remedial, and its provisions must be adapted to fulfil its whole purpose.

In Vermont Marble Co. v. National Surety Co. 213 Fed. 429, the circuit court of appeals for the third circuit had occasion to pass upon the act of Congress under consideration. The court, Circuit Judge Gray speaking for it, decided against the contention now made by the Surety Company. The careful review and exposition of the statute there made leave little else to be said.

That case illustrates the consequences of the contention of defendants in error. Here the contention is urged to defeat a suit by the instituting creditor against the surety of the contractor; there it was urged to defeat a claim of an intervening creditor.

The suit was on a contractor's bond by one who furnished materials to the contractor. The work was completed and final settlement made June 14, 1912. The suit was brought February 28, 1913, within one year from the completion of the work. Notice to creditors was given by publication, the last publication being on April 9, 1913, twenty-three days prior to the expiration of the time within which the suit could have been brought. The Vermont Marble Company intervened and filed its statement of claim within the time prescribed by the statute. The claim was resisted on the ground that publication of notice [340] to creditors should have been so made that the last publication would have been at least three months before the time limited for bringing the suit, and therefore should have been started not later than February 21, 1913 (it was started February 28th, as we have seen), so that the last publication should have been on or before March 14, 1913, three months before June 14, 1913, the time when the right to bring suit expired.

It was contended that the suit not having been brought nor publication made within the time required by the act, it could not be maintained either by the original plaintiff or the Vermont Marble Company or other intervening creditors. The contention found favor with the district court; it was rejected by the court of appeals. The latter court concluded that the third proviso was directory, and not a limitation upon the right of action given by the other provisos.

United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550, does not militate against that conclusion. In the latter case it was decided that no right of action accrued to a materialman until the time reserved to the United States to sue had expired, and that this condition was expressed too clearly to be mistaken.

It is urged that it is a consequence of our construction that an action may be commenced on the last day of the year, and that all opportunity for intervention may be precluded; for, counsel say, "intervention cannot be conducted in a day," and it would seem as if the act intended "to afford creditors an interval of three months within which to secure an intervention." Even if this be the consequence, some of the provisions of the act, as we have intimated, must give way. We can only select those which we consider the fittest to prevail to accomplish the purposes of the statute; and at the very start comes the suggestion that even if it be granted that the diligent creditor is under obligation to give notice to a waiting or tardy, or, it may be, unwilling one, how is the surety of [341] the contractor concerned with the discharge of the obligation? At the most its concern is only to be protected against claims delayed beyond the limit of time provided by the act. We may refer again to Vermont Marble Co. v. National Surety Co. The court in that case, in careful distinction between the purposes of the provisos, said that the first and second confer a substantive right of action or intervention limited only by a time for assertion; that is, one year from the completion of the work; and that that time was "obviously for the benefit of the sureties on the bond;" while the last proviso (the third) was "just as obviously for the benefit of the creditors alone." It was pointed out that indeed it was to the interest of the sureties not to bring in the other creditors, and yet they contended that the provision for notice to the creditors was mandatory and jurisdictional, and not simply directory. The same contention is made in this case. In other words, it is in effect contended that a provision which it is to the interest of the Surety Company not to have observed the statute gave it a right to have observed. Such a contradiction of interests and rights we cannot assume the statute intended to create, nor that it was intended to give to the Surety Company a right to have done that which it is its interest not to have performed. The provision for notice, therefore, is not of the essence of jurisdiction over the case, nor a condition of the liability of the Surety Company. We need not go farther in this case.

In the cited case it was held that the third proviso was directory only, and the conclusion has reason to sustain it. There can be no sacrifice of rights in it, neither of surety companies nor of creditors. Every creditor has the same rights and may institute the action provided for in the first proviso. If he does not choose to do so it is his own affair; and he may guard against surprise or deception. He knows the time limit of suit and of intervention. He knows [342] that the suit must be brought in the district court of the United States in the district where the contract was performed. It would seem as if the law owed him no further care. If he chooses he may institute proceedings if another has not done so. If another has, he knows in what court and within what time, and he may intervene. He has, therefore, the means of suit or the means of intervention. An attentive waiting is all that is necessary for either, and indeed is his ultimate safeguard, as intervention must depend on a suit previously instituted.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

THE JOHN II ESTATE, Limited, Plff. in Err.,

v.

GEORGE II BROWN and Francis Hyde II Brown, a Minor, and A. A. Wilder, as Guardian *ad Litem* of Francis Hyde II Brown.

(See S. C. Reporter's ed. 342-349.)

Foreign judgments — collateral attack.

A decision of the supreme court of the Hawaiian Islands, construing a Hawaiian will, should not be declared invalid by the Federal courts on grounds mainly of local form and procedure and wholly of local control,—especially where, after Hawaii had become a territory of the United States, the territorial supreme court held that the deci-

NOTE.—On conclusiveness of judgment rendered in a foreign country—see notes to Dunstan v. Higgins, 20 L.R.A. 668, and Fisher v. Fielding, 32 L.R.A. 236.

sion in question could not be collaterally attacked.

[For other cases, see Judgment, VI. a, in Digest Sup. Ct. 1908.]

[No. 98.]

Argued November 13, 1914. Decided December 7, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Territory of Hawaii, determining the title as between different claimants to the proceeds of land condemned by the United States. Reversed.

See same case below, 119 C. C. A. 458, 201 Fed. 224.

The facts are stated in the opinion.

Mr. **Reuben D. Silliman** argued the cause, and, with Messrs. Joseph Larocque and Clarence Blair Mitchell, filed a brief for plaintiff in error:

Every time a highest court decides a case on its merits it necessarily decides that it has jurisdiction to decide it, whether it says so or not. The fact that it does decide it is an adjudication upon its jurisdiction to decide it.

Clary v. Hoagland, 6 Cal. 685; Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 32; Washington Bridge Co. v. Stewart, 3 How. 413, 424, 426, 11 L. ed. 658, 663, 664; Grand Central Min. Co. v. Mammoth Min. Co. 36 Utah, 364, 104 Pac. 573, Ann. Cas. 1912A, 254; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

The rules of the Hawaiian supreme court had the force of law.

Bishop's Estate, 5 Haw. 290; Paakuhu v. Komoikehuehu, 3 Haw. 644.

"Decisions" were regarded as the substantial matter, operating as estoppels, and the judgments, if any, but formal incidents.

Rose v. Smith, 5 Haw. 379; Notley v. Brown, 208 U. S. 429, 52 L. ed. 559, 28 Sup. Ct. Rep. 385; Harrison v. Magoon, 205 U. S. 501, 51 L. ed. 900, 27 Sup. Ct. Rep. 577; Kaleialii v. Grinbaum, 9 Haw. 215.

What amounts to a judgment is a question of local law.

Washington, A. & G. Steam Packet Co. v. Sickels, 24 How. 333, 340, 16 L. ed. 650, 652; Calaf y Fugural v. Calaf y Rivera, 232 U. S. 371, 374, 58 L. ed. 642, 645, 34 Sup. Ct. Rep. 411; Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822.

This court takes judicial notice of the laws prevailing in countries acquired by the United States.

United States v. Perot, 98 U. S. 428, 430, 25 L. ed. 251, 252; United States v. Chaves, 159 U. S. 452, 459, 40 L. ed. 215, 218, 16 Sup. Ct. Rep. 57.

The decision in the first Brown Case was an act of the prior government, and entitled to credit as such.

United States v. Delespine, 15 Pet. 331, 10 L. ed. 757; Harvey v. Tyler, 2 Wall. 328, 342, 17 L. ed. 871, 873; Grignon v. Astor, 2 How. 319, 341, 342, 11 L. ed. 283, 292; United States v. Davenport, 15 How. 7, 14 L. ed. 577; United States v. Percheman, 7 Pet. 51, 8 L. ed. 604.

The matter is "pure form."

Kalanianaoli v. Smithies, 226 U. S. 462, 57 L. ed. 303, 33 Sup. Ct. Rep. 169; Adams v. Yazoo & M. Valley R. Co. 77 Miss. 194, 60 L.R.A. 33, 24 So. 200, 317, 28 So. 956, affirmed in 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

The land titles of the country were all settled by awards of informal character, and it is impossible to say how far-reaching and unsettling would be a decision by this court upholding the judgments below.

Damon v. Hawaii, 194 U. S. 154, 48 L. ed. 916, 24 Sup. Ct. Rep. 617; Michigan Trust Co. v. Ferry, 228 U. S. 346, 354, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550; Minnesota Min. Co. v. National Min. Co. 3 Wall. 332, 334, 18 L. ed. 42, 43; Forsyth v. Hammond, 166 U. S. 506, 515, 41 L. ed. 1095, 1098, 17 Sup. Ct. Rep. 665.

The words "final and conclusive," which are comprehensive in themselves, were intended to vest in the Hawaiian supreme court authority to put every controversy brought there "absolutely at rest."

Houghton's Appeal, 42 Cal. 55; Bixler's Appeal, 59 Cal. 556; Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414; McAllister v. Albion Pl. Road Co. 10 N. Y. 355; New York C. R. Co. v. Marvin, 11 N. Y. 277; Re Canal & Water Streets, 12 N. Y. 413; Paakuku v. Komoikehuehu, 3 Haw. 646.

This court has uniformly held that it will follow the decisions of the highest local courts affecting titles and construing wills devising land.

Messinger v. Anderson, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739; New Orleans v. Citizens' Bank, 167 U. S. 371, 396–398, 42 L. ed. 202, 210, 211, 17 Sup. Ct. Rep. 905; Parrish v. Ferris, 2 Black, 606, 610, 17 L. ed. 317, 319; Beauregard v. New Orleans, 18 How. 497, 15 L. ed. 469; Parker v. Kane, 22 How. 1, 16 L. ed. 286; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Bondurant v. Watson, 103 U. S. 281, 289, 26 L. ed. 447, 450; Ridings v. Johnson, 128 U. S. 212, 224, 32 L. ed. 401, 405, 9 Sup. Ct. Rep. 72; Hanrich v. Patrick, 119 U. S. 156, 167–170, 30 L. ed. 396, 403, 404, 7 Sup. Ct. Rep. 147; Bacon v. Northwestern Mut. L. Ins. Co. 131 U. S. 258, 264, 265, 33 L. ed.

128, 131, 9 Sup. Ct. Rep. 787; Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. 137, 22 L. ed. 331.

The questions passed upon in this Brown litigation were mere judicial questions, and the decision was as much entitled to recognition as if it had been made by this court in the forms established for it. It was protected by the treaty of annexation, as well as by the decisions of this court.

Knight v. United Land Asso. 142 U. S. 161, 183, 184, 35 L. ed. 974, 981, 982, 12 Sup. Ct. Rep. 258.

The decision in the second Brown Case, that the decision in the first case was not void and could not be collaterally attacked by the defendants in error, was a determination of that fact to be followed by the courts below. It was, moreover, the decision of the highest Hawaiian court upon constitutional and statutory questions, respecting the organization of the Hawaiian supreme court and its jurisdiction and judgment, and was controlling upon the courts below upon the questions they assumed to pass upon.

Forsyth v. Hammond, 166 U. S. 506, 515–520, 41 L. ed. 1095, 1098–1101, 17 Sup. Ct. Rep. 665.

The decision was one which the Federal courts should have followed even if merely a precedent.

Forsyth v. Hammond, 166 U. S. 518, 519, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; Norton v. Shelby County, 118 U. S. 425, 440, 30 L. ed. 178, 186, 6 Sup. Ct. Rep. 1121; Michigan Trust Co. v. Ferry, 228 U. S. 346, 354, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550; Lewers & Cooke v. Atcherly, 222 U. S. 285, 294, 56 L. ed. 202, 205, 32 Sup. Ct. Rep. 94; Alzua v. Johnson, 231 U. S. 106, 58 L. ed. 142, 34 Sup. Ct. Rep. 27; Gray v. Taylor, 227 U. S. 51, 57, 57 L. ed. 413, 416, 33 Sup. Ct. Rep. 199; Treat v. Grand Canyon R. Co. 222 U. S. 448, 452, 56 L. ed. 265, 266, 32 Sup. Ct. Rep. 125; English v. Arizona, 214 U. S. 359, 361, 363, 53 L. ed. 1030, 1032, 1033, 29 Sup. Ct. Rep. 658; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 479, 51 L. ed. 1143, 1146, 27 Sup. Ct. Rep. 695; Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457; Hind v. Wilder's S. S. Co. 14 Haw. 225; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Wilson v. North Carolina, 169 U. S. 586, 592, 593, 42 L. ed. 865, 870, 18 Sup. Ct. Rep. 435.

The decree in the second case, as affirmed by the supreme court of Hawaii, was a judgment quieting title.

Northern P. R. Co. v. Slaght, 205 U. S. 122, 131, 132, 51 L. ed. 738, 741, 742, 27 Sup. Ct. Rep. 442; Herman, Estoppel, § 92.

The whole controversy was put "absolutely at rest" (Paakuku v. Komoikehuehu, 3 Haw. 646) by the decisions in the two prior cases.

Gila Bend Reservoir & Irrig. Co. v. Gila Water Co. 205 U. S. 279, 284, 51 L. ed. 801, 803, 27 Sup. Ct. Rep. 495.

The supreme court of the territory was not limited to the reasons or grounds of decision of the Hawaiian circuit judge, as held by the courts below; all the grounds presented by the record were before said supreme court upon the appeal from the decree of the circuit judge.

M'Clung v. Silliman, 6 Wheat. 598, 603, 5 L. ed. 340, 341; Colburn v. Holt, 19 Haw. 66; Ridings v. Johnson, 128 U. S. 212, 218, 32 L. ed. 401, 403, 9 Sup. Ct. Rep. 72; William W. Bierce v. Waterhouse, 219 U. S. 320, 332, 55 L. ed. 237, 241, 31 Sup. Ct. Rep. 241; Fowler v. Catton, 13 Haw. 492; Priest v. Las Vegas, 232 U. S. 604, 617, 58 L. ed. 751, 757, 34 Sup. Ct. Rep. 443; Calaca v. Caldeira, 13 Haw. 215.

The reasoning of an appellate court, in jurisdictions other than Hawaii, showing the grounds of the appellate court's decision, has been held always to be competent, particularly where the appellate court has affirmed the judgment on grounds other than that of the trial court.

Hood v. Hood, 110 Mass. 463; Pepper v. Donnelly, 87 Ky. 259, 8 S. W. 441; Bigelow, Estoppel, 5th ed. p. 87, and note p. 88.

The defendants in error are bound by the judgments in the two prior cases, notwithstanding they were minors at the time said cases were brought and decided.

Kealiiahonui's Estate, 8 Haw. 100; Re Moore, 209 U. S. 491, 496–500, 52 L. ed. 904, 907–909, 28 Sup. Ct. Rep. 585, 706; Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 462, 42 L. ed. 539, 543, 18 Sup. Ct. Rep. 121.

Mr. A. A. Wilder argued the cause, and, with Mr. F. E. Thompson, filed a brief for defendants in error:

It is impossible that a person undertaking to act as substitute for a judge of a court be regarded as a *de facto* judge, for the very reason that he has no commission nor any color of title, and does not claim the office, but actually recognizes the incumbency of the real judge for whom he purports to be substituting only.

Van Slyke v. Trempealean County Farmers' Mut. F. Ins. Co. 39 Wis. 390, 20 Am. Rep. 50; State v. Phillips, 27 La. Ann. 663; State v. Sadler, 51 La. Ann. 1397, 26 So. 390.

A person named as a party plaintiff in a bill in equity does not become a party unless the bill is signed by him. Chapman v. Banker & Tradesman Pub. Co. 128 Mass. 478, 479.

Conceding that a bill in equity need not

be signed by the complainant personally if it is signed by his counsel, here neither the original nor the amended bill was signed by counsel for these defendants in error. It is not enough that the name of counsel merely appears on the bill. It is insufficient that counsel's name has been placed to the bill by another, or that it was printed or typewritten on the bill.

Davis v. Davis, 19 N. J. Eq. 180; Eveland v. Stephenson, 45 Mich. 396, 8 N. W. 62; Nightingale v. Oregon C. R. Co. 2 Sawy. 338, Fed. Cas. No. 10,264; Mitford & T. Eq. Pl. 66, 145, 146.

Estoppel by judgment applies only to the parties to an action or their privies. A decree in a former suit is *res judicata* in a subsequent suit only where there is an identity of parties over whom the court acquired jurisdiction.

1 Black, Judgm. § 219; 23 Cyc. 1074; Parker v. Spencer, 61 Tex. 161; Cavanaugh v. Smith, 84 Ind. 380; Mossman v. Hawaiian Government, 10 Haw. 424; George v. Holt, 9 Haw. 47; Fowler v. Stebbins, 69 C. C. A. 209, 136 Fed. 366; Kramer v. Matthews, 68 Ind. 172; Hawes v. Rucker, 94 Ala. 166, 10 So. 85; Lightner's Appeal, 187 Pa. 237, 41 Atl. 46; Morgan v. Halsey, 97 Ky. 789, 36 L.R.A. 716, 31 S. W. 866.

The court had no jurisdiction upon questions reserved in equity.

Brown v. Brown, 11 Haw. 47; Re Hampshire County Comrs. 140 Mass. 181, 5 N. E. 490; Bearce v. Bowker, 115 Mass. 129; Terry v. Brightman, 129 Mass. 535; Taft v. Stoddard, 141 Mass. 150, 6 N. E. 836; Johnson v. Parrotte, 46 Neb. 56, 64 N. W. 363; Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. ed. 164, 170; Williamson v. Berry, 8 How. 495, 541, 12 L. ed. 1170, 1189; Lewers & Cooke v. Redhouse, 14 Haw. 294.

Jurisdiction of the subject-matter cannot be conferred by consent or waiver.

Dudley v. Mayhew, 3 N. Y. 12; Cooley, Const. Lim. 7th ed. 575, 576; Holloway v. Brown, 14 Haw. 170; Re Bishop, 11 Haw. 33.

A decree is the judgment or sentence of a court of equity. It is pronounced on the hearing of issues, and determines the rights of the parties to the suit.

16 Cyc. 471. See also 5 Enc. Pl. & Pr. 949.

In the absence of a decree the decision is not binding.

Oklahoma City v. McMaster, 196 U. S. 529, 533, 49 L. ed. 587, 589, 25 Sup. Ct. Rep. 324; Bouldin v. Phelps, 30 Fed. 578; Springer v. Bien, 128 N. Y. 99, 27 N. E. 1076; Wilson v. Hubbard, 39 Wash. 671, 82 Pac. 154; Hart v. Brierley, 189 Mass. 604, 76 N. E. 286; Chicago v. Goodwillie, 208 Ill. 252, 70 N. E. 228; Child v. Morgan, 51 Minn. 121, 52 N. W. 1127.

Courts of equity, by reason of the power they possess over trusts and trustees, have inherent jurisdiction to construe wills which create trusts, either expressly or by necessary implication. This inherent power is often confirmed by statute. But it must always appear affirmatively that the will which it is desired to have construed does in fact create a trust, or the court will not entertain the bill. If the will does not involve a trust, a court of equity has no jurisdiction to construe it, as the power of equity to entertain an action for the construction of a will arises wholly out of the jurisdiction of these courts over trusts.

1 Underhill, Tr. § 455. See also 3 Pom. Eq. Jur. § 1156; Harrison v. Owsley, 172 Ill. 629, 50 N. E. 227; Greeley v. Nashua, 62 N. H. 166; Woodlief v. Merritt, 96 N. C. 226, 2 S. E. 350; Edgar v Edgar, 26 Or. 65, 37 Pac. 73; Lake View Min. & Mfg. Co. v. Hannon, 93 Ala. 87, 9 So. 539; Bailey v. Briggs, 56 N. Y. 407; Torrey v. Torrey, 55 N. J. Eq. 410, 36 Atl. 1084; Martin v. Martin, 52 W. Va. 381, 44 S. E. 198; Andersen v. Andersen, 69 Neb. 565, 96 N. W. 276; Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914.

Questions only incidentally or collaterally involved, though adjudicated, are not conclusive in another proceeding, even between the same parties.

McGee v. Winehold, 23 Wash. 748, 63 Pac. 571; Cavanaugh v. Buehler, 120 Pa. 457, 14 Atl. 391; Lewis's Appeal, 67 Pa. 165; Marvin v. Dutcher, 26 Minn. 402, 4 N. W. 685; Wahle v. Wahle, 71 Ill. 514; Mullaney v. Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086.

Where a decree refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it, to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was determined by the judgment or decree in question.

Legrand v. Rixey, 83 Va. 862, 3 S. E. 864.

It follows from the rule, that the opinion of the appellate court affirming such a decree is inadmissible to show that the question determined by the trial court was different from that embraced in its decision.

Robinson v. New York, L. E. & W. R. Co. 64 Hun, 41, 18 N. Y. Supp. 728; Penouilh v. Abraham, 43 La. Ann. 214, 9 So. 36; Ohio River R. Co. v. Fisher, 53 C. C. A. 411, 115 Fed. 935; Russell v. Russell, 67 C. C. A. 436, 134 Fed. 840.

Where a demurrer is sustained for want of equity, the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer.

Dennison Mfg. Co. v. Scharf Tag, Label & Box Co. 57 C. C. A. 9, 121 Fed. 313; Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S.

396, 410, 35 L. ed. 1055, 1060, 12 Sup. Ct. Rep. 188.

If the first suit was dismissed for defect of pleadings or parties, or a misconstruction of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.

Hughes v. United States, 4 Wall. 232, 237, 18 L. ed. 303, 305; Converse v. Davis, 90 Tex. 466, 39 S. W. 277.

On the question of the force of a judgment as an estoppel where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than upon another of these different issues.

Washington A. & G. Steam Packet Co. v. Sickles, 24 Haw. 333, 345, 16 L. ed. 650, 654; Russell v. Place, 94 U. S. 606, 608, 24 L. ed. 214, 215; De Sollar v. Hanscome, 158 U. S. 216, 221, 39 L. ed. 956, 959, 15 Sup. Ct. Rep. 816.

In the case of Hughes v. United States, 4 Wall. 232, 18 L. ed. 303, two holdings by the supreme court of the state of Louisiana were held to constitute no bar to an action in the Federal court because, as in our case, the holdings of the supreme court of the state did not involve an adjudication upon the merits of the questions of title involved. The case is in some respects very like our present case.

A decree sustaining a demurrer is no bar to subsequent proceedings upon facts and questions of law not litigated or passed upon by such decree.

Detrick v. Sharrar, 95 Pa. 521; Fulton v. Hanlow, 20 Cal. 484; Cramer v. Moore, 36 Ohio St. 347; Bigley v. Jones, 114 Pa. 510, 7 Atl. 54; Farmers' & M. Life Asso. v. Caine, 224 Ill. 605, 79 N. E. 956.

Even if the matter were in issue, if the issue was not determined because the decision turned upon some other point, or was undetermined for some other reason, there is no estoppel as to that matter.

Thompson v. N. T. Bushnell Co. 80 Fed. 332; Kern v. Wilson, 82 Iowa, 412, 48 N. W. 919; Hudson v. Remington Paper Co. 71 Kan. 300, 80 Pac. 568, 6 Ann. Cas. 103; Callaway v. Irvin, 123 Ga. 344, 51 S. E. 477; Mosteller v. Holborn, 21 S. D. 547, 114 N. W. 693; Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125.

A decree does not adjudicate any issue which the court has excluded from its determination for any reason.

Converse v. Davis, 90 Tex. 466, 39 S. W. 277; Arnold v. Arnold, 11 B. Mon. 81.

A void judgment or opinion, rendered without jurisdiction, can never be made valid by a subsequent expression of opinion by the same or any other court.

Fenton v. Garlick, 8 Johns. 194; Kilburn v. Woodworth, 5 Johns. 37, 4 Am. Dec. 321.

Decisions of state courts on questions of general jurisprudence are not binding on Federal courts.

Lane v. Vick, 3 How. 464, 11 L. ed. 681; Mohr v. Manierre, 7 Biss. 419, Fed. Cas. No. 9,695; Ryan v. Staples, 23 C. C. A. 541, 40 U. S. App. 427, 76 Fed. 727; Swift v. Tyson, 16 Pet. 1, 18, 10 L. ed. 865, 871; Chicago v. Robbins, 2 Black, 428, 17 L. ed. 304; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Venice v. Murdock, 92 U. S. 501, 23 L. ed. 585; Hambly v. Bancroft, 83 Fed. 446, 36 C. C. A. 595, 94 Fed. 979; Three States Lumber Co. v. Blanks, 69 L.R.A. 283, 66 C. C. A. 353, 133 Fed. 482; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 358, 54 L. ed. 228, 233, 30 Sup. Ct. Rep. 140.

Even though the decision of a state court construing a state statute will be followed by the Federal courts, nevertheless, where the action of any court has merely amounted to an affirmance of a decree sustaining a demurrer for want of jurisdiction, the doctrine of Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665, can have no possible application.

Murray v. Pocatello, 226 U. S. 318, 57 L. ed. 239, 33 Sup. Ct. Rep. 107.

Federal courts are not bound by state decisions, particularly when they are conflicting or when the law has not been definitely settled.

Stanly County v. Coler, 190 U. S. 437, 444, 47 L. ed. 1126, 1131, 23 Sup. Ct. Rep. 811; Barber v. Pittsburgh, Ft. W. & C. R. Co. 166 U. S. 83, 99, 41 L. ed. 925, 933, 17 Sup. Ct. Rep. 488.

Federal courts are not bound (and for that matter no courts are bound) by *dicta* of a state court.

Matz v. Chicago & A. R. Co. 85 Fed. 183; Lockhard v. Asher Lumber Co. 123 Fed. 501.

Mr. Justice Holmes delivered the opinion of the court:

This case began as a proceeding by the United States for the taking of certain land. The land was condemned and the sum that was determined by the judgment to be the compensation due to the owners was paid into court. Supplementary proceedings then were had in the cause, according to local statutes, for the determination of the title to this fund as among different claimants who appeared and set up their claims. The plaintiff in error [346] claimed the whole by virtue of a deed from Irene Ii' (Brown), daughter of John Ii, to its grantor, alleging that John Ii devised the land

to Irene in fee, and that her title in fee was established by judgments of the supreme courts of the Hawaiian Islands and of the territory of Hawaii. The defendants in error, two of the three children of Irene, claim one third each, subject to their mother's life interest, on the ground that John Ii devised the land to Irene for life only, with remainder to her children. The circuit court of appeals sustained the latter claim. 119 C. C. A. 458, 201 Fed. 224.

It will be enough to give a few passages from the agreed but more or less impugned translation of the will out of its original Hawaiian: "All my property both real and personal shall descend to my heirs who are mentioned below as follows: First: Irene Haalou Ii, my own daughter is the first heir as follows: [describing certain lands including that condemned] . . . I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will. All the incomes from the lands that are leased and all other receipts from all the lands of my daughter they two alone shall have the sole care of it until she becomes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will. . . . And further, if my daughter shall die having borne children, then the property shall descend to her children and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikehuehu." It is obvious what hesitation an American court ought to feel in attempting to construe a Hawaiian will on the strength of this translation, and, still more, in disregarding the opinion of the court on the spot, familiar [347] with Hawaiian habits, and not improbably with Hawaiian speech.

John Ii died in 1870. In 1894, the Hawaiian Islands then being an independent sovereignty, a bill was filed by Irene and her two children, the present defendants in error, by A. F. Judd as their next friend, and A. F. Judd, as executor, guardian of Irene, and trustee under the will, against Charles A. Brown, husband of Irene, alleging that Brown was in possession and squandering the estate, and praying, among other things, for a construction of the will and determination of the relative rights of the children and mother, and for the reinstatement of Judd in possession as trustee. An amended complaint joined Sanford B. Dole as plaintiff, he having been appointed to take the place of Komoikehuehu, deceased. The case dragged along and finally, the chief justice and one of the justices being disqualified, the remaining justice requested and authorized two members of the bar to sit with him, which they did. At the hearing they reserved questions of law to the supreme court of the Islands two of which were: "1. Was a trust created in the property devised to Irene Ii by the will of her father, John Ii? 5. Has Irene Ii Brown a fee-simple title in said property, or is her estate one for life only?" The supreme court entertained the case, and, as appears from the opinion, against the earnest contention of the counsel for the plaintiffs, decided on May 11, 1897, that Irene, after she bore a child, became the owner in fee simple of the estate. This decision is relied upon as an adjudication concluding the present case. Brown v. Brown, 11 Haw. 47.

The chief objection that is urged to the conclusiveness of the decision is that after the opinion of the supreme court no further proceedings were taken in the case. This seems to be answered by the decision next mentioned, and by the analogy, if not by the letter, of the statute then in force as to cases stated; that the case, the submission, and [348] the written decision, shall constitute the record. Civil Code of 1859, § 1142. It is said further that the court was not legally constituted because two members of the bar were called in. The constitution and statutes allowed the filling of a vacancy if a justice was disqualified, but it is said that the power extended only to a single one. We understand that the practice was the other way for years, and as the supreme court seems to have felt no difficulty, it would be most undesirable to allow the question to be raised now. It is urged again that the children were not properly parties, and were not separately represented, although their interest was adverse to their mother's. The bill was brought by the trustee for instructions, among other things, and the *cestuis que trust* were made parties. It is true that they do not appear to have had separate counsel, but it appears from the decision of the court that the counsel represented and pressed their interest against that of their mother, and it seems to us not permissible to declare that the highest court of what was then a foreign jurisdiction did not know its own powers, and was proceeding in a manner that the court of another country might pronounce wholly void. Finally, it is said that under the statutes in force questions in equity could not be reserved by circuit judges sitting in chambers. To this again it is enough to answer that the court had authority to decide that matter, and, although disapproving the practice, en-

tertained the cause and thereby established its warrant in law.

In January, 1903, another bill was brought by the defendants in error, by their next friend, A. F. Judd, the purposes of which it is unnecessary to state further than it sought to have the previous decision declared void and the interest of Irene adjudged to be only a life estate. The bill was dismissed upon demurrer, and the supreme court of the territory expressed the opinion that the previous decision precluded a collateral attack by the [349] minors, dealing in terms with all the objections except the first, which it sufficiently disposed of by assuming the prior decision to have the effect of a formal decree. Brown v. Brown, 15 Haw. 308. See Calaf y Fugurul v. Calaf y Rivera, 232 U. S. 371, 374, 58 L. ed. 642, 645, 34 Sup. Ct. Rep. 411. It is unnecessary to consider whether this second case again made the matter *res judicata*. It is enough to refer to it here as authority with regard to matters of local procedure, as to which innumerable cases have established the weight to be given to the local courts. Tevis v. Ryan, 233 U. S. 273, 291, 58 L. ed. 957, 967, 34 Sup. Ct. Rep. 481; Nadal v. May, 233 U. S. 447, 454, 58 L. ed. 1040, 1041, 34 Sup. Ct. Rep. 611.

It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirements of the law of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decisions, has been stated and restated, from United States v. Percheman, 7 Pet. 51, 95, 8 L. ed. 604, 620, to Michigan Trust Co. v. Ferry, 228 U. S. 346, 354, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure, and wholly of local control, it seems to us plain that the judgment must be reversed.

Judgment reversed.

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[350] ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF ARKANSAS EX REL. HAL L. NORWOOD, Attorney General.

(See S. C. Reporter's ed. 350-371.)

Constitutional law — due process of law — taxation of foreign corporation.

1. The property of a foreign railway company beyond the jurisdiction of the state is not in effect taxed contrary to due process of law by the annual franchise tax imposed by Ark. Laws 1911, No. 112, "for the privilege of exercising its franchise in this state" of a specified percentage of the outstanding capital stock of the corporation represented by property owned and used in business transacted in the state, where, as construed by the state court, such tax is upon the right to exercise the privilege of transacting intrastate business in corporate form, the amount being fixed by reference to the property of the corporation that is within the state and used in business transacted within the state.

[For other cases, see Constitutional Law, 533-540, in Digest Sup. Ct. 1908.]

Commerce — state taxation — foreign railway company.

2. The annual franchise tax imposed by Ark. Laws 1911, No. 112, upon a foreign corporation "for the privilege of exercising its franchise in this state" of a specified percentage of the outstanding capital stock of the corporation represented by property owned and used in business transacted in

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NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. North Carolina Bd. of Agri. 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

As to taxation of corporate franchises—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

As to taxation of capital stock of corporations—see note to State Bd. of Equalization v. People, 58 L.R.A. 513.

As to validity of license tax imposed on foreign corporation as a condition of permission to do business within a state—see note to Reymann Brewing Co. v. Brister, 45 L. ed. U. S. 269.

the state, is not repugnant to the commerce clause of the Federal Constitution, as applied to a foreign railway company doing both interstate and intrastate business, where, as construed by the state court, such tax is upon the right to exercise the privilege to transact intrastate business in corporate form, the amount of the tax being fixed solely by reference to the property of the corporation that is within the state and used in business transacted within the state, excluding any imposition upon, or interference with, interstate commerce.

[For other cases, see Commerce, 250–255, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — taxation of foreign railway company.

3. There is no denial of the equal protection of the laws or of due process of law in the imposition upon a foreign railway company, under Ark. Laws 1911, No. 112, in addition to the general property tax on the property of foreign corporations within the state, of an annual franchise tax for the privilege of transacting intrastate business in corporate form, fixed solely by reference to the property of the corporation that is within the state and used in business transacted within the state, and excluding any imposition upon, or interference with, interstate commerce, where the classification of corporations adopted by that statute is not unreasonable, and corporations of the class to which the company belongs are not discriminated against in favor of domestic corporations.

[For other cases, see Constitutional Law, 292–336, 528–540, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — double taxation.

4. Nothing in the 14th Amendment to the Federal Constitution imposes any iron-clad rule upon the states with respect to their internal taxation, or prevents them from imposing double taxation or any other form of unequal taxation so long as the inequality is not based upon arbitrary discriminations.

[For other cases, see Constitutional Law, 292–336, in Digest Sup. Ct. 1908.]

Statutes — construction favoring constitutionality — forfeiture of franchise of interstate carrier.

5. Until the state, through its judicial or administrative officers, decides otherwise, the Federal Supreme Court will assume, in order to uphold the constitutionality of the provisions of Ark. Laws 1911, No. 112, § 20, under which a foreign railway corporation forfeits "its right to do business in this state" in case it fails to pay the annual franchise tax imposed by that act upon its privilege of transacting intrastate business in corporate form, based upon the amount and value of its property in the state, that such section will be limited in its operation to forfeiting only the privilege of doing intrastate business, or else that the section in question, being void if requiring a forfeiture of the interstate franchise, will be treated as separable from the other provisions of the statute.

[For other cases, see Statutes, I. d, 4; 145–147; Commerce, III. d, in Digest Sup. Ct. 1908.]

[No. 119.]

Argued February 25 and 26, 1914. Decided December 7, 1914.

IN ERROR to the Supreme Court of the State of Arkansas to review a decree which affirmed a decree of the Pulaski Chancery Court, enforcing a franchise tax on a foreign railway company. Affirmed.

See same case below, 106 Ark. 321, 152 S. W. 110.

Statement by Mr. Justice Pitney:

The attorney general of Arkansas, proceeding under act No. 112, approved March 23, 1911, entitled, "An Act for an Annual Franchise Tax on Corporations Doing Business in the State of Arkansas" (Acts of Arkansas, 1911, p. 67), brought this suit in one of the courts of the state to recover a tax levied against the St. Louis Southwestern Railway Company by the state tax commission under the provisions of that act for the year 1911, amounting to the sum of $6,798.26, besides a penalty and interest.

The act is one of three that were passed by the general assembly during the same year, designed for the purpose of obtaining revenue from corporations doing business in the state. The first of these is act No. 87, approved March 8 (Acts 1911, p. 48), which prescribes the fees to [352] be paid by domestic corporations for the filing of their articles of incorporation, and by foreign corporations for the privilege of doing intrastate business in Arkansas. Its 8th section requires railroad and other transportation companies organized under the laws of the state to pay incorporation fees based upon the mileage of their lines; and, by § 9, "All foreign railroad, street, interurban, or other transportation companies now doing intrastate business, or desiring to engage in intrastate business, or authorized to engage in intrastate business, shall, before being permitted to continue to do intrastate business, or authorized to engage in intrastate business, shall pay the same fees as are required of such domestic corporations."

Act No. 112 provides for what are called "annual franchise taxes" on corporations doing business in the state. The first three sections refer to domestic corporations doing business for profit. Sections 4 and 5 require each foreign corporation for profit doing business in the state, and owning or using a part or all of its capital or plant in the

state, to make an annual return to the tax commission, showing, among other things, the total amount of its capital stock, the market value of the same, and the value of property owned and used by it, within and without the state, respectively. Section 6 provides that the commission, from the facts thus reported and any other facts bearing upon the question, shall determine "the proportion of the authorized capital stock of the company represented by its property and business in this state," and shall report the same to the auditor, who shall charge and certify to the treasurer for collection annually from such company, "in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this state, 1/20 of 1 per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in [353] business transacted in this state." Section 12 requires the attorney general to collect the tax with an added penalty for delinquency in payment, by suit to be brought in the name of the state. By § 14 the tax and penalty are made a first lien upon all property of the corporation. By § 15, if a corporation "organized under the laws of Arkansas or any foreign country authorized to do business in this state for profit" fails or neglects to make the report or pay the tax prescribed for thirty days after the expiration of the time limited by the act, and the default is wilful and intentional, an action may be brought by the attorney general or prosecuting attorney to forfeit and annul the charter of the corporation, and "if the court is satisfied that such default is wilful and intentional it shall revoke and annul such charter." By § 20, when any corporation shall have paid the franchise tax prescribed by the act, the tax commission, or the secretary of state if the commission be abolished, is required to issue to it a certificate authorizing it to do business in the state for the term of five years, upon condition that it pay annually the franchise tax prescribed by the act, and such certificate is made evidence in all the courts of the state of the right of the corporation to do business in the state during the term of the certificate. And, "in case any corporation shall fail to pay the franchise tax prescribed by this act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this state, in addition to the other penalties prescribed in this act." By act No. 313, approved May 26, 1911, act No. 112 was amended with respect to the time of its taking effect, and in another particular not now pertinent.

On May 4, the legislature passed act No. 251, entitled, "An Act to Provide the Manner of Assessing for Taxation the Property of Railroads, Express, Sleeping Car, Telegraph, [354] Telephone, and Pipe Lines Companies." (Acts of Arkansas 1911, p. 233.) This provides that the property of railroad corporations, and of the others named in the title, shall be assessed by the tax commission. Section 2 is as follows:

"Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph, and telephone companies, are declared to be property for the purpose of taxation, and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Section 9 requires railroad companies to file with the tax commission statements showing their physical property in the state. Section 10 requires that the statement shall show "the aggregate value of the whole railroad, and there shall be taken into consideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the state, the franchises, privileges, and everything of any character whatever situated upon the right-of-way of the road, connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing."

The defendant, a Missouri corporation, owning and operating lines of railroad in the states of Missouri, Arkansas, and other states, over which it carries both intrastate and interstate commerce, made its report for the year 1911 in accordance with act No. 112, but under protest, reserving the right to contest the validity of the act. This report, among other things, showed that the total amount of authorized capital stock was $55,000,000 and the total amount of issued and outstanding capital stock was $36,249,750. The commission found the [355] proportion of the outstanding capital stock represented by property owned and used by defendant in business transacted in the state of Arkansas for the year 1911 to be $13,596,520, on which the franchise tax amounted to $6,798.26.

The complaint filed in behalf of the state herein set forth the making of the report by defendant as mentioned, and the taking of the necessary proceedings to fix its responsibility under the provisions of act No. 112.

Defendant's answer, besides setting up its status as a railway corporation incorporated under the laws of Missouri owning and operating a railway line in Arkansas and several other states, and engaged as a common carrier in interstate business in those states, and also doing intrastate business in the state of Arkansas pursuant to its laws, averred that its property in that state was assessed for the purposes of general taxation for the year 1910 at the value of $9,155,965, and the tax levied thereon amounted to $191,713.95, which defendant paid; and that under act No. 251, approved May 4, 1911, the state tax commission assessed its property within the state for tax purposes for the latter year at the value of $11,260,240, upon which assessment taxes had been levied in the sum of $239,388.84, which defendant offered to pay (and has since paid), and averred that the tax sued on "is a tax upon the privilege and right of this defendant to do both an interstate and intrastate business in the state of Arkansas, and is a tax upon the interstate business, property, and income of the defendant, and is a tax placed and imposed upon defendant for the privilege of engaging in interstate commerce, and an attempt to regulate interstate commerce, and a burden thereon; and that if said act is enforced defendant will be deprived of its right to engage in an interstate business in and through the state of Arkansas." The answer also challenged the validity of act No. 112, as applied and attempted to be enforced against [356] defendant, on the ground that it amounted to a taking of its property without due process of law and a denial of the equal protection of the laws.

The attorney general's demurrer to this answer was sustained, and, the defendant declining to plead further, judgment was entered for the tax and penalty sued for.

The supreme court of the state affirmed the judgment (106 Ark. 321, 152 S. W. 110), and the present writ of error was sued out.

Mr. **William T. Wooldridge** argued the cause, and, with Messrs. Samuel H. West, Edward A. Haid, and Frank G. Bridges, filed a brief for plaintiff in error:

Act No. 112 of Ark. Laws 1911, as construed by the supreme court of Arkansas, being the necessary basis for this suit, and being, by its terms and as so construed, a burden on interstate commerce, there is a Federal question involved, and this court has jurisdiction.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1024; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

Act No. 112 of Ark. Laws 1911, as construed by the supreme court of Arkansas in this suit, is void, because the tax is a regulation of interstate commerce in that it imposes a direct burden upon that portion of the business and capital of the plaintiff in error which is engaged in and devoted to interstate commerce.

Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Webster v. Bell, 15 C. C. A. 360, 25 U. S. App. 379, 68 Fed. 183; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Allen v. Pullman's Palace Car Co. 191 U. S. 179, 48 L. ed. 138, 24 Sup. Ct. Rep. 39; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, L.R.A. 1915, —, 34 Sup. Ct. Rep. 15; Freeo Valley R. Co. v. Hodges, 105 Ark. 314, 151 S. W.

281; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203.

Act No. 112 of Ark. Laws 1911, as construed by the supreme court of Arkansas, in connection with act No. 251, subjects the property of plaintiff in error to double taxation, and the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the state of Arkansas; and because the tax denies to the plaintiff in error the equal protection of the law.

Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 165, 47 L. ed. 1000, 23 Sup. Ct. Rep. 817; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Harris Lumber Co. v. Grandstaff, 78 Ark. 187, 95 S. W. 772.

Mr. **William H. Rector** argued the cause, and, with Mr. William L. Moose, Attorney General of Arkansas, and Messrs. De E. Bradshaw, Lewis Rhoton, and Thomas E. Helm, filed a brief for defendant in error:

A state may exact from a railway company a tax upon that portion of its property actually within its borders, and, in assessing it for the purposes of taxation, take into consideration its value as a going concern and as a part of a general system extending over several states.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Western U. Teleg. Co. v. Atty. Gen. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; American Exp. Co. v. Indiana, 165 U. S. 256, 41 L. ed. 707, 17 Sup. Ct. Rep. 991; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527.

As construed by the supreme court of Arkansas, the tax here involved is a legal exaction, intended to reach and make amenable to taxation an element of value which is a well-recognized factor in ascertaining the full value of corporate property, and which expressly has been omitted from taxation in the general enactments relative to the assessment and collection of taxes upon property owned by railway corporations and actually situated in the state of Arkansas. As thus construed, it is not a burden upon interstate commerce nor upon the right of the plaintiff in error to engage in such commerce.

Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 549, 31 L. ed. 790, 793, 8 Sup. Ct. Rep. 961; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107.

If the tax imposed by act No. 112, of Ark. Laws 1911 be regarded as a privilege, license, or excise tax, rather than as a tax upon property, it is nevertheless a valid exercise by the state of its right to prescribe the terms and conditions upon which corporations may transact an intrastate business within its borders.

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 Ann. Cas.

978; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; California v. Central P. R. Co. 127 U. S. 41, 32 L. ed. 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; Ewing v. Leavenworth, 226 U. S. 464, 57 L. ed. 303, 33 Sup. Ct. Rep. 169; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58: Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Tremont & S. Mills v. Lowell, 178 Mass. 469, 59 N. E. 1007; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, L.R.A. 1915, —, 34 Sup. Ct. Rep. 15; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

The tax here involved does not deny to the plaintiff in error the equal protection of the law, nor deprive it of its property without due process of law.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Merchants' & Mfrs. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; St. Louis, I. M. & S. R. Co. v. Davis, 132 Fed. 629; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; Bank of Commerce v. Tennessee, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, L.R.A. 1915, —, 34 Sup. Ct. Rep. 15; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; Carson v. Brockton Sewerage Comrs. 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The validity of act No. 112, and of the tax that, pursuant to its provisions, has been levied against plaintiff in error, is questioned on the ground of repugnancy to the commerce clause of the Constitution of the United States and the "due process" and "equal protection" clauses of the 14th Amendment.

The act is entitled, "An Act for an Annual Franchise Tax on Corporations Doing Business in the State of Arkansas" (Acts of Arkansas, 1911, p. 67). Its 4th, 5th, and 6th sections require each foreign corporation for profit, doing business in the state, and owning or using a part or all of its capital or plant in the state, to pay "for the privilege of exercising its franchise in this state, 1/20 of 1 per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state." On the other hand, act No. 251, approved May 4, 1911 (Acts of Arkansas, p. 233), is entitled, "An Act to Provide the Manner of Assessing for Taxation the Property of Railroads, Express, Sleeping Car, Telegraph, Telephone, and Pipe Lines Companies." By its 2d section the franchises (other than the right to be a corporation) of all railroad, express, telegraph, and telephone com-

panies are declared to be [361] property for the purpose of taxation, and the values of such franchises are to be considered by the assessing officers when assessing the property of such corporations.

The supreme court of the state, in its opinion herein, after reciting the pertinent provisions of the state Constitution, went on to say (106 Ark. 326): "Our court has held that a corporation owes its existence to the state, and the right to enjoy this privilege is a subject of taxation, and that upon the power of the legislature to impose such a tax there exists no restriction in our Constitution. In the case of a foreign corporation, the tax or license is paid for the privilege of exercising its corporate powers in the state. Baker v. State, 44 Ark. 138, and cases cited." (p. 327.) "In the passage of the act in question [act No. 112], no doubt the legislature had in mind the fact that the right or privilege to be or exist as a corporation, although a matter of value to the stockholders of the corporation, is not an asset of the corporation, and transferable as such, and that its value cannot, under ordinary rules, be ascertained for the purpose of taxation as property, but since it is a privilege or right granted by the state, a franchise tax may be imposed upon this right or privilege for the purpose of raising revenue. We think it plain, then, under our Constitution and decisions, that the act in question is valid unless it be held a burden upon interstate commerce." And, after citing certain decisions of this court bearing upon the latter question, the court proceeded (p. 329): "In the case at bar the gross receipts from all sources of the railway company have not been used as a means for ascertaining the value of the property in the state. By the express provision of act No. 251, enacted for the purpose of providing the manner for assessing for taxation the property of railroad companies, the right to be or exist as a corporation was expressly excluded from the items which go to make up the value of the property of the corporation. As we have [362] already seen, the right or privilege to be or exist as a corporation is the subject of taxation, and this right or privilege is not considered in fixing the value of the property of corporations under act No. 251, the general tax act. Our state has fixed a franchise tax based solely 'upon the proportion of outstanding capital stock of corporations represented by property owned and used in business transacted in this state.' The act in question seems to have been drawn with great care and with the evident purpose to exclude any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280, and Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and therefore intended to pass an act that would not be contrary to the principles therein announced. We think it has done so. It will be noted in the Ludwig Case, the statute required a foreign corporation engaged in interstate commerce to pay as a license tax for doing intrastate business, a given amount on its capital stock, whether employed within the state or elsewhere, and the court held that on the authority of the Kansas Case, the statute in question was unconstitutional and void because it directly burdened interstate commerce and imposed a tax on property beyond the jurisdiction of the state."

Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state. Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547; Williams v. [363] Mississippi, 170 U. S. 213, 225, 42 L. ed. 1012, 1016, 18 Sup. Ct. Rep. 583; Smith v. St. Louis & S. W. R. Co. 181 U. S. 248, 257, 45 L. ed. 847, 850, 21 Sup. Ct. Rep. 603; Stockard v. Morgan, 185 U. S. 27, 37, 46 L. ed. 785, 794, 22 Sup. Ct. Rep. 576; Reid v. Colorado, 187 U. S. 137, 151, 47 L. ed. 108, 115, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 288; Sioux Remedy Co. v. Cope, decided November 30, 1914, 235 U. S. 197, ante, 193, 35 Sup. Ct. Rep. 57.

We therefore accept the construction of act No. 112 that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the state, the amount of the tax being fixed solely by reference to the property of the corporation that is within the state and used in business transacted within the state, and excluding any imposition upon or in-

terference with interstate commerce. By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intrastate business; and this exposition of act No. 112 brings it into harmony with act No. 87 (quoted in the prefatory statement), which requires foreign corporations to pay initial fees only for the privilege of doing intrastate business; and renders it harmonious, also, with act No. 251, under which the franchise of corporate existence is excluded from the assessment.

And we proceed to consider whether, in view of the construction thus placed upon act No. 112, the franchise tax imposed upon plaintiff in error pursuant to its terms runs counter to the commerce clause or the 14th Amendment.

The tax, as will be observed, is not in any wise based upon the receipts of the railroad company from interstate commerce, either taken alone or in connection with the receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with the [364] volume or the value of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, as in Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; and United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211.

And we have no hesitation in overruling the contention that the tax is repugnant to the "due process" clause on the ground of being in effect based on property located beyond the limits of the state, as in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 30, 54 L. ed. 355, 367, 30 Sup. Ct. Rep. 190; and in Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 280; for this tax is measured by reference to property situate wholly within the confines of the state.

So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, where the court, by Mr. Chief Justice Fuller, said: "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly [365] thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

So, in Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817, the court, reviewing numerous previous cases, laid down certain propositions as well-established, and among them the following: (a) No state can compel a party, individual, or corporation, to pay for the privilege of engaging in interstate commerce; (b) this immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in interstate commerce; and (c) the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided, at least, the franchise is not derived from the United States.

Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the state. It is fixed at a definite percentage ($\frac{1}{20}$ of 1 per cent) of "the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state," and the act provides machinery for ascertaining the market value of the entire capital stock, and striking a proportion between the value of the property owned and used by the corporation in the state and that owned and used by it outside of the state. In its essence the tax is not distinguishable from that which was sustained by this court in Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, and in another

case between the same parties, 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889. See also Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 430, 435, 38 L. ed. 1031, 1039, 14 Sup. Ct. Rep. 1114; Indianapolis & V. [366] R. Co. v. Backus, 154 U. S. 438, 38 L. ed. 1040, 14 Sup. Ct. Rep. 1114; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 444, 445, 38 L. ed. 1041, 1045, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 18, 41 L. ed. 49, 55, 16 Sup. Ct. Rep. 1054; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 424, 47 L. ed. 1116, 1121, 23 Sup. Ct. Rep. 730.

It is insisted that act No. 112, as construed by the state court, in connection with act No. 251, subjects the property of plaintiff in error to double taxation, and that this contravenes the constitutional guaranties respecting due process of law and the equal protection of the laws. No attempt is made to show that the classification of corporations adopted in act No. 112 is not a reasonable one, or that in any respect corporations of the class to which plaintiff in error belongs are discriminated against in favor of domestic corporations, as was the case in Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247. Under the first three sections of this act, each corporation organized and doing business under the laws of the state for profit is required to pay a tax of 1/20 of 1 per cent upon "that part of its subscribed or issued and outstanding capital employed in Arkansas," with an exception not now pertinent; whereas, by the next three sections, each foreign corporation for profit doing business in the state, and owning or using a part or all of its capital or plant in the state, is required to pay according to the same percentage "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state." It is not contended that there is here any substantial discrimination. The gist of the criticism seems to be that the two acts in question subject the property of plaintiff in error, as well as that of all other corporations that are within the operation of those acts, to double taxation, and that this is a denial of "equal protection" in favor of other classes of taxpayers. Reference is made to an extract from the opinion in the Adams Case, 155 U. S. 696, where the court said: 'Doubtless, no state could add to the taxation of property [367] according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 445, 38 L. ed. 1041, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122." This, however, does not mean, as is contended, that because of the 14th Amendment a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce. The court was dealing only with the commerce clause, and the language quoted means that, by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 154 U. S. at p. 445.

Nothing in the 14th Amendment imposes any ironclad rule upon the states with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality [368] is not based upon arbitrary distinctions. Davidson v. New Orleans, 96 U. S. 97, 105, 106, 24 L. ed. 616, 620; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 351, 35 L. ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 228, 41 L. ed. 683, 697, 17 Sup. Ct. Rep. 305; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 295, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; Armour Packing Co. v. Lacy, 200 U. S. 226, 235, 50 L. ed. 451, 456, 26 Sup. Ct. Rep. 232; Michi-

gan C. R. Co. v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459.

Thus far we have dealt only with the authority of the state to levy a tax of this character, and with the mode in which the amount of the tax is ascertained. But the case presents another question that is more serious. By § 20 of act No. 112 it is enacted: "In case any corporation shall fail to pay the franchise tax prescribed by this act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this state, in addition to the other penalties prescribed in this act."

If this must needs be construed to mean that for nonpayment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intrastate and interstate commerce is to forfeit its right to do business in the state, not only with respect to intrastate but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid, as amounting in effect to a regulation of that commerce; unless, indeed, § 20 could be treated as separable. This result would follow from the principles laid down in Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 554, 31 L. ed. 790, 795, 8 Sup. Ct. Rep. 961; Leloup v. Mobile, 127 U. S. 640, 644, 647, 2 L. ed. 311, 313, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. v. Seay) 132 U. S. 472, 477, 33 L. ed. 409, 410, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 179, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39, and many other cases.

But the state court has not as yet construed the section [369] as calling for the forfeiture of the privilege of doing interstate business in the event of nonpayment of the franchise tax; nor is the state here insisting upon such a construction. The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its nonpayment. *Non constat* but that the state court will hold, when confronted with the question, that the franchise to be forfeited pursuant to § 20 is confined to intrastate commerce. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214], it is proper for this court to wait until the state court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution. Bachtel v. Wilson, 204 U. S. 36, 40, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Adams v. Russell, 229 U. S. 353, 360, 57 L. ed. 1224, 1227, 33 Sup. Ct. Rep. 846; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546, 58 L. ed. 713, 720, 34 Sup. Ct. Rep. 359. And see Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372. At present, therefore, we have merely to consider whether § 20 so clearly requires a forfeiture of the interstate franchise for nonpayment of the tax in question that it is not reasonable to anticipate that the state court will put another construction upon it. And in doing this we ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the state will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this: that if a statute will bear two constructions, one within and the other beyond the constitutional power of the lawmaking body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority. United States v. Coombs, 12 Pet. 72, 76, 9 L. ed. 1004, 1006; Grenada County v. [370] Brogden (Grenada County v. Brown) 112 U. S. 261, 269, 28 L. ed. 704, 707, 5 Sup. Ct. Rep. 125; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 101, 47 L. ed. 721, 726, 23 Sup. Ct. Rep. 611. It hardly needs to be said that the supreme court of Arkansas recognizes and applies this fundamental rule of construction. State v. Lancashire F. Ins. Co. 66 Ark. 466, 477, 45 L.R.A. 348, 51 S. W. 633; Waterman v. Hawkins, 75 Ark. 120, 126, 86 S. W. 844; State v. Moore, 76 Ark. 197, 201, 70 L.R.A. 671, 88 S. W. 881.

It does not seem to us that § 20, when taken in connection with the context, requires to be so construed as to interfere with interstate commerce. The taxing provisions of the act apply to all corporations doing business in the state for profit, whether organized under its laws, or under the laws of other states, or of foreign countries, and entirely irrespective of the question whether they are engaged in commerce. Therefore it was natural that, in such a provision as is contained in § 20, language having upon its face a general scope should be adopted; but it need not be indiscriminately applied to all the several kinds of corporations that are subject to the act.

The forfeiture in terms is of "the right of such corporation to do business in this state." This does not necessarily include the right to transact business that is done partly within and partly without the state The section does not call for an annulment of the charter. That topic is covered by § 15 of the same act, which applies, however, only to corporations organized under the laws of Arkansas or of foreign countries, and not to corporations of other states, to which class plaintiff in error belongs.

In view of all these considerations, we ought to assume, until the state, through its judicial or administrative officers, places a different construction upon the act, that § 20 will be limited in its operation to forfeiting for nonpayment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act. Under either view it is obvious, [371] from what has been already said, that the tax does not amount to a regulation of or a burden upon interstate commerce.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

BERWIND-WHITE COAL MINING COMPANY, Plff. in Err.,
v.
CHICAGO & ERIE RAILROAD COMPANY.

(See S. C. Reporter's ed. 371-376.)

Carriers — demurrage — tariffs — publication.

1. A carrier's demurrage tariff is sufficiently published and filed where the carrier filed with the Interstate Commerce Commission a book of rules of a car service association of which it was a member, relating to liability for demurrage, and a few days later wrote the Commission a letter stating that the demurrage charge would be $1 per day, both of which documents were received and placed on file by the Commission without any objection whatever as to their form, and as a matter of fact were adequate to give notice.

[For other cases, see Carriers, III. g, in Digest Sup. Ct. 1908.]

Carriers — publication of tariffs — posting.

2. Posting for public inspection is not essential to make effective the carrier's tariffs filed with the Interstate Commerce Commission.

[For other cases, see Carriers, III. g, in Digest Sup. Ct. 1908.]

Carriers — demurrage — destination.

3. Cars billed to Chicago for re-consignment have reached their destination for the purposes of a demurrage charge where, in accordance with a practice which has existed for more than twenty years, they are held on storage tracks at Hammond, Indiana, a considerable distance from the terminals of the carrier nearer the center of the city, but convenient to the belt line by which cars could be transferred to any desired new destination.

[No. 92.]

Argued December 3, 1914. Decided December 14, 1914.

IN ERROR to the Appellate Court, First District of the State of Illinois, to review a judgment which, affirming a judgment of the Municipal Court of Chicago, awarded demurrage on carloads of coal. Affirmed.

See same case below, 171 Ill. App. 302.

Mr. Henry T. Martin argued the cause, and, with Mr. Edward D. Pomeroy, filed a brief for plaintiff in error:

The booklet of the Chicago Car Service Association, and the letters and circular which were mailed to the secretary of the Interstate Commerce Commission, do not constitute a tariff.

England v. Baltimore & O. R. Co. 13 Inters. Com. Rep. 614; Porter v. St. Louis & S. F. R. Co. 15 Inters. Com. Rep. 4.

The filing of papers with the Interstate Commerce Commission raises no presumption of approval.

Suffern, H. & Co. v. Indiana, D. & W. R. Co. 7 Inters. Com. Rep. 279; San Bernardino Bd. of Trade v. Atchison, T. & S. F. R. Co. 3 Inters. Com. Rep. 138; England v. Baltimore & O. R. Co. and Porter v. St. Louis & S. F. R. Co. supra.

Demurrage is governed by the interstate commerce act.

Michie v. New York, N. H. & H. R. Co. 151 Fed. 694; United States v. Standard Oil Co. 148 Fed. 722; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174.

There can be no charge for demurrage upon interstate shipments without a specific tariff authority therefor.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; New York, N. H. & H. R. Co. v. Interstate Commerce Commis-

NOTE.—As to right of railroad company to make a charge for detention of its cars by consignees—"demurrage,"—see note to Norfolk & W. R. Co. v. Adams, 22 L.R.A. 530.

sion, 200 U. S. 361–391, 50 L. ed. 515–521, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 80, 81, 52 L. ed. 681, 694, 695, 28 Sup. Ct. Rep. 428; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; United States v. Denver & R. G. R. Co. 18 Inters. Com. Rep. 7; Munroe v. Michigan C. R. Co. 17 Inters. Com. Rep. 27; Crescent Coal & Min. Co. v. Baltimore & O. R. Co. 20 Inters. Com. Rep. 569; Interstate Commerce Commission v. Chicago, B. & Q. R. Co. 186 U. S. 320–328, 46 L. ed. 1182–1187, 22 Sup. Ct. Rep. 824; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

The tariffs are binding upon shipper and carrier alike.

Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893.

The interstate commerce act supersedes the common law with reference to interstate shipments.

St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174.

Demurrage cannot properly be assessed until the shipment has reached its destination.

United States v. Denver & R. G. R. Co. 18 Inters. Com. Rep. 9; Staten Island Rapid Transit R. Co. v. Marshall, 136 App. Div. 571, 121 N. Y. Supp. 82; Crescent Coal & Min. Co. v. Baltimore & O. R. Co. 20 Inters. Com. Rep. 569.

Mr. Edward W. Rawlins argued the cause, and Messrs. William J. Calhoun and Will H. Lyford filed a brief for defendant in error:

Defendant in error, having filed with the Interstate Commerce Commission its demurrage rules and statement of charges, was not only entitled, but required, to collect demurrage charges in accordance therewith.

Schumacher v. Chicago & N. W. R. Co. 207 Ill. 199, 69 N. E. 825; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 594, 56 L. ed. 556, 567, 32 Sup. Ct. Rep. 316; Kehoe v. Charleston & W. C. R. Co. 11 Inters. Com. Rep. 166; Illinois C. R. Co. v. Henderson Elevator Co. 226 U. S. 441, 57 L. ed. 290, 33 Sup. Ct. Rep. 176; Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358; Erie R. Co. v. Wanaque Lumber Co. 75 N. J. L. 878, 69 Atl. 168; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628.

Even though the demurrage rules and charges filed with the Interstate Commerce Commission were in certain respects informal, yet such fact would not excuse plaintiff in error from paying the charges here in question, as they were the regular and usual charges for such service.

Memphis Freight Bureau v. Kansas City Southern R. Co. 17 Inters. Com. Rep. 90; Black Horse Tobacco Co. v. Illinois C. R. Co. 17 Inters. Com. Rep. 588; Cudahy Packing Co. v. Chicago & N. W. R. Co. 12 Inters. Com. Rep. 446.

The demurrage charges in question were properly assessed on the cars while they were being held in the yards at Hammond, as those yards were the regular Chicago holding yards for carload freight held for reconsignment.

Woolner Distilling Co. v. Peoria & E. R. Co. 136 Ill. App. 479; 2 Hutchinson, Carr. § 710, p. 793.

Memorandum opinion by direction of the court, by Mr. Chief Justice White:

The judgment which is under review awarded demurrage [375] on carloads of coal shipped by the plaintiff in error from West Virginia to Chicago, there to be re-consigned. (171 Ill. App. 302.) There are only two alleged Federal contentions:

1. That allowing the demurrage conflicted with the act to regulate commerce because no tariff on the subject was filed or published. The fact is that the railroad had complied with the law as to filing tariff sheets, and had also, long before the time in question, filed a book of rules of the Chicago Car Service Association, of which it was a member, relating to liability for demurrage, and a few days after had written the Commission a letter stating that the demurrage charge would be $1 per day. The argument is that such documents were not sufficiently formal to comply with the law, and hence afforded no ground for allowing demurrage. But the contention is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form, and it is certain that, as a matter of fact, they were adequate to give notice. Equally without merit is the insistence that there was no proof that the documents were posted for public inspection. Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358; Kansas City

Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 594, 56 L. ed. 556, 567, 32 Sup. Ct. Rep. 316; United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323.

2. Conceding that a tariff concerning demurrage was filed, it is insisted it only authorized demurrage at destination, and the cars never reached their destination, but were held at a place outside of Chicago. The facts are these: The storage tracks of the railroad for cars billed to Chicago for re-consignment were at Hammond, Indiana, a considerable distance from the terminals of the company nearer the center of the city, but were convenient to the belt line by which cars could be transferred to any desired new destination, and the holding on such tracks of cars consigned as were those in question was in accordance with [376] a practice which had existed for more than twenty years. Under these circumstances the contention is so wholly wanting in foundation as in fact to be frivolous.

Affirmed.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plff. in Err.,
v.
ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased.

(See S. C. Reporter's ed. 376-380.)

Error to circuit court of appeals — scope of review.

1. The Federal Supreme Court on a writ of error to a circuit court of appeals which rests on the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), but involves no contention as to its meaning, need only determine whether plain error was committed in relation to the principles of general law involved.

[For other cases, see Appeal and Error, 4206-4300, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk.

2. There is no room for the application of the doctrine of assumption of risk, where a railway engineer, after seeing some loaded cars standing on a yard track ahead of his train, which became more and more shut off from his view as the train advanced on a connecting lead track, twice asked the fireman, who was in full view of the cars, whether they were clear of the lead track, receiving the first time an affirmative answer and the second time a negative answer, closely followed by the fireman's jump from the locomotive, whereupon, the engineer, having shut off the power, stepped to the side of the engine, and was killed in the collision which immediately resulted.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

[No. 218.]

Argued December 2, 1914. Decided December 14, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Tennessee, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, 125 C. C. A. 25, 207 Fed. 281.

Mr. H. D. Minor argued the cause, and, with Mr. Charles N. Burch, filed a brief for plaintiff in error:

Even where the situation which was responsible for the accident was due to the master's negligence, yet if the situation was observed by the servant, or was so obvious that an ordinarily prudent person would have seen and appreciated it, then the servant is held to have assumed the risk, and cannot recover.

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68, 48 L. ed. 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Harvey, 228 U. S. 321, 324, 57 L. ed. 855, 856, 33 Sup. Ct. Rep. 518; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, L.R.A.1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635; Texas & P. R. Co. v. Archibald, 170 U. S. 673, 42 L. ed. 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; 4 Labatt, Mast. & S. § 1320.

Where the knowledge of the situation on the part of the servant is equal to that of the master, and he afterwards voluntarily encounters it, he assumes the risk, and cannot recover.

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

Generally as to servant's assumption of risk—see notes to Pidcock v. Union P. R. Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374; and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

On effect of assurance of safety given by master or coservant—see note to McKee v. Tourtellotte, 48 L.R.A. 542.

Fletcher v. Louisville & N. R. Co. 102 Tenn. 7, 49 S. W. 739, 6 Am. Neg. Rep. 204; 3 Labatt, Mast. & S. § 1184.

The doctrine of assumption of risk is not confined to risks existing at the time the contract of employment was entered into, but applies to dangers which subsequently arise, and which become known to the employee or which are so plainly observable that he must be presumed to know them.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635; Chicago & E. R. Co. v. Ponn, 112 C. C. A. 228, 191 Fed. 682.

The true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68, 48 L. ed. 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230.

Plaintiff's case cannot be saved by the claim that it was a matter of contributory negligence, and not assumption of risk. For if there was an assumption of risk, it embraced not only the risk arising from the obvious and patent negligence of the master, but also from the conduct of the servant himself in dealing with the situation.

Seaboard Air Line R. Co. v. Horton, supra; Kane v. Northern C. R. Co. 128 U. S. 94, 32 L. ed. 341, 9 Sup. Ct. Rep. 16.

There being testimony which clearly went to show assumption of risk by the decedent (in our opinion justifying a peremptory instruction for the defendant), the learned circuit court of appeals should not, in view of the error of the trial court, have affirmed the case on the ground that the evidence showed no assumption of risk, but should have remanded the case for a submission of that question to the jury at least.

Slocum v. New York L. Ins. Co. 228 U. S. 387, 57 L. ed. 889, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

Mr. R. M. Barton argued the cause, and Mr. McKinney Barton filed a brief for defendant in error:

There can be no reversal for any error of fact.

3 Foster, Fed. Pr. § 496, p. 1969, and note; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133; Behm v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

It is not possible to invoke the doctrine of assumption of risk as applicable to the facts developed and occurring immediately at the time of the accident; and the only question that could arise upon these facts, and the evidence in the record relating to that, is and was the question of contributory negligence.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 12, 51 L. ed. 681, 686, 27 Sup. Ct. Rep. 407; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, 15 Am. Neg. Rep. 476; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 C. C. A. 68, 37 C. C. A. 499, 96 Fed. 298.

The question of the assumption of risk being out of the way, the decision of the United States circuit court of appeals, is conclusive.

Chicago Junction R. Co. v. King, 222 U. S. 222, 224, 56 L. ed. 173, 174, 32 Sup. Ct. Rep. 79.

The true test as to assumption of risk is not as to whether the employee by the exercise of due diligence could have discovered the danger, but whether the defect or danger was known or plainly observable.

Choctow, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746.

Memorandum opinion by direction of the court, by Mr. Chief Justice White:

While this second appeal rests on the employers' liability act, there is no contention as to its meaning (125 C. C. A. 25, 207 Fed. 281); hence we need only determine whether plain error was committed in relation to the principles of general law involved.[1]

Error in holding that the facts afforded no ground for the application of the doctrine of assumption of the risk is the sole contention pressed in argument. A freight train [379] of which the deceased was engineer, proceeding southward on a lead track, approached or was traversing a railroad yard. Ahead—the distance not being specifically defined—on a yard track connecting with, and to the left of, the lead track, there stood some loaded coal cars which, while visible to the engineer from the right side of the engine, became more and more shut off from his view as the train advanced. The engineer asked the fireman, who was on the left side of the engine, and therefore in full view of the cars, whether they were clear of the lead track, and was answered that they were. There is a dispute

[1] Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; Southern R. Co. v. Gadd, 233 U. S. 577, 58 L. ed. 1090, 34 Sup. Ct. Rep. 696.

as to whether a head brakeman was riding in the cab, and whether subsequently, if there, he called the engineer's attention to the fact that the coal cars were not clear. But there is no dispute that the engineer again asked the fireman, who answered that the cars were not clear, and jumped from the locomotive. The engineer, having shut off his power, stepped to the left side, where, from the collision which immediately resulted, he received the injuries from which he subsequently died.

Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent, since the facts as stated absolutely preclude all inference that the engineer knew, or, from the facts shown, must be presumed to have known, that the coal cars were protruding over the track on which he was moving, and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.[2]

[380] The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish the risk was assumed. Thus it is urged that, as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employees of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again, the argument is that even although the engineer did not know of the protruding cars, and therefore did not consciously incur the great risk to result from the collision, yet, as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk, and only call for the application of the principle of contributory negligence or of fellow servant.

Affirmed.

[2] Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Texas & P. R. Co. v. Behymer, 189 U. S. 468, 47 L. ed. 905, 23 Sup. Ct. Rep. 622, 13 Am. Neg. Rep. 695; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 12, 51 L. ed. 681, 686, 27 Sup. Ct. Rep. 407, s. c. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 503, 504, 58 L. ed. 1062, 1069, 1070, 34 Sup. Ct. Rep. 635.

EASTERLING LUMBER COMPANY, O. L. Benway, and T. R. Thames, Plffs. in Err.,
v.
S. W. PIERCE.

(See S. C. Reporter's ed. 380-382.)

Error to state court — frivolousness of Federal question — equal protection of the laws.

1. An objection founded on U. S. Const., 14th Amend., to the classification provided by Miss. Laws 1908, chap. 194, abrogating the fellow servant rule as to employees of "a railroad corporation, and all other corporations and individuals using engines, locomotives, or cars of any kind or description whatsoever propelled by the dangerous agencies of steam, electricity, gas, gasolene, or lever power, and running on tracks," is so clearly without merit as not to serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1110-1137; Constitutional Law, 286-291 in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On error to state court in cases involving questions of the equal protection of the laws—see note to Manhattan L. Ins. Co. v. Cohen, 58 L. ed. U. S. 1245.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

On constitutionality of statutes abrogating the fellow servant rule—see notes to Louisville & N. R. Co. v. Melton, 47 L.R.A. (N.S.) 84, and Bradford Constr. Co. v. Heflin, 12 L.R.A. (N.S.) 1040.

Error to state court — frivolousness of Federal question — due process of law.

2. The contention that due process of law is denied by giving a retroactive application to Mississippi Laws 1912, chap. 215, enacted after the happening of an accident, but before trial, making the proof of the happening of an accident give rise to a prima facie presumption of negligence, is too devoid of merit to sustain a writ of error from the Federal Supreme Court to a state court, where the latter court held that the statute cut off no substantive defense, but simply provided a rule of evidence controlling the burden of proof.

[For other cases, see Appeal and Error, 1110–1137; Constitutional Law, 774–778, in Digest Sup. Ct. 1908.]

[No. 589.]

Submitted November 30, 1914. Decided December 14, 1914.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Covington County, in that state, in favor of plaintiff in an action to recover damages for personal injuries. Dismissed for want of jurisdiction.

See same case below, — Miss. —, 64 So. 461.

Messrs. **Edward Mayes** and **T. Brady, Jr.**, submitted the cause for plaintiff in error:

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, but the classification must be based on some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

Ballard v. Mississippi Cotton Oil Co. 81 Miss. 557, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Bradford Constr. Co. v. Heflin, 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077; Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360; Givens v. Southern R. Co. 94 Miss. 830, 22 L.R.A.(N.S.) 971, 49 So. 180; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594; Nicol v. Ames, 173 U. S. 521, 43 L. ed. 793, 19 Sup. Ct. Rep. 522; Erb v. Morasch, 177 U. S. 586, 44 L. ed. 898, 20 Sup. Ct. Rep. 819; W. W. Cargill Co. v. Minnesota, 180 U. S. 469, 45 L. ed. 627, 21 Sup. Ct. Rep. 423; Cotting v. Kansas City Stock Yards Co. 183 U. S. 107, 46 L. ed. 107, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 561, 46 L. ed. 690, 22 Sup. Ct. Rep. 431; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 325, 46 L. ed. 932, 22 Sup. Ct. Rep. 662.

Mr. **Joseph Hirsh** submitted the cause for defendant in error. Mr. **E. L. Dent** was on the brief:

The alleged Federal questions are frivolous, and have been explicitly foreclosed by the decisions of this court.

Taylor, Jurisdiction, p. 638; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308–311, 47 L. ed. 190–192, 23 Sup. Ct. Rep. 123; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Louisville & N. R. Co. v. Melton, 47 L.R.A. (N.S.) 84 and note, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; 36 Cyc. 1217; Carothers v. Hurley, 41 Miss. 71; Belcher v. Mhoon, 47 Miss. 613; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; Horne v. Memphis & O. R. Co. 1 Coldw. 72; Meadowcroft v. People, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991; Com. v. Williams, 6 Gray, 1; State v. Thomas, 144 Ala. 77, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 Ann. Cas. 744; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35–42, 55 L. ed. 78–80, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Reitler v. Harris, 223 U. S. 437, 56 L. ed. 497, 32 Sup. Ct. Rep. 248; Luria v. United States, 231 U. S. 9, 58 L. ed. 101, 31 Sup. Ct. Rep. 10; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 296, 42 L. ed. 1037, 1043, 1044, 18 Sup. Ct. Rep. 594; Missouri P. R. Co. v. Mackey, 127 U. S. 208, 32 L. ed. 108, 8 Sup. Ct. Rep. 1161, 33 Kan. 298, 6 Pac. 291; Bucklew v. Central Iowa R. Co. 64 Iowa, 603, 21 N. W. 103; Callahan v. St. Louis Merchants' Bridge Terminal R. Co. 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348–351, 44 L. ed. 192–194, 20 Sup. Ct. Rep. 136; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 942; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Bradford Constr. Co. v. Heflin, 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077; Missouri P. R. Co. v. Castle, 224 U. S. 541–544, 56 L. ed. 875–878, 32 Sup. Ct. Rep. 606; Labatt, Mast. & S. p. 8864; Kreps v. Brady, 37 Okla. 754, 47 L.R.A. (N.S.) 106, 133 Pac. 216; Missouri P. R. Co. v. Smith, 47 L.R.A.(N.S.) 113, note; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U.

S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Chesapeake & O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. Rep. 985; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 70, 54 L. ed. 935, 30 Sup. Ct. Rep. 663; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913B, 1349; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441; Michigan Teleph. Tax Cases, 185 Fed. 634; Singer Sewing Mach. Co. v. Brickell, 199 Fed. 654; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Abilene Nat. Bank v. Dolley, 228 U. S. 1, 57 L. ed. 707, 33 Sup. Ct. Rep. 409; Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. ed. 147, 34 Sup. Ct. Rep. 31; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct. Rep. 372; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 681, 57 L. ed. 1022, 33 Sup. Ct. Rep. 715; Baccus v. Louisiana, 232 U. S. 334, 58 L. ed. 627, 34 Sup. Ct. Rep. 439; Southern P. Co. v. Railroad Commission, 193 Fed. 699; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359; Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. ed. 245, L.R.A.1915A, 1196, 34 Sup. Ct. Rep. 1196; Riley v. Massachusetts, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469; Hutchinson v. Valdosta, 227 U. S. 303, 57 L. ed. 520, 33 Sup. Ct. Rep. 290; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 Sup. Ct. Rep. 610; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 251.

Memorandum opinion by direction of the court, by Mr. Chief Justice White:

The injuries for which damages were awarded by the judgment sought to be reviewed (— Miss. —, 64 So. 461) happened on a steam logging railroad engaged in purely domestic business. The power to here review is based on two constitutional grounds seasonably asserted below, assailing two state statutes, the one (chap. 194, Miss. Laws of 1908, p. 204) enacted before the accident, doing away in the cases for which it provided with the principle of fellow servant; and the other (chap. 215, Miss. Laws of 1912), enacted after the happening of the accident, but before the trial below, providing that from the proof of the happening of an accident there should arise a prima facie presumption of negligence.

The constitutional objection to the first statute is that the classification for which it provided was so unequal as to cause the statute to be in conflict with the 14th [382] Amendment. The classification was this: "Every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasolene, or lever power, and running on tracks, . . ." That the objection is without merit is so clearly established as to require only references to the decided cases to that effect.[1]

The objection to the second statute is that it was wanting in due process because retroactively applied to the case, since the statute was enacted after the accident occurred. But the court below held that the statute cut off no substantive defense, but simply provided a rule of evidence controlling the burden of proof. That as thus construed it does not violate the 14th Amendment to the Constitution of the United States is also so conclusively settled as

[1] Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 184.

to again require nothing but a reference to the decided cases.[2]

As it results that at the time the writ of error was sued out it had been conclusively settled by the decisions of this court that both grounds relied upon were devoid of merit, we think the alleged constitutional questions were too frivolous to sustain jurisdiction, and we therefore maintain the motion which has been made to dismiss, and our judgment will be, dismissed for want of jurisdiction.

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[383] LOVELL-McCONNELL MANUFACTURING COMPANY, Petitioner, v. AUTOMOBILE SUPPLY MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 383-388.)

Appeal — clerk's fees for printing record — final decree.

A decree in favor of complainant in a patent infringement suit, finding that the patents sued on had been infringed, and awarding an injunction, and directing an accounting for damages and profits, while technically interlocutory, is "final" within the meaning of the act of February 13, 1911 (36 Stat. at L. 901, chap. 47, Comp. Stat. 1913, § 1656), under which the clerk of a Federal circuit court of appeals can charge no supervision fee on an appeal from a "final judgment or decree" of a district court if a printed transcript of the record is filed in compliance with the statute with such clerk of the court of appeals.

[For other cases, see Appeal and Error, IV. n. in Digest Sup. Ct. 1908.]

[No. 722.]

Submitted November 16, 1914. Decided December 14, 1914.

ON APPLICATION for leave to file petition for Mandamus or for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to correct the action of that court in approving the charging and retaining by the clerk of that court of a supervision fee. Leave to file petition for Mandamus denied. Petition for Certiorari granted. Order reversed on Certiorari.

The facts are stated in the opinion.

Messrs. **George C. Dean** and **Irving M. Obrieght** submitted the cause for petitioner.

Messrs. **C. A. L. Massie** and **Ralph Lane Scott** submitted the cause for respondent.

Mr. Chief Justice **White** delivered the opinion of the court:

The application is for leave to file a petition for mandamus directing the court below to correct the action taken by it which is complained of, or for the allowance of a certiorari to bring up the record in order that such complained-of action may be reviewed. We decline to allow leave to file the petition for mandamus, but grant the petition for certiorari, and, conformably to the stipulation of the parties, treat the document made a part of this proceeding as the record for the purpose of the certiorari, and proceed to act upon the same, treating the case as under submission on the merits.

The Automobile Supply Company appealed to the court below from an interlocutory decree in favor of the complainant, the Lovell-McConnell Company, finding that the patents sued on had been infringed, and awarding an injunction, and directing an accounting for damages and profits. On such appeal the Automobile Supply Company furnished the clerk of the court below a complete printed record accompanied with a written index of the contents of the same, and, in consequence of a demand made by the clerk, deposited under protest the sum of $696 as a fee [387] due the clerk for supervising the printed record so furnished. When, after a hearing, the court reversed the decree of the trial court, the Automobile Supply Company called upon the clerk either to refund the money charged for supervision, or to include it in his statement of the costs to be entered on the mandate. The clerk, being doubtful as to his duty in the matter, refused to do either, and insisted that the propriety of the charge be tested, to the end that he might act advisedly in the premises. The Automobile Supply Company thereupon moved to direct the clerk to include the supervision fee in the mandate, or to refund the amount of the deposit which had been made. The court held that the charge for supervision

[2] Mobile, J. & K. R. Co. v. Turnipseed, 219 U. S. 35, 42, 43, 55 L. ed. 78, 80, 81, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 82, 55 L. ed. 369, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Reitler v. Harris, 223 U. S. 437, 441, 442, 56 L. ed. 497, 499, 500, 32 Sup. Ct. Rep. 248; Luria v. United States, 231 U. S. 9, 25-27, 58 L. ed. 101, 106, 107, 34 Sup. Ct. Rep. 10.

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302, and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

was lawful, and was therefore properly taxable as costs, and directed the clerk to retain the money and include a charge for the same in the mandate. The application before us was then made by the Lovell-McConnell Company, the party cast and ultimately bound for the costs, both the parties, however, entering into the agreement as to the record and the submission on the merits which we at the outset stated.

Considering the act of Congress of February 13th, 1911 (36 Stat. at L. 901, chap. 47, Comp. Stat. 1913, § 1656), in Rainey v. W. R. Grace & Co. 231 U. S. 703, 58 L. ed. 445, 34 Sup. Ct. Rep. 242, it was held that the provisions of the act were applicable to the circuit courts of appeals, and it was consequently decided that where a printed transcript of the record was filed in compliance with the statute with the clerk of the court of appeals, no supervision fee could be charged by such clerk. Of course, if that ruling is here applicable, the court below clearly erred in allowing the charge for supervision, and the only possible question, therefore, is whether the statute, although generally applicable to records filed in the circuit court of appeals, is not so applicable in this case. It is insisted that it is not—and the court below so held—because, as the statute only provides for an appeal from a "final judgment or decree," it does not apply to [388] a case like the one under consideration, where the appeal was from a decree interlocutory in character. But without affixing to the statute a latitudinarian meaning, upon the theory that to do so is essential to give effect to its purpose and intent, and bring every interlocutory decree within its reach, we are of opinion that to exclude an interlocutory decree of the character of the one here involved from the operation of the statute would be to frustrate its plain purpose by a too rigid and unreasoning adherence to its letter. We so conclude because, while in a technical sense the decree here in question was interlocutory, when its character and the scope of the subject-matter which the appeal brought under review and the relief under it which it was competent to afford are considered, we are of opinion it must follow that such decree was, within the intendment of this statute, a final decree, and therefore that error was committed in permitting the supervision charge. Indeed, this view was taken in a well considered opinion by the circuit court of appeals for the sixth circuit in a case decided before the ruling in the Rainey Case, supra (Smith v. Farbenfabriken of Elberfeld Co. 117 C. C. A. 133, 197 Fed. 894), and we approve the reasoning by which the ruling in that case was sustained.

It results that the Circuit Court of Appeals erred in its order approving the charging and retaining the fee for supervision, and such order is therefore reversed, with directions to the court below to take such steps as may be necessary by recalling the mandate, if needs be, or otherwise, to afford the relief essential to give effect to the conclusions which we have expressed.

Reversed.

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[389] BRIDGET McGOVERN, Administratrix of the Estate of Peter McGovern, Deceased, Plff. in Err.,

v.

PHILADELPHIA & READING RAILWAY COMPANY.

(See S. C. Reporter's ed. 389-402.)

Error to district court — Federal question — treaties.

1. The construction and application of Federal treaties must be deemed to have been so involved as to sustain a direct writ of error from the Federal Supreme Court to a district court to review a judgment directing a verdict for defendant in an action under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 1010), where one of the grounds for directing the verdict was that the action could not be maintained for the benefit of nonresident

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NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On construction and operation of treaties—see note to United States v. The Amistad, 10 L. ed. U. S. 826.

On treaty guaranties to aliens—see note to Gandolfo v. Hartman, 16 L.R.A. 277.

As to right to maintain action for wrongful death for benefit of nonresident alien—see notes to Mulhall v. Fallon, 54 L.R.A. 934; Pittsburgh, C. C. & St. L. R. Co. v. Naylor, 3 L.R.A.(N.S.) 473; Jennings v. Com. 21 L.R.A.(N.S.) 267; and Maiorano v. Baltimore & O. R. Co. 53 L. ed. U. S. 792.

On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

Generally as to servant's assumption of risk—see notes to Pidcock v. Union P. R. Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374; and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

aliens, and the court, in an opinion rendered when granting a motion for a new trial on the same ground,—the case having been tried before and verdict rendered for plaintiff,—had discussed at length questions arising under various treaties of the United States, and held adversely to the plaintiff.

[For other cases, see Appeal and Error, 988–989, in Digest Sup. Ct. 1908.]

Death — action for benefit of nonresident alien.

2. The fact that the beneficiaries are nonresident aliens will not prevent the maintenance of the action for damages given by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 1010), to the personal representative for the benefit of the surviving widow, or certain specified dependent relatives of an employee of an interstate carrier, killed while engaged in interstate commerce.

[For other cases, see Death, II. b, in Digest Sup. Ct. 1908.]

Trial — question for jury — assumption of risk.

3. Conflicting testimony on the question of the assumption of risk by a deceased employee justifies the court in refusing to charge the jury that the risk was assumed.

[For other cases, see Trial, V. c, in Digest Sup. Ct. 1908.]

New trial — effect of waiver of jury trial.

4. A new trial may be ordered by a Federal court, although the party who was successful at the first trial offered to waive her rights to a trial by jury.

[Matters as to new trial, see New Trial, in Digest Sup. Ct. 1908.]

[No. 430.]

Argued November 30, 1914. Decided December 14, 1914.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment entered on a directed verdict in favor of the defendant in an action under the Federal employers' liability act. Reversed and remanded for a new trial.

See same case below, on motion for new trial after first trial, 209 Fed. 975.

The facts are stated in the opinion.

Mr. George Demming argued the cause and filed a brief for plaintiff in error:

A certificate of the trial judge accompanies the writ, showing how the question of jurisdiction arose. In addition to this, however, as carrying out the better practice outlined by this court in the case of C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102, a bill of exceptions, including the entire testimony given at the trial, and a complete record of all the pleadings, opinion filed, etc., also accompanies the writ.

This record shows that, aside from the jurisdictional question as certified to by the judge below, there was also involved in the case the construction and application of treaties of the United States with foreign countries, and that, therefore, there was the right of direct appeal to this court.

The jurisdiction of the court cannot be narrowed to a review of the single question raised by the certificate of the district judge, but all questions involved and raised in the appeal will be comprehensively considered and decided.

Giles v. Harris, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

Under the decision of this court in Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424 plaintiff in error can recover in this suit.

See also Maiorano v. Baltimore & O. R. Co. 216 Pa. 402, 21 L.R.A. (N.S.) 271, 116 Am. St. Rep. 778, 65 Atl. 1077; Deni v. Pennsylvania R. Co. 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558, 3 Am. Neg. Rep. 91; Baltimore & O. R. Co. v. Baldwin, 75 C. C. A. 211, 144 Fed. 53; Brannigan v. Union Gold Min. Co. 93 Fed. 164; Zeiger v. Pennsylvania R. Co. 151 Fed. 348; Zeiger v. Pennsylvania R. Co. 86 C. C. A. 69, 158 Fed. 809; Roberts v. Great Northern R. Co. 161 Fed. 239; Fulco v. Schuylkill Stone Co. 163 Fed. 124.

Under the plain reading of the statute itself, this plaintiff in error should be allowed to recover.

Endlich, Interpretation of Statutes, § 4; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; Thornley v. United States, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227; United States v. Temple, 105 U. S. 97, 26 L. ed. 967; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Low Wah Suey v. Backus, 225 U. S. 460, 476, 56 L. ed. 1165, 1170, 32 Sup. Ct. Rep. 734.

Where the statutes are silent on the point of the relatives who shall recover for a negligent death, it appears to have been held that, by the plain reading of the statute itself, nonresident aliens are necessarily included among those entitled to the remedies and benefits of the statute.

Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; Mulhall v. Fallon, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386;

Vetaloro v. Perkins, 101 Fed. 393; Szymanski v. Blumenthal, 3 Penn. (Del.) 558, 52 Atl. 347; Renlund v. Commodore Min. Co. 89 Minn. 41, 99 Am. St. Rep. 534, 93 N. W. 1057; Bonthron v. Phœnix Light & Fuel Co. 8 Ariz. 129, 61 L.R.A. 563, 71 Pac. 941; Romano v. Capital City Brick & Pipe Co. 125 Iowa, 591, 68 L.R.A. 132, 106 Am. St. Rep. 323, 101 N. W. 437, 2 Ann. Cas. 678; Cleveland, C. C. & St. L. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285; Pocahontas Collieries Co. v. Rukas, 104 Va. 278, 51 S. E. 449; Alfson v. Bush Co. 182 N. Y. 393, 108 Am. St. Rep. 815, 75 N. E. 230; Pittsburgh, C. C. & St. L. R. Co. v. Naylor, 73 Ohio St. 115, 3 L.R.A.(N.S.) 473, 112 Am. St. Rep. 701, 76 N. E. 505, 19 Am. Neg. Rep. 487; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 71, 3 Am. Neg. Cas. 106; Luke v. Calhoun County, 52 Ala. 115; Philpott v. Missouri P. R. Co. 85 Mo. 164; Chesapeake, O. & S. W. R. Co. v. Higgins, 85 Tenn. 620, 4 S. W. 47; Augusta R. Co. v. Glover, 92 Ga. 132, 142, 18 S. E. 406, 2 Am. Neg. Cas. 466; Trotta v. Johnson, 121 Ky. 827, 90 S. W. 540, 12 Ann. Cas. 222; Atchison, T. & S. F. R. Co. v. Fajardo, 74 Kan. 314, 6 L.R.A.(N.S.) 681, 86 Pac. 301; Davidson v. Hill [1901] 2 K. B. 606, 70 L. J. K. B. N. S. 788, 49 Week. Rep. 630, 85 L. T. N. S. 118, 17 Times L. R. 614, 9 Asp. Mar. L. Cas. 223; Patek v. American Smelting & Ref. Co. 21 L.R.A.(N.S.) 273, 83 C. C. A. 284, 154 Fed. 190; Cetofonte v. Camden Coke Co. 78 N. J. L. 662, 27 L.R.A. (N.S.) 1058, 75 Atl. 913; Thornton, Federal Employers' Liability & Safety Appliance Acts, p. 176; Boyd, Workmen's Compensation, § 500; Dennick v. Central R. Co. 103 U. S. 11, 17, 26 L. ed. 439, 441.

Under the general and accepted policy of this country, plaintiff in error should be allowed to recover in her present suit.

Wharton, Confl. L. §§ 17, 478, 478a, 480a, 705, 737, 743; Varesick v. British Columbia Copper Co. 12 B. C. 286; 7 Ops. Atty. Gen. (1855) p. 229; Breedlove v. Nicolet, 7 Pet. 413, 431, 8 L. ed. 731, 738; Gardner v. Thomas, 14 Johns. 134, 7 Am. Dec. 445; Dewitt v. Buchanan, 54 Barb. 31; Crashley v. Press Pub. Co. 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 129, 48 L. ed. 900, 904, 24 Sup. Ct. Rep. 581; Barrow S. S. Co. v. Kane, 170 U. S. 100, 112, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526; Taylor v. Carpenter, 3 Story, 463, Fed. Cas. No. 13,784; 1 Ops. Atty. Gen. 192b; 12 Ops. Atty. Gen. 325; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 448, 42 L. ed. 537, 538, 18 Sup. Ct. Rep. 105; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 65, 67–69, 57 L. ed. 417, 419–421, 33 Sup. Ct. Rep. 192; American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350.

Mr. **William Clarke Mason** argued the cause, and, with Mr. Charles Heebner, filed a brief for defendant in error:

Plaintiffs, being nonresident aliens, had no right of action.

Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424; Adam v. British & F. S. S. Co. [1898] 2 Q. B. 430, 67 L. J. Q. B. N. S. 844, 79 L. T. N. S. 31, 14 Times L. R. 540.

A rule of law once fixed by the court should be firmly adhered to unless clearly erroneous.

Goodtitle v. Kibbe, 9 How. 471, 13 L. ed. 220; Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621.

The deceased employee assumed the risk of the use of the track upon which he was working, by the train which caused his death.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635; Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; Nye v. Pennsylvania R. Co. 178 Pa. 134, 35 Atl. 627; Crowe v. New York C. & H. R. R. Co. 70 Hun, 37, 23 N. Y. Supp. 1100; Peterson v. American Ice Co. 83 N. J. L. 579, 47 L.R.A.(N.S.) 144, 83 Atl. 872; Connelley v. Pennsylvania R. Co. 47 L.R.A. (N.S.) 867, 119 C. C. A. 392, 201 Fed. 54; Norfolk & W. R. Co. v. Gesswine, 75 C. C. A. 214, 144 Fed. 56; Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835.

There is no just ground for the contention made by the plaintiff in error that § 238 of the Judicial Code may be invoked to support the direct writ of error in this cause.

Farrugia v. Philadelphia & R. R. Co. 233 U. S. 352, 58 L. ed. 996, 34 Sup. Ct. Rep. 591; Colorado Cent. Consol. Min. Co. v. Turk, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; Filhiol v. Maurice, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560; Sloan v. United States, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570.

[397] Mr. Justice **McKenna** delivered the opinion of the court:

Action in trespass under the railroad employers' liability act of Congress of April 22, 1908 [35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657], as amended April 5, 1910 [36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 1010], brought against the railway company, which, it is alleged, caused by negligence the death of Peter McGovern, one of its employees. Plaintiff was

duly appointed administratrix of the estate of McGovern, and brought the action in behalf of his surviving parents, who are citizens of Great Britain and Ireland.

McGovern was not married, was twenty-four years old, and was in the habit of making regular contributions to the support of his parents. The facts of the killing are not now in dispute, the principal question in the case being whether, under the act of Congress, an action can be maintained for the benefit of nonresident aliens

There were two trials of the action. At the first trial plaintiff obtained a verdict. On motion of the railway company, the court, being of opinion that the action could not be maintained for the benefit of nonresident aliens, granted a new trial. 209 Fed. 975. On the second trial the railway company submitted to the court for its affirmance the following propositions, among others: (1) The parents of McGovern, being nonresident aliens, have no right under the act of Congress for which the action might be maintained, and therefore a verdict should be directed in favor of the company. (2) Under all of the evidence in the case a verdict should be for the company. The court affirmed the propositions and directed a verdict for the company. The jury returned a verdict accordingly, and judgment was duly entered for the railway company. This writ of error was then sued out.

It is suggested rather than urged that the case is not properly here on direct appeal. But the right of direct [398] appeal is based on the ground, among others, that the construction and application of the treaty between the United States and Great Britain and Ireland are involved in the case, the favored-nation clause of which gives the residents and citizens of Great Britain and Ireland the same rights as those of Italy, and that by a treaty between the latter and the United States its citizens are entitled to exactly the same rights as citizens of this country in the courts of this country, although the citizens of Italy may be residing abroad.

In its first opinion in the case the district court discussed at length the question arising upon the treaty, and held adversely to plaintiff. We must presume, therefore, that the court considered the treaties as elements in its decision upon the right of McGovern to recover for the benefit of the parents of the deceased. This court, therefore, has jurisdiction.

We need not, however, discuss the treaties. The view we take of the statute makes such course unnecessary. But see Maiorano v. Baltimore & O. R. Co. infra.

Section 1 of the act of Congress provides that every common carrier by railroad, while engaged in interstate commerce, "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents . . ." the carrier or its agents being negligent or its instrumentalities being defective, due to its negligence. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, 34 Sup. Ct. Rep. 635.

In ruling upon the statute the district court considered that the reasoning in Deni v. Pennsylvania R. Co. 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558, and in Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424, applied. In the Deni Case the supreme court of Pennsylvania, [399] passing upon a statute of the state which permitted certain named relatives to recover damages for death occurring through negligence, held that the statute had no extraterritorial force, and that plaintiff in the action was not within its purview, though its language possibly admitted of the inclusion of nonresident aliens. The Maiorano Case came to this court on writ of error to the supreme court of Pennsylvania, where the doctrine of the Deni Case was repeated and applied. This ruling was simply accepted by this court as the construction of the state statute by the highest court of the state.

We concede some strength of persuasion to the Pennsylvania decision, but to it may be opposed the ruling in other jurisdictions. Mulhall v. Fallon, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; Kellyville Coal Co. v. Petraytis, 195 Ill. 217, 88 Am. St. Rep. 191, 63 N. E. 94; Atchison, T. & S. F. R. Co. v. Fajardo, 74 Kan. 314, 6 L.R.A.(N.S.) 681, 86 Pac. 301. In the latter case and in Mulhall v. Fallon many other cases are reviewed, including English and Canadian cases, and it was concluded that the weight of authority in this country and in England was that alienage is not a condition affecting a recovery under acts such as that involved in the case at bar.

In Patek v. American Smelting & Ref. Co. 21 L.R.A.(N.S.) 273, 83 C. C. A. 284, 154 Fed. 190, the circuit court of appeals for the eighth circuit passed on a statute of Colorado which gave a right of action for wrongful death to persons standing in certain relation to one whose death was caused by the wrongful act of another. The court, after considering the policy of the act, as manifested in the legislation, and review-

ing the cases under other statutes of like character, said: "We think that the better reason, as also the greater weight of adjudged cases, forbids that nonresident aliens be excluded, by interpretation, from among the beneficiaries designated in the statute."

We may refer to these cases for their reasoning without reproducing it, and need not do much more than add that [400] the policy of the employers' liability act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies. Even if that were its only object, we might accept the distinction expressed in Mulhall v. Fallon, supra, between the duties imposed by a statute upon persons in another state and benefits conferred upon them. Extraterritorial application would naturally not be given to the first, "but rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." Ibid.

The rights and remedies of the statute are the means of executing its policy. If this "puts burdens on our own citizens for the benefit of nonresident aliens," as said by the district court, quoting the Deni Case, supra, it is a burden imposed for wrongdoing that has caused the destruction of life. It is to the prevention of this that the statute is directed. It is for the protection of that life that compensation for its destruction is given and to those who have relation to it. These may be wife, children, or parents. The statute, indeed, distinguishes between them, but what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed.

It is, however, contended by the railway company that the deceased, McGovern, assumed the risk of his employment. This is attempted to be supported by the facts in the case. The testimony of plaintiff tended to show the following facts: McGovern was killed by a train bound from New York to Philadelphia while he was engaged in cleaning snow from the tracks of the railway company when there were mist, smoke, and occasional flurries of [401] snow. At the place where the men were working were four main lines of trackage. Shortly after 9 o'clock the men were warned off what was called track No. 4 by a call of the foreman to "look out" or "heads up," in order to let a local train pass by.

McGovern and two others were working on track No. 2. There was no call to them, the practice of the foreman being to designate the track in his warning, the men on the other track continuing to work. The foreman testified that he did not see the New York train "because it was a bad morning, snowing, and the Norristown train was a little bit slack, and there was steam and smoke and snow in front of the New York train." The New York train gave no signal and no warning was given of it. It was testified that the watchman had got his feet wet and had gone to change his shoes. And it was also in testimony that the Norristown train was slow and the New York train came fast, and that while the men were attracted by the first, the other rushed down upon them.

There was testimony by the railway company that the engine whistled. One witness called it a "wicked whistle," and there was also testimony that the men and McGovern directly were warned that they were working in a dangerous place, and to be careful.

There was testimony that the watchman was not absent, and that it was his duty to notify the workmen of approaching trains; that the company, besides, have subforemen to direct the workmen; that the men are "told to be careful" and to watch for themselves "and depend upon the subforeman, of course. . . . No man should continue working if he sees a train coming." It further appeared that the place where the accident occurred was regarded as a dangerous place, the tracks being in frequent use.

It is hence contended by the railway company that McGovern assumed the risk of the situation, and that, therefore, [402] it was error for the district court to refuse to give an instruction which presented that contention.

We have given the testimony in general outline, but enough to show that what conflict there was in it was for the jury to judge of and what deductions there were to be made from it were for the jury to make. And the district court, being of this view, refused to charge the jury, as we have seen, that McGovern had assumed the risk of the situation. We cannot say that, as a matter of law, the court was mistaken. We see no error, therefore, in its ruling.

Plaintiff in error contends that the District Court should not have ordered a new trial because she offered to waive her rights to a trial by jury. This was not error.

Judgment reversed and cause remanded for new trial.

DETROIT & MACKINAC RAILWAY COMPANY, Appt.,
v.
MICHIGAN RAILROAD COMMISSION, Churchill Lumber Company, Island Mill Company, Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, Executors of the Estate of Frank W. Gilchrist, Deceased.

(See S. C. Reporter's ed. 402-406.)

Judgment — res judicata — judicial establishment of railway rates — state court judgment in Federal court.

A judgment of the Michigan courts dismissing a suit to set aside as unreasonable a rate order of the state railroad commission will be treated as *res judicata* in a suit in the Federal courts which seeks injunctive relief on the ground that the rates are confiscatory, since, in view of the separation of the legislative, executive, and judicial powers, made by Mich. Const. art. 4, and of the absence of any controlling decision of the Michigan supreme court, it will be assumed that legislative functions were not imposed upon the courts by Mich. Pub. Acts 1909 (act No. 300), § 26, under which the courts have power to affirm, vacate, or set aside the order in whole or in part, and to make "such other order or decree" as they shall decide to be in accordance with the facts and the law, and are required, before judgment, to transmit to the commission a copy of any additional evidence introduced which the commission is to consider, and report its action to the court, when judgment is to be rendered as though the last action of the commission had been taken at first.

[For other cases, see Judgment, III. h; VII. in Digest Sup. Ct. 1908.]

[No. 209.]

Argued December 2, 1914. Decided December 14, 1914.

APPEAL from the District Court of the United States for the Eastern District of Michigan to review a decree denying injunctive relief against railway rates as fixed by a state railway commission. Affirmed.

See same case below, 203 Fed. 864.

The facts are stated in the opinion.

Mr. Fred A. Baker argued the cause, and, with Mr. James McNamara, filed a brief for appellant.

Mr. Edward S. Clark argued the cause, and, with Mr. Grant Fellows, attorney-general of Michigan, filed a brief for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the appellant, alleging its railroad to be wholly within the state of Michigan, and subject to the jurisdiction of the Michigan Railroad Commission, to prevent the enforcement of two orders of the commission, respectively reducing certain rates and fixing minimum rates for the transportation of logs. The contention is that the orders take the appellant's property without due process of law, contrary to the 14th [404] Amendment. The bill alleges that after the passing of the orders the appellant brought a bill in the state court upon the same ground among others; that the testimony before the commission was introduced with other additional evidence; that, as provided by the Michigan statutes, this further evidence was transmitted to the commission, which did not modify its orders, and that thereafter the orders were sustained and the bill dismissed by the state circuit court, and, on appeal, by the supreme court of Michigan. 171 Mich. 335, 137 N. W. 329. An application for a preliminary injunction in the present cause was heard by three judges, as required by the Judicial Code of March 3, 1911, chap. 231, § 266 [36 Stat. at L. 1162, Comp. Stat. 1913, § 1243], and on their denying the writ an appeal was taken to this court. The decision below is reported in 203 Fed. 864.

The ground of the decision below was that the petitioner was concluded by the judgment of the Michigan court; and, of course, if the matter properly can be said to be *res judicata*, there is an end of the case. The argument against its being so is drawn from Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; but the applicability of that decision depends upon whether the state courts, in the hearings before them, were acting in a legislative capacity or

NOTE—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

Generally, as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cumming v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

simply were fulfilling their ordinary function as courts. In Virginia the state Constitution itself provided for an appeal from an order by the commission to the supreme court of appeals, and gave that body power to substitute such order as, in its opinion, the commission should have made. 211 U. S. 224. It is with regard to an order upon such a preliminary appeal that it is said that even though issuing from a court, it would not be a judicial act or effect an adjudication, conclusive if questioned later in a suit. 211 U. S. 226, 227. But the Constitution of Michigan, art. 4, separates legislative, executive and judicial powers, and so plainly forbids conferring those given by the Virginia Constitution to the Virginia supreme court of [405] appeals, that, in the absence of a clear decision by the state court, we should not believe that the legislature attempted to grant or could grant such powers to the courts of Michigan.

The Michigan statutes, though they may not have a perfectly clear vision of the distinctions developed in Prentis v. Atlantic Coast Line Co., do not attempt to transgress the limits that the Constitution lays down. The important provisions are that any common carrier or other party in interest dissatisfied with the orders of the commission may bring a suit in the state circuit court in chancery to set aside the order on the ground that the rates fixed are unreasonable, and the court is given power "to affirm, vacate, or set aside the order . . . in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law." If different or additional evidence is introduced, the court, before judgment, is to transmit a copy of it to the commission, and the commission may alter or rescind its order, and is to report its action to the court, and the judgment is to be rendered as though the last action of the commission had been taken at first. Public Acts 1909, No. 300, § 26. Taking the two provisions together it seems plain that the words "such other order or decree" in the first do not embrace a change in the rates fixed, but only such other orders or decrees as are incident to an equity cause. If the order of the commission is to be modified by fixing a new rate, that is to be done upon the new evidence by the commission. This interpretation not only is the natural one upon the face of the statute, but avoids the difficulty that otherwise would arise under the Constitution of the state. It is true that the supreme court in the case cited said that "the duty of the courts in the premises is not essentially different from that of the commission" (171 Mich. 346), but we agree with the district court of three judges that this must be taken to [406] mean only that it is the same in respect of the inquiry, whether the rate is confiscatory or not. That the establishment of rules is a legislative function is recognized in Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 506, 47 L.R.A. 87, 80 Am. St. Rep. 520, 80 N. W. 383, and, in the absence of a clear decision to the contrary, we shall assume that the principle applies to rates.

The distinction between the judicial function of declaring a rate unreasonable and the legislative one of establishing a rate as reasonable is developed in Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 440, 47 L. ed. 892, 893, 23 Sup. Ct. Rep. 571; Re Janvrin, 174 Mass. 514, 47 L.R.A. 319, 55 N. E. 381. And in Bacon v. Rutland R. Co. 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283, it was held that statutory provisions very like those of Michigan, under a Constitution that in like manner separated legislative, executive, and judicial powers, gave only the last to the courts. Of course, when once it is established that the bill in the state court was an ordinary though statutory judicial proceeding, we must assume that the plaintiff was bound to present its whole case. Calaf y Fugurul v. Calaf y Rivera, 232 U. S. 371, 374, 58 L. ed. 642, 645, 34 Sup. Ct. Rep. 411. Whether the commission exceeded its jurisdiction or not, as it purported to make orders, the Michigan court had jurisdiction, and the appellant is bound by its decree.

Decree affirmed.

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[407] SAMUEL C. SCOTTEN and Scotten & Snydacker, Appts.,

v.

CHARLES E. LITTLEFIELD, Trustee of A. O. Brown and Others, Bankrupts.

(See S. C. Reporter's ed. 407-411.)

Bill of review — subject of.

1. A claim involved in reclamation proceedings in a bankruptcy court cannot be held back during review by three successive courts, and then, long afterward, be made the subject of a bill of review.

[For other cases, see Review, III., in Digest Sup. Ct. 1908.]

NOTE.—Generally, as to bills of review—see notes to Bank of United States v. Ritchie, 8 L. ed. U. S. 890, and Shelton v. Van Kleeck, 27 L. ed. U. S. 269.

On bills of review for newly discovered evidence, see note to Smith v. Rucker, 30 L.R.A.(N.S.) 1030.

Bill of review — grounds — change in decision.

2. A subsequent decision of the Federal Supreme Court which would have required a different result if the governing principles had been applied in reclamation proceedings in a bankruptcy court will not lay the foundation for a bill of review for errors of law apparent or for new matter *in pais*, discovered since the decree in such proceedings, and possibly requiring a different result.

[For other cases, see Review, II. a, in Digest Sup. Ct. 1908.]

[No. 439.]

Submitted October 13, 1914. Decided December 14, 1914.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing a bill of review. Affirmed.

See same case below, 213 Fed. 705.

Messrs. Thorndike Saunders and James L. Coleman submitted the cause for appellants.

Mr. Myer Cohen, in behalf of Mr. Daniel P. Hays, submitted the cause for appellee.

Memorandum opinion by Mr. Justice Day, by direction of the court:

This case presents another phase of the bankruptcy of A. O. Brown & Company, stockbrokers in New York. [410] See First Nat. Bank v. Littlefield, 226 U. S. 110, 57 L. ed. 145, 33 Sup. Ct. Rep. 78; Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690; Schuyler v. Littlefield, 232 U. S. 707, 58 L. ed. 806, 34 Sup. Ct. Rep. 466. This case is submitted on the motion of appellee to dismiss, affirm, or place on the summary docket. The appellants filed a petition for reclamation in the bankruptcy court, which concerned, among other stocks, three hundred shares of United States Steel stock, which are now the subject-matter of this controversy. On April 20, 1911, the district court confirmed the report of the master, and entered an order dismissing the petitions of appellants and of some other claimants. Appellants appealed to the circuit court of appeals, and that court affirmed the district court (115 C. C. A. 348, 193 Fed. 24). The case then came to this court, and the judgment of the court of appeals was affirmed (226 U. S. 110). On August 4, 1913, the bill of review with which the present proceeding is concerned was filed in the district court. This was more than two years after the original order in the district court, dismissing the reclamation proceeding, was made. The district court dismissed the bill of review (213 Fed. 701). That decree was affirmed in the circuit court of appeals (213 Fed. 705). Then the case was appealed here.

Both courts below put their decisions on the ground that the appeal to the circuit court of appeals from the original order of the district court in the reclamation proceedings really involved the claim for the United States Steel stock in its present aspect, and that if not presented to the court of appeals when there on appeal it could not be held back and made the subject of a bill of review, as is now attempted to be done. We think this decision was clearly right. Furthermore, the ground alleged for the bill of review now is, that the principles which determined the disposition of the Gorman Case, 229 U. S. 19 (decided May 26, 1913, a little more than two years after the decree in the district court), reversing [411] the circuit court of appeals in the same case (99 C. C. A. 345, 175 Fed. 769), would, had they been applied in this case, have required a different result in the district court in dealing with the original petition in reclamation, so far as the three hundred shares of the United States Steel stock, pledged with the Hanover National Bank, are concerned.

Bills of review are on two grounds: first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result. 2 Bates, Fed. Eq. Proc. 762; 2 Street, Fed. Eq. Pr. § 2151.

If the decision in the Gorman Case would have required a different result if the principles upon which it was decided had been applied in the original proceeding, which we do not find it necessary to decide, such subsequent decision will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree, and probably requiring a different result. Tilghman v. Werk, 39 Fed. 680 (opinion by Judge Jackson, afterwards Mr. Justice Jackson of this court): Hoffman v. Knox, circuit court of appeals, fourth circuit, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed. 484, 491 (opinion by Chief Justice Fuller).

The decree of the Circuit Court of Appeals is affirmed.

[412] DAVID SHAPIRO, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 412–417.)

Error to district court — effect of prior resort to circuit court of appeals.

1. The ruling of a Federal district court upon a plea of *nolo contendere* cannot be revised by a direct writ of error from the Federal Supreme Court to the former court, to review the final judgment of conviction, where such ruling necessarily results from applying the principles which the circuit court of appeals, in reversing a prior conviction, had laid down for the guidance of the district court, since the Federal Supreme Court is thus in substance asked to revise the decision of the circuit court of appeals upon a writ of error to the district court.

[For other cases, see Appeal and Error, 990–993, in Digest Sup. Ct. 1908.]

Error to district court — Federal question — effect of prior resort to circuit court of appeals.

2. New constitutional questions raised by special pleas filed by the accused in a Federal district court, after a judgment of conviction therein had been reversed by the circuit court of appeals, and the cause remanded for further proceedings in accordance with the principles laid down by the latter court for the guidance of the district court, will not sustain a writ of error from the Federal Supreme Court to the district court to review a second judgment of conviction.

[For other cases, see Appeal and Error, 990–993, in Digest Sup. Ct. 1908.]

[No. 93.]

Argued December 3 and 4, 1914. Decided December 14, 1914.

IN ERROR to the District Court of the United States for the Northern District of Illinois to review a conviction for violating the internal revenue laws. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. **Elijah N. Zoline** argued the cause and filed a brief for plaintiff in error:

This is a criminal case. We come to this court upon the contention that plaintiff in error has been twice in jeopardy in violation of the 5th Amendment to the Constitution of the United States. Under the ruling of Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672, and subsequent cases approving it, a judgment placing a man twice in jeopardy is simply void for want of jurisdiction, and not merely erroneous, and can be reviewed collaterally by this court by habeas corpus. There certainly can be no ground of objection to the method pursued here to have the judgment reviewed upon a direct writ of error. This case is therefore distinguishable from the civil cases relied upon by the government, both on the facts and on principle. This is a case where the liberty of a citizen is involved. The questions presented by the three separate pleas of former jeopardy and compromise arose subsequent to the mandate, and involve only the application and construction of the Constitution of the United States, and, accordingly, the jurisdiction of this court is exclusive.

Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

The circuit court of appeals did not pass, and could not have passed, upon the second and third pleas. The opinion is therefore not the law of the case as to these pleas, nor are we seeking a review of its opinion as to those pleas. As to those pleas there is no opinion and no mandate.

United States v. Chouteau, 102 U. S. 603, 26 L. ed. 246; Wells v. Nickles, 104 U. S. 444, 26 L. ed. 825; Hinckley v. Morton, 103 U. S. 764, 26 L. ed. 458; Roberts v. Cooper, 20 How. 467, 481, 15 L. ed. 969, 973.

This court clearly has jurisdiction to review proceedings subsequent to the mandate, and even matters before the court of appeals, where the record there was the result of a clerical error.

Hinckley v. Morton, 103 U. S. 765, 26 L. ed. 459.

The district court had ample authority, after the mandate was filed, to correct the record, or proceed in accordance with the true record.

Marks v. Brown, 69 C. C. A. 80, 136 Fed. 168; Metcalf v. Watertown, 16 C. C. A. 37, 34 U. S. App. 107, 68 Fed. 861; State v. Parish, 43 Wis. 395; Baltimore Bldg. & L. Asso. v. Alderson, 39 C. C. A. 609, 99 Fed. 492; Bank of United States v. Moss, 6 How. 31, 38, 12 L. ed. 331, 334.

Where the former decision relates to a question of fact, it is plainly the law that it is not binding upon a second appeal, where the record discloses a different state of facts.

Davidson v. Mayhew, 169 Mo. 258, 68 S. W. 1031; Klauber v. San Diego Street Car Co. 98 Cal. 105, 32 Pac. 876; Thompson v. Michigan Mut. L. Ins. Co. — Ind. —, 105 N. E. 780; Nieto v. Carpenter, 21 Cal. 455; Herrold v. Com. 10 Ky. L. Rep. 70, 8 S. W. 194; Trinity County v. McCammon, 25 Cal. 117; Wilson v. Wilson, 93 Neb. 182, 139 N.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

W. 1043; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510, 17 L. ed. 900; Story v. Livingston, 13 Pet. 359, 373, 10 L. ed. 200, 207; Packard v. Kinzie Ave. Heights Co. 105 Wis. 323, 81 N. W. 488; Messenger v. Anderson, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739.

Under the Judiciary Code, which practically re-enacts the act establishing the court of appeals, the Supreme Court has exclusive jurisdiction of the writ of error in this case.

Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. ed. 546, 548, 22 Sup. Ct. Rep. 452.

This court is peculiarly the forum for the determination of the rights guaranteed by the Constitution to the person charged with crime. A case involving the violation of the constitutional guaranties stands in a class by itself before this court, and it seems to us that, no matter how the point appears in the record, it is clearly within the jurisdiction of this court, and the duty of this court, to protect a defendant if those constitutional guaranties are violated.

Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939.

Assistant Attorney General Wallace argued the cause, and, with Solicitor General Davis, filed a brief for defendant in error:

This court has no jurisdiction to question or interpret, on a writ of error sued out directly to a district court, a mandate and opinion of a circuit court of appeals upon a former writ of error in the same case, which constitute "the law of the case," not only for the district court, but for this court as well.

Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Brown v. Alton Water Co. 222 U. S. 325, 331, 332, 56 L. ed. 221, 223, 224, 32 Sup. Ct. Rep. 156; Metropolitan Water Co. v. Kaw Valley Drainage Dist. 223 U. S. 519, 521, 522, 524, 56 L. ed. 533-535, 32 Sup. Ct. Rep. 246; Union Trust Co. v. Westhus, 228 U. S. 519, 57 L. ed. 947, 33 Sup. Ct. Rep. 593.

This court has no jurisdiction to question or interpret, on a writ of error sued out directly to a district court, the action of that court in giving effect to a decision of a circuit court of appeals.

Union Trust Co. v. Westhus, 228 U. S. 519, 524, 57 L. ed. 947, 949, 33 Sup. Ct. Rep. 593; Brown v. Alton Water Co. 222 U. S. 325, 331, 56 L. ed. 221, 223, 32 Sup. Ct. Rep. 156; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

[413] Mr. Justice Hughes delivered the opinion of the court:

On June 21, 1910, David Shapiro—the plaintiff in error—was indicted for violation of the internal revenue laws. The indictment contained thirteen counts. Eleven charged offenses punishable by both fine and imprisonment; one (the tenth) was for an offense punishable by fine only; and one (the thirteenth) was for an offense punishable by fine or imprisonment, or both.[1] On June 24, 1910, the plaintiff in error pleaded "not guilty" to every count; on January 3, 1911, "by leave of court first had and obtained," he withdrew this plea, and, being then arraigned upon the indictment, he pleaded "*nolo contendere* thereto;" on January 20, 1911, the United States entered a *nolle prosequi* as to all the counts, save those numbered 4, 9, and 12, each of which charged a felony (Crim. Code, § 335 [35 Stat. at L. 1152, chap. 321, Comp. Stat. 1913, § 10509]); later, on the same day, the cause "coming on to be heard on defendant's plea of *nolo contendere*," the court "having heard the evidence by the parties adduced and statements of counsel" took the cause under advisement; and on January 23, 1911, the court, being fully advised, found the defendant guilty as charged in the indictment, and upon this finding sentenced him to imprisonment for two years and to pay a fine in the sum of $10,000 in addition to costs.

Shapiro sued out a writ of error from the circuit court of appeals, assigning as errors (1) that the district court had no jurisdiction to pass judgment in this case on a plea of *nolo contendere;* (2) that it erred in sentencing him without a trial by jury; (3) that by the judgment he had been deprived of his liberty without due process of law, within [414] the meaning of the 5th Amendment; and (4) that the sentence was excessive and should be limited to a fine only. The circuit court of appeals reversed the judgment. 116 C. C. A. 70, 196 Fed. 268. The grounds of the reversal are set forth in its opinion in Tucker v. United States, 41 L.R.A.(N.S.) 70, 116 C. C. A. 62, 196 Fed. 260,—a case decided at the

[1] Counts 1, 2, 3, and 4 charged a violation of § 3296 of the Revised Statutes (Comp. Stat. 1913, § 6038); counts 5, 6, 7, and 8, of § 3317, amended by act of March 1, 1879, chap. 125, § 5, 20 Stat. at L. 327, 339, Comp. Stat. 1913, § 6099; count 9, of § 3318 (Comp. Stat. 1913, § 6100); count 11, of § 3326 (Comp. Stat. 1913, § 6107); count 12, of § 3324 (Comp. Stat. 1913, § 6105); and count 13, of § 3455 (Comp. Stat. 1913, § 6357).

Count 10 charged a violation of the act of July 16, 1892, chap. 196, 27 Stat. at L. 183, 200. See Rev. Stat. § 3456, Comp. Stat. 1913, § 6358.

same time, which the court deemed to be similar in all material respects. It was held that the plea of *nolo contendere* was not authorized in the case of an offense which must be punished by imprisonment, with or without a fine; that where counts charging offenses which must be punished by imprisonment are joined with counts charging those which may be punished by fine only, the plea may be entertained as "in the nature of a compromise;" and that in such case it is "within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto," and it is "within the jurisdiction of the court to approve such submission." It was further held that in the particular case the proceedings and judgment were in derogation of the plea; that it did not appear in the record that the plea was either "accepted in fact" or "substantially so treated;" that the proceedings leading to the judgment, the adjudication of guilt, and the judgment itself in its sentence of imprisonment, were inconsistent with the acceptance of the plea; and hence that the record failed to show an authorized plea to support the judgment. 196 Fed. pp. 267, 268. The cause was remanded "with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed further in conformity with law."

Thereupon, the district court, against the exception of the plaintiff in error, refused to accept the plea of *nolo contendere* tendered by him, and directed him to plead to the indictment; he stood mute, and the court entered for him a plea of not guilty. Subsequently, by leave of the court, the plaintiff in error filed three special pleas. The first [415] plea, in substance, set forth the prior proceedings, and alleged that the plea of *nolo contendere* had been duly accepted, that the court, acting thereon, had heard evidence solely for the purpose of fixing the punishment to be imposed, and that therefore he had been once before in jeopardy for the same offense, and ought not, by virtue of the protection guaranteed by the 5th Amendment, to be further prosecuted. The second special plea set forth that the defendant had compromised the civil and criminal liability with the commissioner of internal revenue. And the third special plea urged that, while the writ of error was pending in the circuit court of appeals, the original order of supersedeas had been modified so as to permit the judgment to be enforced as to the fine, that thereupon the United States had procured to be seized a certain draft for $5,000 in partial satisfaction of the fine, and that it followed, under the 5th Amendment, that, the judgment having been satisfied in part, the plaintiff in error could not be tried again upon the same indictment.

Meanwhile, the plaintiff in error moved in the district court to correct the record so as to have it show that the plea of *nolo contendere* had been accepted, and petitioned the circuit court of appeals to release its mandate in order that the correction might be made. This petition was denied and the motion in the district court was not pressed.

The government demurred to each of the three special pleas, and the district court, sustaining the demurrers, proceeded to trial. The jury rendered a verdict of guilty, motions for a new trial and in arrest were overruled, and the plaintiff in error was sentenced to imprisonment for two years and to pay a fine of $5,000. The case is now brought directly to this court.

The motion to dismiss must be granted. Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Brown v. Alton Water Co. 222 U. S. 325, 56 L. ed. 221, 32 Sup. Ct. Rep. 156; Metropolitan Water Co. v. Kaw Valley Drainage Dist. 223 [416] U. S. 519, 56 L. ed. 533, 32 Sup. Ct. Rep. 246; Union Trust Co. v. Westhus, 228 U. S. 519, 57 L. ed. 947, 33 Sup. Ct. Rep. 593. The duty of the district court was defined by the decision of the circuit court of appeals, and in its further proceedings it was bound to apply the principles which that court had laid down for its guidance. It may not have been observed by the appellate court that, in the case of Shapiro, the government had entered a *nolle prosequi* as to the counts charging an offense which might be punished by fine alone; but this being the actual state of the record, it cannot be doubted that, reading the mandate of the appellate court in the light of its opinion, the district court was not free to accept the plea of *nolo contendere* as applicable to the remaining "prison counts." Its obedience to the mandate under the law as declared by the circuit court of appeals required it, with respect to these counts upon which the government stood, to reject the plea of *nolo contendere* and to proceed with the case. It is now assigned as error that the district court did set aside this plea. It is insisted that the plea had been accepted when originally tendered, but this is negatived by the ruling of the circuit court of appeals, and we are in substance asked to revise its decision upon a writ of error to the district court. This would be to transcend the limits of our jurisdiction as it has been clearly defined in the cases cited.

It is no answer to say that new constitutional questions were raised by the special pleas after the case had been remanded to the district court. We cannot take the

case in fragments, and if it is reviewable upon a direct writ of error, by reason of the presence of a constitutional question, the whole case must come here, and we must assume the duty of passing upon the proceedings of the district court which were taken by it under the mandate of the circuit court of appeals. The ruling upon this point in Union Trust Co. v. Westhus, supra, is controlling. There, the constitutional question was raised by an amendment to the pleadings in the district court after the decision of [417] the circuit court of appeals, and it was insisted that this fact made the previous decisions inapplicable. But the asserted distinction was not sustained. The error lay, it was said, "in pursuing a mistaken avenue of approach to this court;" that is, "of coming directly from a trial court in a case where, by reason of the cause having been previously decided by the circuit court of appeals, the way to that court should have been pursued even if it was proposed to ultimately bring the case here." There is, as was pointed out in the Alton Case, ample opportunity for a review by this court of every judgment or decree of a lower court which the act of 1891 [26 Stat. at L. 826, chap. 517] (now embodied in the Judicial Code [36 Stat. at L. 1191, chap. 231, Comp. Stat. 1913, § 1108]) contemplated should be here reviewed; but, in the distribution of jurisdiction, this court is not authorized "to review a judgment or decree of a circuit court of appeals otherwise than by proceedings addressed directly to that court."

Dismissed.

MARTHA ADKINS, Plff. in Err.,
v.
HENRY C. ARNOLD et al.

(See S. C. Reporter's ed. 417–421.)

Indians — allotment — restrictions on alienation.

1. Allotments on behalf of deceased members of the Creek Tribe were not subject to the restrictions on alienation imposed by § 16 of the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), but such restrictions apply only to allotments to living members in their own right.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Husband and wife — conveyances by married woman — adoption of Arkansas Laws in Indian Territory.

2. A conveyance by a married woman in the Indian Territory was governed by the provisions of Mansf. (Ark.) Dig. 1884, chap. 104, § 4621, permitting a married woman to convey as if a *feme sole*, which were put in force in the Indian Territory by the act of May 2, 1890 (26 Stat. at L. 81, chap. 182), § 31, rather than by the provisions of Mansf. (Ark.) Dig. 1884, chap. 27, § 648, put in force by the act of February 19, 1903 (32 Stat. at L. 841, chap. 707), that a married woman may convey by deed executed by herself and her husband, and acknowledged and ratified in a specified manner, since § 4621 is a later enactment than § 648, and under the decisions of the Arkansas courts superseded the latter section in so far as they were in conflict.

[For other cases, see Husband and Wife, II. g, in Digest Sup. Ct. 1908.]

[No. 52.]

Submitted November 5, 1914. Decided December 14, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Hughes County, in that state, in favor of plaintiff in a suit to foreclose a mortgage upon real property. Affirmed.

See same case below, 32 Okla. 167, 121 Pac. 186.

The facts are stated in the opinion.

Mr. Lewis C. Lawson submitted the cause for plaintiff in error.

No appearance for defendants in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to foreclose a mortgage upon real property, 80 acres of which were part of a Creek allotment. The allotment was made on behalf of Otheola Adkins, after her death, which occurred in her infancy. Her mother was a Creek woman, duly enrolled as such, but her father was not a Creek citizen. The date of the allotment is not given, but it is conceded that the allotment passed a life estate or more to the mother and nothing to the father. After the allotment was completed and the usual tribal deed issued, the father and mother joined in executing and delivering a deed for the 80 acres to one Arnold, who in turn mortgaged it to the plaintiff. The mother was made a defendant to the suit, and by her answer set up two defenses requiring notice here. One was to the effect that the deed to Arnold was made in violation of restrictions imposed by Congress upon the right to alienate the land, and therefore was void; and the other was to the effect that the deed did not satisfy the requirements of a law of Arkansas, put in force in the Indian Territory by Congress, and therefore did not affect or pass her title. Upon a demurrer to the answer, which set forth the deed and the certificate

of its acknowledgment, [420] these defenses were held not well taken and there was a judgment for the plaintiff. The judgment was affirmed by the supreme court of the state. 32 Okla. 167, 121 Pac. 186.

Other rulings than those just mentioned were made in the cause, but they need not be noticed, for no Federal question was involved in them.

The claim that the deed to Arnold was made in violation of existing restrictions rests upon the assumption that § 16 of the act of June 30, 1902 (32 Stat. at L. 500, chap. 1323), imposed restrictions upon the alienation of all Creek allotments. That this is an erroneous assumption is shown in Skelton v. Dill, 235 U. S. 206, ante, 60, 35 Sup. Ct. Rep. 60. Only allotments to living members in their own right were subjected to restrictions. Allotments on behalf of deceased members were left unrestricted. Thus the mother was at liberty to make a sale of her interest to Arnold if she chose.

A right appreciation of the claim respecting the insufficiency of the deed involves a consideration of the acts of Congress adopting and extending over the Indian Territory certain statutes of Arkansas. The act of May 2, 1890 (26 Stat. at L. 81, chap. 182), § 31, put in force, until Congress should otherwise provide, several general laws of Arkansas appearing in Mansfield's Digest of 1884, among them being chapter 104 concerning the rights of married women. Section 4621 of this chapter reads as follows:

"The real and personal property of any *femme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were a *femme sole;* and the same shall not be subject to the debts of her husband."

The act of February 19, 1903 (32 Stat. at L. 841, chap. 707), put in force chapter 27 of the Mansfield's Digest of 1884 concerning [421] conveyances of real estate, in so far as it was applicable and not inconsistent with any law of Congress. Section 648 of this chapter declares:

"A married woman may convey her real estate or any part thereof by deed of conveyance, executed by herself and her husband, and acknowledged and certified in the manner hereinafter prescribed."

The deed to Arnold, if tested by § 4621 and the applicable decisions of the supreme court of Arkansas, was sufficient to pass the mother's title, but, if tested by § 648, it probably was insufficient, because not acknowledged and certified in the manner contemplated by that section.

It is insisted that § 648 is inconsistent with § 4621 and should be treated as controlling because its adoption by Congress was the later in time. Assuming that the two sections are inconsistent, as claimed, we think § 4621 is controlling. While both were embodied in the Arkansas compilation known as Mansfield's Digest of 1884, § 4621 was a later enactment than § 648, and superseded the latter in so far as they were in conflict. This was settled by the supreme court of the state before either section was put in force in the Indian Territory (Bryan v. Winburn, 43 Ark. 28; Stone v. Stone, 43 Ark. 160; Criscoe v. Hambrick, 47 Ark. 235, 1 S. W. 150), and we think Congress intended they should have the same force and meaning there that they had in Arkansas. See Robinson v. Belt, 187 U. S. 41, 47, 48, 47 L. ed. 65, 68, 69, 23 Sup. Ct. Rep. 16. Although put in force in the Indian Territory by different acts, they were not adopted as if they were unrelated, but as parts of a single system of laws whose relative operation, as determined by the supreme court of Arkansas, had become an integral part of them. Pennock v. Dialogue, 2 Pet. 1, 18, 7 L. ed. 327, 333; Cathcart v. Robinson, 5 Pet. 264, 280, 8 L. ed. 120, 126. It was upon this theory that the supreme court of Oklahoma held the mother's deed sufficient.

Judgment affirmed.

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[422] GEORGE WASHINGTON, Plff. in Err.,

v.

CHARLES W. MILLER.

(See S. C. Reporter's ed. 422–429.)

Indians — descent — Creek allotments.

1. Lands which had been allotted to an enrolled Creek Indian who died intestate after receiving his allotment were still "lands of the Creek Nation" within the meaning of § 6 of the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), which qualified the declaration that the descent and distribution of land and money provided for therein should be in accordance with the Arkansas statutes by providing that "only citizens of the Creek Nation, male and female, and their Creek

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NOTE.—On repeal of statutes by implication, generally—see notes to State v. Massey, 4 L.R.A. 309, and United States v. Henderson, 20 L. ed. U. S. 235.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

descendants, shall inherit lands of the Creek Nation," and that "if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named" in the Arkansas statutes.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — descent — Creek lands — repeal of statute by implication.

2. The provisos in § 6 of the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), which qualify the declaration therein that the descent and distribution of land and money provided for by the act shall be in accordance with the Arkansas statutes then in force in the Indian Territory, by providing that "only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation," and that "if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named" in the Arkansas statutes were not impliedly repealed by a provision in the act of April 28, 1904 (33 Stat. at L. 573, chap. 1824), that all laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise.

[For other cases, see Indians, VIII.; Statutes, III. b, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — local practice.

3. A ruling of a state court involving nothing more than a decision of a question of local pleading and practice is not open to review in the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2209–2226, in Digest Sup. Ct. 1908.]

[No. 53.]

Submitted November 5, 1914. Decided December 14, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Hughes County in that state in favor of plaintiff in a suit to quiet title. Affirmed

See same case below, 34 Okla. 259, 129 Pac. 58.

The facts are stated in the opinion.

Mr. Lewis C. Lawson submitted the cause for plaintiff in error:

After the allotments were made, the titles thereto passed to the respective members to whom the particular allotment was thus made; and it was not in the power of Congress to devest the title thereto of such allottees.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565.

The members of these respective tribes did not acquire a vested right in the surplus lands of these tribes; and it was not unconstitutional for Congress to open the rolls of these respective tribes, and admit other members, and provide for them out of this surplus.

Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580.

The words, "lands of the Creek Nation," used in the first proviso in § 6 of the Creek supplemental agreement, must have had reference to the surplus land of the Creek Nation; for, in fact, these are the only lands that could be included in the plain language of this proviso.

Armstrong v. Wood, 195 Fed. 137.

The supplemental Creek agreement, on its enactment, became a general law as to said Creek Nation and its members, and was not a special act.

Unity v. Burrage, 103 U. S. 447, 26 L. ed. 405; 7 Words & Phrases, pp. 6577, 6578; State ex rel. Roberts v. Indian Territory Illuminating Oil Co. 32 Okla. 607, 123 Pac. 166.

Even if it be conceded that the supplemental agreement was in its nature local because applying only to the Creek Nation, still we insist that the provisions of § 6 in the act, including the proviso, were repealed by the act of Congress passed on the 28th of April, 1904.

Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 617, 20 L. ed. 227, 228; New Jersey S. B. Co. v. The Collector (New Jersey S. B. Co. v. Pleasonton) 18 Wall. 493, 21 L. ed. 771; Hawkins v. Stevens, 21 Okla. 849, 97 Pac. 267; Re Davis, 32 Okla. 209, 122 Pac. 547; Taylor v. Parker, 33 Okla. 199, 125 Pac. 573.

There is necessary inconsistency in the two acts standing together.

Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; District of Columbia v. Hutton, 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369.

A statute revising the whole subject-matter of former acts, containing in the main the provisions of the former acts, and evidently intended as a substitute for them, although it contains no express words to that effect, operates to repeal the former acts.

Hudson v. Ely, 36 Okla. 576, 129 Pac. 11; Garnett v. Goldman, 39 Okla. 516, 135 Pac. 411.

Mr. Nathan A. Gibson submitted the cause for defendant in error:

The act of April 28, 1914, was passed for the purpose of taking from the tribal courts

their criminal, civil, and probate jurisdiction, and investing it in the United States district courts. Its further object was to set at rest all doubts as to whether or not a United States court could have probate power without a clear and explicit statutory provision; it was passed to give additional facilities in the matter of extra judges, and, when these judges were appointed, to give them sufficient work, and give the people of the various court towns the added benefit of three terms per year.

George v. Robb, 4 Ind. Terr. 61, 64 S. W. 615; Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

This act is not repugnant to § 6 of the supplemental treaty.

Lamb v. Baker, 27 Okla. 739, 117 Pac. 189; Hughes Land Co. v. Bailey, 30 Okla. 194, 120 Pac. 290.

A proviso must be construed with reference to the subject-matter of the section of which it forms a part, unless there is a manifest legislative intention that it should limit the operation of other sections of the act.

Boston Safe-Deposit & T. Co. v. Hudson, 15 C. C. A. 651, 25 U. S. App. 257, 68 Fed. 760; United States v. 132 Packages of Spirituous Liquors, 65 Fed. 983; Chattanooga, R. & C. R. Co. v. Evans, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 814; Re Matthews, 109 Fed. 614; McRae v. Holcomb, 46 Ark. 306; Bragg v. Clark, 50 Ala. 363; Black, Constr. & Interpretation of Laws, p. 275; 2 Sutherland, Stat. Constr. § 352.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit to quiet the title to lands within what until recently was the Creek Nation in the Indian Territory. The lands were allotted to an enrolled Creek, who died intestate November 3, 1907, after receiving the usual tribal deeds approved by the Secretary of the Interior. He left no widow or descendant, but was survived by his father and mother, two half brothers and a half sister on the paternal side, and a half sister on the maternal side. The father was an enrolled Seminole and the mother an enrolled Creek. The half brothers and half sister on the paternal side were Seminoles and the half sister on the maternal side was a Creek. The plaintiff in the suit was in possession and claimed under a deed from the mother, executed July 16, 1909, and approved by the county [424] court. See United States v. Knight, 124 C. C. A. 211, 206 Fed. 145. The father was a defendant and by his answer admitted the facts here stated, and insisted that, although not a Creek citizen, he was an heir of the deceased allottee, and as such had an interest in the lands. Upon this answer a judgment was given against him, which was affirmed by the supreme court of the state. 34 Okla. 259, 129 Pac. 58. He then sued out this writ of error.

The ultimate question for decision is whether the father was an heir, and that involves an ascertainment and interpretation of the applicable law of descent.

The allotment was made and the tribal deeds were issued under the act of March 1, 1901 (31 Stat. at L. 861, chap. 676), known as the original Creek agreement, and the modifying act of June 30, 1902 (32 Stat. at L. 500, chap. 1323), known as the supplemental Creek agreement.

Before coming to the provisions of those acts, it may be helpful to refer to the situation existing at the time of their enactment. Long prior thereto the Creek Nation had adopted laws of its own regulating the descent and distribution of property of its citizens dying intestate. Creek Laws of 1867, § 6; Perryman's Compiled Creek Laws of 1890, § 6, p. 32, § 8, p. 76; Bledsoe's Indian Land Laws, 2d ed. §§ 829-831. Congress also had dealt with that subject. By the act of May 2, 1890 (26 Stat. at L. 81, chap. 182), §§ 30 and 31, it had "extended over and put in force in the Indian Territory" several general laws of the state of Arkansas, among which was chapter 49 of Mansfield's Digest of 1884, relating to descent and distribution. At first the operation of this act was materially restricted by a proviso declaring that "the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the state of Arkansas extended over and put in force in said Indian [425] Territory by this act shall not apply." But the proviso lost much of its force when the act of June 7, 1897 (30 Stat. at L. 83, chap. 3), declared that "the laws of the United States and the state of Arkansas in force in the [Indian] Territory shall apply to all persons therein, irrespective of race," and was practically abrogated when the act of June 28, 1898 (30 Stat. at L. 495, chap. 517), abolished all tribal courts in the Indian Territory (§ 28) and provided (§ 26) that "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." Of course, these congressional enactments operated to displace the Creek tribal laws of descent and distribution, and to substitute in their stead the Arkansas law as expressed in chapter 49 of Mansfield's Digest.

Notwithstanding the situation just mentioned, provisions were inserted in the original Creek agreement of March 1, 1901, supra, which undoubtedly gave controlling effect to the Creek tribal laws rather than to the Arkansas law; and those provisions embraced allotments to living citizens as well as allotments on behalf of deceased citizens. Thus in § 7 it was provided that if, after a homestead had served the purposes of its creation, the allottee should die intestate, the land should "descend to his heirs according to the laws of descent and distribution of the Creek Nation;" and in § 28 it was provided that, if a citizen or child entitled to enrolment should die before receiving his allotment and share of the funds of the tribe, the lands and money to which he would be entitled, if living, should "descend to his heirs according to the laws of descent and distribution of the Creek Nation." In other parts of the agreement the word "heirs" was used without any accompanying explanation of who was intended, but this evidently was because the word was intended to have the same signification as in §§ 7 and 28, and therefore no further explanation was necessary.

[426] But the purpose to give effect to the Creek tribal laws was soon changed, for the act of May 27, 1902 (32 Stat. at L. 258, chap. 888), not only expressly repealed so much of the act or agreement of March 1, 1901, as provided for descent and distribution according to the Creek tribal laws, but also declared: "And the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory." A little more than a month later what was said in the act of May 27, 1902, was repeated in § 6 of the supplemental Creek agreement of June 30, 1902, and was there qualified by two provisos which have an important bearing here. That section reads:

"The provisions of the act of Congress approved March 1, 1901 (31 Stat. at L. 861, chap. 676), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation: And provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

Applying this section to the facts of this case, the supreme court of the state held that the father, although an heir according to chapter 49 of Mansfield's Digest, was excluded by the two provisos from the right to inherit, because he was not a Creek citizen, and the mother, who was such citizen, had an inheritable status according to that chapter.

The first contention requiring consideration is that the two provisos do not affect the right to inherit from one [427] who dies after receiving his allotment, but only the right to receive lands from the tribe in place of one who was entitled to an allotment and died before receiving it. The contention rests upon the words "lands of the Creek Nation" in the first proviso, and is sought to be sustained upon the theory that lands which have been allotted and passed into private ownership are no longer lands of the tribe, and therefore not within the provisos. We think the words indicated were merely descriptive of the body of lands which where being allotted in severalty and subjected to the incidents of individual ownership; that is, the lands in the Creek Nation.

In that sense they would include the lands as well after allotment as before. The section as a whole shows that it looked to the future no less than to the present, and was intended to prescribe rules of descent applicable to all Creek allotments. Nothing in the provisos indicates that they were to be less comprehensive. Their purpose was to give Creek citizens and their Creek descendants a perferred right to inherit, and no reason is perceived for giving such a preference where a citizen entitled to an allotment died before receiving it that would not be equally applicable if he had died after it was received. We conclude, therefore, that the contention is not well founded.

It next is insisted that the two provisos were repealed by a provision in the act of April 28, 1904 (33 Stat. at L. 573, chap. 1824), reading as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, . . ."

No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication? There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution [428] without any qualification or restriction. But this would

be only by reason of the generality of its terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute, and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, § 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healey, 160 U. S. 136, 146, 40 L. ed. 369, 373, 16 Sup. Ct. Rep. 247; United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex parte Crow Dog [Ex parte Kaug Gi-Shin-Ca] 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rogers v. United States, 185 U. S. 83, 87–89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians, whose affairs were peculiarly within its control. Taylor v. Parker, 235 U. S 42, ante, 22, 35 Sup. Ct. Rep. 22. See also Re Davis, 32 Okla. 209, 122 Pac. 547.

In the briefs there is considerable discussion of the question whether the mother, through whom the plaintiff [429] claimed, took the fee simple or only a life estate; but as the judgment against the father was amply sustained in either event, that question need not be considered.

The allegations and admissions in one part of the defendant's answer were held to overcome the denials in another, and complaint is made of this; but, as it appears that nothing more than a question of local pleading and practice was involved, the ruling is not open to review in this court.

Judgment affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

WYATT JONES ROSBOROUGH, Home Insurance Company, North British & Mercantile Company, et al.

(See S. C. Reporter's ed. 429–431.)

Error to circuit court of appeals — negligence suit — reversible error.

1. The Federal Supreme Court, when reviewing a judgment of a circuit court of appeals in a negligence case which is brought up to the former court solely on the ground that the defendant corporation has a charter from the United States, will go no further than to inquire whether there was plain error.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Evidence — admissibility — similar facts or acts.

2. Testimony that a few days after a fire, which was alleged to have been set by sparks and cinders negligently permitted to escape from a passing railway locomotive, the witness saw engines emit large cinders while passing near the scene, is admissible in evidence, where the defendant railway company, although insisting that sparks or cinders from only three identified engines

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NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On admissibility of evidence of conditions, before and after accident, of property whose defects are alleged to have caused injury—see note to Alcott v. Public Service Corp. 32 L.R.A.(N.S.) 1084.

As to whether the presumption of negligence arising from the fact that a fire was set by a railroad company's locomotive necessarily makes the question of negligence one for the jury—see note to Continental Ins. Co. v. Chicago & N. W. R. Co. 5 L.R.A.(N.S.) 99.

On presumption of negligence from occurrence of accidents—see note to Barnowski v. Helson, 15 L.R.A. 36.

As to liability of railroad company for negligently burning lumber placed upon its right of way with its consent—see note to Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. 1 L.R.A.(N.S.) 533.

As to duty of owner of property adjoining a railroad right of way to protect it from fires set out by passing locomotives—see notes to Hawley v. Sumpter Valley R. Co. 12 L.R.A.(N.S.) 526, and Brunner v. Minneapolis, St. P. & S. Ste. M. R. Co. 49 L.R.A. (N.S.) 166.

could have caused the fire, introduced evidence tending to show that all its locomotives were properly equipped, and in its answer, after denying all negligence, expressly set up that it exercised ordinary care to procure and use upon all of its engines proper spark arresters, and that these were in good repair when the accident occurred.

[For other cases, see Evidence, XI. k, in Digest Sup. Ct. 1908.]

Railroads — negligence — fires.

3. The mere presence of cotton on a railway company's right of way without the company's affirmative permission does not relieve it from liability for the destruction of the cotton by a fire caused by its own negligence.

[For other cases, see Railroads, 168–170, in Digest Sup. Ct. 1908.]

[No. 357.]

Argued November 30, 1914. Decided December 14, 1914.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Texas in favor of plaintiff in an action against a railway company for the value of cotton destroyed by a fire alleged to have been set by one of its locomotives. Affirmed.

See same case below, 126 C. C. A. 299, 209 Fed. 205.

Mr. F. H. Prendergast argued the cause, and, with Mr. W. L. Hall, filed a brief for plaintiff in error:

A litigant cannot introduce evidence on cross-examination, or otherwise, for the mere purpose of contradicting it by further evidence to be introduced by him.

Gulf, C. & S. F. R. Co. v. Coon, 69 Tex. 730, 7 S. W. 492; 1 Greenl. Ev. 446, 449; 1 Whart. Ev. §§ 448, 454, 559, 562; Dimmitt v. Robbins, 74 Tex. 441, 12 S. W. 94; Sutor v. Wood, 76 Tex. 408, 13 S. W. 321; Jones, Ev. § 827; Union P. R. Co. v. Reese, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 268.

In a suit for the value of property destroyed by fire started by sparks from a locomotive engine, where the engine that started the fire is identified, it is not permissible to prove that other engines at other times threw sparks sufficient to start the fire.

Henderson v. Philadelphia & R. R. Co. 144 Pa. 461, 16 L.R.A. 299, 27 Am. St. Rep. 652, 22 Atl. 851; Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co. 52 C. C. A. 95, 114 Fed. 136, 11 Am. Neg. Rep. 523; Nussbaum v. Trinity & B. Valley R. Co. — Tex. Civ. App. —, 149 S. W. 1083; Morgan v. Missouri, K. & T. R. Co. 50 Tex. Civ. App. 420, 110 S. W. 978; Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. 17 L.R.A. 33 and note, 27 Fla. 1, 9 So. 661; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356; Gulf, C. & S. F. R. Co. v. Johnson, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 L. ed. 1057, 23 Sup. Ct. Rep. 681; Babcock v. Chicago & N. W. R. Co. 62 Iowa, 593, 13 N. W. 740, 17 N. W. 909; Bell v. Chicago, B. & Q. R. Co. 64 Iowa, 321, 20 N. W. 456; First Nat. Bank v. Lake Erie & W. R. Co. 174 Ill. 36, 50 N. E. 1023; Cleveland, C. C. & St. L. R. Co. v. Loos, 38 Ind. App. 1, 77 N. E. 948; Ireland v. Cincinnati, W. & M. R. Co. 79 Mich. 163, 44 N. W. 426; Hygienic Plate Ice Mfg. Co. v. Raleigh & A. Air Line R. Co. 126 N. C. 797, 36 S. E. 279; Shelly v. Philadelphia & R. R. Co. 211 Pa. 160, 60 Atl. 581; San Antonio & A. P. R. Co. v. Home Ins. Co. — Tex. Civ. App. —, 70 S. W. 999; McFarland v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 88 S. W. 450; Norfolk & W. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521; Kimball v. Borden, 95 Va. 205, 28 S. E. 207; Illinois C. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833, reaffirming 127 Ill. App. 41; Fleming v. Pullen, — Tex. Civ. App. —, 97 S. W. 109; Contra, Ft. Worth & D. C. R. Co. v. Ratliffe, 2 Tex. App. Civ. Cas. (Willson) 600; Indian v. Elberton Air-Line R. Co. 90 Ga. 663, 35 Am. St. Rep. 232, 16 S. E. 958; Tribett v. Illinois C. R. Co. 71 Miss. 212, 13 So. 899; Albert v. Northern C. R. Co. 98 Pa. 316; Gibbons v. Wisconsin Valley R. Co. 58 Wis. 335, 17 N. W. 132; Morgan v. Missouri, K. & T. R. Co. 50 Tex. Civ. App. 420, 110 S. W. 978.

It has been held in a number of cases that if our evidence is true as to the condition and operation of our engines, we have rebutted the presumption of negligence that arises from the fact that the engines had started the fire. If the fact that the engine started the fire is sufficient to disprove and rebut the evidence showing that the engines were in good repair as to spark arresters, and well managed, then we cannot see any reason why that evidence should not be sufficient in any case.

Martin v. Texas & P. R. Co. 87 Tex. 118, 26 S. W. 1052; Texas & P. R. Co. v. Levine, 87 Tex. 439, 27 S. W. 466; Campbell v. Goodwin, 87 Tex. 276, 28 S. W. 273.

We are not making the contention that the railway company may by negligence burn cotton placed near the track, but we say that when cotton is placed so near the track that a jury may find it negligently placed there, and when the fire is started by an engine under circumstances that might show negligence in the railway, then the prima facie case in favor of plaintiff's recovery would not exist.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 203; Texas & P. R. Co. v. Ross, 7 Tex. Civ. App. 657, 27 S. W. 728; Ft. Worth & R. G. R. Co. v. Dial, 38 Tex. Civ. App. 260, 85 S. W. 22; Rutherford v. Texas & P. R. Co. — Tex. Civ. App. —, 61 S. W. 422, 9 Am. Neg. Rep. 620; Ft. Worth & D. C. R. Co. v. Hogsett, 67 Tex. 688, 4 S. W. 365; Gulf, C & S. F. R. Co. v. Reagan, — Tex. Civ. App. —, 32 S. W. 846; Gulf, C. & S. F. R. Co. v. Rowland, — Tex. Civ. App. —, 23 S. W. 421; Texas & P. R. Co. v. Gains, — Tex. Civ. App. —, 26 S. W. 433; Galveston, H. & S. A. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 440; Ryan v. Missouri, K. & T. R. Co. 65 Tex. 20, 57 Am. Rep. 589; Ft. Worth & N. O. R. Co. v. Wallace, 74 Tex. 585, 12 S. W. 227; Texas & P. R. Co. v. Gains, — Tex. Civ. App. —, 26 S. W. 873; Missouri, K. & T. R. Co. v. Goode, 7 Tex. Civ. App. 245, 26 S. W. 442; Texas & P. R. Co. v. Levine, 87 Tex. 437, 29 S. W. 466; Houston & T. C. R. Co. v. Cowser, 57 Tex. 302; Murray v. Gulf, C. & S. F. R. Co. 73 Tex. 6, 11 S. W. 125; St. Louis S. W. R. Co. v. Crabb, — Tex. Civ. App. —, 80 S. W. 408.

Mr. S. P. Jones argued the cause, and, with Messrs. William Thompson and J. S. Patterson, filed a brief for defendants in error:

The evidence that other engines which were equipped with the same spark arrester as the one that set the fire permitted the escape of cinders so large that they could not have escaped from an engine equipped with a proper spark arrester in good repair is admissible as showing or tending to show that the engines of the railway company were not equipped with proper spark arresters, and that proper care was not exercised to keep its spark arresters in repair.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356; Texas & P. R. Co. v. Watson, 190 U. S. 289, 47 L. ed. 1059, 23 Sup. Ct. Rep. 681; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; Missouri P. R. Co. v. Donaldson, 73 Tex. 124, 11 S. W. 163; Texas & N. O. R. Co. v. Commercial Union Assur. Co. — Tex. Civ. App. —, 137 S. W. 402; Tuttle v. Missouri P. R. Co. 86 Kan. 28, 119 Pac. 371; Louisville & N. R. Co. v. Home Ins. Co. 146 Ky. 281, 142 S. W. 399; Cincinnati, N. O. & T. P. R. Co. v. Cecil, 28 Ky. L. Rep. 830, 90 S. W. 585; Louisville & N. R. Co. v. Neal, 145 Ky. 42, 139 S. W. 1060; McGill Bros. v. Seaboard Air Line R. Co. 87 S. C. 178, 69 S. E. 156; Taffe v. Oregon R. & Nav. Co. 60 Or. 177, 117 Pac. 989; Asplund v. Great Northern R. Co. 63 Wash. 164, 114 Pac. 1043; Cincinnati, N. O. & T. P. R. Co. v. Sadieville Mill Co. 137 Ky. 568, 126 S. W. 118; Texas & P. R. Co. v. Wooldridge, — Tex. Civ. App. —, 126 S. W. 603; St. Louis & S. F. R. Co. v. Shannon, 25 Okla. 754, 108 Pac. 401, 21 Ann. Cas. 1209; Thomp. Neg. § 2374; Northern P. R. Co. v. Lewis, 2 C. C. A. 453, 7 U. S. App. 254, 51 Fed. 658; Chicago, St. P. M. & O. R. Co. v. Gilbert, 3 C. C. A. 264, 10 U. S. App. 375, 52 Fed. 711; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 7 Sup. Ct. Rep. 243; Dunning v. Maine C. R. Co. 91 Me. 87, 64 Am. St. Rep. 212, 39 Atl. 352.

Where negligence is predicated upon a defective track, it is permissible to show rotten ties, defective bridges, etc., at other places contiguous to that where the derailment occurred.

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; Chicago G. W. R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657; Wabash Screen Door Co. v. Black, 61 C. C. A. 639, 126 Fed. 721; Chicago & N. W. R. Co. v. Netolicky, 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 665; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; Gulf, C. & S. F. R. Co. v. Johnson, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474.

The railway company knew of and acquiesced in the location and use of the compress and its platforms for years without objection. The location was agreeable and beneficial to it in that it made it more probable that the cotton would be shipped out over the road than if it had been located away from the road. It had acquiesced in the storage of cotton upon the platform for years, and as the trial court only held it responsible for the value of the cotton in the event the jury should find that it was set on fire by the negligence of the railway company, it cannot complain. It was familiar with the situation of the cotton, and was certainly required by law to exercise just such care as the trial court imposed in the instructions to the jury.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356.

The property owner makes out a prima facie case of negligence by convincing the jury that his property was destroyed by fire that escaped from the engines of the railway company. This prima facie case is not absolutely destroyed and answered by the testimony of the employees of the railway company, which disputes the prima facie case, but it raises an issue of fact to be determined by the jury, like all other questions of fact, and the jury may conclude from the history of the fire and the

manner of its starting, etc., that the testimony of the rebutting witnesses is not true. Thomp. Neg. §§ 2284-2290; Eddy v. La-Fayette, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1082; Great Northern R. Co. v. Coats, 53 C. C. A. 382, 115 Fed. 452; Missouri, K. & T. R. Co. v. Carter, 95 Tex. 461, 68 S. W. 159; Texas & P. R. Co. v. Rice Bros. 24 Tex. Civ. App. 374, 59 S. W. 833; Houston & T. C. R. Co. v. Ellis, — Tex. Civ. App. —, 134 S. W. 246; 1 Greenl. Ev. §§ 33-48; McCullen v. Chicago & N. W. R. Co. 49 L.R.A. 642, 41 C. C. A. 365, 101 Fed. 66.

Memorandum opinion by Mr. Justice McReynolds, by direction of the court:

This cause was removed from the state court to the district court, and comes here solely because plaintiff in error is incorporated under an act of Congress. We go no further than to inquire whether there is plain error. Chicago Junction R. Co. v King, 222 U. S. 222, 224, 56 L. ed. 173, 174, 32 Sup. Ct. Rep. 79; Texas & P. R. Co. v. Howell, 224 U. S. 577, 582, 56 L. ed. 892, 894, 32 Sup. Ct. Rep. 601.

The circuit court of appeals affirmed the judgment of the district court, rendered upon a verdict, against the railway company for the value of cotton destroyed by fire alleged to have started from sparks and cinders negligently permitted to escape from some passing locomotive. The answer of the company denied all negligence, and expressly set up: (1) That it exercised ordinary care to procure and use upon all of its engines proper spark arresters, and that these were in good repair when the accident occurred. (2) That, without its consent, the cotton was stored on the part of an open platform which [431] extended over its right of way, and was thus voluntarily exposed near tracks along which twenty engines were operated every day.

While insisting that sparks or cinders from only three identified engines could have caused the fire, the railway company nevertheless introduced some evidence tending to show that all locomotives were properly equipped. In rebuttal, and over objection, a witness was permitted to testify that within a few days after the accident he saw engines, while passing near the scene, emit large cinders; and the admission of such evidence constitutes the principal subject of complaint here. In view of the pleadings and the statements of preceding witnesses, this action was not improper. Texas & P. R. Co. v. Watson, 190 U. S. 287, 289, 47 L. ed. 1057, 1059, 25 Sup. Ct. Rep. 681; Goodman v. Lehigh Valley R. Co. 78 N. J. L. 317, 325, 326, 74 Atl. 519.

The court was requested, but refused, to charge that if the railway had not assented to the storage of the cotton over its right of way, and if in fact the fire started there, then it would not be liable. This refusal is said to constitute plain and material error; but we think otherwise, in view of the long-continued use of the platform, and the clear instruction in respect of contributory negligence. The mere presence of the cotton on the right of way without affirmative permission would not suffice to relieve the company from the consequence of its own negligence. Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 471, 23 L. ed. 356, 362.

The other assignments of error are not much relied upon and are without substantial merit.

Judgment affirmed.

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[432] HOLMAN A. DREW, Sheriff of Coos County, State of New Hampshire, Appt.,
v.
HARRY KENDALL THAW.

(See S. C. Reporter's ed. 432-440.)

Extradition — sufficiency of indictment.

1. An indictment found by a New York grand jury, alleging that the accused, having been committed to a state hospital for insane criminals under a court order reciting that he had been acquitted at his trial upon a former indictment upon the ground of insanity, and that his discharge

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NOTE.—What papers are necessary to obtain surrender of fugitive from another state—see note to Ex parte Hart, 28 L.R.A. 801.

As to right of court of asylum state to examine, in interstate extradition proceedings, sufficiency of papers charging the offense for which the return of the fugitive is demanded—see note to Re Waterman, 11 L.R.A.(N.S.) 424.

Who are fugitives subject to extradition—see notes to State v. Hall, 28 L.R.A. 289; Cook v. Hart, 36 L. ed. U. S. 934; and Bassing v. Cady, 52 L. ed. U. S. 540.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 491; Ex parte Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

On habeas corpus to review extradition proceedings—see notes to State v. Jackson, 1 L.R.A. 373; Ex parte Davis, 12 L.R.A. (N.S.) 225; Com. ex rel. Flower v. Superintendent of County Prison, 21 L.R.A.(N.S.) 939; Wisener v. Burrell, 34 L.R.A.(N.S.) 755; and Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464.

On insanity as a ground for refusing extradition—see note to Charlton v. Kelly, 46 L.R.A.(N.S.) 397.

was deemed dangerous to public safety, conspired with certain persons to procure his escape from such hospital, and did escape, to the obstruction of justice and of the due administration of the laws, sufficiently charges a crime for the purpose of interstate extradition, in view of the provisions of the New York Penal Law, §§ 580, 583, making an agreement to commit any act for the perversion or obstruction of justice or of the due administration of the laws a misdemeanor if an overt act beside the agreement is done to effect the object.

[For other cases, see Extradition, 10–12, in Digest Sup. Ct. 1908.]

Extradition — fugitive from justice.

2. The motive which induced the departure from the demanding state of a person who is accused of having successfully conspired to effect his escape from a state hospital for insane criminals has no bearing upon the question whether he is a fugitive from the justice of that state for the purpose of interstate extradition, provided the conspiracy charged constitutes a crime.

[For other cases, see Extradition, 13–17, in Digest Sup. Ct. 1908.]

Habeas corpus — in extradition case.

3. The interstate extradition of a person who is charged with having successfully conspired to effect his escape from a state hospital for insane criminals ought not to be interfered with by habeas corpus on the theory that if he was insane when he contrived his escape, he could not be guilty of crime, while if he was not insane, he was entitled to be discharged, where the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of the demanding state allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, since the question is one as to the laws of the demanding state which the courts of that state must decide.

[For other cases, see Habeas Corpus, 127–139, in Digest Sup. Ct. 1908.]

[No. 514.]

Argued December 11, 1914. Decided December 21, 1914.

APPEAL from the District Court of the United States for the District of New Hampshire to review an order discharging on habeas corpus a person held under an extradition warrant. Reversed.

See same case below, 214 Fed. 423.

The facts are stated in the opinion.

Messrs. **William Travers Jerome** and **Franklin Kennedy** argued the cause, and, with Mr. James E. Parsons, filed a brief for appellant:

The statute of the state of New York by virtue of which the original order was made under which Thaw was confined in the state asylum for the insane is constitutional, and such confinement was not in violation of the 14th Amendment of the Constitution of the United States as depriving him of his liberty without due process of law.

People ex rel. Peabody v. Chanler, 133 App. Div. 159, 117 N. Y. Supp. 322, 196 N. Y. 525, 25 L.R.A.(N.S.) 946, 89 N. E. 1109; Hadfield's Case, 27 How. St. Tr. 1282; United States v. Lawrence, 4 Cranch, C. C. 518, Fed. Cas. No. 15,577; Re Clark, 86 Kan. 539, 39 L.R.A.(N.S.) 680, 121 Pac. 492, Ann. Cas. 1913C, 317.

The prisoner is a fugitive from justice.

Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Appleyard v. Massachusetts, 203 U. S. 222, 226, 51 L. ed. 161, 162, 27 Sup. Ct. Rep. 122, 7 Ann. Cas. 1073; Ex parte Hoffstot, 180, Fed. 240, 218, U. S. 665, 54 L. ed. 1201, 31 Sup. Ct. Rep. 222.

The law of the demanding state controls.

Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218.

The mere fact of insanity alone does not free a person from criminal responsibility, either in the state of New York or within Federal and other state jurisdictions, but the insane person, to free himself from criminal responsibility, must show that in regard to the particular acts charged he did not know the nature and quality of the acts and that they were wrong.

People v. Silverman, 181 N. Y. 240, 73 N. E. 980; People v. Cain, 206 N. Y. 202, 99 N. E. 566; United States v. Ridgeway, 31 Fed. 144; Guiteau's Case, 10 Fed. 161; Charlton v. Kelly, 229 U. S. 447, 57 L. ed. 1274, 46 L.R.A.(N.S.) 397, 33 Sup. Ct. Rep. 945; 12 Cyc. 168, note 45; People v. Taylor, 138 N. Y. 398, 34 N. E. 275.

What counsel for the petitioner asks is substantially to try upon the face of the papers the question of the guilt or innocence of the petitioner; the defense being such insanity as under the law of the state of New York would excuse the commission of crime. It certainly is elementary and entirely settled by authority, that upon extradition proceedings, either before a governor or before a court on habeas corpus, the question of guilt or innocence of the person sought to be extradited will not be inquired into, and the court will not try such questions.

Note to Com. ex rel. Flower v. Superintendent of County Prison, 21 L.R.A.(N.S.) 939; 2 Moore, Extradition, § 610.

In interstate rendition, neither the executive authority, nor courts of the asylum

state, nor the Federal courts, upon habeas corpus, have power or right to inquire into the motive or purpose of the demanding state.

Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Munsey v. Clough, 196 U. S. 372, 49 L. ed. 516, 25 Sup. Ct. Rep. 282; Re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; Dow's Case, 18 Pa. 37; State v. Anderson, 1 Hill, L. 327; Re Voorhees, 32 N. J. L. 145; People ex rel. Draper v. Pinkerton, 17 Hun, 199; 2 Kent, Com. 12th ed. 32; 2 Moore, Extradition, 1891 ed. § 617; Whart. Crim. Pl. & Pr. 9th ed. p. 51; Com. ex rel. Flower v. Superintendent of County Prison, 21 L.R.A.(N.S.) 939, note.

The indictment accompanying the demand upon the state of New Hampshire for the surrender of the petitioner herein constitutes a charge of crime within the meaning of the Constitution and Revised Statutes of the United States, and in form is in accordance with the rules of technical pleading.

Pierce v. Creecy, 210 U. S. 387, 402, 52 L. ed. 1113, 1120, 28 Sup. Ct. Rep. 714; Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542.

Mr. P. C. Knox argued the cause and filed a brief for appellee:

The *parens patriæ* power is protective, not punitive nor police. It is invoked only to help the helpless and to protect his person and estate. It is a prerogative of sovereignty usually committed to the chancellor. It is a duty the sovereign owes the subject in return for his allegiance. New York has never exercised it or sought to exercise it, and cannot exercise it in respect to Thaw, a citizen of Pennsylvania.

Church of Jesus Christ, L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792; Fitzh. Nat Brev. 9th ed. 232; Coke, Inst. pt. 2, p. 14; Beverley's Case, 4 Coke, 124a, note; Wigg v. Tiler, 2 Dick. 552; Murray v. Frank, 2 Dick. 555; Burford v. Lenthall, 2 Atk. 551; Cope's Case, 2 Ch. Cas. 239; Foster v. Marchant, 1 Eq. Cas. Abr. 277, 1 Vern. 262; Audley v. Audley, 1 Dick. 16, 1 Eq. Cas. Abr. 277, 2 Vern. 192; Dormer's Case, 2 P. Wms. 263; Wenman's Case, 1 P. Wms. 702; Neal's Case, 2 P. Wms. 545; Ex parte Ludlow, 2 P. Wms. 635; Sheldon v. Aland, 3 P. Wms. 104; Ex parte Billinghurst, 1 Ambl. 104; Ex parte Annandale, 1 Ambl. 80; Re Fitzgerald, 2 Sch. & Lef. 435, 1 Lloyd & Goold (t. Sugden) 20; Ex parte Southcote, 1 Ambl. 109, 2 Ves. Sr. 401.

Where insanity is once shown it is presumed to exist until the opposite is shown, and the *onus* of proving it is on the one asserting the sanity.

Peters v. Peters, 3 Misc. 264, 22 N. Y. Supp. 764; Greenl. Ev. ¶ 42; Cook v. Cook, 53 Barb. 180.

Extradition, or interstate rendition, will lie only for "crimes," and this includes misdemeanors; and an act, to constitute a crime or misdemeanor, must contain the elements and satisfy the requirements that are essential to constitute crimes or misdemeanors at common law. The power of a state to create extraditable crimes is subject to this limitation.

4 Bl. Com. chap. 1, p. 5.

In construing terms of art in the Constitution we are to look at the meaning which those terms had at common law, both in the United States and England, at the time of the adoption of the Constitution.

United States v. Wilson, 7 Pet. 160, 8 L. ed. 643; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; West v. Gammon, 39 C. C. A. 271, 98 Fed. 427; Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; United States v. Harris, 1 Sumn. 21 Fed. Cas. No. 15,315; United States v. Potter, 56 Fed. 83; Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; United States v. Three Copper Stills, 47 Fed. 495; United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; United States v. Ayres, 46 Fed. 651.

In interstate rendition the papers of the demanding state should show, by competent proof, that the accused is substantially charged with crime against the laws of the demanding state; that is, the papers must charge a crime, and must make out a prima facie case against the accused in respect to the crime charged; otherwise the rendition of the fugitive must fail.

Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Hyatt v. New York, 188 U. S. 691, 709, 47 L. ed. 657, 660, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; Appleyard v. Massachusetts, 203 U. S. 222, 228, 51 L. ed. 161, 163, 27 Sup. Ct. Rep. 122, 7 Ann. Cas. 1073; Pierce v. Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714.

Whether or not a crime has been charged within the foregoing rule, and a prima facie case duly and properly made out, will be examined into on habeas corpus in cases of interstate rendition.

Roberts v. Reilly, 116 U. S. 80, 94, 29 L. ed. 544, 548, 6 Sup. Ct. Rep. 291; Ex parte Slauson, 73 Fed. 666; Appleyard v. Massachusetts, 203 U. S. 222, 228, 51 L. ed. 161, 163, 27 Sup. Ct. Rep. 122, 7 Ann. Cas. 1073; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 112, 52 L. ed. 121, 126, 28 Sup. Ct. Rep. 58; Re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; United States v.

Hess, 124 U. S. 483, 486, 31 L. ed. 516, 517, 8 Sup. Ct. Rep. 571; United States v. Fowkes, 49 Fed. 50, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13; Ex parte Slauson, 73 Fed. 666.

The *sine qua non* of all crimes and misdemeanors at law is a criminal intent.

4 Bl. Com. chap. 2, p. 20; 1 Bishop, New Crim. Law, §§ 206, 430; Davis v. United States, 160 U. S. 469–484, 40 L. ed. 499–504, 16 Sup. Ct. Rep. 353; Stokes v. People, 53 N. Y. 179, 13 Am. Rep. 492; People v. Powell, 63 N. Y. 91; Martin v. Goldstein, 20 App. Div. 203, 46 N. Y. Supp. 961; Wright, Conspiracy & Crimes, Carson's ed. p. 6; 2 Bishop, New Crim. Law, p. 171.

Insane persons are incapable of entertaining a criminal intent, and therefore incapable of committing a crime.

Hawk. P. C. chap. 1, § 1; Hale, P. C. pt. 1, chap. 1; 1 Bishop, New Crim. Law, §§ 375, 396a.

Mr. William A. Stone also argued the cause, and, with Messrs. Merrill Shurtleff and George F. Morris, filed a brief for appellee:

It is to the law, and not to the principles of comity, that we must look for the authority to order the rendition of a person charged with having committed a crime, from one state to another.

Re Kopel, 148 Fed. 505; People ex rel. Cockran v. Hyatt, 172 N. Y. 176, 60 L.R.A. 774, 92 Am. St. Rep. 706, 64 N. E. 825.

In extradition matters three primary questions arise for the consideration of the executive of the asylum state:

1. Is the accused substantially charged with a crime against the laws of the demanding state?

2. Is the accused a fugitive from justice?

3. Is the requisition sought for an ulterior or private purpose?

The action of the governor of the asylum state is open to review in the courts upon a writ of habeas corpus upon all of these questions.

Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Munsey v. Clough, 196 U. S. 364, 372, 49 L. ed. 515, 516, 25 Sup. Ct. Rep. 282; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; People ex rel. Lawrence v. Brady, 56 N. Y. 186; Ex parte Slauson, 73 Fed. 666; Tennessee v. Jackson, 1 L.R.A. 370, 36 Fed. 258; United States v. Pope, Fed. Cas. No. 16,069; Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; Re Herres, 33 Fed. 165.

The person charged may invoke the aid of either the Federal or state courts through the medium of a writ of habeas corpus to secure his release, if illegally detained on requisition papers.

Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Ex parte Smith, 3 McLean, 131, Fed. Cas. No. 12,968; Ex parte Morgan, 20 Fed. 298; Ex parte McKean, 3 Hughes, 23, Fed. Cas. No. 8,848.

The burden of strict compliance with the Constitution and statutes is upon the demanding state. Jurisdictional facts must be alleged and proven. This is the law in this country and in England.

Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; Ex parte Percival, 21 Cox, C. C. 387.

The courts of the United States take judicial notice of the laws of all states.

Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291.

Thaw was committed under an unconstitutional statute.

Re Boyett, 136 N. C. 415, 67 L.R.A. 972, 103 Am. St. Rep. 944, 48 S. E. 789, 1 Ann. Cas. 729; Brown v. Urquhart, 139 Fed. 846; State ex rel. Blaisdell v. Billings, 55 Minn. 474, 43 Am. St. Rep. 524, 57 N. W. 206, 794; Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633; Re Lambert, 134 Cal. 626, 55 L.R.A. 856, 86 Am. St. Rep. 296, 66 Pac. 851; People ex rel. Ordway v. St. Saviour's Sanitarium, 34 App. Div. 363, 56 N. Y. Supp. 431; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Tiedeman, Pol. Power, p. 107; Portland v. Bangor, 65 Me. 120, 20 Am. Rep. 681; Re Kenny, 23 Misc. 9, 49 N. Y. Supp. 1037; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Re Blewitt, 131 N. Y. 541, 30 N. E. 587; People ex rel. Sullivan v. Wendel, 33 Misc. 496, 68 N. Y. Supp. 948; Re Janes, 30 How. Pr. 446; Re Bryant, 3 Mackey, 489; Sporza v. German Sav. Bank, 192 N. Y. 8, 84 N. E. 406; Smith v. People, 65 Ill. 375; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Rouse, H. & Co. v. Circuit Judge, 104 Mich. 239, 27 L.R.A. 577, 53 Am. St. Rep. 457, 62 N. W. 359; Dartmouth College v. Woodward, 4 Wheat. 518, 581, 4 L. ed. 629, 645.

It may be argued that the question of the legality of Thaw's commitment is not open to us in this proceeding; that the question is *res judicata;* and that this proceeding is a collateral attack on a judgment of the highest court of the state of New York. If this case were one of mere error in the decision of the court of New York, it might be very properly argued that that decision was proof against collateral attack; but the question we raise is one

of jurisdiction, or want of authority to make the order because of the invalidity of the statute under which it was made This question strikes at the foundation of the entire proceedings. The state of New York is now attempting to extradite Thaw upon a process which depends entirely, for its validity, upon the legality of his confinement in Matteawan. If that confinement was illegal because his commitment was under a void statute, then he has a right to raise the question in this proceeding, brought to secure his release from the custody in which he is held because of such commitment and detention. The judgment of any state court, based upon a statute which is in contravention of the Constitution of the United States, is a nullity and is open to attack, either by direct proceedings or collaterally.

Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Thaw's acts were neither *malum in se* nor *malum prohibitum.*

State v. Leach, 7 Conn. 452, 18 Am. Dec. 118; Housh v. People, 75 Ill. 487, 2 Am. Crim. Rep. 465; State v. Williams, 10 N. J. L. J. 293; People v. Ah Teung, 92 Cal. 421, 15 L.R.A. 190, 28 Pac. 577; State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93; People v. Hochstim, 76 App. Div. 25, 78 N. Y. Supp. 638, 986; Redman v. State, 28 Ind. 205; People v. Thompson, 9 Johns. 70; Com. v. Homer, 5 Met. 555.

At the time of the alleged offense, Thaw was not committed for punishment. He had been acquitted of the offense of homicide, and his detention was solely for protection. He was not held under any criminal law or civil process, but by a questionable exercise of the police power. He is entitled to all the privileges of any innocent man.

Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633.

The indictment against Thaw does not allege a confederacy to commit an unlawful overt act, or a confederacy to commit a lawful act by unlawful means.

People v. Hubbard, 141 Mich. 96, 104 N. W. 386; Pierce v. Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714; Re Waterman, 29 Nev. 288, 11 L.R.A.(N.S.) 424, 89 Pac. 291, 13 Ann. Cas. 926; Barriere v. State, 142 Ala. 72, 39 So. 55; Re Tod, 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303; Smith v. State, 21 Neb. 552, 32 N. W. 594; Ex parte Rowland, 35 Tex. Crim. Rep. 108, 31 S. W. 651; Ex parte Lorraine, 16 Nev. 63; State v. Burnham, 15 N. H. 396; State v. Parker, 43 N. H. 83; State v. Potter, 28 Iowa, 554; State v. Stevens, 30 Iowa, 391; State v. Jones, 13 Iowa, 269; State v. Roberts, 34 Me. 320; Com. v. Shedd, 7 Cush. 514; Com. v. Hunt, 4 Met. 125, 38 Am. Dec. 346; Lambert v. People, 9 Cow. 578; Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

An insane person cannot be substantially charged with a crime within the meaning of the extradition laws.

Speare, Extradition, p. 288.

When insanity is once judicially established, it is presumed to continue, and the burden of proving sanity shifts to the party alleging it.

1 Greenl. Ev. § 42; State v. Spencer, 21 N. J. L. 196; State v. Wilner, 40 Wis. 304; People v. Francis, 38 Cal. 184; Armstrong v. State, 30 Fla. 204, 17 L.R.A. 484, 11 So. 618; Langdon v. People, 133 Ill. 382, 24 N. E. 874; State v. Schaefer, 116 Mo. 96, 22 S. W. 447; Wheeler v. State, 34 Ohio St. 395, 32 Am. Rep. 372; Lawson, Presumptive Ev. p. 180; Whart. Crim. Law, 11th ed. p. 106; Cook v. Cook, 53 Barb. 180; Hughes v. Jones, 116 N. Y. 72, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; People v. Egnor, 175 N. Y. 419, 67 N. E. 906; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Brotherton v. People, 75 N. Y. 159, 3 Am. Crim. Rep. 218; Walker v. People, 88 N. Y. 81.

The relator was entitled to introduce evidence on the question of whether or not he was a fugitive from justice. He is also entitled to have such facts and admissions as appear in the record considered for the same purpose.

Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 109, 52 L. ed. 121, 125, 28 Sup. Ct. Rep. 58; Bruce v. Rayner, 62 C. C. A. 501, 124 Fed. 481; Roberts v. Reilly, 116 U. S. 94, 29 L. ed. 548, 6 Sup. Ct. Rep. 291.

No case can arise demanding a more searching scrutiny into the evidence than in cases arising under this part of the Constitution of the United States.

Ex parte Smith, 3 McLean, 136, Fed. Cas. No. 12,968.

If the court is convinced from the entire record that this proceeding is instituted for a purpose other than appears on the face of the papers, it furnishes another reason why the ruling of the district court should be sustained.

Church, Habeas Corpus, 2d ed. § 474, p. 828; Speare, Extradition, pp. 424, 425; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 109, 52 L. ed. 121, 125, 28 Sup. Ct. Rep. 58; Re Cannon, 47 Mich. 481, 11 N. W. 280.

If Thaw's extradition is sought for an ulterior purpose, it is an abuse of process.

If the state of New York has mistaken its remedy, it is a misuse of process. In either case extradition should be denied.

Pooley v. Whetham, L. R. 15 Ch. Div. 435, 50 L. J. Ch. N. S. 236, 43 L. T. N. S. 267, 29 Week. Rep. 296; Re Maltby, 14 Cox, C. C. 609, 50 L. J. Q. B. N. S. 413, L. R. 7 Q. B. Div. 18, 44 L. T. N. S. 711, 29 Week. Rep. 678, 45 J. P. 681.

[438] Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a final order discharging the appellee on habeas corpus. Thaw was held upon a warrant from the governor of New Hampshire for his extradition to New York, in pursuance of a demand of the governor of the latter state. He was alleged to be a fugitive from justice, and a copy of an indictment found by a New York grand jury accompanied the demand. The indictment alleged that Thaw had been committed to the Matteawan State Hospital for the insane under an order of court reciting that he had been acquitted at his trial upon a former indictment on the ground of insanity, and that his discharge was deemed dangerous to public safety. It then alleged that, being thus confined, he conspired with certain persons to procure his escape from the hospital, and did escape, to the obstruction of justice and of the due administration of the laws. By the New York Penal Law an agreement to commit any act for the perversion or obstruction of justice or of the due administration of the laws is a misdemeanor, if an overt act beside the agreement is done to effect the object. Penal Law, §§ 580, 583.

In the wide range taken by the argument for the appellee it was suggested, among other things, that it was not a crime for a man confined in an insane asylum to walk out if he could, and that therefore a conspiracy to do it could not stand in any worse case. But that depends on the statute. It is perfectly possible and even may be rational to enact that a conspiracy to accomplish what an individual is free to do shall be a crime. An individual is free to refuse his custom to a shop, but a conspiracy to abstain from giving custom might and in some jurisdictions probably would be punished. If the acts conspired for tend to obstruct the due administration of the laws, the statute makes the conspiracy criminal whether the acts themselves are so or not. We do not regard it as open [439] to debate that the withdrawal, by connivance, of a man from an insane asylum, to which he had been committed as Thaw was, did tend to obstruct the due administration of the law. At least, the New York courts may so decide. Therefore the indictment charges a crime. If there is any remote defect in the earlier proceedings by which Thaw was committed, which we are far from intimating, this is not the time and place for that question to be tried.

If the conspiracy constituted a crime, there is no doubt that Thaw is a fugitive from justice. He was a party to the crime in New York, and afterwards left the state. It long has been established that, for purposes of extradition between the states, it does not matter what motive induced the departure. Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Appleyard v. Massachusetts, 203 U. S. 222, 226, 227, 51 L. ed. 161-163, 27 Sup. Ct. Rep. 122, 7 Ann. Cas. 1073. We perceive no ground whatever for the suggestion that in a case like this there should be a stricter rule.

The most serious argument on behalf of Thaw is that if he was insane when he contrived his escape, he could not be guilty of crime, while if he was not insane, he was entitled to be discharged; and that his confinement and other facts scattered through the record require us to assume that he was insane. But this is not Thaw's trial. In extradition proceedings, even when, as here, a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the state having jurisdiction of the crime. Art. 4, § 2. Pettibone v. Nichols, 203 U. S. 192, 205, 51 L. ed. 148, 153, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047. There is no discretion allowed, no inquiry into motives. Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Pettibone v. Nichols, 203 U. S. 192, 203, 51 L. ed. 148, 153, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047. The technical sufficiency of the indictment is not open. Munsey v. Clough, 196 U. S. 364, 373, 49 L. ed. 515, 517, 25 Sup. Ct. Rep. 282. [440] And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide. The statute that declares an act done by a lunatic not a crime adds that a person is not excused from criminal liability except upon proof that at the time "he was laboring under such defect of reason as: 1, not to know the nature and quality of the act he was doing; or 2, not to know that the act was wrong." Penal Law, § 1120. See

§ 34. The inmates of lunatic asylums are largely governed, it has been remarked, by appeal to the same motives that govern other men, and it well might be that a man who was insane and dangerous, nevertheless in many directions understood the nature and quality of his acts as well, and was as open to be affected by the motives of the criminal law as anybody else. How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether, at the moment of the conspiracy, Thaw was insane in such sense as they may be instructed would make the fact a defense. Pierce v. Creecy, 210 U. S. 387, 405, 52 L. ed. 1113, 1122, 28 Sup. Ct. Rep. 714; Charlton v. Kelly, 229 U. S. 447, 462, 57 L. ed. 1274, 1281, 46 L.R.A. (N.S.) 397, 33 Sup. Ct. Rep. 945. When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once.

Final order reversed.

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[441] WILLIAM SIZEMORE et al., Plffs. in Err.,
v.
FOIL M. BRADY.

(See S. C. Reporter's ed. 441-451.)

Indians — descent — Creek allotments.

1. The devolution of an allotment on behalf of a deceased Creek citizen which was not selected nor made until after the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap 1323), went into effect, is governed by the Arkansas laws of descent and distribution which, by § 6 of that act, and by the act of May 27, 1902 (32 Stat. at L. 258, chap. 888), were substituted for the Creek tribal laws of descent and distribution recognized by a provision of the original Creek agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), § 28, which the later acts repeal.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — vested right — descent.

2. Any right to have the beneficiaries of an allotment, made on behalf of a deceased Creek citizen, ascertained by the Creek tribal laws of descent and distribution recognized by a provision of the original Creek agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), § 28, could, without denying due process of law, be recalled as was done by the act of May 27, 1902 (32 Stat. at L. 258, chap. 888), and the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), § 6, substituting the Arkansas laws of descent and distribution for the Creek laws, where the allotment was neither selected nor made until after the later acts went into effect.

[For other cases, see Constitutional Law, IV. b. 4; IV. e, in Digest Sup. Ct. 1908.]

[No. 59.]

Submitted November 4, 1914. Decided December 21, 1914.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which, reversing a judgment of the District Court of Wagoner County, in that state, directed the entry of a judgment in favor of plaintiff in a suit to determine conflicting claims to an Indian allotment. Affirmed.

See same case below, 33 Okla. 169, 124 Pac. 615.

The facts are stated in the opinion.

Messrs. Frederick E. Chapin and Andrew B. Duvall submitted the cause for plaintiffs in error. Mr. James B. Diggs was on the brief:

The allotment which an enrolled Creek citizen would have been entitled to under the original Creek agreement of March 1, 1901, had he lived to select and receive the same, descends to his heirs under such agreement. Such heirs are to be ascertained as of the date of his death. The right of the heirs to such allotment is a vested right which cannot be impaired or taken away by subsequent legislation.

Aspey v. Barry, 13 S. D. 220, 83 N. W. 91; Auman v. Auman, 21 Pa. 348; Aydlett v. Swope, — Tenn. —, 17 S. W. 208; Ballentine v. Wood, 42 N. J. Eq. 552, 9 Atl. 582; Barclay v. Cameron, 25 Tex. 232; Barnett v. Way, 29 Okla. 780, 119 Pac. 418; Best v. Polk (Best v. Dow) 18 Wall. 112, 21 L. ed. 805; Borgner v. Brown, 133 Ind. 391, 33 N. E. 92; Brown v. Belmarde, 3 Kan. 41; Brooks v. Kip. 54 N. J. Eq. 462, 35 Atl. 658; Burke v. Modern Woodmen,

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

2 Cal. App. 611, 84 Pac. 275; Choate v. Trapp, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 Sup. Ct. Rep. 565; Clark v. Lord, 20 Kan. 390; Cooper v. Wilder, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; Doe ex dem. Mann v. Wilson, 23 How. 461, 16 L. ed. 585; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634; Doren v. Gillum, 136 Ind. 134, 35 N. E. 1101; Drew v. Carroll, 154 Mass. 181, 28 N. E. 148; Durbin v. Redman, 140 Ind. 694, 40 N. E. 133; Fabens v. Fabens, 141 Mass. 395, 5 N. E. 650; Gilman v. Morrill, 8 Vt. 74; Goodrich v. O'Connor, 52 Tex. 375; Gould v. Tucker, 20 S. D. 624, 105 N. W. 624; Gray v. Coffman, 3 Dill. 393, Fed. Cas. No. 5,714; Ground v. Dingman, 33 Okla. 760, 127 Pac. 1078; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Haun v. Martin, 48 Or. 304, 86 Pac. 371; Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221; Halstead v. Hall, 60 Md. 209; Henry Gas Co. v. United States, 111 C. C. A. 612, 191 Fed. 137; Hobbie v. Ogden, 178 Ill. 357, 53 N. E. 106; Irving v. Diamond, 23 Okla. 325, 100 Pac. 557; Jackson ex dem. McCloughey v. Lyon, 9 Cow. 664; Johnson v. Norton, 10 Pa. 245; Jones v. Meehan, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1; Jumbo Cattle Co. v. Bacon, 79 Tex. 5, 14 S. W. 840; Leathers v. Gray, 96 N. C. 548, 2 S. E. 455; Re McCrea, 180 Pa. 81, 36 Atl. 412; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Meadowcroft v. Winnebago County, 181 Ill. 504, 54 N. E. 949; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Niles v. Anderson, 5 How. (Miss.) 383; Prentice v. Stearns, 113 U. S. 435, 28 L. ed. 1059, 5 Sup. Ct. Rep. 547; Reichart v. Felps, 6 Wall. 160, 18 L. ed. 849; Reynolds v. Fewel, 34 Okla. 112, 124 Pac. 623; Rock Hill College v. Jones, 47 Md. 1; Shellenbarger v. Fewel, 34 Okla. 79, 124 Pac. 617; Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529; Spangenberg v. Guiney, 3 Ohio S. & C. P. Dec. 163; Starnes v. Hill, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011; Starr v. Hamilton, Deady, 268, Fed. Cas. No. 13,314; Stratton v. McKinnie, — Tenn. —, 62 S. W. 636; Tate v. Townsend, 61 Miss. 316; United States ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. ed. 165, 32 Sup. Ct. Rep. 37; United States v. Brooks, 10 How. 442, 460, 13 L. ed. 489, 496; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 219; Ward v. Stow, 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 239; White v. Martin, 66 Tex. 340, 17 S. W. 727; Wilburn v. Wilburn, 83 Ind. 55; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Wray v. Doe, 10 Smedes & M. 461.

If the act of June 30, 1902, known as the supplemental Creek agreement, which was in force at the time of the selection of the land, determines the heirs, such supplemental agreement is prospective in operation, and does not, and was not intended to, operate on or affect the estates of members or citizens of the Creek Tribe or Nation who died prior to the going into effect of the supplemental agreement; but such supplemental agreement was passed for the purpose of affecting, and was intended to affect, only the descent of estates where such descent took place after its going into effect.

Carroll v. Carroll, 16 How. 275, 14 L. ed. 936; Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Murray v. Gibson, 15 How. 421, 14 L. ed. 755; United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; note to Stewart v. Vandervort, 12 L.R.A. 50.

Mr. Grant Foreman submitted the cause for defendant in error. Mr. James D. Simms was on the brief:

A duly enrolled citizen of the Creek Nation, who died on March 1, 1901, without having selected an allotment of land, died seised and possessed of no interest, either legal or equitable, in the domain of the Creek Nation; and no persons claiming to be his heirs, at any time after his death and before allotment, had a vested right to land to be allotted in his name or right. They had a mere expectancy, subject to be changed or extinguished by subsequent acts of Congress.

McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Brann v. Bell, 192 Fed. 427; Shellenbarger v. Fewel, 34 Okla. 79, 124 Pac. 617.

The mere right to allot land of the Creek Nation was not a vested right before it was exercised, because it was subject at any time to be withdrawn.

Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221; Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302. See also Emblen v. Lincoln Land Co. 42 C. C. A. 499, 102 Fed. 559; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. ed. 82; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Campbell v. Wade, 132 U. S. 34, 33 L. ed. 240, 10 Sup. Ct. Rep. 9.

The lands of the Creek Nation before allotment were held by the tribe for the common use of the members, and no right in severalty could be asserted by any member.

Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Delaware Indians v. Cherokee Nation, 193 U. S. 127, 48 L. ed. 646, 24 Sup. Ct. Rep. 342; Eastern Band of Cherokee Indians v. United States, 117 U. S. 288, 29 L. ed. 881, 6 Sup. Ct. Rep. 718; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; Stephens v. Cherokee Nation, 174 U. S. 488, 43 L. ed. 1056, 19 Sup. Ct. Rep. 722.

Congress had full power to make laws of descent in Indian Territory, independently of the Indians or other people residing there; but the Muskogee or Creek Tribe were under the special guardianship of Congress, and it had plenary authority over them.

McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75.

The selection or allotment of the land was the initiatory step, and was prerequisite to the vesting of any individual title or interest in the land of the tribe.

Hooks v. Kennard, 28 Okla. 457, 114 Pac. 744; De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Brann v. Bell, 192 Fed. 427; Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221.

The application of § 6 of the Creek supplemental agreement, changing the rule of descent of lands allotted after the act, in the right of citizens dying before the act, is not to be denied on the ground that it would operate retrospectively. In view of the purpose to be accomplished and the state of the subject-matter, the operation was not retrospective. The power reposed in Congress, and the legislation disclosed the intention to make all lands allotted to heirs after the date of the act descend according to the rule of descent in force at the date of the allotment, regardless of what rule of descent was in force before the act.

Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Brann v. Bell, 192 Fed. 427.

Allotment was necessary to segregate and vest a member's interest in lands of the tribe.

Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565.

[446] Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit to determine conflicting claims to an allotment selected and made after August 8, 1902, on behalf of Ellis Grayson, a Creek citizen duly entitled to enrolment, who died unmarried March 1, 1901, leaving as his only surviving relatives three first cousins, one on the paternal and two on the maternal side. All were Creek citizens. In the papers evidencing the selection and approval of the allotment, as also in the ensuing tribal deed, the beneficiaries were designated as the "heirs" of the deceased, without otherwise naming them; and this was in accord with the usual practice. The suit was brought by the paternal cousin, who insisted that the title under the allotment and tribal deed passed to him alone. The others were made defendants and answered, asserting an exclusive right in themselves. Each side also advanced an alternative claim that the three took the land in equal parts. Two questions of law were involved: First, whether the beneficiaries were to be ascertained according to the Creek tribal law or according to an Arkansas law presently to be noticed; and, second, whether the governing law preferred either paternal or maternal relatives when all were of the same degree. The trial court, concluding that the tribal law was applicable and preferred maternal relatives, gave judgment for the defendants; but the supreme court of the state held that the Arkansas law was controlling and preferred paternal relatives, so the decision below was reversed, with a direction that judgment be entered for the plaintiff. 33 Okla. 169, 124 Pac. 615. The defendants then sued out this writ of error.

Anterior to the legislation which we must consider, the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in [447] the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was neither alienable nor descendible. Under treaty stipulations the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient and in time proved unsatisfactory. Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government. This

Congress undertook to do. The earlier legislation was largely preliminary and need not be noticed.

The first enactment having a present bearing is that of March 1, 1901 (31 Stat. at L. 861, chap. 676), called the "Original Creek agreement," which went into effect June 25, 1901 (32 Stat. at L. 1971). It made provision for a permanent enrolment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation. In § 28 this act directed that the enrolment, except as to children, should include "all citizens who were living" on April 1, 1899, and entitled to enrolment under the earlier legislation, and then declared that "if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

[448] So much of that act as recognized the tribal laws of descent and distribution was repealed by the act of May 27, 1902 [1] (32 Stat. at L. 258, chap. 888), which also provided: "And the descent and distribution of lands and moneys provided for in said act [March 1, 1901] shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory." This was repeated, with a qualification not material here, in § 6 of the act of June 30, 1902 (32 Stat. at L. 500, chap. 1323), called the "Supplemental Creek Agreement," which went into effect August 8, 1902. See 32 Stat. at L. 2021; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 301, 55 L. ed. 738, 743, 31 Sup. Ct. Rep. 578.

Ellis Grayson was living April 1, 1899, and entitled to enrolment. Had he lived he would have been entitled, under the original agreement, to participate in the allotment and distribution of the tribal property. But he died March 1, 1901, before the agreement went into effect, and without receiving any part of the lands or funds of the tribe. In these circumstances the agreement contemplated that his heirs should take his place in the allotment and distribution, and should receive "the lands and money to which he would be entitled, if living;" and it also contemplated that effect should be given to the Creek laws of descent and distribution in determining who were his heirs and in what proportions they were to take the property passed to them in his right. But, as before said, the act of May 27, 1902, and the supplemental agreement, repealed the provision giving effect to the Creek laws of descent and distribution, and substituted in their stead the laws of Arkansas embodied in chapter 49 of Mansfield's Digest. This change went into effect before the allotment in question was selected or made, and has an important [449] bearing here, because, according to the Creek laws, [2] the maternal cousins were either the sole heirs or joint heirs with the paternal cousin, while according to the Arkansas laws [3] the paternal cousin was the only heir.

On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in præsenti*, and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the 5th Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in præsenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe, or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be en-

[1] This act went into effect July 1, 1902. See Joint Resolution No. 24, 32 Stat. at L. 742.

[2] Perryman's Compiled Creek Laws of 1890, p. 32, § 6; Bledsoe's Indian Land Laws, 2d ed. § 829.

[3] Mansfield's Digest, § 2532.

titled, if living. In short, the power of Congress was not exhausted or restrained by the [450] adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be devested or impaired. Choate v. Trapp, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 Sup. Ct. Rep. 565.

In principle it was so held in Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580. There an act or agreement of 1902 had made provision for allotting and distributing the lands and funds of the Cherokees in severalty among the members of the tribe who were living on September 1, 1902, and an act of 1906 [34 Stat. at L. 137, chap. 1876] had directed that Cherokee children born after September 1, 1902, and living on March 4, 1906, should participate in the allotment and distribution. By enlarging the number of participants the later act operated to reduce the distributive share to which each would be entitled, and because of this the validity of that act was called in question, the contention being that the prior act confined the allotment and distribution to the members living on September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds, and that this right could not be impaired by subsequent legislation. This court rejected the contention and said (p. 648): "No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' Cherokee Intermarriage Cases, 203 U. S. 76, 93, 51 L. ed. 96, 103, 27 Sup. Ct. Rep. 29. It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect, and while the tribal relations continued. Stephens v. Cherokee Nation, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct Rep. 115; Wallace v. Adams, 204 U. S. 415, 423, 51 L. ed. 547, 551, 27 Sup. Ct. Rep. 363."

[451] We have seen that the allotment in question was not selected or made until after the supplemental agreement went into effect. The heirs designated in chapter 49 of Mansfield's Digest were therefore the true beneficiaries. According to its provisions, as is conceded, the paternal cousin was the sole heir.

Judgment affirmed.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 451-460.)

United States — contracts — waiver of time limit — damages for delay.

1. The waiver by the Quartermaster General of the United States Army, in the exercise of his discretion, of the time limit fixed in a contract for the construction of a vessel for harbor and cable service before any default occurred, carries with it a release of any claim by the government for the liquidated damages stipulated in the contract for each day's delay beyond the time set for the completion and delivery of the vessel, where there was no unreasonable delay after the waiver, and the government did not suffer any actual pecuniary loss or damage because of the delay.

[For other cases, see United States, VI. e, in Digest Sup. Ct. 1908.]

United States — contracts — requisites — oral waiver of time limit.

2. An oral waiver by the Quartermaster General of the United States Army of the time limit fixed in a contract for the construction of a vessel for harbor and cable service is not forbidden by the provision of the act of June 2, 1862 (12 Stat. at L. 411, chap. 93, Comp. Stat. 1913, § 6895), requiring contracts for military supplies to be in writing.

[For other cases, see United States, VI. b, in Digest Sup. Ct. 1908.]

[No. 104.]

Argued December 8, 1914. Decided January 5, 1915.

APPEAL from the Court of Claims to review a judgment dismissing a petition seeking to recover an alleged balance due upon a contract with the United States government. Reversed and remanded for entry of judgment in favor of appellant.

See same case below, 48 Ct. Cl. 50.

The facts are stated in the opinion.

NOTE.—As to liquidated damages—see note to Tayloe v. Sandiford, 5 L. ed. U. S. 384.

As to performance of building contract—see note to Boettler v. Tendick, 5 L.R.A. 272.

As to effect of waiver, without new consideration, of time clause in a building contract—see note to Jobst v. Hayden Bros. 50 L.R.A.(N.S.) 501.

Mr. Walter D. Davidge argued the cause, and, with Mr. Alexander Preston, filed a brief for appellant:

A waiver of a time limit in contracts for military supplies does not constitute a new contract.

Salomon v. United States, 19 Wall. 17, 19, 20, 22 L. ed. 46, 47; Ford v. United States, 17 Ct. Cl. 60; District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. Rep. 680; Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341; Williams v. Bank of United States, 2 Pet. 96, 7 L. ed. 360; Ittner v. United States, 43 Ct. Cl. 336.

The waiver of the time limit in the first contract necessarily tolls the provision in that contract for liquidated damages.

Kemp v. Rose, 1 Giff. 258, 4 Jur. N. S. 919; Dodd v. Churton [1897] 1 Q. B. 562, 66 L. J. Q. B. N. S. 477, 76 L. T. N. S. 438, 45 Week. Rep. 490; Wait, Engineering & A. Jur. § 726, pp. 667, 668; Flynn v. Des Moines & St. L. R. Co. 63 Iowa, 491, 19 N. W. 312; Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341; District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. Rep. 680; United Engineering & Contracting Co. v. United States, 47 Ct. Cl. 489; Mosler Safe Co. v. Maiden Lane Safe Deposit Co. 199 N. Y. 479, 37 L.R.A. 363, 93 N. E. 81; Williams v. Bank of United States, 2 Pet. 96, 7 L. ed. 360.

Aside from the express waiver of the time limit by the Quartermaster General, the fact of payment in full of the entire balance due under the first contract was an accord and satisfaction, and conclusive on the government, and a waiver of any claims against the claimant under that contract.

United States v. Corliss Steam Engine Co. 91 U. S. 321, 23 L. ed. 397, 10 Ct. Cl. 494; Shipman v. United States, 18 Ct. Cl. 138; 1 Hudson, Bldg. Contr. 538; Wait, Engineering & A. Jur. § 325, pp. 269, 270.

The payment of the entire contract price under the first contract, without any deduction, was deliberate and under no mistake.

Griffith v. United States, 22 Ct. Cl. 165; Barnes v. District of Columbia, 22 Ct. Cl. 394.

There was no loss or damage suffered by the government in completing and delivering the steamer under the first contract.

Hathaway v. Lynn, 75 Wis. 186, 6 L.R.A. 551, 43 N. W. 956; Werner v. Finley, 144 Mo. App. 554, 129 S. W. 73.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

Where the contract provides for the payment of liquidated damages, the same become chargeable without a showing of actual damage suffered.

United States v. Bethlehem Steel Co. 205 U. S. 105, 119, 51 L. ed. 731, 736, 27 Sup. Ct. Rep. 450.

The waiver of the stipulated time limit for the performance of the contract did not destroy the right to liquidated damages.

Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 651, 23 L. ed. 341, 343; McGowan v. American Pressed Tan Bark Co. 121 U. S. 575, 600, 601, 30 L. ed. 1027, 1035, 1036; United States v. McMullen, 222 U. S. 460, 468, 471, 56 L. ed. 269, 272, 273, 32 Sup. Ct. Rep. 128; Nibbe v. Brauhn, 24 Ill. 268; Redlands Orange Growers' Asso. v. Gorman, 161 Mo. 203, 54 L.R.A. 718, 61 S. W. 820; Fisk v. Tank, 12 Wis. 306, 78 Am. Dec. 737; Jeffrey Mfg. Co. v. Central Coal & I. Co. 93 Fed. 412.

The government is not bound by the acts of its officers in making unauthorized payments.

Wisconsin C. R. Co. v. United States, 164 U. S. 190, 212, 41 L. ed. 399, 407, 17 Sup. Ct. Rep. 45; Logan County v. United States, 169 U. S. 259, 42 L. ed. 738, 18 Sup. Ct. Rep. 361; United States v. Saunders, 24 C. C. A. 649, 50 U. S. App. 24, 79 Fed. 407; United States v. Utz, 26 C. C. A. 184, 39 U. S. App. 630, 80 Fed. 850.

Mr. Justice McKenna delivered the opinion of the court:

Petition in the court of claims for judgment for the sum of $4,750, balance due upon a contract entered into between petitioner in such court, appellant here, and the United States, for the construction of a steel hull twin-screw suction dredge, and for installing therein the propelling and other machinery.

There was and is no controversy as to the performance [454] of the contract or as to the amount due upon it. The government set up as an offset an amount alleged to have been illegally paid on a prior contract between appellant and the government, which contract, according to the findings of the court of claims (all the facts which we state being the findings of the court of claims), was entered into between appellant and the government on June 24, 1903, for the construction and equipment of a single screw steamer for harbor service of the Quartermaster's Department and submarine cable service, according to certain specifications which were made part of the contract, for a consideration of $88,000, to be paid in various amounts as the work progressed, less 10 per cent, to be withheld to make good any defects, the vessel to be completed within one hundred and forty days, exclu-

sive of Sundays and legal holidays, or by December 9, 1903.

It was provided that if appellant should "fail to complete and deliver the steamer within the stipulated time, it should pay to the United States the sum of $50 per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount, it was provided, might be withheld from any money due" appellant under the contract.[1]

[455] On December 1, 1903, before the time stipulated for completion had expired, at the request of appellant, owing to unavoidable delays in procuring the necessary material, the Quartermaster General of the Army, within his discretion under the contract, orally waived the time limit in the contract, and subsequently, on April 2, 1904, confirmed the waiver by letter.

On April 1, 1904, or ninety-five days, exclusive of Sundays and holidays, after the time fixed in the contract, the Quartermaster General directed the depot quartermaster at New York to make final payment for the steamer, retaining, however, the 10 per cent to make good any defects there might be in the material and workmanship. On July 13, 1904, the entire sum stipulated to be paid by the government was paid without any deduction whatever.

It does not appear that appellant unreasonably delayed the work after the waiver of the time limit, or that the government suffered any actual pecuniary loss or damage by reason of the delay in the completion and delivery of the steamer.

The court found the facts as to the other contract as set out in the petition of appellant, and that appellant was paid the stipulated price therefor, less the sum of $4.750, "which [we quote from the findings] the defendants (the United States) claim was the amount arising as liquidated damages for the ninety-five days' delay of the claimant [appellant here] in the completion of the steamer under the first contract hereinbefore referred to, and which amount the defendants further claim was inadvertently and under mistake of fact paid to the claimant company" (appellant). And the court recites [456] that the government set up by way of counterclaim the amount so paid, and that the government claimed such sum was due as liquidated damages for the ninety-five days' delay of the claimant (appellant) in the execution of the first contract, and claimed further that such sum was "inadvertently, improperly, and illegally paid by the officers of the government." The record shows that the counterclaim was filed February 15, 1912.

From the findings of fact the court decided "as a conclusion of law that the petition be dismissed." And this as a consequence of sustaining the counterclaim of the government, the court deciding that a waiver of the time limit "did not embrace and release from the payment of the agreed damages, which were assessable upon its [appellant's] default." The court said: "Under such circumstances an officer, in the absence of some provision of law or contract therefor, would have no authority to release a contractor from the provision for liquidated damages so arising." This appeal was then taken.

Appellant attacks the conclusion of the court and contends that "the waiver of the time limit in the first contract necessarily tolled the provision in that contract for liquidated damages." The government, on the other hand, maintains "that the waiver of the time limit simply estopped the government from annulling the contract, but that this in no way affected the other terms of the contract." It is the effect of the contention of the government, curious certainly at first impression, if we consider the intention of the parties, that the time limit was waived, but its sanction was retained, and what seemed to be concession to a delay which was without fault (so found by the court of claims) carried with it the full rigor of the bond.

It may be that the government would have had the right to annul the contract upon the default of appellant [457] and

[1] "That the Maryland Steel Company shall complete the construction and equipment of the said steamer, and deliver same to the party of the first part in New York harbor, or as directed by him, in one hundred and forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is hereby fixed at the rate of fifty ($50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract. In the event of the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such periods as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above-mentioned causes."

avail itself of resultant remedies. It did not do so, but preferred to retain the contract and extend the time of its execution; and, we may assume, upon a consideration of the circumstances, as much in view of the government's interest as appellant's interest, the government suffering no damage by the delay, but getting the instrumentality for which it had contracted in time for its purpose, sooner, indeed, it may be, than if it had annulled the contract with appellant and relet the work to another. These were considerations which the Quartermaster General, in the government's interest, might well entertain. And it may have seemed to that officer that it would have been as harsh as it would have been useless to sacrifice what had been already done, and faithfully done, by annulling the contract or by refusing to excuse the delay in final performance which was without fault. The case should be judged by that consideration and conduct. But the government insists that these seemingly natural suppositions cannot be indulged, and urges against them the principle of building contracts, that if the builder has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he chooses the latter course, he so far waives absolute performance as to be liable on his covenant for the contract price of the work when completed. For the injury done him through the broken covenant he may sue, or, if he waits to be sued, he may recoup the damages thus sustained in reduction of the sum due upon the contract for the completed work. Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341, and United States v. Bethlehem Steel Co. 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. Rep. 450, are cited. Cases are also cited which declare the same principle in regard to contracts for the sale and delivery of goods where time is of the essence of the contract. The latter cases were cases of actual damages, and so also was [458] Phillips & C. Constr. Co. v. Seymour, where, there being no legal evidence of actual damage, it was decided none could be recovered.

It may be said that a provision for liquidated damages is a declaration by the parties of the fact of damage from delay in the performance of the work contracted for and the measure of its amount, it not being susceptible of exact ascertainment. United States v. Bethlehem Steel Co. supra, is adduced for the application of the proposition to the case at bar. The contract in that case was entered into when war was imminent with Spain, and was for the delivery of gun carriages. It contained a clause for a deduction, in the discretion of the Chief of Ordinance, of $35 per day from the price to be paid for each day of delay in the delivery of each carriage. The clause was held, considering the circumstances, to be not a penalty, but a provision for liquidated damages, and that it was competent for the parties to the contract to provide the latter, and, having so provided, recovery might be had "for the amount stated as liquidated damages upon the violation of the contract, and without proof of the damages actually sustained." It will be observed, therefore, that a condition of recovery was proof of violation of the contract. The condition does not exist in the case at bar. The contract was not violated. The time for its performance was extended, and, we may observe, before any default had occurred. In that case there was no waiver of the time limit; in the case at bar there was an express waiver. That case, therefore, fails in its asserted analogy. Undoubtedly parties may agree that time shall be of the essence of their contract, and, the proper legal conditions existing, may stipulate for damages and the measure of them, but they may subsequently change their views and requirements, and consider that performance within the stipulated time is unimportant.

Flynn v. Des Moines & St. L. R. Co. 63 Iowa, 490, 19 N. W. 312, is directly in point. The plaintiff in the case entered into a contract [459] with the railroad to construct part of its line. Payments for the work were to be made monthly upon the certificate of the engineer of the company, and it was covenanted that 10 per cent from the value of the work as an agreed compensation for damages should be retained by the company in case of failure by Flynn to complete the whole amount of the work according to the stipulations of the agreement. It was contended by the railway company that it was entitled to retain the 10 per cent as liquidated damages. The court found that the stipulation as to time was waived, and by being waived was eliminated from the contract, and the railway company was not entitled to any sum as liquidated damages.

In the present case, as we have seen from the findings, there was no thought by the officers of the government of a culpable delinquency on the part of the appellant, or of detriment to the government. The

steamer was delivered, tested, approved, and paid for.

It was held, however, by the court of claims, that the Quartermaster General had no power to waive the provision for liquidated damages. It is not clear that counsel contends for so broad a proposition. His contention is that "the government is not bound by the acts of its officers in making unauthorized payments through mistake of fact or of law." There was no mistake of fact, and by mistake of law counsel may mean, the action of the Quartermaster General was outside of the scope of the official authority given him by law. If that officer so acted, the government is not bound by his acts. Wisconsin C. R. Co. v. United States, 164 U. S. 190, 212, 41 L. ed. 399, 407, 17 Sup. Ct. Rep. 45, and Logan County v. United States, 169 U. S. 259, 42 L. ed. 737, 18 Sup. Ct. Rep. 361.

The cited cases (they are those upon which the government relies) involved the construction of statutory law; in other words, of a specific law which was the source of the officer's authority. The case at bar is a case of contract, authorized by law, necessarily entered into and [460] conducted by the officers of the government, and as necessarily they must have had the powers to make it effective in its beginning and progress. The court of claims recognized this, and found that "the Quartermaster General, United States Army, within his discretion under the contract, orally waived the time limit in said contract,"—a very essential discretion which might have been embarrassed or defeated if it had not extended to what depended upon the time limit of the contract. We think the case, therefore, falls under the ruling of Salomon v. United States, 19 Wall. 17, 19, 20, 22 L. ed. 46, 47, where it is said that "the act of 1862 [12 Stat. at L. 411, chap. 93, Comp. Stat. 1913, § 6895], requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid." See also District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. Rep. 680.

Judgment reversed and cause remanded, with direction to dismiss the counter petition of the government, and to enter judgment for appellant in the amount claimed by it.

Mr. Justice McReynolds took no part *in the consideration and decision of* the case.

[461] J. D. LANKFORD, John J. Gerlach, W. F. Barber, and A. D. Kennedy, Composing the State Banking Board of the State of Oklahoma, Appts.,

v.

PLATTE IRON WORKS COMPANY.

(See S. C. Reporter's ed. 461–496.)

Constitutional law — police power — bank depositors' guaranty fund — administration.

1. The validity, under the police power, of Okla. Laws 1911, chap. 31, as amended by Laws 1913, chap. 22, under which a bank depositor's guaranty fund is created by the levy of an assessment upon the state banks for the purpose of securing the full repayment of deposits in case any such bank becomes insolvent, is not affected because the state, instead of committing the fund to the mere ministerial administration of the state banking board, and subjecting them to controversies with depositors, may have vested the title to the fund in itself so as to extend to the board the state's immunity from suit.

[For other cases, see Constitutional Law, 881–890, in Digest Sup. Ct. 1908.]

States — immunity from suit — suits against state officers.

2. The title of the state to the bank depositors' guaranty fund created under Okla. Laws 1911, chap. 31, as amended by Laws 1913, chap. 22, by the levy of an assessment upon state banks to secure the full repayment of deposits in case any such bank becomes insolvent, and the interest which the state has that such fund be administered by the state banking board appointed under the statute for that purpose, rather than by a judicial tribunal, are such that a suit brought by a depositor in an insolvent bank to compel such board to pay the deposit out of the fund, or, if that be insufficient, to issue a certificate of indebtedness and levy an assessment to make up the deficit in the fund, is a suit against the

Note. —For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On the constitutionality of bank guaranty laws—see notes to Abilene Nat. Bank v. Dolley, 32 L.R.A.(N.S.) 1065; and Noble State Bank v. Haskell, 32 L.R.A.(N.S.) 1062.

Generally, on suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; and Hans v. Louisiana, 33 L. ed. U. S. 842.

On suits against state officers as suits against state—see notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727; Ex parte Young, 13 L.R.A.(N.S.) 932; Louisville & N. R. Co. v. Burr, 44 L.R.A.(N.S.) 189; and Beers v. Arkansas, 15 L. ed. U. S. 991.

state, which, under U. S. Const. 11th Amend., cannot be maintained without the state's consent.

[For other cases, see States, 283–325, in Digest Sup. Ct. 1908.]

[No. 381.]

Argued October 14 and 15, 1914. Decided January 5, 1915.

APPEAL from the District Court of the United States for the Western District of Oklahoma to review a decree directing the state banking board to repay a deposit in an insolvent bank out of the depositors' guaranty fund, or, in the alternative, to issue a certificate of indebtedness and levy an assessment to make up any deficit in the fund. Reversed.

The facts are stated in the opinion.

Mr. Charles West, Attorney General of Oklahoma, argued the cause and filed a brief for appellants:

The supreme court of Oklahoma in construing the banking law has held (1) that the depositors' guaranty fund is a fund of the state, and (2) that the state had a first lien on the failed bank's assets to discharge whatever the state should advance for it.

State ex rel. Taylor v. Cockrell, 27 Okla. 630, 112 Pac. 1000.

And, further, that the state has a first lien upon the assets of a defunct bank for the benefit of the depositors' guaranty fund, by virtue of Okla. Rev. Laws 1910, § 303; and the effect of this statute is to make the state a preferred creditor until any deficiency created therefrom by payment of depositors is made up.

Lankford v. Oklahoma Engraving and Printing Co. 35 Okla. 404, 130 Pac. 278; see also Lovett v. Lankford, — Okla. —, 145 Pac. 767.

Is an action to compel state officers to pay a claim from a state fund in their charge, which they, in the exercise of an executive discretion refused to pay, an action against the state? We think there can be no doubt about the answer. The supreme test in such case is whether the state is bound by the judgment, or whether any of the funds under its control are so bound, and, that test being applied, there can be no doubt of the outcome in this case.

Sundry African Slaves v. Madrazo, 1 Pet. 110, 7 L. ed. 73; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Pennoyer v. McConnaughy, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

Messrs. W. A. Ledbetter and Joseph L. Hull also argued the cause for appellants.

Mr. Charles A. Loomis argued the cause and filed a brief for appellee:

This is not a suit against the state of Oklahoma. An action against a state officer to compel him to perform duties prescribed by law is not an action against the state. An officer who refuses to obey the law does not stand for the state, within the meaning of the Federal Constitution. A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its laws it speaks to its servants, and commands them to do something. Those servants by their acts of disobedience do not stand for or represent that state. This suit, therefore, instead of being against the state, is against its servants to compel the performance of duties which, by their acceptance of the office, they obligated themselves to perform.

Huidekoper v. Hadley, 40 L.R.A.(N.S.) 505, 100 C. C. A. 395, 177 Fed. 1; Lankford v. Oklahoma Engraving & Printing Co. 35 Okla. 404, 130 Pac. 278: State ex rel. Taylor v. Cockrell, 27 Okla. 630, 112 Pac. 1000; Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245; Taylor v. Louisville & N. R. Co. 31 C. C. A 537, 60 U. S. App. 166, 88 Fed. 350; Smyth v. Ames, 169 U. S. 518, 42 L. ed. 839, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The depositors' guaranty fund for the state of Oklahoma is not a part of the general state funds, and is not under the control of, and cannot be used by, the executive or legislative branches of the state government for general state purposes, or for any purpose whatever. The fund is in the possession and control of the state banking board, and can be used solely for the purpose of paying depositors of failed banks; and a proceeding to recover a judgment for the depositor of a failed bank is not a proceeding against the state to enforce any liability of the state.

Danby Bank v. State Treasurer, 39 Vt. 92.

Mr. Allen McReynolds also argued the cause, and, with Messrs. Howard Gray and John W. Halliburton, filed a brief for appellee:

This action is not an action against the state. The defendants cannot seek shelter

behind the state for the abuse of their discretion in office.

Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; Madison v. Smith, 83 Ind. 502; Huidekoper v. Hadley, 40 L.R.A.(N.S.) 505, 100 C. C. A. 395, 177 Fed. 1; State Board v. People, 191 Ill. 528, 58 L.R.A. 513, 61 N. E. 339; State ex rel. First Nat. Bank v. Bourne, 151 Mo. App. 104, 131 S. W. 896; State ex rel. McCleary v. Adcock, 206 Mo. 556, 121 Am. St. Rep. 681, 105 S. W. 270.

[468] Mr. Justice McKenna delivered the opinion of the court:

Suit in equity brought by appellee against appellants, constituting the Oklahoma State Banking Board. The Platte Iron Works Company, appellee, is a Maine corporation and a citizen of that state, and became the holder of two certain time certificates of deposit issued by the Farmers' & Merchants' Bank of Sapulpa. Appellants are members of the state banking board, and the appellant J. D. Lankford is the state bank commissioner.

On September 10, 1912, the bank commissioner took charge of the Farmers' & Merchants' Bank and of all its assets, and proceeded to wind up its affairs. Demand for the payment of the certificates was made upon the banking board and the commissioner out of the depositors' guaranty fund of the state, but payment was refused.

A decree was prayed adjudging appellee owner of the deposits and certificates of deposit, and that it was entitled to have the same paid out of the depositors' guaranty fund created under and by virtue of the laws of the state. If there should be not sufficient funds available therefor, that the banking board be required to issue to appellee certificates of indebtedness for the amount of the deposit, to be known as "depositors' guaranty fund warrants of the state of Oklahoma," bearing 6 per cent interest as provided by § 3, article 2, chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the state legislature, and that the banking board be required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of Oklahoma for the purpose of increasing such depositors' guaranty fund, and pay the deposits and the "depositors' guaranty fund warrants of the state of Oklahoma." General relief was also prayed.

[469] Defendants in the suit, appellants here, moved to dismiss the bill on the ground that the court had no jurisdiction of the action or of the persons of the defendants, the suit being one against the state of Oklahoma without its consent, in violation of the provisions of the 11th Amendment to the Constitution of the United States.

The motion was denied and defendants were given thirty days to answer. No answer appears in the record, but the decree recites that one was filed. The court entered a decree as prayed for in the bill and this appeal was then prosecuted.

The assignments of error in this court are: (1) The suit is an original action in mandamus and the district court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained; (2) the suit is one against the state, "the defendants [appellants] having no personal interest therein and being sued in their official capacity as agents" of the state; (3) the amended bill upon its face states no cause of action for relief.

Is the suit one against the state? The appellee earnestly contends that the answer should be in the negative. "An action," counsel say, "against a state officer to compel him to perform duties prescribed by law is not an action against the state. An officer who refuses to obey the laws does not stand for the state, within the meaning of the Federal Constitution."

These contentions depend upon the meaning of the law; they assume its commands are disobeyed by the officers of the state; in other words, that the default of the officers is personal, in opposition—not in conformity—to the law of the state. But another and seemingly broader contention is made. It is asserted that the depositors' guaranty fund is not under the executive and legislative control of the state, and cannot be used by either for any purpose whatever, but "can be used solely for the purpose of paying depositors of failed banks." Two questions, [470] therefore, are presented, one of power and one of interpretation.

This court, in Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, sustained the constitutionality of the act as an exercise of the police power of the state. The law in its general purpose was there presented and passed on. The relation of the state to the fund did not come up for consideration, but necessarily this is but a detail in administration, not one affecting legality of the law. The creation of the fund was said:

to be justified by its purpose, and the power of the state was declared adequate to accomplish it. "The purpose of the fund," it was said, "is shown by its name. It is to secure the full repayment of deposits."

Where the state should vest the title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the state should commit it to the mere ministerial administration of the bank commissioner and banking board, and subject them to controversies with depositors, or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the state done?

By the statute, the banking board is composed of the bank commissioner and three other persons, to be appointed by the governor; and it is provided that the "board shall have supervision and control of the depositors' guaranty fund, and shall have power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund." The fund is created by levying "against the capital stock of each and every bank organized and existing under the laws" of the "state an annual assessment equal to ½ of 1 per cent, and no more, of its average daily deposits during its continuance as a banking corporation," the fund to be "used solely for the purpose [471] of liquidating deposits of failed banks and retiring warrants provided for" in the act. If at any time the fund be insufficient for such purpose or to pay "other indebtedness properly chargeable against the same, the banking board shall have authority to issue certificates of indebtedness to be known as 'depositors' guaranty fund warrants of the state of Oklahoma,' in order to liquidate the deposits" or such other indebtedness. It is provided that the depositors shall be paid in full, and when the cash available, or that can be made immediately available, is not sufficient to discharge the obligations of the bank or trust company, "the banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in § 300, the amount necessary to make up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers, and directors of said bank or trust company, and against all other persons, corporations, or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

The contention of appellee is that the law has created a fund for the payment of depositors, and directs that they shall be paid in full from the fund or "from additional assessments." If the fund be insufficient for such purpose, it is further contended, the board is required to issue guaranty fund warrants in order to liquidate the deposits. Such, it is insisted, are the plain commands of the statute to which obedience is imposed and is necessary to fulfil the purpose of the law, which is to secure the full repayment to depositors. And, therefore, a suit by depositors is not a suit against the state, but a suit to compel submission by the officers of the state to the laws of the state, accomplishing at once the policy of the law and its specific purpose.

[472] There is strength in the contentions and we are not insensible to it, but there may be more complexity in fulfilling the scheme of the statute than the language of counsel exhibits, and it may be embarrassed if not defeated by subjecting the banking board to incessant judicial inquiries of its administration. We certainly cannot assume that it will not do its duty and provide the ultimate payment of all depositors. To this result the state makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors, and against other persons, which may be enforced by the state for the benefit of the fund which its law has created.

In Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458, there is analogy to the case at bar. The state of South Carolina in the year 1892 assumed the exclusive management of all traffic in liquor. It subsequently abandoned the scheme and passed an act called "the state dispensary act" to provide for the disposition of all property of the instrumentality it had created and to wind up its affairs. A commission was appointed for that purpose. A part of the duties of the commission was to dispose of the property, collect all debts due, and pay "from the proceeds thereof all just liabilities at the earliest date practicable." Any surplus was to be paid to the state treasury. A duty, therefore, was imposed upon the commission to collect the assets of the dispensary and pay its debts, and it was as directly expressed as was the duty imposed upon the banking board in the pending case.

The Wilson Distilling Company contended that the winding-up act of the state created a trust, and the funds in the hands of the

commission were a trust fund held for the benefit of the creditors of the state dispensary, and the suit a plain suit in equity brought by a *cestui que trust* to compel a trustee holding property for his benefit [473] to perform the duties imposed upon him. The suit, therefore, it was contended, was not to require the commissioners to do that which the law of the state forbade, but to do what the law of the state commanded, and the state was not a necessary nor an indispensable party. The contentions received the approval of the circuit court of appeals, but this court took a different view of them, and decided that there was "no just ground for the conclusion that the state, in providing . . . for the liquidation of the affairs of the state dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the state as to authorize a judicial tribunal to take the assets of the state out of the hands of those selected to manage the same, and by means of a receiver to administer such assets as property affected by a trust, irrevocable in its nature, and thus to dispose of the same without the presence of the state." The case, it is true, has some differences from that at bar. There the state was the owner of the property committed to the commissioners for disposition, and was also the original debtor. Here the property is that of the contributing banks, and is accumulated in a fund for the security of their respective depositors. There are differences, but there are substantial resemblances. In that case officers were appointed to administer the property and liquidate and pay the demands against it, and this was the specific direction of the law, marking the beneficiaries, and apparently making them the exclusive parties in any proceedings to enforce the law. In this case officers are appointed having even a greater power. They are not only empowered to liquidate the deposits or other indebtedness of failed banks, but to levy assessments on other banks to make up any deficiency. Therefore, as the [474] state was said to be a necessary party in the cited case, the state can be said to be a necessary party in the pending case because of its interest that the fund which it has caused to be created in pursuance of its policy shall be administered by the officers it has appointed rather than by judicial tribunals. Certainly this construction can be given to the Oklahoma statute; and, granting that it may admit of dispute, an important element to be considered is the decision of the state tribunals.

In State ex rel. Taylor v. Cockrell, 27 Okla. 630, 112 Pac. 1000, the supreme court of Oklahoma had occasion to define the duties of state examiner and inspector. It decided that the office was constituted by the Constitution of the state and was independent of the control of the governor, and passing upon the authority of the examiner and inspector over the accounts of the bank commissioner, it decided that "the funds and assets" of an insolvent bank are "under the management of the state," and "that the depositors' guaranty fund and the funds of a failed bank in the hands of a bank commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund."

It was further decided that the act creating the fund was sustained as an exercise of the police power for the public welfare of the people of the state, and, having been so exercised, the assessment levied by it upon deposits for the purpose of protecting the depositors of the banks is the exertion of the same power "which levies or causes to be levied, a tax upon the property within the state for the maintenance and support of the common schools and educational institutions." And it was said: "The title of such depositors' guaranty fund vests in the state just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for [475] a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the state."

From this decision it appears that the law intended to give to the state as definite a title to the depositors' guaranty fund as to the common school fund; as definite, therefore, as the title of South Carolina to the assets of the state dispensary, which was the subject of decision in Murray v. Wilson Distilling Co. In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund, having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied.

In Lovett v. Lankford, composing the banking board of the state of Oklahoma

(— Okla. —, 145 Pac. 767), the supreme court of Oklahoma decided, citing the Cockrell Case, that the defendants in error in the case composing the banking board were "executive officers of the state, and in performing their duties in administering the law under consideration [the guaranty fund act] do so as such officers, and the property intrusted to their control and management by the law is property owned by the state, or property in which the state has an interest," and that therefore a suit against them to compel their administration of the depositors' guaranty fund "is, in fact, a suit against the state; and in the absence of the consent of the state, the same cannot be maintained." The court further said that "the law has specifically confided to the banking board and the bank commissioner the duty and authority to determine the validity of claims against the depositors' [476] guaranty fund," and also that "it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund. Lankford v. Oklahoma Engraving & Printing Co. 35 Okla. 404, 130 Pac. 278." Any other view, the court in effect said, would not only substitute the judgment of a court for that of the officials, "but would harass and create confusion, the effect of which would destroy the efficiency of such board." The case and Columbia Bank & T. Co. v. United States Fidelity & G. Co. 33 Okla. 535, 126 Pac. 556, give special emphasis to the principle announced. Both were suits to recover deposits respectively of county and state moneys deposited as general or special deposits.

It will serve no purpose to review the cases cited by appellee in which state officers were enjoined from doing unlawful acts, prescribed, it may be, by unconstitutional laws, or commanded by valid laws to perform specific duties. Examples of such cases are reviewed and distinguished in Murray v. Wilson Distilling Co. and there is a later example in Hopkins v. Clemson Agri. College, 221 U. S. 636. 55 L. ed. 890, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654.

The foundation of appellee's argument is, as we have said, that the Oklahoma statute imposed the duty upon the bank commissioner of paying depositors of insolvent banks, and that "this suit, therefore, instead of being against the state, is against its servants, to compel the performance of duties which, by their acceptance of the office, they obligated themselves to perform." A duty being prescribed, it is further contended, the officers "cannot seek shelter behind the state for the abuse of their discretion in office." But these contentions and the arguments based upon them all depend upon an incorrect version of the statute, as we have seen.

Decree reversed.

[477] Mr. Justice **Pitney**, with whom concurred Mr. Justice **Day**, Mr. Justice **Van Devanter**, and Mr. Justice **Lamar**, dissenting:

The question upon which we are divided is whether this action brought by a depositor in an insolvent state bank of Oklahoma, and asserting the right to compel payment of his deposit by the state banking board out of the depositors' guaranty fund, or, if this be insufficient, then by the issuance of a certificate of indebtedness of the kind known as depositors' guaranty fund warrants, is in effect a suit against the state, and therefore within the inhibition of the 11th Amendment to the Federal Constitution, or whether it is merely an action against state officers to compel the performance of duties of a nonpolitical nature clearly prescribed by a statute of the state, so that the officers, in refusing to obey that law, do not represent the state. I agree that the question depends upon the true intent and meaning of the law, and that in determining it we are to assume that the commands of the law are disobeyed by the defendants-appellants; so much, indeed, having been adjudged, upon their confession, in the present case.

There is, I think, no controlling decision. Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458, seems plainly distinguishable. That case dealt with transactions in which the state of South Carolina had a direct property interest and a direct responsibility as a contracting party; and it was upon this ground that the court held the action brought against the agents of the state was in effect a suit against the state. This will appear by a reference to the opinion, pp. 168, 170, etc. It will be my endeavor to show that, under the Oklahoma statute, there is no such interest or responsibility on the part of the state.

We are referred to certain cases in the state court of last resort, one of which, and a very recent one, bears [478] directly upon the question; and it is frankly conceded that proper deference should be paid to them. At the same time, it is not to be forgotten that this action was brought in the district court of the United States because of the diverse citizenship of the parties,—a ground of jurisdiction especially provided for in the Constitution (art. 3, § 2). And, however desirable it may be

to preserve harmony of decision between the Federal and the state courts, we cannot, with due regard to our duty, fail to exercise an independent judgment respecting the true intent and meaning of the statute, in the absence of an authoritative adjudication to the contrary *previous to the time that the cause of action arose.* For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion. Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; East Alabama R. Co. v. Doe, 114 U. S. 340, 353, 29 L. ed. 136, 140, 5 Sup. Ct. Rep. 869; Gibson v. Lyon, 115 U. S. 439, 446, 29 L. ed. 440, 442, 6 Sup. Ct. Rep. 129; Anderson v. Santa Anna Twp. 116 U. S. 356, 362, 29 L. ed. 633, 635, 6 Sup. Ct. Rep. 413; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 Sup. Ct. Rep. 914; Folsom v. Township 96, 159 U. S. 611, 625, 40 L. ed. 278, 283, 16 Sup. Ct. Rep. 174; Stanly County v. Coler, 190 U. S. 437, 444, 47 L. ed. 1126, 1131, 23 Sup. Ct. Rep. 811; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 357, 360, 54 L. ed. 228, 233, 234, 30 Sup. Ct. Rep. 140.

The statute in question is the so-called bank depositors' guaranty fund act of Oklahoma, first enacted December 17, 1907, and several times amended, but not in essential respects. The portions pertinent to the discussion, as they stood upon the statute-book when the present cause of action arose (in the year 1912), are set forth in the margin, followed by an amendment adopted in 1913, shortly before the action was commenced.[1]

[479] It seems to me clear that, by the language and evident meaning of this law, the state has no property interest in the guaranty fund. No part of it is raised through general taxation, nor can any part of it be lawfully placed in the treasury of the state, or devoted to any of the [480] ordinary purposes of the government, or to any purpose other than the payment of depositors. The state, it is true, through the banking commissioner, holds the bare legal title to the fund, and enforces in the name of the [481] state the liabilities of the failed banks, but this is done for the sole benefit of the fund. Thus, the state has title only, but without real ownership. Not even is the credit of the state pledged for the success of the scheme, for while § 8 permits banks to display an official certificate of compliance with the law, the certificate declares that safety to the depositors is guaranteed not by the state, but by the depositors' guaranty fund, and it is made a misdemeanor for any bank officer to advertise the deposits as guaranteed by the state. It would, I think, be difficult to find language more clearly showing that the state is [482] neither interested in the fund nor responsible to the depositors with respect to it. And when we read these and the other provisions of the act in the light of the state Constitution the matter becomes still more plain. For, by the Constitution, article 5, § 55, "No money shall ever be paid out of the treasury of this state, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law, . . . and every such law . . . shall distinctly specify the sum appropri-

[1] Extracts from bank depositors' guaranty fund act, as found in Revised Laws of Oklahoma, 1910 (Harris and Day), §§ 298 et seq., and in subsequent Session Laws.

Section 3 (299 and 300, as amended by Laws 1911, p. 54): "There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this state, for the purpose of creating a depositors' guaranty fund, equal to 5 per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessment shall be payable one fifth during the first year of existence of said bank or trust company, and one twentieth during each year thereafter until the total amount of said 5 per centum assessment shall have been fully paid. . . . After the 5 per centum assessment, hereby levied, shall have been fully paid, no additional assessment shall be levied or collected against the capital stock of any bank or trust company, except emergency assessments, hereinafter provided for, to pay the depositors of failed banks, and except assessments that may be necessary by reason of increased deposits to maintain such funds at 5 per centum of the aggregate of all deposits in such banks and trust companies, doing business under the laws of this state.

"Whenever the depositor's fund shall become impaired or be reduced below said 5 per centum by reason of payments to depositors of failed banks, the state banking board shall have the power and it shall be its duty to levy emergency assessments against capital stock of each bank and trust company doing business in this state to restore said impairment or reduction, but the aggregate of such emergency assessments shall not, in any one calendar year, exceed 2 per centum of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks having valid claims against said depositors' guaranty fund, the state banking board shall

sted and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum." It cannot, I think, be reasonably contended that the guaranty fund was intended to be a state fund, or a fund under the management of the state, within the meaning of the Constitution. To so hold would render the act violative of the section quoted, since its provisions are plainly inconsistent with the slow and formal process of legislative appropriations. Again, by article 10, § 15, of the state Constitution, "The credit of the state shall not be given, pledged, or loaned to any individual, company, corporation, or association . . . ; nor shall the state become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association, or corporation." These constitutional limitations explain, I think, why, in the framing of the act, the legislature was so careful to dissociate the state in its organized capacity from all participation in the scheme or responsibility for its success. The act contemplates that the cash constituting the fund is to be in the physical custody of the banks themselves, until actually needed; for by § 3, as amended in 1911, it was provided that the fund should be redeposited with the banks from which it was paid, and a special certificate or certificates of deposit issued to the bank commissioner by each bank, bearing 4 per centum interest per annum; and by the 1913 amendment the [483] annual assessments for that and succeeding years are to be paid by cashier's checks, to be held by the banking board until, in its judgment, it is necessary to collect them; but the checks are not to bear interest during the time they are so held. In short, the act, as I read it, simply establishes a plan for enforced co-operative insurance by all the banks in favor of the depositors of each and every bank, the bank commissioner and the banking board being charged with the management of it as public trustees, with duties owing to a limited class of persons having financial, and not political, interests.

The promise held out to bank depositors is clear and unequivocal. By §§ 5 and 6, in the event of the insolvency of any bank, the bank commissioner may take possession of its assets, and in this event "*the depositors of said bank or trust company shall be paid in full*, and when the cash available or that can be made *immediately available* of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in § 300, the amount necessary to make up the deficiency." And by § 3 (300), if the amount realized from emergency assessments shall be insufficient to pay off the depositors, "The state banking board *shall issue and deliver to each depositor, having such unpaid deposit, a certificate of indebtedness for his unpaid deposit, bearing 6 per centum interest;*" these certificates to be consecutively numbered *and to be paid in the order of their issue* out of future emergency assessments which the banking board is required to levy annually until the certificates of indebtedness, with accrued interest, shall have been fully paid. By the 1913 amendment, the certificates of indebtedness are designated

issue and deliver to each depositor, having such unpaid deposit, a certificate of indebtedness for his unpaid deposit, bearing 6 per centum interest. Such certificate shall be consecutively numbered, and shall be payable, upon the call of the state banking board, in like manner as state warrants are paid by the state treasurer in the order of their issue, out of the emergency levy thereafter made; and the state banking board shall from year to year levy emergency assessments, as hereinbefore provided, against the capital stock of all the banking corporations and trust companies doing business in this state, until such certificates of indebtedness, with the accrued interest thereon, shall have been fully paid. As rapidly as the assets of failed banks are liquidated and realized upon by the bank commissioner, the same shall be applied first, after the payment of the expenses of liquidation, to the repayment of the depositors' guaranty fund of all money paid out of said fund to the depositors of such failed bank, and shall be applied by the state banking board toward refunding any emergency assessment levied by reason of the failure of such liquidated bank. Provided, that the guaranty fund collected under this act shall be redeposited with the banks from which it was paid, and a special certificate, or certificates, of deposit, shall be issued to the bank commissioner by each and every bank and trust company, bearing 4 per centum interest per annum."

By § 5 (302) in the event of the insolvency of any bank, the bank commissioner "may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers, and directors."

Section 6 (303): In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately

as "depositors' guaranty fund warrants," and are to constitute a charge upon the guaranty fund when collected, as well as a lien against the capital stock, surplus, and [484] undivided profits of every bank to the extent of its liability to the fund.

The entire scheme is carefully devised to give assurance to every bank and to every bank depositor not merely of ultimate payment of the amount of the deposits, but of immediate payment in cash or in certificates salable for cash, in case the bank becomes insolvent. A winding up of the bank's affairs, with a liquidation of its assets and enforcement of the liabilities of stockholders, officers, and directors, is provided for, and the proceeds are to be devoted to restoring the guaranty fund and repaying to the solvent banks the amount of the emergency assessments; but the depositors are not to await the outcome of the process. A main purpose of the act, as I read it, is to relieve them not merely from the hazard of ultimate loss, but from the hardships normally incident to the delays of winding-up proceedings, and for which, as everybody knows, an ultimate allowance of interest is very often an inadequate compensation.

The law was intended, as I think, to render the rights of depositors so clear as to be readily understood by all, and free from cavil or question in any quarter. It constitutes a clear and unequivocal tender of a benefit to every person who might contemplate becoming a depositor of a state bank in Oklahoma. Under § 8 every bank is permitted to advertise that its depositors are protected by the depositors' guaranty fund. Every would-be depositor is thus directly referred to the terms of the law, and on reading it may learn that, in the event of insolvency, "the depositors of said bank or trust company shall be paid in full," etc.

It was said upon the argument that this promise, however unequivocal, is a "political" promise, and therefore not enforceable by suit. If it is a promise of the state of Oklahoma, it, of course, is a "political" promise; otherwise not. But does not § 8 show most plainly that it is not [485] at all a promise of the state, and is enforceable out of, and only out of, a fund kept upon deposit in the banks themselves, and controlled by trustees whose salaries are, indeed, paid from the public treasury, but who are charged with no political function, and whose duties are owing solely to the banks and to depositors and others interested in the banks?

The failure of the statute to make any

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available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in § 300, the amount necessary to make up the deficiency: and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers, and directors of said bank or trust company, and against all other persons, corporations, or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

Section 8 (305): "The bank commissioner shall deliver to each bank or trust company that has complied with the provisions of this chapter a certificate stating that said bank or trust company has complied with the laws of this state for the protection of bank depositors, and that safety to its depositors is guaranteed by the depositors' guaranty fund of the state of Oklahoma. Such certificate shall be conspicuously displayed in its place of business, and said bank or trust company may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the depositors' guaranty fund of the state of Oklahoma: Provided, however, that no bank shall be permitted to advertise its deposits as guaranteed by the state of Oklahoma; and any bank or bank officers or employees who shall advertise their deposits as guaranteed by the state of Oklahoma shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $500, or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment."

By act of March 6, 1913 (Sess. Laws, chap. 22, pp. 27–29), the 3d section was amended so as to provide for the issuance of certificates of indebtedness to be known as "depositor's guaranty fund warrants of the state of Oklahoma," in order to liquidate the deposits of failed banks or other indebtedness properly chargeable against the fund; the warrants to bear 6 per cent interest, and to constitute a charge and first lien upon the depositors' guaranty fund when collected, as well as a first lien against the capital stock, surplus, and undivided profits of every bank operating under the banking laws of the state to the extent of its liability to the fund; and that "all warrants heretofore issued by the banking board shall be paid serially in the order of their issuance from any funds on hand when this act takes effect, or provided for by the terms of this act, and all warrants hereafter issued shall be in numerical order and retired in like order. As rapidly as the assets of failed banks are liquidated and realized upon by the bank commissioner, the proceeds thereof, after deducting the expenses of liquidation, shall be paid to the state banking board, and by said board credited to the depositors' guaranty fund."

express provision for an action against the banking board at the suit of a depositor can hardly be deemed significant. This is taken care of in the Constitution, which declares (article 2, § 6): "The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation."

That the fund is established for a public purpose through the exercise of the police power of the state does not, I submit, make the fund itself public property. It is closely analogous, I think, to the surplus of a mutual insurance company. The argument that the fund is public will hardly bear analysis. In one of the briefs it is expressed as follows: "The essence of the law, therefore, is not to establish a private right, but to serve public welfare; and, as such, no justiciable rights in the depositors are presumed to arise; the law was not primarily enacted to return to the depositor his money, but more properly to prevent the public injury by bank panics. Nowhere is there language used showing an intent to give to a depositor the right to sue." But, since bank panics are caused by the fear on the part of depositors that their money—that is, their ability to withdraw the money or otherwise realize upon their deposits—is in jeopardy, the argument pretty clearly defeats itself.

Not only has the state no part in the raising of the guaranty fund nor property in it, nor interest or responsibility in the distribution of it, nor even the remotest [486] reversionary right should the scheme prove a failure, but the act contains no expression of a purpose that the public trustees are to be clothed with that immunity from private suit which is one of the prerogatives of sovereignty. There is nothing to suggest any participation by the state in the transaction, except that § 6 declares that "the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank," etc., and that "such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund." But does not this plainly show that the state is to be a merely nominal party, and that the fund alone is the real beneficiary? It seems to me the language naturally imports the familiar action brought in the name of one, but for the sole use of another; an action in which the nominal plaintiff at the same time avows that he has no interest in the proceeds. I cannot find in § 6, or elsewhere, anything to suggest that the state is to be an active agent in the matter, otherwise than as the bank commissioner and banking board act therein.

It is argued that the board is endowed with discretionary powers in respect to the administration of the fund. I concede that the act implies a considerable latitude of administrative discretion with respect to the care and management of the fund; but it is quite different with the provision for the payment of depositors. Here the plain mandate is: "Pay in cash, so far as you have it, and give certificates of indebtedness or warrants to the extent that the cash falls short." The argument in behalf of appellants goes to the length of saying: "It [the fund] may be used not only to pay the depositors of failed banks, but frequently to aid banks while in a failing condition. All of the fund which may be available at a particular time might, in the judgment of the banking board, be better used to aid disabled banks than to be [487] applied to the immediate payment of depositors of a particular bank which had already been taken into the custody of the bank commissioner. In this way the available funds might be withdrawn by the banking board, in the exercise of its discretion, from the payment of a failed bank," etc. As showing the results to which the argument for discretionary powers with respect to paying depositors logically leads, this is illuminating; but if anything is clear in the letter and spirit of this enactment, it is that the legislature by no means intended that the fund or any part of it should be subject to use in supporting banks while in a failing condition, or in any other form of hazardous enterprise.

And it would seem plain enough that an interest on the part of the state or a discretion on the part of the banking board ought not to be read into the act by construction, when the result is not to make the promised guaranty more clear or more readily enforceable by the depositors, but, on the contrary, to render it unenforceable except with the consent of the state, and therefore materially less valuable to the depositors than otherwise it would be.

It is submitted that for the proper interpretation of the statute—or for its construction, if construction be needed—we should observe the fundamental rules that apply to contracts; for while there is disagreement upon the question whether the state is a party to it, we all agree that the act prescribes a contract, and one of wide importance, between the banks and the depositors, and that the public interest is as much concerned in seeing it carried out and enforced according to its true intent and meaning as in requiring that the con-

tract be made. Not only has the state obliged the banks to make this contract with their depositors, but in the law it has expressed the terms in which it shall be made. The courts, therefore, ought by all means to adopt an interpretation such as reasonably [488] would have been placed and presumably was placed upon the statute by ordinary bankers and bank depositors in advance of judicial interpretation: reading it according to the fair import of its terms, without resort to legal subtlety in order to overthrow or weaken it, but seeking rather to uphold it and give it effect, "*Ut res magis valeat quam pereat;*" and if construction be needed, adopting that meaning which the promisor had reason to believe the promisee relied upon in accepting the offer. 2 Kent, Com. *557; The Binghamton Bridge, 3 Wall. 51, 74, 18 L. ed. 137, 142; Ewing v. Howard, 7 Wall. 499, 506, 19 L. ed. 293, 296; Empire Rubber Mfg. Co. v. Morris, 73 N. J. L. 602, 610, 65 Atl. 450; Gunnison v. Bancroft, 11 Vt. 490; Jordan v. Dyer, 34 Vt. 104, 80 Am. Dec. 668; Barlow v. Scott, 24 N. Y. 40, 42; Tallcot v. Arnold, 61 N. Y. 616; White v. Hoyt, 73 N. Y. 505; Chamberlain v. Painesville & H. R. Co. 15 Ohio St. 225, 246; Clinton County v. Ramsey, 20 Ill. App. 577, 579.

I cannot resist the conviction that this legislation was intended to convey and did convey to the banks and to intending depositors the understanding that the deposits were to be secured by the fund, and not by the state; that in the event of the insolvency of any bank its depositors were to be paid in full, without delay and without "ifs" or "ans," out of the cash in the fund, or, at worst, by delivery of interest-bearing certificates of indebtedness capable of being sold for cash, and payable in consecutive order as issued, and that the duty imposed upon the banking board to thus pay off the depositors without regard to the ultimate outcome of the liquidation of the particular bank would be enforceable, if need be, by process out of the courts of justice. It savors of repudiation to read into the scheme an unexpressed condition that renders the promise unenforceable by any means within the command of the promisee.

Let us now examine the state decisions in their order.

[489] State ex rel. Taylor v. Cockrell (1910), 27 Okla. 630, 112 Pac. 1000. This was an action for a writ of mandamus instituted upon the relation of the "state examiner and inspector" (a constitutional officer with large powers, in the performance of which he is independent of the chief executive), to require the state bank commissioner to permit relator to examine the records and accounts pertaining to the collection and disbursement of the depositors' guaranty fund and the assets of failed or insolvent banks. Relator invoked a statute which declared: "The examiner and inspector shall examine the books and accounts of state officers whose duty it is to collect or disburse funds of the state or (under) its management at least once each year." As the court said (27 Okla. 632), the sole question involved was whether relator was authorized under the law to examine these records. The court's response was succinctly expressed,—"That the bank commissioner is a state officer has not been and cannot be questioned. That the depositors' guaranty fund, and the funds of a failed bank in the hands of a bank commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the state as the common school fund, is also true. . . . The title of such depositors' guaranty fund vests in the state, just as much so as the common school lands, or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the state." I cannot see that this amounts to the placing of a construction upon the statute in any respect pertinent to the question now before us. The decision was in effect that the depositors' guaranty fund was under the management of the state through the bank commissioner, a state officer, and that, therefore, [490] the accounts of the latter were subject to examination by the examiner and inspector by the terms of the statute that defined his duties. Treating it as a decision that the *title* of the fund is in the state, within the meaning of that statute, this is very far from holding that the *real ownership* of the fund is in the state, so as to clothe the managers of the fund with immunity from suit in a controversy raised by one of the stated beneficiaries. The decision rather puts the bank commissioner in a subordinate position than in one that entitles him to participate in the sovereign's immunity from responsibility to action in the courts of justice.

Columbia Bank & T. Co. v. United States Fidelity & G. Co. (1912) 33 Okla. 535, 126 Pac. 556. The bank commissioner applied to a state court for orders in connection with the administration of the affairs of an insolvent bank of which he was in possession, and prayed that the creditors and depositors be granted all relief to which they might be entitled. The Fidelity & Guaranty Company filed its petition in interven-

tion, alleging that it had signed, as surety for the bank, a bond to the state of Oklahoma for the sum of $50,000 to protect the state against loss by reason of a deposit in the bank of certain funds in possession of the commissioners of the land office; and that the bank commissioner since taking charge of the assets of the bank, had acted under the direction and control of the state banking board, and had paid the claims of other depositors in full without in any way protecting the deposit for which the intervening petitioner was surety. The trial court rendered a decree directing the bank commissioner to treat the amount due the commissioners of the land office as a deposit, and pay over to said depositors their *pro rata* share of the assets. The supreme court, upon a review of other legislation (Comp. Laws 1909, § 7943) relating to the custody and investment of the permanent school [491] funds of the state in the hands of the commissioners of the land office, which provided (*inter alia*) that they might be deposited in bank upon security being given, held that such a deposit of the state's money was not within the purview of § 3 of the guaranty fund law, and hence that the surety was not entitled to relief. In the course of reaching this conclusion the court held (p. 540) that the surety, having responded to the invitation implied in relator's prayer for relief in behalf of creditors and depositors, was entitled to "maintain its petition of intervention, and have its rights, if it has any, in relation to the bank guaranty fund, determined without having previously paid the penalty of its bond." There was no intimation that the bank commissioner was clothed with immunity from action, or endowed with any discretion that rendered it inappropriate that he should be sued.

Lankford v. Oklahoma Engraving & Printing Co. (1913) 35 Okla. 404, 130 Pac. 278. The court simply held that a "merchandise creditor" of a defunct bank was not entitled to share *pro rata* with the depositors in the distribution of the assets.

It will be observed that both of the two latter cases were decided upon the merits of the intervener's claims; upon grounds inconsistent, indeed, with the immunity from suit that is now asserted.

The last-mentioned decision was subsequent to the time when the rights of the present plaintiff accrued; the cases in 27 and 33 Okla. were decided before that time.

Another case, decided not only after the cause of action accrued, but *after this court acquired jurisdiction* by the taking of the appeal, is Lovett v. Lankford (September 29, 1914, — Okla. —, 145 Pac. 767. Here the supreme court of Oklahoma has distinctly held that a petition for mandamus brought by a depositor against the state banking board to require payment of the deposit [492] is in effect a suit against the state, and that the board is a part of the executive branch of the government, charged with the exercise of judgment and discretion in the administration of the law, so that their acts cannot be controlled by mandamus. This, of course, is directly in favor of the contention of the present appellants. Ought it to control our decision? What are the grounds upon which the state court proceeded? (a) Citing the language of the act that gives to the state a first lien upon the assets of the bank, and invoking the authority of State ex rel. Taylor v. Cockrell, 27 Okla. 630, 633, 112 Pac. 1000 (supra), the court holds that a judgment in favor of the depositor "would directly affect the state, and would, in effect, be a judgment against the state and would require the subjection of state funds to satisfy said judgment." This treats the word "title" as equivalent to "ownership." I have endeavored to show that this is inconsistent with the language and purpose of the act, and that state ownership renders the act, in its other and essential provisions, inconsistent with the limitations found in the state Constitution. (b) The court cites Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458. For reasons already indicated, it seems to me this case is clearly distinguishable. (c) It is said that the failure of the legislature to make specific provision for review in the courts of the action of the banking board concerning claims against the guaranty fund tends to prove a legislative purpose to give exclusive jurisdiction to the board. As already shown, it would be a work of supererogation for the legislature to specifically provide for an action in the courts; for, if the statute confers a right upon the depositor, article 2, § 6 of the state Constitution provides a remedy. And I find nothing in the act that expressly or by reasonable implication confers any judicial jurisdiction upon the board. Exclusive jurisdiction in that body seems plainly inconsistent with the same constitutional [493] provision. (d) After quoting from the 1st section of the act, which gives to the banking board supervision and control of the fund, with power to adopt necessary rules and regulations, not inconsistent with law, for its management and administration, and after quoting the other pertinent sections that are set forth in the marginal note, supra, the court cites Lankford v. Oklahoma Engraving & Printing Co. supra, as authority for holding that, under § 6 (303), it is the duty of the banking

board and the bank commissioner to determine the validity of claims against the fund, and that "by this section, it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund." I am unable to find any provision of this kind in the statute; and the case cited, far from holding that these questions are confided to the decision of the board or the commissioner, is directly to the point that such questions are properly to be decided by the courts; and to the same effect is the case from 33 Okla. cited above.

For these reasons, it is submitted that the decision just referred to ought not to be followed by this court in the present case. Laying that on one side, and adopting that view of the statute above indicated as being in accord with its letter and spirit, there appears to be no legal or constitutional obstacle in the way of affirming the present decree.

For, if the action is not nominally or in effect a suit against the state, is not brought to enforce any liability or duty of the state, or interfere with its property, but has for its object merely to require public officers to perform a plain official duty, not of a political nature, owing to a special class of persons, among whom the plaintiff is included, it is not properly to be deemed a suit against the state within the prohibition of the 11th Amendment. [494] We are referred by appellant's counsel to Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Louisiana ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; Pennoyer v. McConnaughy, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; and similar cases. But there is a broad distinction, uniformly recognized by this court, which as it seems to me, takes the present action out of the prohibition of the 11th Amendment. It was well expressed in Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623, 628, where the court, by Mr. Justice Bradley, said: "The objections to proceeding against state officers by mandamus or injunction are: first, that it is, in effect, proceeding against the state itself and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." In the Jumel Case, 107 U. S. at p. 727, 27 L. ed. 453, 2 Sup. Ct. Rep. 128, Mr. Chief Justice Waite said: "The relators do not occupy the position of creditors of the state, demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty." In the Cunningham Case, 109 U. S. at p. 452, 27 L. ed. 994, 3 Sup. Ct. Rep. 292, Mr. Justice Miller, in describing [495] the class of cases in which public officers may be sued, said: "A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process." In Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 390, 411, 30 L. ed. 721, 728, 7 Sup. Ct. Rep. 599, Mr. Chief Justice Waite said: "It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the 11th Amendment of the Constitution of the United States, and Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128, is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment ac-

cording to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied; but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the trustees must do in order to fulfil the law, and under what circumstances the governor can be compelled to execute the assignment which has been provided for." In Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, where it was objected that the suit was in effect a suit against the state of Texas, the court, by Mr. Justice Brewer, said: "There [496] is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered."

Finally, this is an equitable action brought to establish and enforce a trust in favor of plaintiff, with only an incidental prayer for a mandatory decree. It is not an original proceeding by mandamus, of which the Federal courts have no jurisdiction. Bath County v. Amy, 13 Wall. 244, 20 L. ed. 539; Jordan v. Cass County, 3 Dill. 185, Fed. Cas. No. 7,517; Cass County v. Johnston, 95 U. S. 360, 370, 24 L. ed. 416, 418; Greene County v. Daniel, 102 U. S. 187, 195, 26 L. ed. 99, 101; Davenport v. Dodge County, 105 U. S. 237, 242, 26 L. ed. 1018, 1020.

It seems to me that the decree should be affirmed.

AMERICAN WATER SOFTENER COMPANY, Appt.,
v.
J. D. LANKFORD, A. D. Kennedy, W. F. Barber, and John J. Gerlach, Composing the State Banking Board of the State of Oklahoma.

(See S. C. Reporter's ed. 496–498.)

This case is governed by the decision in Lankford v. Platte Iron Works Company, ante, 316.

[No. 418.]

Argued October 14 and 15, 1914. Decided January 5, 1915.

APPEAL from the District Court of the United States for the Eastern District of Oklahoma to review a decree dismissing for want of jurisdiction a suit to compel the state banking board to repay a deposit in an insolvent bank out of the bank depositors' guaranty fund, or, in the alternative, to issue a certificate of deposit. Affirmed.

The facts are stated in the opinion.

Mr. C. Wilfred Conard argued the cause, and, with Mr. L. J. Roach, filed a brief for appellant:

It is freely conceded that under the 11th Amendment a suit may not be maintained against a state, either in fact or in effect, without its consent. The cases to this effect are many and very clear.

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

But this case is not nominally or in effect against the state of Oklahoma, nor is it to enforce any contract obligation or duty of the state, nor does it seek to recover any property of the state, or to compel any officer of the state to perform any governmental function. It seeks only to compel the officers of the state to obey the laws of the state, and to do what those laws plainly direct them to do. It falls within the category of cases which hold that a suit against the officers of a state to restrain them from acting under an unconstitutional statute, or to compel them to perform a plain duty demanded of them by the laws of the state, is not against the state itself, but is against the officers themselves as individuals, and hence not affected by the 11th Amendment.

Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245; Morrill v. American Reserve Bond Co. 151 Fed. 305; Huidekoper v. Hadley, 40 L.R.A.(N.S.) 505, 100 C. C. A. 395, 177 Fed. 1; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Re Ayers, 123 U. S. 443, 31 L. ed. 216,

8 Sup. Ct. Rep. 164; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Regan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Mr. Charles West, Attorney General of Oklahoma, argued the cause and filed a brief for appellees.

Messrs. W. A. Ledbetter and Joseph L. Hull also argued the cause for appellees.

Mr. Justice McKenna delivered the opinion of the court:

Appellant, on June 8, 1912, deposited with the Farmers' & Merchants' Bank of Sapulpa the sum of $3,337.50. The bank issued to appellant a certificate of deposit for the sum in the usual form.

The bank, which, it is alleged, was entitled to the benefits of the Oklahoma bank guaranty law, subsequently failed and was closed and taken possession of by appellees, composing the state banking board. The certificate of deposit was presented to the banking board and payment demanded out of the depositors' guaranty fund, or, if that fund should be insufficient, that there be issued to appellant a certificate of deposit. Both demands were refused, and this suit was instituted to enjoin compliance with one or the other of the demands.

Motion was made by appellees to dismiss the bill on the ground that the court had no jurisdiction of the subject-matter of the action or of the persons of the defendants (appellees), the suit being one against the state of Oklahoma, without its consent, in violation of the provisions of the 11th Amendment to the Constitution of the United States.

The motion was granted on the authority of the court's opinion in Farish v. State Bkg. Board [235 U. S. 498, infra, 330, 35 Sup. Ct. Rep. 185].

This appeal was then prosecuted.

The questions in this case are the same as those discussed and decided in Lankford et al., Composing the State Banking Board, v. Platte Iron Works Company, No. 381, [498] and on the authority of that case the decree in this is affirmed.

Mr. Justice Pitney, with whom concurred Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice Lamar, dissenting:

For reasons expressed in the dissenting opinion in Lankford et al. v. Platte Iron Works Company, this day decided, ante, 316, I am unable to concur in the opinion and judgment of the court in this case.

W. S. FARISH, Appt.,
v.
STATE BANKING BOARD OF THE STATE OF OKLAHOMA, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, a Corporation. (No. 446.)

STATE BANKING BOARD OF THE STATE OF OKLAHOMA, the Bank Commissioner of the State of Oklahoma, and the Union State Bank, a Corporation, Appts.,
v.
W. S. FARISH. (No. 447.)

(See S. C. Reporter's ed. 498-513.)

States — immunity from suit — suit against state officers — waiver.

The immunity of the Oklahoma state banking board from liability to suit to control the administration of the depositors' guaranty fund created under Okla. Laws 1911, chap. 31, as amended by Laws 1913, chap. 22, was not waived by the unauthorized participation by the board in a prior suit.

[For other cases, see States, 282-325, in Digest Sup. Ct. 1908.]

[Nos. 446 and 447.]

Argued October 14 and 15, 1914. Decided January 5, 1915.

CROSS APPEALS from the District Court of the United States for the Eastern District of Oklahoma to review a decree refusing to compel the state banking board to repay a depositor in an insolvent bank out of the depositors' guaranty fund, but granting subrogation, and establishing and foreclosing a lien upon certain funds and impounded securities. Affirmed.

The facts are stated in the opinion.

Mr. Amos L. Beaty argued the cause and filed a brief for W. S. Farish:

The banking board does not represent the state of Oklahoma in true governmental capacity, and therefore is not within the exemption from suit contained in the 11th Amendment.

Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; 11 Cyc. 497; Lincoln

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NOTE.—Generally, on suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; and Hans v. Louisiana, 33 L. ed. U. S. 842.

On suits against state officers as suits against state—see notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727; Ex parte Young, 13 L.R.A.(N.S.) 932; Louisville & N. R. Co. v. Burr, 44 L.R.A.(N.S.) 189; and Beers v. Arkansas, 15 L. ed. U. S. 991.

County v. Luning, 133 U. S. 530, 33 L. ed. 767, 10 Sup. Ct. Rep. 363; Chicago & N. W. R. Co. v. Day, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Reagan v. Farmers' Loan & T. Co. 154 U. S. 363, 38 L. ed. 1015, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; 7 Am. & Eng. Enc. Law, 953; Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18; Missouri R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Hopkins v. Clemson Agri. College, 221 U. S. 636, 55 L. ed. 890, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; United States v. Beebe, 127 U. S. 338, 344, 345, 32 L. ed. 121, 124, 8 Sup. Ct. Rep. 1083.

But even if the banking board did represent the state, it could not successfully claim here an exemption from suit, since it owes the appellant a specific statutory duty.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245; Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; Huidekoper v. Hadley, 40 L.R.A.(N.S.) 505, 100 C. C. A. 395, 177 Fed. 1.

The existence of a controversy on the law or the facts will not operate to protect the board from suit.

Rolston v. Missouri Fund Comrs. supra.

Moreover, by participation in the former suit, and interference with the process of the court, the banking board waived any exemption from suit which otherwise it might have claimed.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 292, 50 L. ed. 477, 487, 26 Sup. Ct. Rep. 252.

The fact that the statute fails to classify the banking board as a body corporate, or to provide that it may be sued, is no impediment to this proceeding; and it is also immaterial that the legislature has changed the composition of the board and its plan of assessment.

Murphy v. Utter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776; Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245; Huidekoper v. Hadley, 40 L.R.A.(N.S.) 505, 100 C. C. A. 395, 177 Fed. 1.

Mr. Walter A. Ledbetter argued the cause, and, with Messrs. Harry L. Stuart and Robert R. Bell, filed a brief for the State Banking Board:

The suit is one against the state.

State ex rel. Taylor v. Cockrell, 27 Okla. 630, 112 Pac. 1000; Lovett v. Lankford, — Okla. —, 145 Pac. 767.

Mr. Charles West, Attorney General of Oklahoma, and Mr. Joseph L. Hull also argued the cause for the State Banking Board.

Mr. Justice McKenna delivered the opinion of the court:

Suit in equity brought by appellant against the state banking board and the bank commissioner of the state of Oklahoma, the Oklahoma Trust Company, the Alamo State Bank, the McNerney Company, corporations, and one P. J. McNerney. Later the Union State Bank, another corporation, was made a defendant. The object of the suit was to compel the banking board to pay appellant, as an equitable depositor of the Oklahoma Trust Company, a failed banking institution, the sum of $25,351.63. Another object was subrogation to and the establishment and enforcement of liens in the amount of $61,252.40 upon certain funds and impounded securities, [502] with a decree against the banking board for any final deficiency or unpaid balances.

The banking board demurred to the bill on the ground, stated with much circumstance, (1) that the suit was in effect against the state of Oklahoma; and (2) for want of equity. The demurrer was overruled. The banking board and the Union State Bank filed answers admitting some of the allegations of the bill and denying others, to which there were replications. A decree *pro confesso* was taken against the other defendants, which was subsequently made final.

On final hearing the court decreed subrogation and established and foreclosed a lien on certain of the securities in controversy and rendered a money decree against the Union State Bank for $18,018.58.

The court reversed its ruling on demurrer of the banking board, holding that "because it is the opinion of the court that said state banking board represents the state, and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day."

Farish then prayed for an order allowing appeal from that part of the decree which denied him relief against the state banking board on the ground that it was one in effect against the state, and that the question of the jurisdiction of the court be certified to this court. The appeal was allowed and the certificate made.

The Union State Bank and the state banking board also prayed an appeal from that part of the decree which adjudged that judgment be rendered against the Union State Bank for the sum of $18,018.58 with interest, being the amount of a certain deposit alleged to have been transferred from the Alamo State Bank to it, and that the state banking board and the state bank commissioner did not have a first and prior lien as against complainant for the reimbursement of the amount of money [503] taken by the board and commissioner from the depositors' guaranty fund to pay off and discharge the deposits of the Alamo State Bank and the Oklahoma Trust Company, and a first lien on the same account and for the same purpose on certain other securities.

There was an order of severance, and the case is here on these appeals and the certificate of jurisdiction made by the district court.

The pleadings are very long and set forth the grounds of suit with circumstantial detail. A repetition of them is not necessary. The appellant's case depends upon two propositions: (1) Whether he was an equitable depositor of the Oklahoma Trust Company. (2) This established, whether the banking board is subject to be sued by him.

His rights have their origin in an assignment to him by a corporation called the Texas Company.

The Texas Company furnished material to the contractors for certain paving work in the city of Muskogee, Oklahoma, for which bonds were issued and upon which, by agreement between the parties and the Oklahoma Trust Company, the Texas Company was given a first lien. Bonds to the amount of $154,035.92 were issued and delivered to the Oklahoma Trust Company, and disposed of by it or carried as a deposit to the credit of itself as trustee, and of which there remained to its credit as trustee on January 3, 1910, the sum of $25,351.63. It paid to the Texas Company only $27,906.57 of the proceeds of the sale of the bonds. The balance of the sum was used by the Oklahoma Trust Company in various ways which are detailed at length in the bill of complaint and traced to the possession of the Alamo State Bank, and through that bank to the banking board, the banking board having taken possession under the banking laws of the state of the Alamo State Bank upon its becoming insolvent. The Alamo State Bank obtained the assets [504] of the Oklahoma Trust Company through a sale by the latter company to it on January 3, 1910. Composing these assets was the sum of $25,351.63, carried as a deposit by the Oklahoma Trust Company, and other sums, being credit balances of the Oklahoma Trust Company in other banks, cash paid to the Alamo State Bank and used by it to pay the indebtedness of the Oklahoma Trust Company or its depositors.

The assets of the Alamo State Bank were sold to the Union State Bank by the banking board, acting under the authority of an order of the district court of Muskogee county. The Union State Bank assumed in consideration thereof the payment of the depositors of the Alamo State Bank.

On December 18, 1909, the complainant herein brought suit against the Oklahoma Trust Company and others to establish his right to the paving bonds or their proceeds. The suit was numbered 1239. A receiver was appointed who was directed to demand and receive from the Oklahoma Trust Company the proceeds of the paving bonds and from all persons who might have them. The receiver duly qualified. On the 6th of August, 1910, subsequent to the sale by the Oklahoma Trust Company of its assets to the Alamo State Bank, the complainant filed a motion against the latter bank for the purpose of obtaining an order for contempt, and peremptorily requiring it to immediately pay and turn over to the receiver the proceeds of the bonds received by it.

The banking board subsequently appointed counsel to appear in that suit for the purpose of defeating the recovery by the complainant. In that suit all of the defenses herein pleaded were set up. The Union State Bank also appeared in that suit and aided in its defense. The final decree in that case adjudged, among other things, that the complainant became entitled to the proceeds of the paving bonds, and the Oklahoma Trust Company [505] was ordered forthwith to deliver their proceeds to him.

The Oklahoma Trust Company and the Alamo State Bank were banking institutions under the laws of the state, and subject to the banking laws, and paid in accordance with such laws assessments to the banking board, including certain emergency assessments for the purpose of creating and maintaining a depositors' guaranty fund as provided by law. And it is alleged that the depositors of the Oklahoma Trust Company, except complainant, were paid or caused to be paid by the Alamo State Bank, and that this was accomplished by the use of the proceeds of the paving bonds obtained by the Alamo State Bank. That the latter bank received not less than $65,000 of the proceeds of the bonds as a part of the consideration of the assumption of the payment of the depositors of the Oklahoma Trust Company: "that the state,

and, through it, said depositors, had a lien on all of the assets of said Oklahoma Trust Company to secure the payment of said depositors; and that, to the extent that the proceeds of said paving bonds were so used, your orator is subrogated to said lien, and, moreover, since said depositors were entitled to resort to the depositors' guaranty fund in the hands of the state banking board, and this was averted by said use of the proceeds of said paving bonds, a trust fund to which your orator was entitled, he is subrogated to that extent to the rights of said depositors against said guaranty fund, as it exists and shall exist, and against said state banking board."

The facts of the case are set out in the opinion of the court, and need not be further stated, and the grounds of decision and the relief granted are expressed in the decree hereinafter set out.

The case of complainant is, indeed, sufficiently though generally stated in a letter which his counsel addressed to the banking board. It is as follows:

[506] Dallas, Texas, July 26, 1910.

State Banking Board, Guthrie, Oklahoma.
State Banking Board, Oklahoma City, Oklahoma.

Gentlemen:—

Under contracts of January 5 and June 14, 1909, and transfer of December 9, 1909, my client, W. S. Farish, had a lien for more than $180,000 on certain paving bonds issued to P. J. McNerney and the McNerney Company, of Muskogee, and on the proceeds of such paving bonds, when sold. In the latter part of the year a considerable amount of such bonds were turned over to the Oklahoma Trust Company, which was engaged in the banking business at Muskogee, with its depositors guaranteed under your state law, and that company afterwards sold these bonds and used the proceeds in paying its depositors. The amount thus used, and to which my client was entitled, was $88,002.31.

Of the amount stated, $63,117.85, or about that amount, was thus misapplied in defiance of an injunction of the United States circuit court for the eastern district of Oklahoma, made in cause Eq. No. 1239, W. S. Farish v. P. J. McNerney et al., pending at Muskogee, by which injunction the Oklahoma Trust Company was restrained from commingling or confusing the proceeds of said paving bonds with other funds, and was peremptorily required to keep the same separate and apart.

My client contends that when the trust fund was wrongfully taken and applied to the payment of depositors, who were guaranteed under the state law, he, Farish, became subrogated to the rights of such depositors, and is entitled to resort to the depositors' guaranty fund, and to have you make such assessments as may be necessary to replenish said fund, if it is depleted or from any cause is inadequate to meet this demand.

If you desire further particulars of the claim, I shall be glad to furnish them, but hardly consider it necessary [507] at this time, as, if I am correctly informed, you already have full knowledge of the matter.

Please consider this as a formal demand for payment, and let me have your decision as soon as possible.

Yours very truly,
(Signed) A. L. Beatty,
Attorney for W. S. Farish.

No particularization of the allegations of the answer of the banking board is necessary except to say in explanation of its attitude that it admitted that the bank commissioner took possession on the 25th of August, 1910, of the Alamo State Bank and of its property and assets, and sold and transferred them to the Union State Bank in pursuance of an order of sale of the district court of Muskogee county, state of Oklahoma. The sale, it is alleged, was in pursuance of an agreement whereby the bank assumed and agreed to pay the deposits owing by the Alamo State Bank, amounting to the sum of $450,000, and the bank commissioner and the banking board agreed to guarantee the solvency of the assets of the Alamo State Bank to the extent and for a sufficient amount to pay all of the deposits assumed by the Union State Bank, and to protect it against loss. On August 25, 1910, in pursuance of the agreement, the banking board advanced to the Union State Bank the sum of $50,000, and has since from time to time advanced to the bank the additional sum of $150,000. These payments were made in the course of the liquidation of the assets of the Alamo State Bank, and in discharge of the obligations assumed by it to pay the deposits of the Oklahoma Trust Company.

It is further alleged that under the law the state of Oklahoma, for the benefit of the depositors' guaranty fund, has a first lien on the assets of the Oklahoma Trust Company and the Alamo State Bank for the reimbursement of the sum to the Union State Bank in the payment [508] of the deposits assumed by it. That the lien of the state is superior to any lien claimed by complainant under and by virtue of the assignments of the paving bonds under the contract set forth in the first paragraph of the bill, and the banking board has a right under the law to enforce the lien of the state

against the assets transferred to the Alamo State Bank by the Oklahoma Trust Company, and by the former to the Union State Bank.

The answer of the Union State Bank repeated the allegations of the banking board in regard to the transfer to it of the assets of the Alamo State Bank, and alleged that its purchase of them was in good faith, for a valuable consideration, and without notice of any claim or lien of complainant or his assignor, the Texas Company, and the bank became the owner thereof free from any such claim or lien.

Upon the issues thus formed and upon the proofs presented, the court decreed: (1)—(2) That to secure complainant in the payment of a portion, to wit, the sums of $16,530.98 and $20,000, with interest thereon at the rate of 6 per cent per annum on the first sum from the 18th of April, 1910, and on the second sum from the 22d of January, 1910, of a certain decree for money rendered by the court in equity cause No. 1239 on the 5th of September, 1911, and costs, complainant, W. S. Farish, has a lien, which is hereby foreclosed against each and all of the defendants, upon those certain notes mentioned in paragraphs IX. and X. of the original bill of complaint in the cause, and on the proceeds of such of the notes as have been collected. The notes are described. (3) That complainant recover from the Union State Bank the sum of $18,018.58, with interest at 6 per cent per annum from August 25, 1911, the net amount, when paid, to apply as a credit on the decree in equity cause No. 1239. (4) That if the last-mentioned amount be not paid within ten days, execution shall issue therefor, and if the defendants, including the banking board and the bank commissioner [509] or his successor, fail to pay the amounts adjudged against the securities, then the securities, or such of them as remain unpaid, shall be sold to satisfy the amounts so adjudged against them. A special master was appointed to make the sale. (5) The complainant "was a depositor of the defendant, Oklahoma Trust Company, within the meaning of the laws of the state of Oklahoma governing the guaranteed payment of bank deposits, to the extent of $25,351.63, on the 3d day of January, 1910; but because it is the opinion of the court that the state banking board represents the state, and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day." (6) "That the decree *pro confesso* heretofore entered against the defendants, Oklahoma Trust Company, Alamo State Bank, the McNerney Company, and P. J. McNerney, is hereby made final, and, as to said defendants, the complainant is adjudged fully subrogated to the rights of depositors of said Oklahoma Trust Company, not only to the amount of the aforesaid sum of $25,351.63, but also as to any deficiency that may remain after he shall have collected the amount in this decree awarded against said Union State Bank and such amounts as may be realized on the securities mentioned in the first and second paragraphs hereof, which is to say, it is hereby adjudged that, in addition to said $25,351.63, funds amounting to $61,252.40, on which the complainant had a lien, and to which he was entitled, were, on the 3d day of January, 1910, wrongfully used by said Oklahoma Trust Company and said Alamo State Bank, at the instance, request, and demand of the bank commissioner representing said state banking board, to accomplish the payment of depositors of said Oklahoma Trust Company, and therefore the complainant is fully subrogated to all rights of such depositors; but, because it is the opinion of the court that said state banking board represents [510] the state, and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day."

It is contended by appellant in No. 446 that "the banking board does not represent the state of Oklahoma in any true governmental capacity, and therefore is not within the exemption from suit contained in the 11th Amendment."

It is further contended: "But even if the banking board did represent the state, it could not successfully claim here an exemption from suit, since it owes the appellant a specific statutory duty."

These contentions are the same as those made in Lankford v. Platte Iron Works Co. [235 U. S. 461, ante, 316, 35 Sup. Ct. Rep. 173] and American Water Softener Co. v. Lankford [235 U. S. 496, ante, 329, 35 Sup. Ct. Rep. 184] and are disposed of by the decisions in those cases. It was there held that the banking board and bank commissioner were not subject to suit by depositors of insolvent banks. Therefore, as a depositor, subrogated or direct, of the Oklahoma Trust Company, Farish has no right of suit against the banking board.

It will be observed from the decree of the court two sums, to wit, $16,530.98 and $20,000, with interest on each, were, in accordance with the judgment rendered "in equity cause No. 1239," declared a lien on certain securities, the lien foreclosed, and the securities ordered to be sold.

The court also rendered a judgment against the Union State Bank for the sum

of $18,018.58, above mentioned as coming under the decree in cause No. 1239, and which, when paid, with the interest thereon, was to be applied as a credit on that decree. In other words, such sum was decreed as part of a fund which the court said in its opinion "equitably belonged to the complainant," Farish. Of this part of the decree appellant makes no complaint.

[511] The court further decreed that "complainant [appellant] was a depositor of the Oklahoma Trust Company, within the meaning of the laws of the state of Oklahoma, governing the guaranteed payment of bank deposits, to the extent of $25,351.63, on the 3d day of January, 1910." And "that in addition to said $25,351.63, funds amounting to $61,252.40, on which complainant had a lien and to which he was entitled, were, on the 3d day of January, 1910 [the day when the Alamo State Bank acquired the assets of the Oklahoma Trust Company], wrongfully used by said Oklahoma Trust Company and said Alamo State Bank, at the instance and request and demand of the bank commissioner representing said banking board to accomplish the payment of depositors of said Oklahoma Trust Company, and therefore complainant is fully subrogated to all rights of such depositors. . . ." Relief was not granted against the banking board because, as the decree declared, of the immunity of the board from suit.

Based on the decree, the contention of appellant is that he was not only a depositor to the extent of the $25,351.63, but also to the extent of the sum of $61,252.40, it having been used to pay depositors, and he thereby became subrogated to the rights of depositors, and "entitled to be treated as though holding assignments from the various depositors who were thus paid;" and hence the banking board should be required to pay him the first sum and also so much of the second sum as may not be realized from the impounded securities or on the decree against the Union State Bank, and "if necessary"—we quote from the prayer of his bill—"to make assessments for the payment of any balance of his debt."

The contention of appellant is, therefore, that he has become a depositor of the Oklahoma Trust Company by subrogation, his money having been used to pay the depositors of that company; and the court so decreed, carefully distinguishing the rights of complainant against [512] what the court called "impounded collaterals" and the sum of $18,018.58 which the Union State Bank had received, and his right, to use the language of the court, "as a depositor, either directly or by subrogation." It may be admitted, therefore, that he has the rights of a depositor, but the right of suit against the banking board is not one of them, Lankford v. Platte Iron Works Co. and American Water Softener Co. v. Lankford, supra.

It is further contended by appellant that "by participation in the former suit [cause 1239], and interference with the process of the court, the banking board waived any exemption from suit which otherwise it might have claimed." Gunther v. Atlantic Coast Line R. Co. 200 U. S. 273, 292, 50 L. ed. 477, 487, 26 Sup. Ct. Rep. 252, is cited in support of the contention. The case is not apposite. The case was, it is true, ancillary to another, but in it the attorney general of the state appeared, being directly authorized so to do by statute, and "defend said action for and on behalf of the state." The state, therefore, consented to be sued. The Oklahoma laws do not give the state banking board such power. Besides, the judgment in the former suit was that appellant was a depositor of the Oklahoma Trust Company,—a right which was confirmed in the decree in the present case. In making this comment we assume, but do not decide, that the board, by employing counsel to resist the complainant's recovery in cause No. 1239, became bound by its decree.

And we see no reason for disturbing the decree in other particulars; that is, in No. 447. Indeed, there are no briefs filed in the latter case.

Decree affirmed.

Mr. Justice **Pitney**, with whom concurred Mr. Justice **Day**, Mr. Justice **Van Devanter**, and Mr. Justice **Lamar**, dissenting:

[513] In No. 446,—the appeal of Farish, the depositor,—for reasons expressed in the dissenting opinion in Lankford v. Platte Iron Works Co. this day decided, 235 U. S. 461, ante, 316, 35 Sup. Ct. Rep. 173, it seems to me that the decree here under review should be reversed.

In No. 447,—the cross-appeal,—I concur in the result reached by the court.

UNITED STATES, Plff. in Err.,
v.
ERIE RAILROAD COMPANY.

(See S. C. Reporter's ed. 513-522.)

Postoffice — carrying letters otherwise than in the mails — current business of carrier.

The letters of a telegraph superintendent, jointly appointed and paid by a railway

company and a telegraph company, which were written to a railway station agent and telegraph operator with the purpose of promoting the efficient and successful operation of the telegraph business, in the success of which the railway company, under its contract with the telegraph company, has a financial interest, relate to the current business of the railway carrier, within the meaning of U. S. Pen. Code, § 184, prohibiting the carriage of letters otherwise than in the mails, except such as relate to cargo or freight, or the current business of the carrier.

[Offenses against postal laws, see Postoffice, VI., in Digest Sup. Ct. 1[illegible]

[No. 552.]

Argued December 14, 1914. Decided January 5, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to an indictment against a railway company for carrying letters otherwise than in the mails. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause, and, with Solicitor General Davis, filed a brief for plaintiff in error:

The strict rule of construction should not be applied to this statute. It should rather be interpreted with the purpose, so far as the language taken naturally admits, to carry out the intent of Congress,—which was to establish a monopoly of the carriage of the mails,—and to prevent any evasion

NOTE.—Offenses against statutes intended to preserve governmental postal monopoly.

Congress has reserved to the Postal Department of the government a monopoly of the business of receiving, transmitting, and delivering the mails of the country, and has enacted various measures intended to preserve such right of monopoly intact, and to deter all others from engaging therein.

Beginning with the establishment of the postoffice, or, rather, with the passage of the act of February 20, 1792 (1 Stat. at L. 232, chap. 7), it was made unlawful for stages performing regular trips on a post road to carry letters or packets other than those containing newspapers, magazines, or pamphlets. In the revision of these laws by the act of March 3, 1825 (4 Stat. at L. 102, chap. 64), the word "packet" was dropped, and by § 19 the conveyance of letters by stage or other vehicle which regularly performs trips on a post road, or on a road parallel to it, or by any packet boat or other vessel regularly plying on a water declared to be a post road, except such as relate to some part of the cargo, was made unlawful. The omission of this word "packet" was said in United States v. Chaloner, 1 Ware, 214, Fed. Cas. No. 14,777, to have been *ex industria*, and not unlikely for the purpose of making the law conform to a universal usage, and the court therefore held that the carriage of a package of executions by such a stage was not forbidden by the penal clause of § 21, punishing by fine any person concerned in carrying the mail of the United States who shall collect, receive, or carry any letter or packet, or shall cause or procure the same to be done, contrary to the statute.

A packet of merchandise weighing one pound is not embraced by the term "letters or packets" as employed in U. S. Rev. Stat. § 3982, forbidding any person to establish a private express for the conveyance of letters or packets, or in any manner cause or provide a conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried. Williams v. Wells, F. & Co. Express, 35 L.R.A.(N.S.) 1034, 101 C. C. A. 328, 177 Fed. 352, 21 Ann. Cas. 699. The court said: "The entire history of the legislation on this subject from the beginning, and the many adjudicated cases as well, show the legislative intent to have been to maintain for the government a monopoly only of the carriage of its mails, consisting of letters and packets of letters, and the like mailable matter. While it is true parcels or packages of merchandise weighing not to exceed four pounds in weight, and not in nature such as liable to injure the contents of the mail sacks of the government, may be received and carried through the mails, yet that the government has neither attempted to reserve to its Postoffice Department a monopoly of the transportation of merchandise in parcels or packages weighing less than four pounds, nor has prohibited private express companies or others making regular trips over established post roads or between cities where mails are regularly carried, from engaging in the business of carrying such parcels of merchandise for hire, is evident from the language employed in the opinion of the Supreme Court in Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628. And that it has not reserved such right of monopoly in the carriage of merchandise such as was carried in this case by defendant, and perhaps lacks the constitutional power to do so, is clearly stated in the opinion delivered by Mr. Justice Field in Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877, wherein it is said: 'But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of

of that purpose attempted under an unnatural or loose construction.

United States v. Bromley, 12 How. 88, 13 L. ed. 905; Johnson v. Southern P. Co. 196 U. S. 1, 17, 49 L. ed. 363, 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. 36 Barrels of High Wines, 7 Blatchf. 463, Fed. Cas. No. 16,468; 4 Ops. Atty. Gen. 161.

Neither of the letters set out in the indictment related to the railroad company's business.

21 Ops. Atty. Gen. 400; 2 Ops. Asst. Atty. Gen. P. O. Dept. 415; 2 Ops. Asst. Atty. Gen. P. O. Dept. 877.

Assistant Attorney General Wallace also filed a separate brief for plaintiff in error:

The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed.

United States v. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728.

And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

Virginia v. Tennessee, 148 U. S. 503, 519, 37 L. ed. 537, 543, 13 Sup. Ct. Rep. 728.

A proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

United States v. Dickson, 15 Pet. 151, 165, 10 L. ed. 693, 698.

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letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend.' "

A sealed package of bank notes is not a letter or packet within the meaning of the provisions of the act of April 30, 1810 (2 Stat. at L. 597, chap. 37), § 18, forbidding any person concerned in carrying the mail of the United States to collect, receive, or carry any letter or packet, or cause the same to be done, contrary to that act. Dwight v. Brewster, 1 Pick. 53, 11 Am. Dec. 133; Chouteau v. The St. Anthony, 11 Mo. 226.

The setting up of a post by railroad or steamboat is not setting up a "foot post" within the meaning of the act of March 2, 1827 (4 Stat. at L. 238, chap. 61), § 3, prohibiting any person setting up any foot or horse post for the conveyance of letters or packets upon any post road. United States v. Kimball, Fed. Cas. No. 15,531.

Letter carrier routes within cities are "post routes" within the meaning of U. S. Rev. Stat. § 3982, forbidding any person to establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at a stated period over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried. Blackham v. Gresham, 21 Blatchf. 354, 16 Fed. 609. Distinguishing United States v. Kochersperger, Fed. Cas. No. 15,541, where it was held that private expresses between places within the postal district of a city or other town were not prohibited by the act of March 2, 1827 (4 Stat. at L. 238, chap. 61), § 3, forbidding any person other than the Postmaster General or his authorized agents to set up any foot or horse post for the conveyance of letters and packets upon any "post road" which is or may be established as such by law, nor by the act of March 3, 1845 (5 Stat. at L. 735, chap. 43), § 9, forbidding the establishment of a private express for the conveyance of mailable matter from one city, town, or place to any other city, town, or place in the United States between which mail is regularly transported. This provision of the act of 1827 would, however, the court held, have prohibited private expresses from carrying, on streets in territory annexed to a municipality, mailable matter which the general post of the government might carry on those streets as established post roads between mail stations in the annexed territory.

If mail was actually carried by a railroad under the authority of the Postoffice Department by assent of and by arrangement with the railroad company, there was a "mail route" within the meaning of the act of March 3, 1845, § 9, forbidding the establishment of private expresses for the carriage of mail matter on a mail route. United States v. Thompson, Fed. Cas. No. 16,489.

It was not necessary, in order to constitute the offense under the act of March 3, 1845, § 9, of establishing a private express for carrying mail matter over a mail route, that the carrying of such matter be the sole business of the express, but it was requisite that it be one of its purposes. Ibid.

By the act of March 3, 1845 (5 Stat. at L. 736, chap. 43), § 10, carried into the Revised Statutes as § 3985 (now Criminal Code, § 184), the carrying otherwise than in the mail of any letters or packets except such as relate to some part of the cargo, or to some article carried at the same time, was forbidden. An order for goods folded in the form of a letter and directed as such, though not sealed, is a letter within the meaning of this statute. United States v. Bromley, 12 How. 88, 13 L. ed. 905.

The word "letter," as used in the act of March 3, 1845, § 9, forbidding the establishment of private expresses for the carriage of mail matter over a mail route, has no particular meaning, but must be understood in the sense in which it is generally understood among business men. United States v. Thompson, supra.

The exception of the 11th section of the act of March 3, 1845, in favor of gratuitous

Mr. **Rush Taggart** argued the cause and filed a brief for defendant in error:

Both of the letters in question relate to the "current business" of the Erie Railroad Company.

Thomas v. Peoria & R. I. R. Co. 36 Fed. 819; Stanton v. Board of Education, 68 N. J. L. 496, 53 Atl. 236; Taylor v. Davis (Taylor v. Mayo) 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147.

Mr. Justice **McKenna** delivered the opinion of the court:

Indictment in two counts against the railroad company for carrying, otherwise than in the mails, certain letters in violation of § 184 of the Penal Code of the United States. The section is as follows:

"Sec. 184. Whoever, being the owner, driver, conductor, master, or other person having charge of any stagecoach, railway car, steamboat, or conveyance of any kind which regularly performs trips at stated periods on any post route, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried, and which shall carry, otherwise than in the mail, any letters or packets except such as relate to some part of the cargo of such steamboat or other vessel, to the current [516] business of the carrier, or to some article carried at the same time by the same stagecoach, railway car, or other vehicle, except as otherwise provided by law, shall be fined not more than fifty dollars." [35 Stat. at L. 1124, chap. 321, Comp. Stat. 1913, § 10,354.]

The counts are similar except as to the letter carried. The indictment alleged that the railroad between designated points (Jersey City, New Jersey, and Montgomery, New York) regularly made trips; that it had made a contract with the Western Union Telegraph Company by which provision was made for a joint operation of telegraph lines over the right of way of the railroad company; that the business was under the supervision of a joint superintendent named E. P. Griffith, and that the telegraph office at Montgomery—both for

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conveyance by private hand, did not authorize a person to establish an express for the carrying of letters in connection with or as a part of his business as a merchandise express, although no charge was made for letters as such. Ibid.

An exception from the operation of U. S. Rev. Stat. § 3982, in favor of the conveyance of letters by "special messenger employed for the particular occasion only," was made by § 3992; but the proprietor of a private express could not claim the benefit of such exception as to that part of his business which consisted in the collection of letters in a central office, and the delivery of them through carriers employed for the purpose, where the understanding of customers was, and the business was so designed and arranged, that such deliveries should be made daily over the streets of the city wherever such letters are directed. United States v. Easson, 18 Fed. 590. The court said: "The evidence in this case shows, without contradiction, that a part of the defendant's business was to employ a corps of messengers for the purpose of going about the city to the stores and offices of all his customers, collecting letters daily, generally two or three times a day, for delivery anywhere between the Battery and Harlem; that stamps similar to postage stamps were furnished and sold to such customers beforehand, which, on being affixed to the letters, entitled them to delivery by the defendant according to the course of his business; that the course of his business was to bring all letters thus collected to the defendant's office, then sort them out into packages, making up convenient routes for delivery, and then despatching them by messengers sent out for that purpose. These messengers usually made three collections and deliveries daily. Several thousand letters were usually thus collected and delivered every day. No one messenger went on the errand of any particular person, but he took on his route all the letters of all the persons whose letters had been brought to the central office, which on distribution were going to a particular portion of the city. From twenty to forty messengers were thus in constant employment. To constitute regularity it is not essential that the minute or hour of the departures of the messengers should be always the same. Provision for a delivery daily, once, twice, or thrice, as the case may be, over the streets of the city, wherever wanted, is a provision for delivery by regular trips and at stated periods."

The transmission by an express company, in an envelop containing money, of a letter relating to such money, is within the exception in the act of March 3, 1845, § 10, forbidding the carrying outside the mail of any letters except such as relate to some part of the cargo or to some article conveyed at the same time. United States v. United States Exp. Co. 5 Biss. 91, Fed. Cas. No. 16,602.

A letter accompanying a parcel of bank notes will be presumed, in the absence of evidence to the contrary, to relate to the parcel so as to come within the exception in the act of April 30, 1810, § 16, forbidding the establishment of any post for the purpose of carrying letters or packets outside the mails except such as may be directed to the owner of the conveyance and relating to the same, or to the person to whom any packet or bundle in such conveyance is intended to be delivered. Dwight v. Brewster, 1 Pick. 53, 11 Am. Dec. 133; Chouteau v. The St. Anthony, 11 Mo. 226.

railroad and commercial business—was in charge of G. A. Osborne, the station agent of the railroad; that on June 27, 1912, the railroad carried otherwise than in the mails the following letter:

June 27, 1912.

Mr. G. A. Osborne,
Agent Erie Railroad and Manager W. U. T. Co., Montgomery, N. Y.

Dear Sir:—

The revenue of the W. U. T. Co's. receipts at Montgomery, N. Y., would indicate that the new telegraph service, such as day and night letters, had not been thoroughly presented to the people of Montgomery. At many of the Erie Railroad stations similar to Montgomery very handsome increases in telegraph receipts have been shown on account of this new service and as the Erie Railroad participates in the telegraph revenues from its railroad stations it is desired that their revenue from the telegraph company shall increase as well as the revenue from its freight and passenger traffic, and I hope you will do everything to make such showing.

Yours truly,
(Sd.) E. P. Griffith,
Supt. of Telgh.

[517] The letter upon which the second count is based was as follows:

June 27, 1912.

Mr. G. A. Osborne,
Agent Erie Railroad Co. and Manager W. U. Tel. Co., Montgomery, Orange County, N. Y.

Dear Sir:—

I forwarded to you by train mail on June 20th a copy of the new Western Union Telegraph Company's tariff book, which shows a considerable number of changes in telegraph rates, particularly with respect to the old 40-cent rate having been reduced to 30 cents to a considerable number of points, and I would ask that you familiarize yourself with the new rates in order to avoid check errors. The misquoting of rates creates a large number of error sheets and

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A letter carried by a common carrier in a package of bank notes and stamps is presumed, in the absence of evidence to the contrary, to have related to them so as to bring the case within the proviso in 42 Geo. III. chap. 81, § 5, which enacts that the prohibition against sending letters otherwise than by the post shall not extend to letters sent by a common carrier with and for the purpose of being delivered with the goods that the letter concerns. Bennett v. Clough, 1 Barn. & Ald. 461, 19 Revised Rep. 352.

The exception in favor of letters which relate to the "current business of the carrier" seems to have received its first construction in UNITED STATES v. ERIE R. CO.

A conveyance of three letters by private express in the Lowell cars was held in United States v. Gray, Fed. Cas. No. 15,253, to be punishable under the act of March 3, 1825 (4 Stat. at L. 102, chap. 64).

The intention of this statute was to prevent the carrying of letters by stages and vessels openly in the ordinary course of business. United States v. Adams, Fed. Cas. No. 14,421.

Hence, a private express is not liable under this act for carrying letters in a package, unless it was known that the package contained letters. Ibid.

Stages or water craft are not prevented by this statute from carrying individuals with letters on their persons or in their baggage. Ibid.

If a passenger in a railroad car or steamboat passing over a post road or route carries a letter without the knowledge or consent of the owner of the car or steamboat, or any of its agents or servants, such owner is not liable to the penalty provided by the act of March 3, 1825, § 19, for carrying letters on a post road. United States v. Kimball, Fed. Cas. No. 15,531; United States v. Hall, Fed. Cas. No. 15,281.

But notice to a railway company through public advertisement and through the agents of the Postoffice Department, that a person and his agents are engaged in the business of conveying letters over such railway, out of the mails, renders the railway company liable to the penalty prescribed by the act of March 3, 1825 (4 Stat. at L. 107, 109, chap. 64), §§ 19, 24, where it thereafter transports such agents carrying letters. United States v. Hall, supra.

The proprietor of a private express is not answerable for any acts of his agent in carrying mailable matter over a mail route, contrary to the act of March 3, 1845, § 9, unless such acts were authorized by him, expressly or impliedly; but if his instructions were in general terms not to carry any mailable matter, and he still assented to, or approved of the carrying of what was mailable, whether or not he knew that the law embraced such matter, he violated the statute. United States v. Thompson, Fed. Cas. No. 16,489.

A person who sends a letter by a passenger in a railway car or vessel over a post road or post route is not liable to the penalty provided by the act of March 3, 1825 (4 Stat. at L. 109, chap. 64), § 24, for procuring, advising, or assisting in the doing or perpetration of any of the acts or crimes forbidden by the statute, unless the owner of the car or vessel is liable for the penalty provided by § 19 for having carried the letter in question. United States v. Pomeroy, Fed. Cas. No. 16,065; United States v. Kimball, Fed. Cas. No. 15,531; United States v. Hall, Fed. Cas. No. 15,281. Contra, United States v. Fisher, Fed. Cas. No. 15,100.

correspondence, and not only confuses the auditing department of the W. U. Tel. Co., but also delays settlements between the Telegraph Company and the Erie Railroad.

As you are aware, the Erie Railroad receives a percentage of the W. U. Tel. Co.'s telegraph receipts at all Erie railroad stations, where the agent of the railroad, under contract with the telegraph company, also acts as the agent or manager of the telegraph company, and that the handling of Western Union telegrams, in making up of Western Union reports, from which the railroad company's proportion of receipts are figured, and all of the accounting and correspondence relative to Western Union matters, are as much the current business of the railroad as handling accounts or reports made in connection with the freight shipments or sale of tickets for the railroad, the railroad company receiving a revenue from all.

Your attention is specially called to modification of rule No. 8 for the instructions to all New York state offices only, and to be used instead of rule 8, printed in the tariff book, printed copy of which I inclose herewith.

Yours truly,
(Sd.) E. P. Griffith,
Supt. of Telgh.

[518] The indictment was demurred to by the railroad company on the ground that the matters set forth therein were not sufficient in law to constitute a crime. The demurrer was sustained, the court expressing itself to be "clearly of the opinion that the 'current business of the carrier,' referred to in § 184, is the kind of business in which it appears from the indictment the carrier was engaged, and that the sending of the letters in question was in accordance with law."

The opinion of the court exhibits the point in the case, to which, though a short one, considerable argument has been addressed by counsel. The solution of it is in the contract between the companies.

It is a very elaborate document, regulating the relations of the railroad and telegraph companies by a variety of provisions and details. By it the railroad company leased to the telegraph company the right to maintain the telegraph line it (the railroad company) then had, and operate the same, and the right to build new lines. One wire was to be provided for railroad use and one for commercial use, though joint wires were to be used where nothing more was required.

Article 6 of the agreement is especially relied on by the railroad company. It provides that at all telegraph offices now or hereafter maintained at the stations of the railroad company it shall, at its own expense, furnish office room, light and heat for telegraph service, and also at its own expense provide an operator and other employees, who, acting as agents for the telegraph company, shall receive, transmit, and deliver, exclusively for the telegraph company, such commercial and public messages as may be offered, and shall charge the telegraph company's tariff rates thereon, and shall render to the telegraph company monthly accounts thereof, the railroad company to pay all of such receipts to the telegraph or other employees, but not to be responsible [519] for the failure of its operators to pay over such receipts.

The telegraph company agrees to pay the railroad company as soon as practicable after the close of each month 25 per cent of the cash receipts, at offices in the railroad company's stations or other public buildings, received from commercial or public messages of the telegraph company, with certain exceptions not material to mention, and transmit free telegrams relating to railroad business, the railroad company to carry materials, furnish offices and operators, pay for certain lines, and give exclusive privileges, as far as possible, to the telegraph company. The railroad company is given the right to investigate the accounts of the telegraph company so far as they relate to such earnings. Either party may discontinue any of its offices. If the telegraph company removes any of its offices from the railroad company's stations, the latter company shall still have the right to continue doing a commercial business in such station, and the telegraph company will provide the usual signs for such business, the railroad company not to solicit business in competition with the telegraph company.

By the 12th article it is provided that the telegraph lines and wires and the offices and operators in railroad stations shall be under the supervision and control of a competent joint superintendent of telegraph, who shall be appointed by the railroad company subject to the approval of the telegraph company, and be paid jointly and equally by both companies at a salary to be fixed by both, each company paying one half thereof. Either company may discharge the joint superintendent, but his successor can only be appointed on the written consent of both parties. By the 9th article it is expressly covenanted and agreed that the joint superintendent and all other persons engaged in the work contemplated by the agreement, by whichever company paid, shall be deemed [520] to be the servants of the telegraph company except when

engaged in the transmission of messages for the railroad company, and in certain construction work.

It will be observed that while the companies in many respects are independent, they are also, in some respects, at least, dependent. The telegraph is a facility of the railroad company, and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement, and, but for the agreement with the telegraph company, would have to do. The railroad company has an interest in the receipts of the other company, and is concerned in their amount and the maintenance and increase of the telegraph business. The control of the telegraph company's instrumentalities and its offices and operators is in a "competent joint superintendent of telegraph," in whose appointment the railroad company has a voice, and whom it also may discharge. It is, however, not possible, and keep this opinion within a reasonable length, to detail the many ways in which the two companies are related, and while it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is "current."

In reaching this conclusion it is not necessary to consider the character of the statute, whether it be penal or remedial, or whether it is to have a strict or a liberal construction. It is one justified by the words of the statute and in view of the facts by its history, and is not precluded by anything that was said at the time the act was amended. As originally enacted and carried into the Revised Statutes (§ 3985) it forbade the carrying, "otherwise [521] than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, or to some article carried at the same time by the same stagecoach, railway car, or other vehicle."

The section coming before the Attorney General for construction, the opinion was expressed that it only intended to prohibit the transportation of communications between third parties, and did not prohibit the transportation of communications, whatever their substance, belonging to the carrier, or relating to the carrier's business. 21 Ops. Atty. Gen. 394. It is the contention of the government that when § 184 came to be enacted, that construction was narrowed by the use of the word "current," Senator Bacon, who suggested it, in effect so declaring, and urged it as an amendment, so that the new section might not relate, as the senator said, to the "financial transactions" of the carriers, "or anything of that kind, but to current business and operations." To this comment counsel for the government adds the definition of "current" from the dictionaries as "now passing; present in its course; as the current month or year;" and supposes this to be the meaning which was in Senator Bacon's mind, and urges the view that "the 'current business' of the carrier, therefore, is that business which is, at any particular time, in the present course of its transactions." But so confined in meaning, it is not very clear what enlargement the new section is on the old one. We cannot so confine it. The statute certainly cannot mean that the described business should have no relation to the past and no connection with the future, however near. It may be that there might be a business so completely consummated or so much in speculation that it could not be described as "current," but the letters with which this case is concerned are not of either character. They regard not only immediate, but day-by-day action, and so [522] relate to "current," as distinguished from exceptional, business.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of the case.

MARTIN LAWLOR et al., Plffs. in Err.,
v.
DIETRICH E. LOEWE and Marvin Fuchs, Partners, under the Firm Name of D. E. Loewe & Company.

(See S. C. Reporter's ed. 522-537.)

Monopoly — conspiracy of members of trades unions — circulation of unfair lists.

1. Irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put a ban upon those whose names appear therein among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the

NOTE. — On monopolies, generally—see notes to Fowle v. Park, 33 L. ed. U. S. 67, and United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008.

As to illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to conspiracy, generally,—see note to

prohibition of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, §§ 8820, 8829), if it is intended to restrain and does restrain commerce among the states.

[For other cases, see Monopoly, II., in Digest Sup. Ct. 1908.]

Trial — instructions — action under anti-trust act.

2. The rights of the defendants in an action under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, §§ 8820, 8829), against members of labor organizations to recover the damages caused to an interstate trade of hat manufacturers by a combination to compel them to unionize their factory, through the use of the boycott and "we don't patronize" or "unfair" lists, were sufficiently guarded by an instruction that if such members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members, and no others, were jointly liable.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

Appeal — instructions — weight of evidence.

3. No injustice was done in an action under the Sherman anti-trust law of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, §§ 8820, 8829), against members of labor organizations to recover the damages caused to the interstate trade of hat manufacturers by a combination to compel them to unionize their factory, through the use of a boycott and "we don't patronize" and "unfair" lists, because the court spoke to the jury of "proof" that, in carrying out the object of the associations, unlawful means had been used with their approval, where the court cautioned the jury with special care not to take their view of what had been proved from him, and the context plainly shows that the word "proof" was used in a popular way for "evidence," and must have been understood in that sense.

[For other cases, see Appeal and Error, VIII. j, 7, in Digest Sup. Ct. 1908.]

Damages — for what time recoverable — accruing since action began.

4. Damages accruing since the action began, if the consequence of acts done before, and constituting part of the cause of action declared on, are properly allowed in an action under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, §§ 8820, 8829), against members of labor organizations, to recover the damages caused to the interstate trade of hat manufacturers by a combination to compel them to unionize their factory, through the use of the boycott, and "we don't patronize" and "unfair" lists.

[For other cases, see Damages, VI. r, in Digest Sup. Ct. 1908.]

Evidence — newspapers — action under anti-trust act.

5. The introduction of newspapers, etc., in an action under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 200, chap. 647, Comp. Stat. 1913, §§ 8820, 8829), against members of labor organizations, to recover damages caused to the interstate trade of hat manufacturers by a combination to compel them to unionize their factory, through the use of the boycott and "we don't patronize" and "unfair" lists, was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove the intended and detrimental consequence of the principal acts.

[For other cases, see Evidence, IV. v, in Digest Sup. Ct. 1908.]

Evidence — relevancy — intent.

6. Reasons given by customers for refusing to deal with sellers of plaintiffs' hats, including letters from dealers to plaintiffs, were admissible in evidence in an action under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, §§ 8820, 8829), against members of labor organizations, to recover the damages caused to the interstate trade of hat manufacturers by a combination to compel them to unionize their factory through the use of the boycott, and "we don't patronize" and "unfair" lists.

[For other cases, see Evidence, XI. e, in Digest Sup. Ct. 1908.]

[No. 358.]

Argued December 10 and 11, 1914. Decided January 5, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit

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Casey v. Cincinnati Typographical Union, 12 L.R.A. 193.

On right of labor union to notify persons not to deal with a certain individual—see notes to Hey v. Wilson, 16 L.R.A.(N.S.) 85; Lindsay & Co. v. Montana Federation of Labor, 18 L.R.A.(N.S.) 707; and American Federation of Labor v. Buck's Stove & Range Co. 32 L.R.A.(N.S.) 748.

On what relation must a contract bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act—see note to Loewe v. Lawlor, 52 L. ed. U. S. 488.

As to liability of individual member of trade combination for injury to boycotted dealer—see note to Purington v. Hinchliff, 2 L.R.A.(N.S.) 824.

On actions for threefold damages under Federal anti-trust act—see note to American Banana Co. v. United Fruit Co. 53 L. ed. U. S. 826.

On right of labor union to forbid its members to handle one's product—see notes to Purvis v. Local No. 500, U. B. C. J. 12 L.R.A.(N.S.) 643; Meier v. Speer, 32 L.R.A. (N.S.) 792; and Burnham v. Dowd, 51 L.R.A.(N.S.) 778.

to review a judgment which affirmed a judgment of the District Court for the District of Connecticut in favor of plaintiffs in a suit to recover treble damages under the Sherman anti-trust act. Affirmed.

See same case below, 126 C. C. A. 445, 209 Fed. 721.

The facts are stated in the opinion.

Mr. Alton B. Parker argued the cause, and, with Mr. Frank L. Mulholland, filed a brief for plaintiffs in error:

Even if a fine had been threatened or imposed upon union men who refused to join in the strike, it is not certain, in the present state of the authorities, that it would amount to such coercion as the law condemns.

Jetton-Delke Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590; L. D. Willcutt & Sons Co. v. Driscoll, 23 L.R.A.(N.S.) 1236, note; Associated Hat Mfrs. v. Baird-Unteidt Co. 88 Conn. 332, 91 Atl. 373.

Suppose that the men were ordered out by the officers of their unions, and that they went out because of those orders and solely because of them, and suppose the jury found this to be a fact; that would not have authorized the jury to find that there was coercion.

Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; Delaware, L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541; Aluminum Castings Co. v. Local No. 84, I. M. U. 197 Fed. 221; Saulsberry v. Coopers' International Union, 147 Ky. 170, 39 L.R.A.(N.S.) 1203, 143 S. W. 1018; Jose v. Metallic Roofing Co. [1908] A. C. 514, 24 Times L. R. 878; Wabash R. Co. v. Hannahan, 121 Fed. 563.

It is the absolute right of every workman to exercise his own option in regard to the persons with whom he will agree to work or with whom he will continue to work, and therefore union workmen may refuse to continue to work with those who are not members of their union.

Adair v. United States, 208 U. S. 161, 175, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Allis-Chalmers Co. v. Iron Moulders' Union, 150 Fed. 155; National Protective Asso. v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369: Allen v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285.

Laws for the registration and protection of trade-union labels have been held not to violate any personal rights or principles of public policy, or the constitutional provision against deprivation of property without due process of law, or the guaranty of the equal protection of the laws.

7 Labatt, Mast. & S. p. 8656, § 2786.

And it has been held that the boycotting of nonunion workmen, to deprive them of the legitimate fruits of their labors, cannot be deemed the purpose for which a statute for the protection of union labels was procured, so as to make the statute invalid.

Perkins v. Heert, 158 N. Y. 306, 43 L.R.A. 858, 70 Am. St. Rep. 483, 53 N. E. 18.

There are boycotts which the law condemns, but the word does not necessarily import illegality.

Gill Engraving Co. v. Doerr, 214 Fed. 111; Mills v. United States Printing Co. 99 App. Div. 605, 91 N. Y. Supp. 185, 199 N. Y. 76, 92 N. E. 214.

Surely the hatters' union is not bound to grant its label to anybody and everybody, or, having granted the label, is not powerless to recall it when it is misused, or the possibility that it will be misused arises. If so, what is the use of the label? In Saulsberry v. Cooper's International Union, 147 Ky. 170, 39 L.R.A.(N.S.) 1203, 143 S. W. 1018, it was held that a manufacturer cannot enjoin a labor union from removing its stamp from his shop on failure to renew a contract for labor with the union.

The only question which can possibly arise as to the legality of the actions of these labor unions is as to the legality of placing the names of these merchants on their unfair lists and publishing the lists, or publishing the fact of having declared the merchants unfair, and requesting members of labor unions and others not to deal with, or trade in the goods of, these merchants. It must be confessed that there is not much judicially declared law upon this question, but we contend that according to well-settled fundamental principles of law these acts are entirely legal.

7 Labatt, Mast. & S. p. 8453; Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso. 150 Fed. 413; American Federation of Labor v. Buck's Stove & Range Co. 33 App. D. C. 83, 32 L.R.A.(N.S.) 748; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172.

In the legal sense of the term, the word "threat" does not embrace every announcement of an intention to do an act which will result in injury to another; it embraces only the announcement of an intention to do an unlawful act.

7 Labatt, Mast. & S. pp. 8448, 8458; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; Cote v. Murphy, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; National Protective Asso. v.

Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Albro J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in 144 App. Div. 939, 129 N. Y. Supp. 1111; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912.

In the legal sense of the term, coercion does not embrace every constraint placed upon the free will of another, but only such constraint as results from the announcement of an intention to do, or from the doing of, an unlawful act to the prejudice of the person constrained.

7 Labatt, Mast. & S. pp. 8448, 8458; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165.

There can, of course, be no question as to the duty of a trial judge to submit to the jury, when requested to do so, all the issues raised by the pleadings and the evidence.

Douglass v. M'Allister, 3 Cranch, 298, 2 L. ed. 445; Smith v. Carrington, 4 Cranch, 62, 71, 2 L. ed. 550, 553; Texas & P. R. Co. v. Volk, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; Bird v. United States, 180 U. S. 356, 361, 362, 45 L. ed. 570, 573, 21 Sup. Ct. Rep. 403.

It is the duty of the court to state to the jury the issues made by the pleadings, and erroneous to read the pleadings to the jury, or to refer them to the pleadings to ascertain the issues in the case.

38 Cyc. 1608; 2 Thomp. Trials, 2d ed. § 2314.

In Pointer v. United States, 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410, this court expressed its disapproval of the practice of trial judges reading from the opinions or judgments of other courts when charging juries. Certainly, the course of the trial court in refusing to charge as requested, because counsel who made the requests had read to the jury extracts from the opinions of other judges, can neither be approved nor tolerated.

It cannot be presumed that the matter covered by the requests to charge which were refused had been presented to the jury by the undisclosed extracts from the opinions of different judges which counsel for the defendants read.

Bird v. United States, 180 U. S. 356, 45 L. ed. 570, 21 Sup. Ct. Rep. 403.

No evidence whatever was offered in respect of these boycotts of the Berg and Roelofs companies by the American Federation of Labor, to distinguish them in principle from that described in Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

There must be something to bring these acts home to the defendants, in order that they may be held responsible for them, and be held to have been parties to the alleged conspiracy.

Benton v. Minneapolis Tailoring & Mfg. Co. 73 Minn. 506, 76 N. W. 265.

The liability of the defendants, with the exception of Lawlor, may more properly be compared to the liability of stockholders for the acts of officers and agents of a corporation. Or their liability may be compared with the liability of a partner for acts of copartners outside of the scope of the partnership.

United States v. Cohn, 128 Fed. 615, affirmed in 76 C. C. A. 31, 145 Fed. 1, 200 U. S. 618, 50 L. ed. 623, 26 Sup. Ct. Rep. 755.

That membership in, and payment of dues to, the hatters' union, are not alone sufficient to charge the defendants with liability for the wrongful acts of the officers and agents of the union, was pointed out when this case came before the circuit court of appeals after the first trial.

Lawlor v. Loewe, 109 C. C. A. 288, 187 Fed. 522.

An appellate court, it is true, will not reverse on the ground of the erroneous admission of evidence, or other error, unless the error was prejudicial to the party complaining. But it has been established, in a number of cases decided by this court, that where error is shown it is presumed to have worked injury to the party against whom it was committed, unless the contrary affirmatively appears from the record.

Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; Gilmer v. Higley, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; Mexia v. Oliver, 148 U. S. 664, 37 L. ed. 602, 13 Sup. Ct. Rep. 754.

The liability of Lawlor must rest upon the ground that he was vice president, unless there is competent evidence in the record to bring knowledge of the alleged illegal boycott home to him.

State v. Dreany, 65 Kan. 292, 69 Pac. 182, 12 Am. Crim. Rep. 626; Leeson v. Holt, 1 Starkie, 186, 18 Revised Rep. 758; Graham v. Hope, Peake, N. P. Cas. 154, 3 Revised Rep. 671; Roberts v. Spencer, 123 Mass. 397; Com. v. Robinson, 1 Gray, 555; Milbank v. Dennistoun, 10 Bosw. 382.

The admission of the newspaper paragraph in this case was not proper, even under the more liberal decisions.

Clark v. Ricker, 14 N. H. 44.

Conversations of plaintiffs' witnesses with retailers were inadmissible.

Tilk v. Parsons, 2 Car. & P. 202.

A newspaper report is not admissible as evidence of the facts therein stated.

13 Laws of England (Halsbury) p. 565; Rossmore v. Mowatt, 15 Jur. 238; 9 Am. & Eng. Enc. Law, 2d ed. 885; Child v. Sun Mut. Ins. Co. 3 Sandf. 26; Fosgate v. Herkimer Mfg. & Hydraulic Co. 9 Barb. 287; Riley v. St. John, 11 N. B. 78; Downs v. New York C. R. Co. 47 N. Y. 83, 5 Am. Neg. Cas. 142; Southern P. Co. v. Schuyler, 68 C. C. A. 409, 135 Fed. 1015; Southern P. Co. v. Cavin, 75 C. C. A. 350, 144 Fed. 348.

This is an action at law, and therefore the equity rule allowing the recovery of damages down to the time of the decree (1 Enc. L. & Pr. 1079; 4 Sedgw. Damages, 9th ed. p. 1256) is not applicable.

It is an action in tort, and therefore the rule which is applicable in a suit for the breach of a contract of employment, or in any other action for the total breach of an entire contract (1 Sedgw. Damages, 9th ed. p. 90; Wilson v. Plummer, 4 Pet. 172, 7 L. ed. 821), has no application.

And the character of the tort which constitutes the cause of action in this case is not such as to make this a case for the application of the rule governing the time to which damages may be assessed in actions for torts which produce immediate and permanent injury, so that only one action can be maintained therefor, the rule in such cases being that the plaintiff is entitled to recover all the damages sustained, including not only all the damages sustained up to the time of the trial or verdict, but even prospective damages.

New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; Fort v. Union P. R. Co. 2 Dill. 259, Fed. Cas. No. 4,952; Chicago & A. R. Co. v. Robbins, 159 Ill. 598, 43 N. E. 332; Chicago & N. W. R. Co. v. Hoag, 90 Ill 339; Baltimore v. Merryman, 86 Md. 584, 39 Atl. 98; Fowle v. New Haven & N. Co. 107 Mass. 352; Wheeler v. Hanson, 161 Mass. 370, 42 Am. St. Rep. 408, 37 N. E. 382.

The alleged wrongful combination or conspiracy for which the plaintiffs seek to recover is a continuing wrong of a temporary and removable character, for which successive actions may be brought from time to time as damages may accrue, and therefore the case is not excepted from the general rule that the rights of the parties to an action at law must be determined according to the facts existing when it was commenced (1 Enc. L. & Pr. 1079; Woodbridge v. Pratt & W. Co. 69 Conn. 304, 37 Atl. 688; Moyer v. Scott, 30 Mich. 348; Storm v. Livingston, 6 Johns. 44; Garrigue v. Loescher, 3 Bosw. 578; Moreland v. Atchison, 24 Tex. 164), from which arises the rule for computing damages, that only damages sustained by the plaintiff at the time of the commencement of his action can be recovered.

John D. Park & Sons Co. v. Hubbard, 134 App. Div. 468, 119 N. Y. Supp. 347.

There seem to have been no exception to this rule in the early days of the English law; it appears that the invariable rule of the early common law of England was that only such damages were recoverable as had been sustained at the time of the institution of the action.

Comyns's Dig. Damages, D. And see Pilfold's Case, 10 Coke, 115b; Brasfield v. Lee, 1 Ld. Raym. 329; Powers v. Ware, 4 Pick. 107.

The exceptions to the general rule depend entirely and solely upon the fact that the plaintiff will not be able to maintain more than one action upon the contract or for the tort which forms the basis of his action.

Robinson v. Bland, 2 Burr. 1077.

This being the basis for the recognized exceptions to the general rule that damages are recoverable only up to the time of the commencement of the action, the rule is to be applied in actions on contract where the breach for which the action is brought does not put an end to the contract, but the contract continues to be a subsisting obligation for the breach of which successive actions may be maintained.

1 Sedgw. Damages, 9th ed. 89; Phelps v. New Haven & N. R. Co. 43 Conn. 453; Powers v. Ware, 4 Pick. 106; Pierce v. Woodward, 6 Pick. 206; Fay v. Guynon, 131 Mass. 31; Parker v. Russell, 133 Mass. 74; Albey v. Weingart, 71 N. J. L. 92, 58 Atl. 87; Moore v. Love, 48 N. C. (3 Jones, L.) 215; Bradley v. Washington, A. & G. Steam Packet Co. 9 Pet. 107, 9 L. ed. 68; Wicker v. Hoppock, 6 Wall. 94, 18 L. ed. 752.

The general rule is also applied in an action of tort when the action is brought for a wrongful act which gives rise to a continuous series of torts which can be brought to an end by the defendant discontinuing the act, and damages can be had only for loss caused before the bringing of the action. This is in analogy to the rule which is to be applied, as shown above, in actions for partial breaches of contract.

1 Sedgw. Damages, 9th ed. p. 91; 29 Cyc. 273.

And the rule has been applied in many tort cases and in greatly varying circumstances.

Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; Savannah & O. Canal Co. v. Bourquin, 51 Ga. 378; Bailey v. Heintz, 71 Ill. App. 189; Catlin Coal Co. v. Lloyd, 109 Ill. App. 122; Gebhardt v. St. Louis, M. & S. E. R. Co. 122 Mo. App. 503, 99 S. W.

773; Troy v. Cheshire R. Co. 23 N. H. 83, 55 Am. Dec. 177; Brewster v. Sussex R. Co. 40 N. J. L. 57; Church of the Holy Communion v. Paterson Extension R. Co. 66 N. J. L. 218, 55 L.R.A. 81, 49 Atl. 1030, 68 N. J. L. 399, 53 Atl. 449, 1079; Blunt v. McCormick, 3 Denio, 283; Uline v. New York C. & H. R. R. Co. 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536; John D. Park & Sons Co. v. Hubbard, 134 App. Div. 468, 119 N. Y. Supp. 347; Duncan v. Markley, Harp. L. 276; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705; Cobb v. Smith, 38 Wis. 21; Stadler v. Grieben, 61 Wis. 500, 21 N. W. 629.

Messrs. **Daniel Davenport** and **Walter Gordon Merritt** argued the cause and filed a brief for defendants in error:

The constitution of the Federation provides for boycotting, and its principal activity has been the prosecution of interstate boycotts. This has been formally admitted in open court. Who is bound by this constitution and responsible for these boycotts? Who is bound by the provisions to assist each other in "the sale of union label goods?" Obviously, the million and a half members who compose and support this organization. They are presumed to have knowledge of them.

Raggett v. Musgrave, 2 Car. & P. 556.

The arguments and authorities contained in the brief of the defendants in support of the right to strike and the right to boycott are not pertinent to the case, since this court has held in this and other cases that acts lawful in themselves become unlawful when done in furtherance of an illegal conspiracy.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Aikens v. Wisconsin. 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3.

The question is not whether the particular acts performed by the defendants in furtherance of the conspiracy were innocent and lawful, but whether such acts were done in furtherance of the combination to restrain interstate trade, and upon this question the court sufficiently charged the jury. The question whether the strike was in furtherance of the illegal combination was submitted with most explicit instructions. Whether the complaint was limited to strikes caused by coercion was not raised by any request or exception of the defendants, but it is obvious that strikes carried out in furtherance of the illegal combination are tainted with the illegal transaction, whether induced by persuasion or coercion. The allegations of the complaint relative to boycotting are not limited to acts which compel customers involuntarily not to deal with the plaintiffs, and the plaintiffs' right to recovery is not limited to losses due to that cause.

Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 58 L. ed. 1490, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951.

If the conspiracy was illegal from its inception, and included the intention to resort to an interstate boycott if necessary, then the plaintiffs are entitled to recover the loss due to the strike, even though the defendants did not intend to resort to the interstate boycott unless the strike was unsuccessful in unionizing the factory.

Davis v. United States, 46 C. C. A. 619, 107 Fed. 754.

Moreover, since the union officers were acting within the scope of their employment and the organization's purposes, and the defendants' conduct warranted them in assuming that they acted with defendants' authority and approval, all the defendants are liable.

Grand Lodge, A. O. U. W. v. Grand Lodge, A. O. U. W. 81 Conn. 203, 70 Atl. 617; Rogers v. Vicksburg, S. & P. R. Co. 114 C. C. A. 85, 194 Fed. 65; Jones v. Maher, 62 Misc. 388, 116 N. Y. Supp. 180; Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; Clark & S. Agency, pp. 61, 1141; Com. v. Morgan, 107 Mass. 199; Bank of Metropolis v. Guttschlick, 14 Pet. 19, 10 L. ed. 335; Dicey, Parties, p. 170; Mechem, Agency, ¶ 72; Wilcox v. Arnold, 162 Mass. 577, 39 N. E. 414; McDermott v. St. Wilhelmina Benev. Aid Soc. 24 R. I. 535, 54 Atl. 58; Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 103, 110, 37 L. ed. 98, 102, 13 Sup. Ct. Rep. 261; 4 Harvard L. Rev. 348; 7 Harvard L. Rev. 315; American Fur Co. v. United States, 2 Pet. 358, 7 L. ed. 450; United States v. Gooding, 12 Wheat. 460, 6 L. ed. 693; Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491; Green v. London General Omnibus Co. 1 L. T. N. S. 95, 7 C. B. N. S. 290, 29 L. J. C. P. N. S. 13, 6 Jur. N. S. 228, 8 Week. Rep. 88; Limpus v. London General Omnibus Co. 1 Hurlst. & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258; Taff Vale R. Co. v. Amalgamated Soc. [1901] A. C. 426, 1 B. R. C. 832, 70 L. J. K. B. N. S. 905, 65 J. P. 596, 50 Week. Rep. 44, 85 L. T. N. S. 147, 17 Times L. R. 698; Giblan v. National Amalgamated Labourers' Union

[1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708; Kinver v. Phœnix Lodge, 7 Ont. Rep. 387; Pennant, Trade Unions, p. 81; Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; Illinois C. R. Co. v. International Asso. 190 Fed. 910; Aluminum Castings Co. v. Local No. 84, I. M. U. 197 Fed. 221; Schultz v. Frankfort Marine, Acci. & Plate Glass Ins. Co. 151 Wis. 537, 43 L.R.A.(N.S.) 520, 139 N. W. 387; F. R. Patch Mfg. Co. v. Protection Lodge, 77 Vt. 294, 107 Am. St. Rep. 765, 60 Atl. 74; F. R. Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 Atl. 939; Vredenburg v. Behan, 33 La. Ann. 627, 1 Am. Neg. Cas. 349; Lawler v. Murphy, 58 Conn. 294, 8 L.R.A. 113, 20 Atl. 457; Re Peck, 206 N. Y. 55, 41 L.R.A.(N.S.) 1223, 99 N. E. 258, Ann. Cas. 1914A, 798; Cheney v. Goodwin, 88 Me. 567, 34 Atl. 420; Bennett v. Lathrop, 71 Conn. 613, 71 Am. St. Rep. 222, 42 Atl. 634; Hodgson v. Baldwin, 65 Ill. 532; Jenne v. Matlack, 19 Ky. L. Rep. 503, 41 S. W. 11; Crawley v. American Soc. 153 Wis. 13, 139 N. W. 734; McKenney v. Bowie, 94 Me. 397, 47 Atl. 918; Tyrrell v. Washburn, 6 Allen, 466; Bacon, Ben. Soc. 1904, § 120; Niblack, Ben. Soc. 1888, §§ 98–100, 2 Pollock & M. History of English Law, p. 533.

The law can never tolerate that those who join these vast and powerful combinations can escape liability by pleading ignorance or private disapproval of acts done in the execution of the common purpose by the agencies they created. If innocent, they may seek contribution and indemnity for damages they have to pay.

Wooley v. Batte, 2 Car. & P. 417; Horbach v. Elder, 18 Pa. 33; Vandiver v. Pollak, 97 Ala. 467, 19 L.R.A. 628, 12 So. 473; 9 Cyc. 805.

The only acts of the defendants for which the plaintiffs may recover damages in this case are such acts as are set forth in the complaint, and as were done by the defendants or their agents before the suit was commenced, and the plaintiffs are entitled to recover all damages which are the proximate and natural result of such acts, including such damages as may have continued or resulted therefrom after the suit was commenced by the plaintiffs, but cannot recover in this suit for any damages which are the result of the continuation of the alleged conspiracy after the suit was commenced, or which are the result of the performance of any acts in furtherance of said conspiracy after the suit was commenced.

Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821; Van Horn v. Van Horn, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485; Nalle v. Oyster, 230 U. S. 165, 57 L. ed. 1439, 33 Sup. Ct. Rep. 1043; Phelps v. New Haven, & N. Co. 43 Conn. 453; Robinson v. Bland, 2 Burr. 1077; Occidental Consol. Min. Co. v. Comstock Tunnel Co. 125 Fed. 244; Joseph Schlitz Brewing Co. v. Compton, 142 Ill. 511, 18 L.R.A. 390, 34 Am. St. Rep. 92, 32 N. E. 693; Ridley v. Seaboard & R. R. Co. 118 N. C. 996, 32 L.R.A. 708, 24 S. E. 730; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; Jones v. Allen, 29 C. C. A. 318, 56 U. S. App. 529, 85 Fed. 527; 1 Sutherland, Damages, § 113; John D. Park & Sons Co. v. Hubbard, 198 N. Y. 136, 91 N. E. 261; Chicago & N. W. R. Co. v. Hoag, 90 Ill. 347; Hicks v. Herring, 17 Cal. 569; Weston v. Barnicoat, 175 Mass. 456, 49 L.R.A. 612, 56 N. E. 619; Cooper v. Sillers, 30 App. D. C. 567; 23 Cyc. 446, 447; Troy v. Cheshire R. Co. 23 N. H. 101, 55 Am. Dec. 177; Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 782; National Copper Co. v. Minnesota Min. Co. 57 Mich. 83, 58 Am. Rep. 333, 23 N. W. 781, 17 Mor. Min. Rep. 44; Lord v. Carbon Iron Mfg. Co. 42 N. J. Eq. 157, 6 Atl. 812; 1 Joyce, Damages, § 250; 1 Sedgw. Damages, 9th ed. § 869.

On all questions of knowledge and intent it is a well settled rule of law that similar acts prior to the act charged, or subsequent to the act charged, are admissible.

Exchange Bank v. Moss, 79 C. C. A. 278, 149 Fed. 340; Wood v. United States, 16 Pet. 342, 10 L. ed. 987; Wigmore, Ev. §§ 316, 320, subdiv. 2, 325, 333, 363, 364, 370, 382; Moore v. United States, 150 U. S. 60, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; Fisher v. Campbell, 9 Port. (Ala.) 215; Columbia Land & Min. Co. v. Tinsley, 22 Ky. L. Rep. 1082, 60 S. W. 10; Cheshire Provident Inst. v. Vandegrift, 1 Neb. (Unof.) 339, 95 N. W. 615; Rice v. Ege, 42 Fed. 663, 16 Mor. Min. Rep. 179; Elwell v. Russell, 71 Conn. 465, 42 Atl. 862; 1 Greenl. Ev. § 53; Buckeye Powder Co. v. Hazard Powder Co. 205 Fed. 827; Reg. v. Stenson, 12 Cox, C. C. 111; Hedderly v. United States, 114 C. C. A. 227, 193 Fed. 571; Schultz v. United States, 118 C. C. A. 420, 200 Fed. 234; Worden v. United States, 122 C. C. A. 315, 204 Fed. 1; United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; Brown v. United States, 150 U. S. 93, 37 L. ed. 1010, 14 Sup. Ct. Rep. 37; Lawrence v. State, 103 Md. 17, 63 Atl. 96.

The ruling on cross-examination, for the purpose of affecting the truthfulness or accuracy of a witness's testimony, is entirely within the discretion of the trial judge; and the scope of such cross-examination is broader with parties than it is with ordinary witnesses.

Storm v. United States, 94 U. S. 76, 24 L. ed. 42; Langley v. Wadsworth, 99 N. Y. 63, 1 N. E. 106; 40 Cyc. 2506, 2511; Gorman v. Fitts, 80 Conn. 531, 69 Atl. 357; People v. Braun, 158 N. Y. 558, 53 N. E. 529; People v. Meadows, 136 App. Div. 226, 121 N. Y. Supp. 17, affirmed in 199 N. Y. 1, 92 N. E. 128; 40 Cyc. 2482, 2484, 2486, 2507, 2508; State v. Griswold, 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046; Harris v. Rosenberg, 43 Conn. 227; Southern Bell Teleph. & Teleg. Co. v. Watts, 13 C. C. A. 579, 25 U. S. App. 214, 66 Fed. 460; Winn v. Itzel, 125 Wis. 19, 103 N. W. 220; Taggart v. Bosch, 5 Cal. Unrep. 690, 48 Pac. 1092; Jansson v. Larsson, 30 App. D. C. 203; People v. Meadows, 136 App. Div. 226, 121 N. Y. Supp. 17.

It was proper to permit salesmen of the plaintiffs, and salesmen of jobbers who were distributing the plaintiffs' hats, to testify as to the reasons given by customers from whom they were soliciting orders, for their refusal to purchase plaintiffs' hats.

Elmer v. Fessenden, 151 Mass. 361, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208; Hine v. New York Elev. R. Co. 149 N. Y. 154, 43 N. E. 414; Casey v. Cincinnati Typographical Union, 12 L.R.A. 193, 45 Fed. 135; My Maryland Lodge v. Adt, 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; Wigmore, Ev. § 1729, subdiv. 2; Hadley v. Carter, 8 N. H. 42; Steketee v. Kimm, 48 Mich. 322, 12 N. W. 177; Webb v. Drake, 52 La. Ann. 290, 26 So. 791; Weston v. Barnicoat, 175 Mass. 456, 49 L.R.A. 612, 56 N. E. 619; Bausbach v. Reiff, 244 Pa. 559, L.R.A.—, —, 91 Atl. 224.

Extracts from the journal of the United Hatters, and the convention proceedings of the United Hatters, were properly admitted in evidence.

Clune v. United States, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; Connecticut Mut. L. Ins. Co. v. Hillmon, 188 U. S. 218, 47 L. ed. 451, 23 Sup. Ct. Rep. 294.

Extracts from the daily newspapers of Danbury and Norwalk, relative to the boycotting operations of the United Hatters, were properly admitted in evidence.

Glaspie v. Keator, 5 C. C. A. 474, 12 U. S. App. 281, 56 Fed. 203; People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042; Lancaster v. Collins, 115 U. S. 222, 29 L. ed. 373, 6 Sup. Ct. Rep. 33; Adams v. State, 25 Ohio St. 584, 2 Am. Crim. Rep. 393; American F. Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068; 2 Taylor, Ev. §§ 1665, 1666; Leeson v. Holt, 1 Starkie, 186, 18 Revised Rep. 758; Wigmore, Ev. §§ 251-255.

The court properly refused to suppress the depositions of Lynch, Ford, and Riley, and commited no error in admitting in evidence the answers of those deponents, in which they refused to answer on the ground of self-incrimination.

Andrews v. Frye, 104 Mass. 234; Century Dig. Depositions, ¶ 223; Samuel Bros. v. Hostetter Co. 55 C. C. A. 111, 118 Fed. 257; Holladay's Case, 27 Fed. 830; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; Spear v. Coon, 32 Conn. 292; Wendell v. Abbott, 45 N. H. 349; Commercial Bank v. Union Bank, 11 N. Y. 203; First Nat. Bank v. Rush, 29 C. C. A. 333, 56 U. S. App. 556, 85 Fed. 539; Tuskaloosa Cotton-Seed Oil Co. v. Perry, 85 Ala. 158, 4 So. 635; Valton v. National Fund Life Assur. Co. 20 N. Y. 32; Galveston, H. & S. A. R. Co. v. Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78; Cullum v. Smith, 6 Ala. 625.

Mr. Justice Holmes delivered the opinion of the court:

This is an action under the act of July 2, 1890, chap 647, § 7, 26 Stat. at L. 209, 210, Comp. Stat. 1913, §§ 8820, 8829, for a combination and conspiracy in restraint of commerce among the states, specifically directed against the plaintiffs (defendants in error), among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815, where it will be found set forth at length. The substance of the charge is that the plaintiffs were hat manufacturers who employed nonunion labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other states, and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other states. The case now has been tried, [534] the plaintiffs have got a verdict, and the judgment of the district court has been affirmed by the circuit court of appeals. 126 C. C. A. 445, 209 Fed. 721.

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still further since the trial by the case of Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 58 L. ed. 1490, 34 Sup. Ct. Rep. 951. Whatever may

be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman act if it is intended to restrain and restrains commerce among the states.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters, made use of such lists and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employees was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. Loewe v. Lawlor, 208 U. S. 274, 299, 52 L. ed. 488, 500, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815. We agree with the circuit court of appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the [535] plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the "We don't patronize" or "Unfair" list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See Gompers v. United States, 233 U. S. 604, 58 L. ed. 1115, 34 Sup. Ct. Rep. 693. By the Constitution of the United Hatters the directors are to use "all the means in their power" to bring shops "not under our jurisdiction" "into the trade." The by-laws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell nonunion hats. The Federation of Labor, with which the Hatters were affiliated, had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public, especially among the members, in every possible way. If the words of the documents, on their face and without explanation, did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the states. We think it unnecessary to repeat the evidence of the publicity of this particular [536] struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found to have known how the words of those constitutions had been construed in act.

It is suggested that injustice was done by the judge speaking of "proof" that, in carrying out the object of the associations, unlawful means had been used with their approval. The judge cautioned the jury with special care not to take their view of what had been proved from him, going even farther than he need have gone. Graham v. United States, 231 U. S. 474, 480, 58 L. ed. 319, 324, 34 Sup. Ct. Rep. 148. But the context showed plainly that proof was used here in a popular way for evidence, and must have been understood in that sense.

Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct. New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 615, 616, 37 L. ed. 292, 304, 13 Sup. Ct. Rep. 444. We shall not discuss the objections to evidence separately and in detail, as we find no error requiring it. The introduction of newspapers, etc., was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove an intended and detrimental consequence of the principal acts, not to speak of other grounds. The reasons given by customers for ceasing to deal with sellers of the Loewe

hats, including letters from dealers to Loewe & Co., were admissible. 3 Wigmore, Ev. § 1729 (2). We need not repeat or add to what was said by the circuit court of appeals with regard to evidence of the payment of dues after this suit was begun. And, in short, neither the argument [537] nor the perusal of the voluminous brief for the plaintiffs in error shows that they suffered any injustice, or that there was any error requiring the judgment to be reversed.

Judgment affirmed.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plff. in Err.,

v.

CITY OF COVINGTON, John J. Craig, Mayor, and Henry B. Schuler, Chief of Police.

(See S. C. Reporter's ed. 537-549.)

Commerce — what is interstate commerce — transportation by street railway.

1. The traffic carried on by a Kentucky street railway corporation in connection with an Ohio corporation operating on the Ohio side of the Ohio river, in transporting passengers upon continuous and connecting tracks and across an interstate bridge between points in Covington, Kentucky, and Cincinnati, Ohio, by means of continuous trips and a single fare, and under practically the same management,—is interstate commerce.

[For other cases, see Commerce, I. b, in Digest Sup. Ct. 1908.]

Commerce — state regulation — street railways — congressional inaction.

2. The absence of Federal regulation does not justify the city of Covington, Kentucky, in regulating the interstate business of a street railway company principally engaged in transporting passengers from that city to Cincinnati, Ohio, by restricting the number of passengers which the company may admit to its cars to not more than one third in excess of the seating capacity, except on certain holidays, and by requiring the company to operate sufficient cars reasonably to accommodate the public within the limits of such restriction, where compliance with such regulations will require about one half more than the present number of cars operated by the company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges held by the company or controlled by it in that city.

[For other cases, see Commerce, I. c; III. a, in Digest Sup. Ct. 1908.]

Commerce — state regulation — street railways — congressional inaction.

3. Municipal regulation of a street railway company, principally engaged in interstate commerce, with reference to passengers riding on car platforms unless the same are provided with suitable rails or barriers, and with reference to the cleanliness, ventilation, and fumigation of the cars, does not infringe upon the Federal authority over such commerce,—at least, until such Federal authority is exerted.

[For other cases, see Commerce, I. c; III. a, in Digest Sup. Ct. 1908.]

Commerce — state regulation — street railways — temperature of cars.

4. A municipal ordinance providing that the temperature of the cars of a street railway company which is principally engaged in interstate commerce shall never be permitted to be below 50 degrees Fahrenheit must be deemed to be invalid as unreasonable, where the undisputed testimony shows that it is impossible in the operation of the cars to keep them uniformly up to this temperature, owing to the opening and closing of doors, and other interferences that make it impracticable.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

[No. 28.]

Argued October 30, 1914. Decided January 5, 1915.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decree which affirmed a decree of the Circuit Court of Kenton County, in that State, dismissing a suit to enjoin the enforcement of municipal regulations respecting the operation of street cars. Reversed in part and remanded for further proceedings.

See same case below, 146 Ky. 592, 143 S. W. 28.

The facts are stated in the opinion.

Mr. Alfred C. Cassatt argued the cause, and, with Messrs. Frank W. Cottle and Richard P. Ernst, filed a brief for plaintiff in error:

Plaintiff in error would be engaged in interstate commerce in Covington, even if its cars were turned over at the state line to another company, as suggested by the court below.

Cincinnati N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the applicability of the commerce clause, or statutes thereunder, to street railway or interurban roads—see note to Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 46 L.R.A.(N.S.) 385.

On the duty of a railway company to heat cars—see note to Taylor v. Wabash R. Co. 42 L.R.A. 110.

Sup. Ct. Rep. 700; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651.

Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Such a direct regulation of interstate commerce as this was not within the power of the city of Covington or state of Kentucky, even in the absence of Federal legislation on the subject.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277.

This ordinance in its essentials is a comprehensive and direct regulation of interstate commerce, and not a mere police regulation.

Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633.

Even considered as a police regulation the ordinance is unreasonable, and hence an unlawful burden on interstate commerce.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Southern R. Co. v. Com. 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213; McNeil v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Central of Georgia R. Co. v. Murphy, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 120.

The attempted enforcement of such an ordinance, upon all the facts of this case, is in violation of the due process clause of the Constitution.

St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 359, 56 L. ed. 799, 800, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 168, 58 L. ed. 554, 555, 34 Sup. Ct. Rep. 301; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961.

Mr. Frederick W. Schmitz argued the cause and filed a brief for defendants in error:

Even if the performance of the duty of the street railway company, to furnish adequate facilities or accommodation to the public within the corporate limits of the city of Covington, required the company, as an alternative measure, to accord like treatment to its interstate passengers, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed.

Missouri P. R. Co. v. Kansas, 216 U. S. 261, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

It was the duty of the street car company as a common carrier, to furnish sufficient cars for the reasonable accommodation of the public, and it could not be said, as a matter of law, that such duty was performed by a service resulting in a daily occurrence of overcrowded cars, so as to make a regulation by the city of Covington, limiting the number of passengers to be carried within a car to one third as many more as its seating capacity, and requiring the operation of sufficient cars to reasonably accommodate the public, subject to such limitation, so arbitrary and unreasonable as to deprive the street car company of rights protected by the Constitution of the United States.

Missouri P. R. Co. v. Kansas, 216 U. S. 261, 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; People ex rel. Cantrell v. St. Louis,

A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292.

An ordinance of a city requiring a common carrier to perform its duty to furnish sufficient cars for the reasonable accommodation of the public is not unreasonable because of difficulties within the control of the carrier.

Missouri P. R. Co. v. Kansas, supra; North Jersey Street R. Co. v. Jersey City, 75 N. J. L. 349, 67 Atl. 1072; Minneapolis Street R. Co. v. Minneapolis, 189 Fed. 445; Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 661; New York v. Dry Dock, E. B. & B. R. Co. 133 N. Y. 108, 28 Am. St. Rep. 609, 30 N. E. 563; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; 1 Nellis, Street Railroads, 2d ed. § 143.

A provision of an ordinance, leaving it to the court or jury to determine what is "reasonable," does not make the enactment invalid.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

A penalty of $5 to $100 for violating the provisions of an ordinance requiring reasonable accommodation and equipment from a street car company is not so arbitrary and oppressive as to deprive the company of its property without due process of law.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; New York v. Dry Dock, E. B. & B. R Co. 133 N. Y. 108, 28 Am. St. Rep. 609, 30 N. E. 563.

Mr. Justice Day delivered the opinion of the court:

This case originated in a petition filed by the South Covington & Cincinnati Street Railway Company, a corporation of the state of Kentucky, having for its purpose to enjoin the city of Covington from enforcing a certain ordinance regulating the operation of the street cars of the company. The features of the ordinance essential to be considered here are found in its first seven sections, which are:

"Section 1. That it shall be unlawful for any person, [542] corporation, or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the city of Covington, to permit more than one-third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same, provided that this section shall not apply to or be enforced on the days celebrated as Fourth of July, Decoration Day, or Labor Day.

"Section 2. No such person, company, or corporation shall suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car, and no one shall be permitted to stand in such place so provided for such ingress and egress, but the same shall at all times be kept clear, free, and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor, and be subject to a fine of not less than $5 nor more than $50, recoverable in the police court of said city.

"Section 3. No such person, company, or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform, said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from the other person upon said platform, if any, and no person or passengers shall be ever permitted to stand by or remain within the inclosure thus provided for the motorman.

"Section 4. It shall be the duty of every such person, [543] company, or corporation to at all times keep its cars thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant, and the board of health of the city of Covington shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation, and fumigation of such cars, and all such persons, companies, or corporations shall comply with such reasonable rules.

"Section 5. The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

"Section 6. It is hereby made the duty of every company, person, or corporation operating street cars and the street car lines within the corporate limits of the city of Covington, to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the general council of the city of Covington may, by resolution, at any time direct

that the number of cars operated upon any line or route be increased to a sufficient number to so accommodate the public, if there is failure in that respect. Any such person, company, or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by § 2 hereof.

"Section 7. Any person, company, or corporation violating either of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense, recoverable in the police court of the city of Covington, and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all police officers of such city, and others exercising police power, to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons [544] guilty of its infraction. And the chief of police is hereby directed to assign at least one police officer to the special enforcement of this ordinance. It shall be the duty of such officer to examine and observe street cars in operation, and to make arrests and cause proper prosecutions to be started against offenders violating this ordinance."

The circuit court of Kenton county, Kentucky, refused the injunction and dismissed the petition, and this decree was affirmed by the court of appeals of Kentucky (146 Ky. 592, 143 S. W. 28), and the case is brought here.

It was set up in the petition and amended petition that the ordinance is an unlawful interference with interstate commerce, in violation of the Federal Constitution, article I., § 8, giving exclusive authority to Congress over that subject; that it deprives plaintiff of its property without due process of law, in violation of the 14th Amendment; and that it impairs the obligation of a certain contract previously entered into between the plaintiff and the city of Covington, in violation of article I., § 10, of the Constitution.

The testimony shows that the plaintiff is a Kentucky corporation, and its principal occupation is the carrying of passengers in connection with an Ohio corporation which operates on the other side of the Ohio river, upon continuous and connecting tracks, and across a bridge from Covington to Cincinnati, which this court has held to be an instrument of interstate commerce (Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087). This traffic is conducted by means of continuous trips and for single fare, between points on the lines of the railway in Covington and Fourth street or Fountain square in the city of Cincinnati or from any point between Fourth street or Fountain square in the city of Cincinnati to points in the city of Covington. Practically every car is thus engaged in going to or coming from Cincinnati, and from 75 to 80 per cent of the passengers carried [545] in the city of Covington are being transported from Covington to Cincinnati, or from Cincinnati to Covington, or farther in Kentucky. The cars operate without change of motormen or conductors, and under the direction of the same officers.

This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion. Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce. Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 336, 57 L. ed. 1501, 1506, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890. A contrary conclusion was reached in this case by the Kentucky court of appeals upon the authority of Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330, but that case concerns an order under authority of the state of Kansas, requiring the running of a passenger train wholly within the state. It was pointed out in the course of the opinion that the order did not deal with an interstate train, or put a burden upon such train, but simply required the operation within the state of a local train, the duty of operating such train arising from the charter obligation of the company.

Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the Federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution? [546] In numerous instances this court has sustained local en-

actments, passed in the exercise of the police power of the state, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given much consideration in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety, and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce. Summing up the matter, it is there stated:

"Our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

In the light of the principles settled and declared, the various provisions of this ordinance must be examined. [547] That embodied in §§ 1 and 6 makes it unlawful for the company to permit more than one third greater in number of the passengers to ride or be transported within its cars over and above a number for which seats are provided therein, except this provision shall not apply or be enforced on the Fourth of July, Decoration Day, or Labor Day, and by § 6 it is made the duty of the company operating the cars within the city of Covington to run and operate the same in sufficient numbers at all times to reasonably accommodate the public, within the limits of the ordinance as to the number of passengers permitted to be carried, and the council is authorized to direct the number of cars to be increased sufficiently to accommodate the public if there is a failure in this respect. To comply with these regulations, the testimony shows, would require about one half more than the present number of cars operated by the company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges held by the company, or controlled by it, in that city. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the state. We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business [548] might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in Hall v. DeCuir, 95 U. S. 485, 489, 24 L. ed. 547, 548, "commerce cannot flourish in the midst of such embarrassments."

We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of Federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered.

There are other parts of the ordinance which we are of opinion are within the authority of the state, and proper subject-matter for its regulation; at least, until the Federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided, separating the motorman from the balance of the front platform,

as well as those provisions with reference to the requirement to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands. New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 291, 292, 58 L. ed. 1312, 1317, 1318, 34 Sup. Ct. Rep. 829. As to the regulation affecting the temperature of the cars, and providing that they shall never be permitted to be below 50° Fahrenheit, the undisputed testimony [549] shows that it is impossible in the operation of the cars to keep them uniformly up to this temperature, owing to the opening and closing of doors, and other interferences that make it impracticable. We therefore think, upon this showing, this feature of the ordinance is unreasonable and cannot be sustained.

Our conclusion is that the court of appeals of Kentucky erred in refusing the injunction as against the provisions of the ordinance regulating the number of passengers to be carried in a car and the number of cars to be provided, and the requirement as to heating, in view of the testimony as heretofore stated. In these respects its decision should be reversed. We think the other provisions of the ordinance separable, and concerning them the plaintiff in error was not entitled to an injunction in the state court.

Judgment is reversed in part, and the case remanded to the state court for further proceedings not inconsistent with this opinion.

Reversed.

PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF CORNELL STEAMBOAT COMPANY, Plff. in Err.,

v.

WILLIAM H. SOHMER, as Comptroller of the State of New York.

(See S. C. Reporter's ed. 549-561.)

Commerce — carriers by water — state and Federal licenses.

1. The annual excise tax or license fee equal to $\frac{1}{10}$ of 1 per cent upon gross earnings from transportation originating and terminating within the state, which is imposed by N. Y. tax law, § 184, upon transportation and transmission corporations and associations for the privilege of carrying on business in the state in a corporate or organized capacity, is not an invalid regulation of commerce as applied to a navigation company engaged in the business of towing upon the Hudson river under the authority of a license granted by the United States, since the charge is not upon the navigation of the river, but upon the doing of business within the state as a corporation of the state, which may be carried on by individuals without paying any charge. [For other cases, see Commerce, 295-307, in Digest Sup. Ct. 1908.]

Commerce — state regulation — gross earnings of navigation company — route partly in other state.

2. No taxation of interstate commerce results from including the earnings derived by a New York corporation from towing vessels between ports in that state over a course in the Hudson river lying partly in the state of New Jersey when computing the annual excise or license tax equal to $\frac{1}{10}$ of 1 per cent upon gross earnings from transportation originating and terminating within the state, which is imposed by N. Y. tax law, § 184, upon transportation and

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NOTE. — As to state licenses or taxes, generally, as affecting interstate commerce —see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

On taxation of corporate franchises—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

As to whether a state may regulate the transportation between points within the state over route which passes outside the state—see note to Hanley v. Kansas City Southern R. Co. 47 L. ed. U. S. 333.

As to whether shipments between points in the same state lose their character of domestic commerce by passing out of the state during transit—see note to Campbell v. Chicago, M. & St. P. R. Co. 17 L.R.A. 443.

As to whether transportation between points in the same state, over a route part of which is another state, constitutes interstate commerce—see note to Missouri, K. & T. R. Co. v. Leibengood 28 L.R.A.(N.S.) 985.

transmission corporations and associations for the privilege of carrying on business in the state in a corporate or organized capacity.

[For other cases, see Commerce, III. d, 3, in Digest Sup. Ct. 1908.]

[No. 62.]

Argued and submitted November 5, 1914.
Decided January 5, 1915.

IN ERROR to the Supreme Court of the State of New York in and for the County of Albany, in that state, to review a judgment affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals, confirming a determination of the state comptroller, who had denied an application for revision and readjustment of a franchise tax on the earnings of a navigation company. Affirmed.

See same case below in Court of Appeals, 206 N. Y. 651, 99 N. E. 1115.

The facts are stated in the opinion.

Messrs. H. T. Newcomb and Amos Van Etten submitted the cause for plaintiff in error. Mr. Lewis E. Carr was on the brief:

The state of New York has no right to impose any tax or burden on earnings derived from business done on navigable waters of the United States with the means, instrumentalities, and facilities provided by the United States.

(a) The place where the business was done was on navigable waters of the United States.

Ex parte Boyer, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434; Hardin v. Jordan, 140 U. S. 371, 381, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 119, 34 L. ed. 394, 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 399, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; The Daniel Ball, 10 Wall. 557, 563, 19 L. ed. 999, 1001; The Montello, 20 Wall. 430, 439, 443, 22 L. ed. 391, 393, 394; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 26, 35, 48 L. ed. 73, 77, 81, 24 Sup. Ct. Rep. 8.

(b) The vessels with which the business was done were vessels of the United States.

Gibbons v. Ogden, 9 Wheat. 1, 189, 190, 6 L. ed. 23, 68, 69; North River S. B. Co. v. Livingston, 3 Cow. 747; Ravesies v. United States, 37 Fed. 447; Sinnot v. Davenport, 22 How. 227, 240, 241, 16 L. ed. 243, 246, 247.

(c) The men employed on the vessels doing the business were licensed under the laws of the United States.

(d) The vessels with which the business was done were operated under and in accordance with the rules and regulations of the United States.

The business so done by the plaintiff in error was not subject to the dominion and control of the state of New York in any respect, and that state therefore could not subject it to any tax or burden.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Gilman v. Philadelphia, 3 Wall. 724, 18 L. ed. 99; Gibbons v. Ogden, 9 Wheat. 1, 213, 6 L. ed. 23, 74; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Harman v. Chicago, 147 U. S. 396, 404, 405, 37 L. ed. 216, 220, 13 Sup. Ct. Rep. 306; Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 542, 26 L. ed. 224; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 338, 30 L. ed. 1200, 1201, 1202, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; People ex rel. Pennsylvania R. Co. v. Knight, 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152; St. Louis v. Consolidated Coal Co. 158 Mo. 342, 51 L.R.A. 850, 81 Am. St. Rep. 310, 59 S. W. 103; Sinnot v. Davenport, 22 How. 227, 241, 16 L. ed. 243, 246; The Daniel Ball, 10 Wall. 557, 564, 565, 19 L. ed. 999, 1001, 1002; The Belfast, 7 Wall. 624, 640, 19 L. ed. 266, 270; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 19, 20, 54 L. ed. 355, 362, 363, 30 Sup. Ct. Rep. 190.

The right of a state to impose a tax is based upon the protection or opportunity it affords or the privilege it grants to the one who is subjected to the tax.

Gibbons v. Ogden, 9 Wheat. 1, 213, 6 L. ed. 23, 74; Harman v. Chicago, 147 U. S. 396, 405, 406, 37 L. ed. 216, 220, 221, 13 Sup. Ct. Rep. 306; M'Culloch v. Maryland, 4 Wheat. 316, 436, 4 L. ed. 579, 608.

The business as done in part involved movement of the tows in the state of New Jersey as well as New York.

Gibbons v. Ogden, 9 Wheat, 214, 6 L. ed. 74; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; People ex rel. Fifth Ave. Bldg. Co. v. Williams, 198 N. Y. 247, 193 Am. St. Rep. 809, 91 N. E. 638; People ex rel. New York C. & H. R. R. Co. v. Morgan, 57 App. Div. 302, 68 N. Y. Supp. 135, affirmed in 168 N. Y. 1, 60 N. E. 1041; Southern R. Co. v. United States, 222 U. S. 20, 27, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 57, 69 N. E. 124.

Mr. Franklin Kennedy argued the cause, and, with Mr. Thomas Carmody, Attorney General of New York, filed a brief for defendant in error:

The decision of the court of appeals of the state of New York, that the earnings upon which the taxes were imposed were not included in the exemption contained in § 184 of the tax law, is conclusive upon this court, and will be accepted by it as correct.

Post v. Kendall County, 105 U. S. 667, 26 L. ed. 1204; Manley v. Park, 187 U. S. 547, 47 L. ed. 296, 23 Sup. Ct. Rep. 208; Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Baccus v. Louisiana, 232 U. S. 337, 58 L. ed. 629, 34 Sup. Ct. Rep. 439.

It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.

Munn v. Illinois, 94 U. S. 113, 135, 24 L. ed. 77, 87.

The tax imposed by § 184 is a tax upon the exercise of corporate franchises, and not a tax directly on property or gross earnings.

Flint v. Tracy Co. 220 U. S. 108, 163, 55 L. ed. 389, 418, 31 Sup. Ct. Rep. 342; People ex rel. Connecting Terminal R. Co. v. Miller, 178 N. Y. 194, 70 N. E. 472; People ex rel. Pennsylvania R. Co. v. Knight, 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152; People v. Home Ins. Co. 92 N. Y. 328, affirmed in 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; People ex rel. United States Aluminum Printing Plate Co. v. Knight, 174 N. Y. 475, 63 L.R.A. 87, 67 N. E. 65.

The power of Congress over navigable streams is derived from two clauses in the Constitution: (1) The commerce clause, giving Congress power "to regulate commerce with foreign nations, and among the several states," and (2) the clause providing that the judicial power of the United States "shall extend to all cases of admiralty and maritime jurisdiction." The latter clause is held to give Congress power to enact and amend the general maritime code of the country, although the clause itself relates only to the jurisdiction of the courts.

Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840.

The state of New York succeeded after the Revolution to all the powers of the King and Parliament with respect to navigable waters within its boundaries, subject only to the limitations placed on those powers by the United States Constitution.

People v. New York & S. I. Ferry Co. 68 N. Y. 71; Langdon v. New York, 93 N. Y. 129.

A tax imposed under § 184 of the tax law of the state of New York, on a domestic corporation of the state of New York, for the privilege of exercising its corporate franchise, measured by the gross earnings of business done on navigable waters of the United States, is not an interference with Federal control of such waters.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 211, 29 L. ed. 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Michigan C. R. Co. v. Powers, 201 U. S. 245, 296, 50 L. ed. 744, 762, 26 Sup. Ct. Rep. 459; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Flint v. Stone Tracy Co. 220 U. S. 107, 165, 55 L. ed. 389, 419, 31 Sup. Ct. Rep. 342; Meyer v. Wells, F. & Co. 223 U. S. 298, 301, 56 L. ed. 445, 447, 32 Sup. Ct. Rep. 218; United States Exp. Co. v. Minnesota, 223 U. S. 335, 344, 56 L. ed. 459, 464, 32 Sup. Ct. Rep. 211; Ewing v. Leavenworth, 226 U. S. 464, 469, 57 L. ed. 303, 305, 33 Sup. Ct. Rep. 169; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, L.R.A. —, —, 34 Sup. Ct. Rep. 15; New York ex rel. Annan v. Walsh, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

The comptroller's determination must stand unless clearly shown to be erroneous.

People ex rel. John A. Roebling's Sons' Co. v. Wemple, 138 N. Y. 587, 34 N. E. 386; People ex rel. Western Electric Co. v. Campbell, 145 N. Y. 587, 40 N. E. 239; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 27, 48 L. ed. 325, 327, 24 Sup. Ct. Rep. 202, affirming 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152.

The gross earnings by which the tax on the corporate franchises of the relator is measured were not derived from business of an interstate character.

Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; United States ex rel. Kellogg v. Lehigh Valley R. Co. 115 Fed. 373; United States ex rel. Interstate Commerce Commission v. Chicago, K. & S. R. Co. 81 Fed. 783; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912; People ex rel. Pennsylvania R. Co. v. Knight, 171 N. Y. 364, 98 Am. St. Rep. 610, 64 N. E. 152, affirmed in 192 U. S. 21, 27, 48 L. ed. 325, 327, 24 Sup. Ct. Rep. 202;

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

Even if the gross earnings were derived from business of an interstate character, yet the state could constitutionally and legally measure its tax on the exercise of the franchises of its domestic corporations by such gross earnings.

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Ewing v. Leavenworth, 226 U. S. 464, 469, 57 L. ed. 303, 305, 33 Sup. Ct. Rep. 169; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; People ex rel. Pennsylvania R. Co. v. Wemple, 138 N. Y. 6, 19 L.R.A. 694, 33 N. E. 720; People ex rel. Pennsylvania R. Co. v. Knight, 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152; People ex rel. Connecting Terminal R. Co. v. Miller, 178 N. Y. 202, 70 N. E. 472; People ex rel. International Elevating Co. v. Roberts, 116 App. Div. 30, 101 N. Y. Supp. 184; People ex rel. United States Aluminum Printing Plate Co. v. Knight, 174 N. Y. 475, 63 L.R.A. 87, 87 N. E. 65; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515; People ex rel. American Soda Fountain Co. v. Roberts, 158 N. Y. 174, 52 N. E. 1104.

Mr. Justice Day delivered the opinion of the court:

The proceeding which resulted in the judgment here complained of originated in an application by the Cornell Steamboat Company to review by certiorari a decision of the comptroller of New York, denying a petition for revision and readjustment of taxes imposed by the comptroller on the steamboat company for the years 1902 and 1903. These taxes were imposed under § 184 of the Tax Laws of New York, which, so far as it is pertinent here, reads:

"Section 184. Additional franchise tax on transportation [556] and transmission corporations and associations.—Every corporation . . . formed for . . . navigation . . . purposes . . . shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to $\frac{4}{10}$ of 1 per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character."

In the year 1902 and 1903, the comptroller of the state imposed upon the steamboat company taxes on its earnings for those years, and denied the application for a revision and readjustment. The writ of certiorari was afterwards issued from the supreme court of New York upon petition to review and correct the determination of the comptroller. The matter was heard in the appellate division of the supreme court of New York, and that court affirmed the determination of the comptroller. Appeal was taken to the court of appeals of New York, and that court affirmed the order appealed from, and remitted the case to the supreme court of the state. 206 N. Y. 651, 99 N. E. 1115. This writ of error is sued out to reverse the judgment.

Taxes were assessed upon the return of the steamboat company for the year 1902: "Gross earnings, not interstate business, derived from all sources during the above period, $377,146.33;" also on the return for the year 1903: "Gross earnings on business commenced and terminated in the territorial limits of New York, derived from towing charges upon the Hudson river (navigable waters of the United States), earned with vessels enrolled and licensed by the U. S. government, *i. e.*, business which is regulated by the U. S. government, and which it is claimed is not taxable by the state of New York, $394,505.59;" which [557] return was followed by a supplemental return: "State of New York, County of Ulster, *ss.* George Coykendall, being duly sworn, says that he is the vice president of the Cornell Steamboat Company; that the report of gross earnings in the state of New York, of the Cornell Steamboat Company for the year ending June 30th, 1903, verified by me on September 17th, 1903, should be amended as follows: That the statement in such report of business commenced and terminated within the territorial limits of the state of New York, derived from towing charges upon the Hudson river, is made up largely of towing done in the following manner, as deponent knows from personal knowledge and information derived from the superintendent of the company, to wit: Tows for up-river points on the Hudson river are made up at a stakeboat located at Weehawken, within the territorial limits of the state of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken to the stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river

is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both states, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the state of New Jersey is included in the Hudson river and New York bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either state. Deponent further says that he desires to file this affidavit as a correction of the report verified September 17th, 1903, by him, which report [558] was filed with the state comptroller on or about the 17th day of September, 1903."

These returns may be supplemented by a statement from the brief of plaintiff in error, derived from the record, as to the manner in which the towing business of the company was done: "The tows were made up in the Hudson river at Albany, New York, or its vicinity, and the steamboat company, the plaintiff in error, thereupon attached a towing line connecting the tows with its tugs or steamers, and moved the tows down or up the river, leaving the tows up-bound in the river at Albany or its immediate vicinity, and those bound down the river in the bay at New York city or in the waters adjacent thereto."

It is apparent from a consideration of § 184 that the tax here imposed upon transmission and transportation corporations is for the privilege of carrying on the business in a corporate capacity within the state of New York, for which an annual excise tax or license fee is exacted equal to $\frac{1}{10}$ of 1 per centum upon the gross earnings on transportation originating and terminating in the state of New York. By its express terms, the statute provides that the tax shall not include earnings derived from business of an interstate character.

It is contended that as the business of towing carried on by the plaintiff company is done upon the navigable waters of the United States, and under authority of a license granted by the United States, the state has no jurisdiction or authority to levy the tax in question, and that it is in reality and substance an attempt to enforce a license tax for the privilege of navigating the public waters of the United States,—a privilege already granted under the general government. (See §§ 4400 and 4401 of the Revised Statutes of the United States [Comp. Stat. 1913, §§ 8152, 8153], and also §§ 4438-4443 [Comp. Stat. 1913, §§ 8200-8205], providing for the license of officers of vessels.)

The right of the Federal government to regulate commerce, [559] under §§ 1, 8, subdivision 3, of the Federal Constitution, giving Congress control over interstate commerce, confers the supreme authority over navigable rivers and streams for the purpose of regulating navigation, and all that pertains thereto; and under this authority the Federal government is supreme and may not be interfered with by the laws of the states. The subject is fully discussed in United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579. The tax here in question does not impose a license tax as a prerequisite to the navigation of the river, as was the case in Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 300, cited and relied upon by the plaintiff in error, where an ordinance of the city of Chicago, imposing a license tax for the privilege of navigating the Chicago river and its branches by steam tugs licensed under the Federal authority, was held an unconstitutional exaction, as it required payment for a privilege which had already been granted within the authority of the Federal government.

In the case now before the court, the tax, as was said by Chief Judge Cullen, in delivering an opinion in the court of appeals in New York in this case, concurring in the order affirming the court below without opinion, is levied upon the corporation for the privilege of carrying on its business in a corporate or organized capacity. As the chief judge says, if the parties beneficially interested in the company are dissatisfied with the price exacted by the state for this privilege, they may carry on the business as individuals without paying any charge. In other words, the charge is not upon the navigation of the river, but is upon the doing of business as a corporation of the state within the state. While the state may not require a navigation license except in very exceptional cases, as for compensation for improvements which the state has made (a situation not presented here), it may, certainly as to a corporation of its own creation, having [560] property within its borders, enforce its usual and customary systems of taxation without infraction of the superior authority and laws of the United States concerning the navigation of rivers.

With this view of the tax now under consideration, we think the state did not exceed its authority in its imposition of a tax for the purpose stated.

But it is urged that this is a tax upon

interstate commerce, and therefore beyond the power of the state, notwithstanding the statute undertakes to exempt the proceeds of interstate commerce from taxation. That interstate commerce is necessarily taxed is said to arise from the fact that the business of the company is in fact interstate commerce, as shown by its additional return, from which it appears that vessels for up-river points on the Hudson river are taken by tows, which are made up at a stakeboat located at Weehawken, which is within the territorial limits of New Jersey; that these stakeboats are anchored in the river just below Weehawken ferry, and that the course up the river is in territory of New York and New Jersey. But transportation between the ports of the state is not interstate commerce, excluded from the taxing power of the state, because as to a part of the journey the course is over the territory of another state. Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; Ewing v. Leavenworth, 226 U. S. 464, 57 L. ed. 303, 33 Sup. Ct. Rep. 169, and see Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 183, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208. Weehawken is opposite New York harbor, and the business upon which the tax is here imposed is all done between New York ports, and the record shows distinctly that no earnings were returned for tugs operated in New York harbor and ports outside the state. Such business was deducted as interstate business, and not taxable under the terms of the statute. It is evident that the making up of the tows for the state ports in the river below Weehawken was for convenience in conducting domestic transportation.

[561] We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the state, and that the return on which the tax was assessed did not involve the revenues of commerce among the states, and this contention must be rejected.

It follows that the decision of the Supreme Court of New York must be affirmed.

HENRY A. GILBERT, Administrator of Isaac H. Selleck, Deceased, Plff. in Err.,
v.
EMMA S. DAVID, Administratrix of Darius Selleck, Deceased, and Benjamin S. Selleck and Robert Selleck, Executors of Benjamin Selleck, Deceased.

(See S. C. Reporter's ed. 561-571.)

Courts — jurisdiction — citizenship of plaintiff — when in issue.

1. The citizenship of plaintiff in a suit in a Federal court must be deemed to have been in issue where the defendants averred in their answer that they had no knowledge or information as to such citizenship, and would "leave him to proof thereof," which form of denial under the state practice raises the issue, and the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court, and a motion of plaintiff to strike off a motion to dismiss for want of jurisdiction was based upon the ground that that issue was already made in the pleadings.

[For other cases, see Courts, V. c, 1, b; Trial, II., in Digest Sup. Ct. 1908.]

Trial — province of court and jury — question of citizenship.

2. The issue of the citizenship of the plaintiff in a suit brought in a Federal court need not be submitted to the jury, but may be disposed of by the court upon the testimony introduced by the parties upon that question.

[For other cases, see Trial, VI., in Digest Sup. Ct. 1908.]

Laches — as bar to raising question of jurisdiction.

3. A delay of several years in forcing to

Note.—Generally, as to diverse citizenship as ground of Federal jurisdiction—see notes to Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Roberts v. Lewis, 36 L. ed. U. S. 579; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; and McDonald v. Smalley, 7 L. ed. U. S. 287.

On presumption of citizenship from residence—see note to State ex rel. Phelps v. Jackson, 8 L.R.A.(N.S.) 1245.

On laches as a defense—see notes to Middletown v. Newport Hospital, 1 L.R.A. 191; Calhoun v. Delhi & M. R. Co. 8 L.R.A. 248; Coffey v. Emigh, 10 L.R.A. 125; Pratt v. Carroll, 3 L. ed. U. S. 627; Hammond v. Hopkins, 36 L. ed. U. S. 135; Felix v. Patrick, 36 L. ed. U. S. 720; and Abraham v. Ordway, 39 L. ed. U. S. 1037.

As to domicil as fixing the national character, see note to Warren v. Board of Registration, 2 L.R.A. 203.

As to change of domicil as affected by removal for benefit of health—see note to Pickering v. Winch, 9 L.R.A.(N.S.) 1159.

On going to another state, county, or district to teach school or preach, as affecting a change of domicil or residence—see note to Dignam v. Shaff, 22 L.R.A.(N.S.) 996.

As to when nonresidence of person intending to leave permanently begins for purpose of attachment or exemption—see note to Brown v. Beckwith, 1 L.R.A.(N.S.) 778.

As to loss of domicil by abandonment without intention of returning, before acquiring a new one—see note to Barhydt v. Cross, 40 L.R.A.(N.S.) 986.

As to gaining new domicil or residence before abandoning occupation of old residence, by purchasing or hiring property in new locality with intention of establishing permanent residence there—see note to People v. Turpin, 33 L.R.A.(N.S.) 766.

trial a cause in a Federal court in which the issue of the citizenship of the plaintiff was made when the answer was filed, some two years after the filing of the complaint, is not such laches as precludes the consideration of such issue at the trial, although the state statute of limitations may have run so as to prevent the bringing of a new action in the state courts.

[For other cases, see Limitation of Actions, I. b; Courts, V. c, 1, b, in Digest Sup. Ct. 1908.]

Domicil — change — intention to return.

4. One who removes with his family from Michigan to Connecticut upon the death of a relative in the latter state, and resides there continuously until his death in a house to which he holds title, taking with him his church letter, and selling the Michigan homestead and much of the furniture used there, acquires a domicil in Connecticut so far as Federal jurisdiction is concerned, although he may have had some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut, should he succeed in disposing of it for what he considered it worth.

[For other cases, see Domicil, II., in Digest Sup. Ct. 1908.]

[No. 97.]

Argued December 4, 1914. Decided January 5, 1915.

IN ERROR to the District Court of the the United States for the District of Connecticut to review a judgment dismissing a suit for want of jurisdiction because of the citizenship of the plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. Howard W. Taylor argued the cause and filed a brief for plaintiff in error:

Since the act of March 3, 1875, the trial court has had the right to elect whether he would himself try a question as to diversity of citizenship, or whether he would submit the matter to the jury as a separate and distinct issue.

Wetmore v. Rymer, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293.

In many cases the question has been submitted to the jury as a separate question, and usually a plea in abatement has been filed.

Jones v. League, 18 How. 76, 15 L. ed. 263; Chicago & M. W. R. Co. v. Ohle, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632; Rucker v. Bolles, 25 C. C. A. 600, 49 U. S. App. 358, 80 Fed. 504; Terry v. Davy, 46 C. C. A. 141, 107 Fed. 50; Lebensberger v. Scofield, 71 C. C. A. 476, 139 Fed. 382; Kirven v. Virginia-Carolina Chemical Co. 76 C. C. A. 172, 145 Fed. 288, 7 Ann. Cas. 219.

Where the plaintiff's pleading sets out the necessary diverse citizenship of the party, the burden of both allegation and proof to the contrary rests upon the party who seeks to defeat the jurisdiction.

National Masonic Acci. Asso. v. Sparks, 28 C. C. A. 399, 49 U. S. App. 681, 83 Fed. 225; Wiemer v. Louisville Water Co. 130 Fed. 244; Kilgore v. Norman, 119 Fed. 1006; Foster v. Cleveland, C. C. & St. L. R. Co. 56 Fed. 434; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 805; Gaddie v. Mann, 147 Fed. 955; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 248; Chase v. Wetzlar, 225 U. S. 79, 56 L. ed. 990, 32 Sup. Ct. Rep. 659.

Whether the court elects to submit the question to the jury, or to determine it himself, its proper issue must be made in the pleadings, and only evidence pertinent to the issues made by the party, or to the inquiry instituted by the court, can be considered.

Hartog v. Memory, 116 U. S. 590, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; Wetmore v. Rymer, 169 U. S. 122, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; Imperial Ref. Co. v. Wyman, 3 L.R.A. 503, 38 Fed. 574; Pike County v. Spencer, 112 C. C. A. 433, 192 Fed. 11; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 248; Every Evening Printing Co. v. Butler, 75 C. C. A. 657, 144 Fed. 916.

In the case at bar there were no issues made in the pleadings, either by the parties themselves, or at the direction of the court, which properly raised the alleged jurisdictional defect.

Hart v. Granger, 1 Conn. 170; Perkins v. Perkins, 7 Conn. 565, 18 Am. Dec. 120; G. M. Williams Co. v. Mairs, 72 Conn. 430, 44 Atl. 729; Jones v. League, 18 How. 76, 15 L. ed. 263; Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632; Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; Cuthbert v. Galloway, 35 Fed. 466; Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 248; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 805; National Masonic Acci. Asso. v. Sparks, 28 C. C. A. 399, 49 U. S. App. 681, 83 Fed. 225; Foster v. Cleveland, C. C. & St. L. R. Co. 56 Fed. 434; Every Evening Printing Co. v. Butler, 75 C. C. A. 657, 144 Fed. 916.

Upon the facts proven, the court erred in holding that the evidence showed the plaintiff to be a citizen of the state of Connecticut.

Wetmore v. Rymer, 169 U. S. 122, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; Gaddie v. Mann, 147 Fed. 955; Howe v. Howe & O. Ball Bearing Co. 83 C. C. A. 536, 154 Fed. 820; Pike County v. Spencer, 112 C. C. A. 433, 192 Fed. 13; Williamson v. Osenton,

232 U. S. 619, 58 L. ed. 758, 34 Sup. Ct. Rep. 442.

The law as to payment of poll taxes is not restricted to such inhabitants as are citizens of the state, unless expressly so limited by the statute, but applies to resident aliens as well.

Opinion of Justices, 7 Mass. 523; Kuntz v. Davidson County, 6 Lea, 65; State, Potter, Prosecutor, v. Ross, 23 N. J. L. 517; On Yuen Hai Co. v. Ross, 8 Sawy. 384, 14 Fed. 338; 37 Cyc. 811.

The doctrine of laches may and should be invoked, even in case of alleged lack of jurisdiction of a Federal court owing to lack of diversity of citizenship.

Briggs v. Traders' Co. 145 Fed. 254; Re Cleland, 218 U. S. 122, 54 L. ed. 964, 30 Sup. Ct. Rep. 647; Deputron v. Young, 134 U. S. 251, 33 L. ed. 928, 10 Sup. Ct. Rep. 539; Hartog v. Memory, 116 U. S. 592, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; Toledo Traction Co. v. Cameron, 69 C. C. A. 28, 137 Fed. 55.

Messrs. Frederick H. Wiggin and A. T. Bates argued the cause and filed a brief for defendants in error:

The plaintiff was domiciled in, and a citizen of, Connecticut when the action was brought, and was not a citizen of Michigan.

Mitchell v. United States, 21 Wall. 352, 22 L. ed. 587; Williamson v. Osenton, 232 U. S. 619, 624, 58 L. ed. 758, 761, 34 Sup. Ct. Rep. 442; Shelton v. Tiffin, 6 How. 185, 12 L. ed. 397; Davis v. Dixon, 184 Fed. 509; Jones v. Subera, 150 Fed. 462; Reckling v. McKinstry, 185 Fed. 842; Pacific Mut. L. Ins. Co. v. Tompkins, 41 C. C. A. 488, 101 Fed. 539; Butler v. Farnsworth, 4 Wash. C. C. 101, Fed. Cas. No. 2,240.

It was not error to render judgment dismissing the cause upon the pleadings as they stood.

Morris v. Gilmer, 129 U. S. 327, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; Anderson v. Watt, 138 U. S. 694–701, 34 L. ed. 1078–1081, 11 Sup. Ct. Rep. 449; Roberts v. Lewis, 144 U. S. 653, 36 L. ed. 579, 12 Sup. Ct. Rep. 781; Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616; W. L. Wells Co. v. Gastonia Cotton Mfg. Co. 198 U. S. 177, 49 L. ed. 1003, 25 Sup. Ct. Rep. 640; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 241; Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719.

Even under the state practice a plea to the jurisdiction is unnecessary, if want of jurisdiction of the subject-matter becomes otherwise apparent.

Olmstead's Appeal, 43 Conn. 114; Banks v. Porter, 39 Conn. 307; Wildman v. Rider, 23 Conn. 172.

The court committed no error in taking the question of jurisdiction from the jury.

Rosenbaum v. Bauer, 120 U. S. 450, 459, 30 L. ed. 743, 747, 7 Sup. Ct. Rep. 633.

Mr. Justice Day delivered the opinion of the court:

This case is here upon writ of error and certificate presenting the question of jurisdiction of the district court. It comes under § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215], and presents to this court the question of jurisdiction only. The suit was begun on November 5th, 1904, in the United States circuit court for the district of Connecticut. On May 24th, 1905, a substituted complaint was filed. The object of the suit was to recover for alleged breaches of a certain indemnity contract set forth in the complaint. In this substituted complaint, as well as in the original complaint, the allegation as to diverse citizenship is that plaintiff is a citizen of the state of Michigan, and defendants are citizens of the state of Connecticut. On August 3d, 1907, an answer was [566] filed, in which it was admitted that the defendants were citizens of the state of Connecticut, and it was averred that the defendants had no knowledge or information as to the citizenship of the plaintiff, and would "leave him to proof thereof." On April 27th, 1911, the defendants filed a motion to dismiss the suit for want of jurisdiction. On October 5th, 1911, defendants filed another motion to dismiss for want of jurisdiction. On October 6th, 1911, the plaintiff filed a motion to strike the last-mentioned motion from the files. Both of the motions to dismiss were upon the ground that the plaintiff was not a citizen of the state of Michigan, but was a citizen of the state of Connecticut. The motion of the plaintiff to strike the last-mentioned motion from the files was upon the ground, among others, that the motion was an improper and irregular method of raising the question of jurisdiction, and because that matter was already in issue under the allegations of complaint and answer.

After the taking effect of the Judicial Code on January 1st, 1912, the case was transferred to the district court of the United States for the district of Connecticut. On August 26th, 1912, a jury was impaneled, and the case came on for trial. The court directed that the trial should proceed upon the question of jurisdiction. Thereupon the parties proceeded to offer testimony upon the question of plaintiff's residence. At the conclusion of this testimony, the court found that the plaintiff and defendants were citizens of the state of Connecticut at the time the action was

begun, and accordingly dismissed the suit upon the sole ground of want of jurisdiction, and ordered the jury discharged from further consideration of the case.

The act of 1875 [18 Stat. at L. 472, chap. 137], § 5, now § 37 of the Judicial Code [36 Stat. at L. 1098, chap. 231, Comp. Stat. 1913, § 1019], provides:

"If, in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district [567] court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This section defines the duty of the district court of the United States when it shall appear to its satisfaction that the suit does not really and substantially involve a dispute or controversy properly within the court's jurisdiction. While this section gives the court the right to dismiss a suit when that situation appears, whether the parties raise the question or not, it is the duty of the defendant to bring the matter to the attention of the court, in some proper way, where the facts are known upon which a want of jurisdiction appears. Deputron v. Young, 134 U. S. 241, 251, 33 L. ed. 923, 928, 10 Sup. Ct. Rep. 539. Under the former practice, before the passage of the act of 1875, above quoted, it was necessary to raise the issue of citizenship by a plea in abatement, when the pleadings properly averred the citizenship of the parties. Farmington v. Pillsbury, 114 U. S. 138, 143, 29 L. ed. 114, 116, 5 Sup. Ct. Rep. 807; Little v. Giles, 118 U. S. 596, 604, 30 L. ed. 269, 272, 7 Sup. Ct. Rep. 32. The objection may be made now by answer before answering to the merits, or it may be made by motion. Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616. The statute does not prescribe any particular mode by which the question of jurisdiction is to be brought to the attention of the court, and the method of raising the question may be left to the sound discretion of the trial judge. Wetmore v. Rymer, 169 U. S. 115, 121, 42 L. ed. 682, 684, 18 Sup. Ct. Rep. 293. It may be raised by a general denial in the answer, where the state practice permits of that course. Roberts v. Lewis, 144 [568] U. S. 653, 36 L. ed. 579, 12 Sup. Ct. Rep. 781. In the state of Connecticut, under the form of denial contained in this answer, the answer raised the issue. Sayles v. Fitzgerald, 72 Conn. 391, 396, 44 Atl. 733. Moreover, the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court. The motion of the plaintiff to strike off the motion to dismiss for want of jurisdiction was based upon the ground that that issue was already made in the pleadings. The question was properly before the court.

It is also insisted that the court erred in itself considering the testimony, and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so; the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject. Wetmore v. Rymer, supra.

It is urged that the delay in making the issue and bringing it to a hearing was such laches upon the part of the defendants as to preclude the consideration of the question. The issue was made when the answer was filed, but for some reason neither party forced the case to trial. Apart from the imperative duty of the court to dismiss the action under the statute, when it appears that the case is not within the jurisdiction of the court, we find nothing in the conduct of the parties to support the suggestion of laches. If it be true that the statute of limitations would prevent the beginning of a new action in the state court, that fact cannot confer jurisdiction upon a court of the United States, in the absence of a showing of diverse citizenship.

As the record brings up the testimony upon which the court below decided the question, it becomes the duty of this court to consider it and determine whether the court rightly found that the plaintiff at the beginning of the suit was not a citizen of the state of Michigan. Wetmore v. [569] Rymer, supra. If the plaintiff was domiciled in the state of Michigan when this suit was begun, he was a citizen of that state within the meaning of the Judicial Code. Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Williamson v. Osenton, 232 U. S. 619, 624, 58 L. ed. 758, 761, 34 Sup. Ct. Rep. 442. In this case it clearly appears that for some years prior to 1890 the plaintiff lived in Menominee, in the state of Michigan. He had there a home, and exercised the ordinary duties and privileges of citizenship. In

February, 1890, his uncle died in Connecticut, and the plaintiff immediately went to Danbury, in that state, where he remained practically all the time until his death, in 1911.

The question is, Had he lost his domicil in Michigan and acquired one in Connecticut, so that he was, at the beginning of the suit in 1904, in reality a citizen of the last-mentioned state?

This matter of domicil has been often before this court, and was last under consideration in the case of Williamson v. Osenton, supra. In that case the definition of domicil, as defined by Mr. Dicey, in his book on "Conflict of Laws," 2d ed. 111, is cited with approval. There change of domicil is said to arise where there is a change of abode and "the absence of any present intention to not reside permanently or indefinitely in the new abode." Or, as Judge Story puts it in his work on "Conflict of Laws," 7th ed. § 46, page 41, "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period." "The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely." Price v. Price, 156 Pa. 617, 626, 27 Atl. 291.

[570] Applying these definitions to the conduct of plaintiff, we have no doubt that the court was right in holding that he had acquired a new domicil in the state of Connecticut. He removed there with his family, and occupied a house to which he held the title. He owned other real estate in Connecticut, inherited from his uncle. He took a letter from his church in Michigan to a church in Danbury, Connecticut. For about ten years he was not back in Michigan, except for a short time, and then for a temporary purpose. The Michigan homestead and much of the furniture used there were sold upon the removal to Connecticut. For more than ten years he resided continuously with his family in the same house in Danbury, Connecticut. While the plaintiff did not vote in Connecticut, as far as the record shows, it is in evidence that he declared to another his intention of becoming a voter there. To some witnesses he declared his purpose to reside in Connecticut. As against this testimony, it appears that he left his desk with his brother-in-law in Michigan, which he declared was for the purpose of "holding his residence there." To some witnesses he declared his intention to live in Michigan, and expressed his preference for that state as a dwelling-place. He continued to pay membership dues to orders to which he belonged in Michigan.

It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut, should he succeed in disposing of it for what he considered it worth. But, as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicil. It was his place of abode, which he had no present intention of changing; that is the essence of domicil.

[571] We find no error in the conclusion of the District Court upon the question of jurisdiction, and its judgment is therefore affirmed.

JEFFREY MANUFACTURING COMPANY, Plff. in Err.,
v.
HARRY O. BLAGG, by Joseph M. Downing, His Next Friend.

(See S. C. Reporter's ed. 571-579.)

Statutes — who may assail validity — discrimination.

1. An employer cannot object to the discrimination, so far as it affects employees by themselves, which the Ohio workmen's compensation act (1 Page & Adams's Anno. Gen. Code [Ohio] §§ 1465 et seq.) makes as between employees in shops with five or more employees and those in shops having a lesser number.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — workmen's compensation — classification on basis of number of employees.

2. Employers having five or more em-

NOTE.—As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579

On constitutionality of compulsory industrial insurance—see notes to State ex rel. Davis-Smith Co. v. Clausen, 37 L.R.A. (N.S.) 466, and Borgnis v. Falk Co. 37 L.R.A.(N.S.) 489.

On constitutionality of statute rendering master liable for injury to servant irrespective of negligence—see note to Ives v. South Buffalo R. Co. 34 L.R.A.(N.S.) 163.

ployees are not denied the equal protection of the laws because their failure to comply with the terms of the Ohio workmen's compensation act (1 Page & Adams's Anno. Gen. Code [Ohio] §§ 1464 et seq.) by paying into a state insurance fund thereby created the premiums required by that act deprives them in negligence suits of the defenses of contributory negligence, assumed risk, and the negligence of fellow servants, while those employing four or less employees are still privileged to make either or all of these defenses.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 511.]

Argued December 1, 1914. Decided January 5, 1915.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Court of Appeals of Franklin County, in that state, affirming a judgment of the Court of Common Pleas of that county, in favor of plaintiff in a personal-injury suit. Affirmed.

The facts are stated in the opinion.

Mr. H. B. Arnold argued the cause, and, with Mr. W. Wilson Carlile, filed a brief for plaintiff in error:

The Ohio workmen's compensation act contravenes the provisions of § 1 of the 14th Amendment to the Constitution of the United States, in that the classification of employers and employees created by the act is arbitrary and unreasonable.

Engel v. O'Malley, 219 U. S. 128, 138, 55 L. ed. 128, 136, 31 Sup. Ct. Rep. 190; Miller v. Crawford, 70 Ohio St. 214, 71 N. E. 631, 1 Ann. Cas. 558; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 76, 55 L. ed. 369, 376, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Billings v. Illinois, 188 U. S. 97-102, 47 L. ed. 400-403, 23 Sup. Ct. Rep. 272; Willoughby, Const. § 484; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Cotting v. Kansas City Stock Yards Co. (Cotting v. Goddard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150-155, 41 L. ed. 666-668, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400-412, 54 L. ed. 536-539, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed 220, 6 Sup. Ct. Rep. 1064; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 257, 52 L. ed. 195, 197, 28 Sup. Ct. Rep. 89; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Chicago, I. & L. R. Co. v. Railroad Commission, 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529.

Messrs. Fred C. Rector and James I. Boulger argued the cause, and, with Mr. Timothy S. Hogan, Attorney General of Ohio, and Mr. F. M. McSweeney, filed a brief for defendant in error:

All questions arising under the state Constitution have been foreclosed by the decision of the supreme court of Ohio in the case of State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602.

The argument there presented is also applicable to the Federal questions involved, in so far as the Federal Constitution and the state Constitution contain similar provisions. Laws of this character have been uniformly upheld against all possible objections.

State ex rel. Davis-Smith Co. v. Clauson, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; Opinion of Justices, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; State v. Mountain Timber Co. 75 Wash. 581, L.R.A.—, —, 135 Pac. 647; Stettler v. O'Hara, 69 Or. 519, L.R.A.—, —, 139 Pac. 543.

A law of this character is within the police power of the state. This power is of very widening force. It is progressive in character, and must be construed so as to meet the modern conditions of society. This becomes very plain when we consider that it is vested in the legislature in order to enable it to establish laws which are for the good and welfare of the commonwealth of its people.

Kansas P. R. Co. v. Mower, 16 Kan. 573; Com. v. Alger, 7 Cush. 85; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Crowley v. Christenson, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; McGehee, Due Process of Law, pp. 301, 362; Holden v. Hardy, 169 U. S. 366, 387, 42 L.

ed. 780, 789, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 76, 49 L. ed. 937, 949, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Hurtado v. California, 110 U. S. 530, 28 L. ed. 237, 4 Sup. Ct. Rep. 111, 292; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Freund, Pol. Power, § 20.

This court has never hesitated to declare that limitations upon state power in the Federal Constitution were not designed to interfere with the exercise of the state police power.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; Cunnius v. Reading School Dist. 198 U. S. 469, 49 L. ed. 1130, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121.

Consequently the test whether due process of law has been violated is that of reasonableness, as distinguished from arbitrary action; but this must not be understood to authorize the court to substitute its judgment for that of the legislature as to the necessity or propriety of legislation.

Noble State Bank v. Haskell, 219 U. S. 104, 32 L.R.A.(N.S.) 1062, 55 L. ed. 112, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Hurtado v. California, 110 U. S. 530, 28 L. ed. 237, 4 Sup. Ct. Rep. 111, 292; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; Ornstine v. Cary, 204 U. S. 669, 51 L. ed. 672, 27 Sup. Ct. Rep. 788; Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 407, 53 L. ed. 848, 29 Sup. Ct. Rep. 527; McGehee, Due Process of Law, pp. 306–308; Gundling v. Chicago, 177 U. S. 185, 44 L. ed. 727, 20 Sup. Ct. Rep. 633; McLean v. Arkansas, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Freund, Pol. Power, § 63.

Discrimination is not invalid if it is not so arbitrary as to be beyond the wide discretion that a legislature may exercise. It may rest on narrow distinction. Whether it makes for public welfare is a matter of legislative judgment, and the courts cannot set aside a law except upon the ground of want of power.

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612.

The Federal Supreme Court is not a place of refuge from oppressive and unequal legislation, as the hardship, impolicy, or injustice of state laws is not necessarily a constitutional objection. With the folly or wisdom of a law the 14th Amendment has no concern.

Billings v. Illinois, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

The constitutional mandate permits classification, and the state may select, distinguish, and classify the objects of legislation.

Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Bachtel v. Wilson, 204 U. S. 42, 51 L. ed. 360, 27 Sup. Ct. Rep. 246; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 106, 43 L. ed. 909, 913, 19 Sup. Ct. Rep. 609; Kansas City Southern R. Co. v. Anderson, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, 34 Sup. Ct. Rep. 790; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 34 Sup. Ct. Rep. 190.

The plaintiff in error must first show,

before it may have the question presented to this court for review, that the alleged unconstitutional feature of the act injures it, and so operates in the case at bar as to deprive it of rights protected by the 14th Amendment.

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 532, 58 L. ed. 714, 34 Sup. Ct. Rep. 359; Southern R. Co. v. King, 217 U. S. 524, 537, 54 L. ed. 868, 873, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann Cas. 1914B, 71.

The classification provided for in the Ohio workmen's compensation act is reasonable, and the law does not contravene § 1 of the 14th Amendment to the United States Constitution.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649: Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 539, 58 L. ed. 713, 717, 34 Sup. Ct. Rep. 359; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 34 Sup. Ct. Rep. 190; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A.—, —, 148 N. W. 71.

Mr. Justice Day delivered the opinion of the court:

This action was brought in the court of common pleas of Franklin county, Ohio, to recover for injuries received by Harry O. Blagg, while in the service of the Jeffrey Manufacturing Company, a corporation engaged in manufacturing at Columbus, Ohio. The allegation was that the injury happened to the plaintiff because of the standing of certain freight cars upon a switch, with an opening left between them for the use of employees; that the plaintiff was directed by the defendant to assist in removing certain lumber from a point on the north side of the switch, and, in so doing, it was necessary for the plaintiff to pass, as directed and instructed by the defendant, through the opening between the fourth and fifth cars on the switch; that whilst he was so doing, defendant caused to run against the car standing on the east end of the switch a long cut of car pushed by an engine, with the result that the cars on the switch were jammed and pushed together, and the plaintiff was caught and seriously injured. The negligence charged was (1) in causing said cut of cars to be pushed upon and against the car standing upon said switch while plaintiff was between said cars; (2) in failing to warn or notify the plaintiff of the intention of the defendant to push said cars into or upon said switch or [573] against the car on the east end thereof; and (3) in having an insufficient number of men or employees engaged in the handling and switching of said cut of cars. A recovery was had in the court of common pleas, and the judgment was affirmed in the court of appeals and in the supreme court of the state, and the case was brought here by writ of error.

The constitutionality of the act of the general assembly of the state of Ohio, known as the workmen's compensation law, is brought in question because of the fact that manufacturing companies, employing five or more, who do not take advantage of its provisions, and the plaintiff in error did not, are deprived in negligence cases of certain defenses otherwise available: (1) negligence of fellow servants; (2) defense of assumed risk; and (3) defense of contributory negligence.

The constitutionality of the act was sustained against many objections after full consideration by the supreme court of Ohio in State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602. The validity of the act in a single feature is here brought in question. To decide it renders necessary some examination of its provisions, as outlined in §§ 1465 et seq. of vol. 1, Page & Adams's Annotated General Code of Ohio. The act is intended to create a state insurance fund for the benefit of injured, and the dependents of killed, employees. The general scheme of the law is to provide compensation by means of procedure before a board, for injuries not wilfully self-inflicted, received by employees in the course of their employment. The employer who complies with the law is relieved from liability for injury or death of an employee who has complied with the terms of the act, except the injury arise from the wilful act of the employer, his officer

or agent, or from failure to comply with laws enacted for protection of the employee, in which event the injured may sue for damages or recover under the act. It is one of the laws which has [574] become more or less common in the states, and aims to substitute a method of compensation by means of investigation and hearing before a board, for what was regarded as an unfair and inadequate system, based upon statutes or the common law. The purpose of the act, as appears from its title, is to provide a fund out of which reparation in such cases shall be made. For that purpose the employments are classified by the state liability board of awards, with reference to their degree of hazard and risk, and rates of premiums fixed, based upon the total payroll and number of employees in each of the classes of employments, the purpose being to establish a fund adequate to provide for the compensation required in the act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year. General Code, § 1465–53. Every employer who employs five workmen or more regularly in the same business or in the same establishment, who pays into the fund in accordance with the requirements of the act, is not liable to respond in damages at common law or by statute, save as in the act provided for injuries or deaths of any such employees, provided the employees remain in the service with notice that the employer has paid into the state insurance fund the premiums required by the act. General Code, § 1465–57. Section 1465–60 provides that "all employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment, who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment, caused by the wrongful act, neglect, or default of the employer, or any of the employer's officers, agents, or employees, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant [575] shall not avail himself or itself of the following common-law defenses: The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence." There are provisions of the act concerning other features not necessary now to consider.

As the plaintiff in error, employing a large number of men, did not pay into the state insurance fund the premiums provided by the law, it was held not entitled to the defenses of the fellow-servant rule, the assumption of risk, or of contributory negligence. "The sole question presented," says the counsel for the plaintiff in error, "is whether the Ohio workmen's compensation act contravenes the provisions of § 1 of the 14th Amendment to the Constitution of the United States in that the classification of employers and employees created by the act is arbitrary and unreasonable." This is said to result from the fact that, in denying the defenses, industries are classified by the number of employees,—those employing four or less are still privileged to make either or all of these defenses, while if the employer has five or more employees, and has not paid into the state insurance fund the premiums provided by the act, he is deprived of the benefit of such defenses. In other words, the legislature has selected for the application of this act only establishments employing five or more, and which comply with the terms of the act by paying the assessments required, and the law does not apply to establishments having less than five employees.

The fact that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones, is conceded in argument, and, is, we think, so obvious that the state legislature cannot be deemed guilty of arbitrary classification in making one rule for large [576] and another for small establishments as to these defenses.

The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employee in a shop with five employees with those having less. No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Engel v. O'Malley, 219 U. S. 128, 135, 55 L. ed. 128, 135, 31 Sup. Ct. Rep. 190; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Yazoo

& M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 219, 57 L. ed. 193, 194, 33 Sup. Ct. Rep. 40; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Darnell v. Indiana, 226 U. S. 390, 398, 57 L. ed. 267, 272, 33 Sup. Ct. Rep. 120; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 648, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678.

The question now is: Are employers who fail to come into the plan of the statute by complying with its requirements, who employ five men or more, arbitrarily discriminated against, because of the provisions of the act which deprive them of the benefit of the defense of contributory negligence of the employee, while the smaller employers, employing four or less, may still find such defense available?

This court has many times affirmed the general proposition that it is not the purpose of the 14th Amendment [577] in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws, from the generality of their application, necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded. Classifications of industries with reference to police regulations, based upon the number of employees, have been sustained in this court. Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616. In that case, an inspection law of the state was sustained, which was applicable only to mines employing five men or more at any one time. This case was cited with approval, and its doctrine applied, in McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, where a law regulating the payment of wages in coal mines in Arkansas was sustained though made applicable only where not less than ten miners were employed.

Certainly in the present case there has been no attempt at unjust and discriminatory regulations. The legislature was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employees. It included, as we have said, all of that class of institutions in the state.

No employer is obliged to go into this plan. He may stay out of it altogether if he will. Not opening the door of the statute to those employing less than five, still leaving them to the obligations and rules of the common and existing statute law, the legislature may have believed [578] that, having regard to local conditions, of which they must be presumed to have better knowledge than we can have, such regulation covered practically the whole field which needed it, and embraced all the establishments of the state of any size, and that those so small as to employ only four or less might be regarded as a negligible quantity, and need not be assessed to make up the guaranty fund, or covered by the methods of compensation which are provided by this legislation. This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers with five and more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the same conditions as those on the other side of it; but if the state has the right to pass police regulations based upon such differences,—and this court has held that it has,—we must look to general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours.

We are not prepared to say that this act of the legislature, in bringing within its terms all establishments having five or more employees, including the deprivation of the defense of contributory negligence where such establishments neglect to take the benefit of the law, and leaving the employers of less than five out of the act, was [579] classification of that arbitrary and unreasonable nature which justifies a court in declaring this legislation unconstitutional.

It follows that the judgment of the Supreme Court of the State of Ohio is affirmed.

EDWIN J. MERCELIS, Lewis F. Green, and Juan Ramon Lorenzo Domenech, Appts.,

v.

JOHN A. WILSON, George W. Jones, E. B. Wilcox, Wenceslao Borda, Jr., and M. Le Franc.

(See S. C. Reporter's ed. 579–583.)

Appeal — estoppel — by obtaining ruling below.

Complainants in a suit for injunctive relief against alleged trespasses upon their lands cannot complain on appeal that the trial court without a cross bill made a decree quieting title, where it was upon complainants' own motion to amend their bill to conform to the proofs and in effect constitute it a bill to quiet title that the court treated the proceeding as in the nature of one to quiet title, and made a decree appropriate to such proceeding.

[For other cases, see Appeal and Error, VIII. g, 2, in Digest Sup. Ct. 1908.]

[No. 68.]

Submitted November 6, 1914. Decided January 5, 1915.

APPEAL from the District Court of the United States for Porto Rico to review a decree quieting title. Affirmed.

See same case below, 5 Porto Rico Fed. Rep. 492.

The facts are stated in the opinion.

Mr. Hector H. Scoville submitted the cause for appellants. Mr. Joseph Anderson, Jr., was on the brief.

Mr. Felix Frankfurter submitted the cause for appellees. Mr. Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, was on the brief.

Mr. S. T. Ansell also submitted the cause for appellees.

[580] Mr. Justice Lamar delivered the opinion of the court:

On the north shore of the island of Porto Rico, in the districts of Arecibo and Manati, there is a slough or swamp known as El Caño de Tiburones. It is 12 miles long, of varying width, and was supposed to contain about 7,000 acres, though that was a mere estimate, since the exterior boundaries had not been established. Neither had it been authoritatively determined whether it was public land or private property. This uncertainty of boundary and title was the occasion of much litigation. Rubert y Catala v. Grahame, 4 Porto Rico Fed. Rep. 538.

The legislative assembly of Porto Rico treated it as belonging to the public, and, in December, 1907, leased it to Wenceslao Borda, Jr., with the right to drain, use, and occupy the swamp as a sugar plantation. He was put in possession by the Porto Rican police, acting under the orders of the commissioner and assistant commissioner of the interior and other officials. For the purpose of establishing the boundaries they also took part in a survey which fixed a line running for a distance of about 2 miles through lands claimed by Mercelis and associates. Borda built a fence along this line, and thereupon Mercelis and other landowners at once filed a bill in equity in the district court of the United States for Porto Rico, claiming that Borda and the Porto Rican officials had trespassed upon their property, and, with force and arms, had taken possession of land on which were located valuable fresh water springs essential to the successful management and operation of their plantations. They alleged further that the trespass and marking of the line had already been the occasion of violent altercations between the respective parties: that the deprivation of the property, and especially of the fresh water springs, would occasion irreparable damage. For that reason, and to avoid a multiplicity of suits, the court was asked to enjoin Borda and the other defendants [581] from entering upon complainants' land, running lines, digging ditches, erecting fences, or committing other trespasses. The defendants filed an answer in which they denied all of the material allegations of the bill, and averred that they had only entered upon land belonging to the government of Porto Rico by virtue of a lease from it. During the trial the defendants insisted that there was no equity in the bill, but the court, following Hernandez v. Ochoa y Hermano, 4 Porto Rico Fed. Rep. 400, and Rubert y Catala v. Grahame, 4 Porto Rico Fed. Rep. 538, held the remedy at law to be wholly inadequate, and ruled that, in view of the nature of the questions arising under the Spanish law, the case was of a nature which could not be tried by a jury. There was a trial lasting many days, in which a multitude of witnesses were examined. There was an irreconcilable conflict in their testimony as to the boundaries of the swamp, and whether it belonged to the public or to private in-

NOTE.—On removal of cloud on title; jurisdiction of court of equity—see note to West v. People's Bank, 8 L.R.A. 729.

As to jurisdiction of equity to restrain trespass and wrongs—see note to Northern Indiana R. Co. v. Michigan C. R. Co. 14 L. ed. U. S. 674.

On injunction against repeated trespass—see notes to De Pauw v. Oxley, 13 L.R.A. (N.S.) 173, and Cragg v. Levinson, 21 L.R.A. (N.S.) 417.

dividuals. "When the proofs were all in, counsel for the plaintiffs moved for leave to amend the prayer of their bill so as to make it conform to the proofs, and, in effect, constitute it a bill to quiet title." The respondents objected, but the court granted the motion.

The evidence is not in the record, but the court delivered an opinion (5 Porto Rico Fed. Rep. 492) in which he set out the facts as found by him. He thereupon made a decree that El Caño de Tiburones was public property; that the boundary of the adjacent land extended to the edge of the swamp, and not to the channel or canal in the center; that the springs, which were the main cause of the controversy, were the property of the plaintiffs; that wherever the line encroached upon high ground it should be relocated so as to run a few feet within the edge of the well-defined swamp, and directed that a surveyor should mark and stake the line as designated in the decree. There was a motion and a supplemental motion for a rehearing, which were denied, and the case was brought to [582] this court on a record containing sixteen assignments of error, in which appellants complain of the findings against them, insist that the court erred in holding that equity had jurisdiction to decide the question of title, and in not sending that question to a court of law to be determined by a jury. They contend that it was error, in a proceeding involving title to what was claimed to be public land, to enter a decree in a case to which the island of Porto Rico was not a party; that the court erred in establishing the line and in deciding the question of title adversely to the appellants; and that in a proceeding in which the sole relief prayed was an injunction, he erred in entering a decree in which he neither granted nor denied the injunction.

The original bill prayed for purely equitable relief by injunction, and if the case be treated as a suit in equity, which was to proceed "in the same manner as a circuit court" of the United States (31 Stat. at L. 84, § 34, chap. 191, Comp. Stat. 1913, § 3785), then there was, of course, no right to demand a trial by jury, although, in its discretion, the court could have taken the verdict of a jury on any issue of fact upon which he desired their finding. On the other hand, if it be treated as a proceeding in a statutory court whose jurisdiction and form of procedure were to be in conformity with the Porto Rican law (31 Stat. at L. 84, § 33, chap. 191, Comp. Stat 1913, § 3784), there was nothing to prevent the adoption and enforcement of rules by which relief could be afforded through the intervention of a jury or by the court itself. Ely v. New Mexico & A. R. Co. 129 U. S. 291, 293, 32 L. ed. 688, 689, 9 Sup. Ct. Rep. 203; Hornbuckle v. Toombs, 18 Wall. 654, 21 L. ed. 967.

It is, however, not necessary to separately consider each of the sixteen assignments of error, since they relate to rulings none of which is erroneous if the court, acting on the appellant's motion to amend, was justified in treating the proceeding as in the nature of a bill to quiet title. For in that event there was not only no right to a trial by jury, but it was not error, as against the parties to the record, to [583] make a decree appropriate to such a bill instead of denying or granting the prayer of the original bill for injunction.

The appellants insist, however, that, even with their consent, the court could not, without a cross bill, make a decree quieting the title. In this view of the case they rely upon the assignment of error that "the court erred in suggesting and allowing the plaintiffs to amend their bill to conform to the proof after the trial of the issues, and the prayer of their bill in such a way as to change the nature and character of the bill from a bill for an injunction to a bill as to quiet title."

The defendants did not appeal, and the appellants cannot be heard to complain of the court's action in granting their own motion. Parties cannot give jurisdiction, and may sometimes except to an erroneous ruling of the court in their favor. Capron v. Van Noorden, 2 Cranch, 126, 2 L. ed. 229; United States v. Huckabee, 16 Wall. 433, 21 L. ed. 464; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 382, 28 L. ed. 463, 4 Sup. Ct. Rep. 510.

But in this case the court had jurisdiction of the subject-matter and of the parties before it, and therefore the appellants cannot ask for a reversal because of a ruling which, if not actually invoked, was voluntarily acted upon by them when they assented that the bill should be converted into a proceeding to quiet title. Cowley v. Northern P. R. Co. 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; Perego v. Dodge, 163 U. S. 160, 41 L. ed. 113, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364; United States v. Memphis, 97 U. S. 284, 24 L. ed. 937; Connell v. Smiley, 156 U. S. 335, 39 L. ed. 443, 15 Sup. Ct. Rep. 353; Bethell v. Mathews, 13 Wall. 2, 20 L. ed. 556. The case involved the fixing of a line. When that question was settled, it was proper to quiet the title of each party as against the other up to the line thus established. The findings support the decree, which not only operated to prevent the multiplicity of suits referred to in the original bill, but was in accord with the

character of the proceedings, which the appellants themselves asked the court to make. The decree is affirmed.

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[584] JAMES M. HULL, JR., Trustee,
v.
MRS. M. J. DICKS.

(See S. C. Reporter's ed. 584-589.)

Bankruptcy — death of bankrupt — allowance to widow and children.

The right of the widow and children of a deceased bankrupt, under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), § 8, to any allowance which, upon his death, they were entitled to receive from his estate under the law of the state of his residence, was not lost because the title to the bankrupt estate had vested in the trustee in bankruptcy under § 70 of the bankrupt act, prior to the death of the bankrupt; but the assets remaining in the hands of the trustee at the bankrupt's death are chargeable with the payment of such allowance.

[For other cases, see Bankruptcy, VII., in Digest Sup. Ct. 1908.]

[No. 78.]

Argued November 12, 1914. Decided January 5, 1915.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit, presenting the question as to whether the widow and children of a bankrupt who died after adjudication and partial administration of the bankrupt estate are entitled to the year's support given by state law. Answered in the affirmative.

The facts are stated in the opinion.

Mr. **William H. Barrett** argued the cause and filed a brief for James M. Hull, Jr., trustee:

The provision for a year's support is a branch of the statute of distributions.

Farris v. Battle, 80 Ga. 189, 7 S. E. 262; Swain v. Stewart, 98 Ga. 367, 25 S. E. 831.

Ownership of property by a husband and father at the date of his death is essential to the year's support.

Summerford v. Gilbert, 37 Ga. 59; Hill v. Hill, 81 Ga. 516, 8 S. E. 879; Burckhalter v. Planters' Loan & Sav. Bank, 100 Ga. 431, 26 S. E. 236; Sellers v. Shore, 89 Ga. 416, 15 S. E. 494; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Wood v. Brown, 121 Ga. 471, 49 S. E. 295; American Surety Co. v. Wood, 2 Ga. App. 641, 58 S. E. 1116; Whatley v. Watters, 136 Ga. 701, 71 S. E. 1103.

Upon appointment and qualification of the trustee, the date of the adjudication becomes the date of the cleavage between the old and new estate of the bankrupt. The bankrupt cannot bind any assets belonging to him prior to that date (Remington, Bankr. § 1117), nor can the trustee claim any assets acquired by him after that date (Remington, Bankr. § 1130).

Upon adjudication, in general, all power of inchoate rights to become consummated or vested rights ceases, save and except dower rights, which constitute, in law, actual though inchoate interests in land, and which are specially excepted by § 8.

Remington, Bankr. § 1117.

If the right to exemption and the right to effect a composition be an estate left in the bankrupt, the year's support could, if the necessary steps had been taken, be set aside out of these two items. But Mr. Dicks made no application for an exemption, and the trustee could not set it aside.

Re Nunn, 2 Am. Bankr. Rep. 664.

Section 8 of the bankrupt act is not to have the effect of enabling the widow and minor children to obtain the year's support, when the husband and father dies after adjudication.

Re McKenzie, 15 Am. Bankr. Rep. 684, 73 C. C. A. 483, 142 Fed. 383; Re Litchfield, 7 Ben. 259, Fed. Cas. No. 8,385; Remington, Bankr. §§ 99, 1167; Frazier v. McDonald, 8 Nat. Bankr. Reg. 237, Fed. Cas. No. 5,073.

Mr. **B. B. McCowen** argued the cause, and, with Mr. Thomas W. Hardwick, filed a brief for Mrs. M. J. Dicks:

It would seem impossible to credit the law-making power with having enacted into law § 8 without interpreting § 70 (a) to mean that the trustee would hold the property subject to all debts and liabilities, of which, ranking highest under the Georgia law, is that of a year's support for the wife and minor children.

Thomas v. Woods, 23 Am. Bankr. Rep. 141; Collier, Bankr. 8th ed. § 8; Re Slack, 111 Fed. 524; Re Newton, 122 Fed. 103.

[585] Mr. Justice **Lamar** delivered the opinion of the court:

In January, 1912, L. K. Dicks, a citizen and resident of Richmond county, Georgia, was adjudicated a bankrupt. James M. Hull, Jr., was elected trustee, and on February 5, 1912, took possession of all the property of the bankrupt. Three weeks later L. K. Dicks died, leaving a widow and four minor children. Thereafter the widow applied to the court of ordinary for the year's support to which the family was entitled by virtue of the provision in the Georgia Code (§ 4041) that

"upon the death of any person . . .

leaving an estate, solvent or insolvent . . . it shall be the duty of the ordinary . . . to appoint . . . appraisers, . . . to set apart and assign to such widow and children . . . either in property or money, a sufficiency *from the estate* for their support and maintenance for the space of twelve months. . . ."

Citation issued and thereafter the ordinary duly set apart to the family a year's support to be made out of the estate of L. K. Dicks in the hands of the trustee in bankruptcy. The widow subsequently applied to the referee for an order directing the trustee to pay over the amount so set apart. Her application was denied and that ruling was reversed by the district court. 198 Fed. 293. The trustee took the case to the circuit court of appeals, which certified to this court the following question:

"Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies after such adjudication, and after the appointment, qualification, and partial administration of the trustee, is the estate vested in the trustee under § 70 of the bankruptcy law of 1898 [30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9654] chargeable under § 8 of the same law, or otherwise, with the allowance for a year's support of the widow and minor children, as provided in the laws of Georgia?"

[586] Counsel for the appellant contends that this question should be answered in the negative. He insists that § 8[1] of the bankruptcy act does not create a right, but, as in this case, merely preserves the right, given by the state law, to have a year's support "out of the estate" left by the husband and father. It was then argued that as the title to the property had vested in the trustee before the death of the bankrupt, Dicks did not die "leaving an estate," and there was, therefore, no estate out of which, under the Code of Georgia, the year's support could be set apart.

This reasoning would be applicable if the widow and children were asserting rights of inheritance under the statute of distribution. Moreover, there would be no answer to the argument advanced if the title, which vested in the trustee, was in its nature like that which would have been acquired if Dicks in his lifetime had made a deed of assignment to the trustee. But such is not the case. For, construing the statute as a whole, it will be seen that while § 70[2] of the bankruptcy act vested title in the trustee primarily for the benefit of the creditors, there was no exception in favor of the bankrupt himself, and the transfer was also subject to a condition in favor of his family if he died before the [587] proceedings ended. If the bankrupt elected to claim a homestead, the exempt property, even though it had passed to the trustee, would, after identification and appraisal, be turned back into his possession. Chicago, B. & Q. R. Co. v. Hall, 229 U. S. 515, 57 L. ed. 1309, 33 Sup. Ct. Rep. 885. The trustee's title was also subject to the condition that if the bankrupt died during the pendency of the proceedings, the widow and children would be entitled to receive the allowance given them by the laws of the state of his residence. This latter limitation on the trustee's title was in connection with legislation on the subject of abatement.

For the statute seems to assume that, in the absence of a statutory provision to the contrary, the death of the bankrupt would have abated the proceedings. In that event the property, although the title thereto had been previously vested in the trustee, would have been surrendered to the bankrupt's personal representatives, who would then have been in possession of an *estate*, out of which, under the Georgia Code, a year's support could have been set apart to the widow and children. Congress need not have made any change in the general law, but, as in the act of 1841 (5 Stat. at L. 440, chap. 9), could have allowed the suit to abate on the death of the bankrupt; or, as in the act of 1867 (14 Stat. at L. 522, § 12, chap. 176), it could have permitted, without requiring, an abatement; or, as in the act of 1800 (2 Stat. at L. 27, § 19, chap. 19,), it could have made a mandatory provision that the proceedings should continue if the bankrupt died "after commission sued out;" or, it could have legislated, as in § 8 of the present statute (30 Stat. at L. 549, § 8, chap. 541, Comp. Stat. 1913, § 9592), where Congress went further than in any of the previous bankruptcy laws and made a universal and mandatory provision that "the death . . . of a bankrupt shall not abate the proceed-

[1] "§ 8. Death or insanity of bankrupts.—a. The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by *the laws of the state of the bankrupt's residence.*"

[2] "§ 70. Title to property.—a. The trustee of the estate of a bankrupt, upon his appointment and qualification . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, . . ."

ing." That sweeping declaration, however, was coupled with the *Proviso* that, "in case of death, the widow and children shall be entitled to all [588] rights of dower and allowance fixed by the laws of the state of the bankrupt's residence.

Section 8 with these two clauses prevents, on the one hand, the loss and inconvenience to creditors resulting from an abatement, while at the same time avoiding the hardship of depriving the widow and minor children of a right to which they would have been entitled if the suit had abated on the death of the husband and father. The statute makes no exception or qualification; after the proceedings have been commenced they are not to be abated by death. And the *Proviso* clearly indicates an intention to make the preservation of the widow and children's right to the allowance as broad as the prohibition against the abatement of the suit. Inasmuch as the proceedings did not abate if the death of the bankrupt occurred after filing the petition and before the election of the trustee, neither was the right to the allowance lost if the bankrupt died after such election, and at a stage of the proceedings where the title had, by the operation of law, vested in the trustee. For such title, whenever it accrued, was subject to the condition that the assets, in the hands of the trustee, should be charged with the payment of the allowance to which, on the death of the bankrupt, the widow and children were entitled under the laws of the state of his residence.

It is claimed that, under this interpretation, if the bankrupt died after the trustee had wholly or partially administered the estate, the widow and children could still enforce their rights to a year's support out of the bankrupt estate, even if the property had passed into the hands of purchasers. But this loses sight of the fact that the family had nothing in the nature of a lien which, during his lifetime, prevented the bankrupt or the trustee from disposing of his property. What was done by the court, while the bankrupt was in life and a party to the proceeding, was binding upon him, and therefore as effectual [589] to defeat the right to a year's support out of such property as if the sale and distribution had been made by the bankrupt himself, or by his duly authorized agent.

The right to the year's support accrued at the date of the bankrupt's death, and could be enforced out of property remaining in the hands of the trustee,—and then only after the allowance had been duly made in proceedings where he, as representative of the creditor, had the right to be heard.

There has been some conflict in the decisions dealing with the subject (Re McKenzie, 73 C. C. A. 483, 142 Fed. 384 [6]; Re Slack, 111 Fed. 523; Re Newton, 122 Fed. 103; Re Seabolt, 113 Fed. 767; Re Parschen, 119 Fed. 976; Thomas v. Woods, 26 L.R.A.(N.S.) 1180, 97 C. C. A. 535, 173 Fed. 586, 19 Ann. Cas. 1080; vacated, 101 C. C. A. 664, 178 Fed. 1005), but the foregoing considerations require that the question of the Circuit Court of Appeals should be answered, Yes.

JOHN A. S. BROWN and Frank E. Schermerhorn, as Trustees for Clara Schermerhorn under the Last Will and Testament of Thomas Cunningham, Deceased, Appts.,

v.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., Deceased, and Conrad Morris Braker. (No. 454.)

PROVIDENT LIFE & TRUST COMPANY and Catharine Stewart Wood, as Executors under the Last Will and Testament of William Brewster Wood, Deceased, Appts.,

v.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., Deceased, and Conrad Morris Braker. (No. 455.)

(See S. C. Reporter's ed. 589–601.)

Courts — Federal jurisdiction — suits by assignees.

A suit to enforce the rights in and to the corpus of a trust estate of persons claiming under the assignee of a part of the beneficiary's interest in a testamentary trust by the terms of which the trust estate was to be held by the trustee for the purpose of paying the income to such beneficiary until he reached a certain age, when it was to become his absolutely, is not within the provisions of the Judicial Code, § 24, governing suits to recover upon a chose in action in favor of any assignee or subsequent holder, since such provision does not apply to suits brought by a transferee or assignee for the recovery of an interest in property.

[For other cases, see Courts, 817–830, in Digest Sup. Ct. 1908.]

[Nos. 454 and 455.]

NOTE.—On suits by assignees in Federal courts—see notes to Goldsmith v. Holmes, 1 L.R.A. 817; Republic Iron Min. Co. v. Jones, 2 L.R.A. 746; and American Freehold Land & Mortg. Co. v. Thomas, 12 L.R.A. 681.

Argued December 1, 1914. Decided January 5, 1915.

TWO APPEALS from the District Court of the United States for the Southern District of New York to review a decree dismissing bills to enforce rights in a trust estate of persons claiming under the assignee of a part of the beneficiary's interest in a testamentary trust. Reversed.

Statement by Mr. Justice Lamar:

Conrad Braker, Jr., of New York, died testate July 21, 1890. The 15th item of his will provided that the sum of $50,000 should be held in trust and securely invested for the use of his son, Conrad Morris Braker, who was to receive the income until he attained the age of fifty-five, when the "principal should be paid to him and belong to him absolutely." If he failed to reach that age the property was to be held for the benefit of his wife for life with remainder to Henry Braker.

The 16th item directed that "one half of all the rest, residue and remainder, both real and personal," of his estate should be held in trust for the use and benefit of Conrad Morris Braker, who was to receive the interest derived from said trust, until he attained the age of fifty-five, when "the whole amount, less $25,000, shall be paid and belong to him absolutely." If he failed to reach that age, then the property was to pass to another son.

The amount realized from the residuum, described in the 16th item, aggregated $120,000, and with the $50,000 described in the 15th item of the will, was invested in property (not described) which is now held by Austin B. Fletcher, the duly appointed testamentary trustee.

On April 18, 1901, Conrad Morris Braker assigned to [591] Frank L. Rabe "seven tenths of all the estate, right, title and interest which he had in and to the principal sum of $50,000 described in the 15th item of the will." Thereafter Rabe transferred and assigned this interest to the New York Finance Company.

On February 25, 1902, Conrad Morris Braker executed an instrument in which, subject to the assignment of $35,000 above referred to, he "granted, bargained, sold, assigned, transferred and set over to the New York Finance Company all of his estate, right, title and interest of any kind, form or description whatsoever to the amount or extent of $35,000 in and to the legacy of $50,000, and also in and to a legacy of the part or share of the residuary estate to which he was entitled under and by virtue of the 15th and 16th paragraphs of the will of Conrad Braker, Jr., deceased."

By virtue of these two transfers the New York Finance Company claimed to be the owner of such interest in the fund or estates created under the 15th and 16th items of the will.

The Finance Company thereafter made a note for $15,000, payable to William Brewster Wood, and secured the same by a transfer of its interests under the 16th item. It also made another note for $10,000 to Brown and Schermerhorn, trustees for Clara Schermerhorn, and secured the same by a transfer of its interest under the 15th item.

These notes were not paid when they fell due, and the New York Finance Company's equity of redemption was acquired by the respective holders of the two notes. In February, 1913, when Conrad Morris Braker attained the age of fifty-five, the respective holders of the notes and assignments demanded that the trustee should pay over to them that to which they were entitled by virtue of the instruments aforesaid. The trustee refused to comply, and thereupon the executors of Wood and the [592] trustees of Clara Schermerhorn (all of whom were citizens and residents of Pennsylvania) brought suit in the United States district court for the southern district of New York against Fletcher, trustee, and Conrad Morris Braker, beneficiary, both being citizens and residents of New York.

The two bills were each prepared by the same counsel, and were identical, except that the trustees of Schermerhorn sued for what had been assigned them under the 15th item. The executors of Wood sued for the interest assigned them in the money or property mentioned in the 15th and 16th items of the will. In both suits it was alleged that the complainants had acquired title by virtue of the sale, transfer, and assignment executed by Conrad Morris Braker, and subsequent mesne conveyance. It was alleged that complainants had been informed that he claimed the transfers signed by him to be void because made to secure usurious debts. Both bills prayed that Braker should be enjoined from litigating the question of title in any other court; that the complainants' right under the assignments should be established by final decree, and that Fletcher, the testamentary trustee, should be ordered to pay over to the complainants what was due them by virtue of the respective assignments from Braker.

The court dismissed both bills, and in each case gave a certificate that the order was based "solely on the ground that no jurisdiction of the district court existed."

From that order the complainants appealed to this court.

Mr. Charles H. Burr argued the cause, and, with Mr. Frederic W. Frost, filed a brief for appellants in No. 454:

The facts and the decision of this court in Ingersoll v. Coram, 211 U. S. 336, 53 L. ed. 209, 29 Sup. Ct. Rep. 92, have foreclosed the question of jurisdiction as applicable to the case at bar.

But if any distinction unperceived by counsel for appellants exists, it is submitted that a suit against a trustee to establish a lien upon a distributive share in a decedent's estate can hardly be described as a suit to recover the contents of a chose in action.

Croxall v. Shererd, 5 Wall. 268, 18 L. ed. 572; Deshler v. Dodge, 16 How. 622, 14 L. ed. 1085; Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 736; Ambler v. Eppinger, 137 U. S. 480, 34 L. ed. 765, 11 Sup. Ct. Rep. 173; Bertha Zinc & Mineral Co. v. Vaughan, 88 Fed. 566.

Messrs. H. Gordon McCouch and Perry D. Trafford filed a brief for appellants in No. 455:

An interest in a distributive share of an estate (*a fortiori* in a trust fund) is not within the statute (Judicial Code, § 24).

Croxall v. Shererd, 5 Wall. 268, 18 L. ed. 572; Deshler v. Dodge, 16 How. 622, 14 L. ed. 1085; Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 736; Ambler v. Eppinger, 137 U. S. 480, 34 L. ed. 765, 11 Sup. Ct. Rep. 173; Bertha Zinc & Mineral Co. v. Vaughan, 88 Fed. 566.

The prohibition is against suits by "an assignee," and neither an administrator nor an executor is regarded as an assignee within the statute.

Chappedelaine v. Dechenaux, 4 Cranch, 306, 2 L. ed. 629; Sere v. Pitot, 6 Cranch, 332, 3 L. ed. 240; Rice v. Houston, 13 Wall. 66, 20 L. ed. 484.

Mr. William P. S. McIvin argued the cause, and, with Mr. Safford A. Crummey, filed a brief for appellees:

The supreme court early defined what is a "chose in action," as the term is used in the statute, and the term has a familiar meaning in our law literature and decisions.

Sheldon v. Sill, 8 How. 441, 448, 12 L. ed. 1147, 1151; Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 736; United States v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827; Mercantile Trust Co. v. Gimbernat, 143 App. Div. 308, 128 N. Y. Supp. 751; Bouvier's Law Dict. Choses in Action; 2 Bl. Com. 389, 397; Ayres v. Western R. Corp. 48 Barb. 135; Gillet v. Fairchild, 4 Denio, 80; Haskell v. Blair, 3 Cush. 534; *Prudential* Ins. Co. v. Hann, 21 Ind. Ap. 525, 69 Am. St. Rep. 380, 52 N. E. 772; Steele v. Gatlin, 115 Ga. 929, 59 L.R.A. 129, 42 S. E. 253; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515; Williams, Pers. Prop. 4; 3 Am. & Eng. Enc. Law, subtitle, "Choses in Action," 236; Brown v. Fletcher, 124 C. C. A. 367, 206 Fed. 461.

Equitable assignments of choses in action, as well as legal assignments, are comprehended within the application of the statute.

Sere v. Pitot, 6 Cranch, 333, 3 L. ed. 240; Corbin v. Black Hawk County, 105 U. S. 659, 26 L. ed. 1136.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The appellants brought suit in the United States district court for the southern district of New York for the purpose of recovering from the trustee an interest in a trust estate which had been sold, transferred, and assigned by Conrad Morris Braker, the beneficiary. The complainants were citizens and residents of Pennsylvania. Both defendants were citizens and residents of New York. Notwithstanding the diversity of citizenship, the court dismissed the bill on the ground that, as the assignor Braker, a citizen of New York, could not, in the United States district court, have sued Fletcher, trustee and citizen of the same state, neither could the complainants, his assignees, sue therein, even though they were residents of the state of Pennsylvania.

The appeal from that decision involves a construction of § 24 of the Judicial Code [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1913, § 991(1)], which limits the jurisdiction of [595] the United States district court when suit is brought therein . . . "to recover upon any promissory note or other chose in action in favor of any assignee. . . ."[1]

This section of the Judicial Code is the last expression of a policy intended to prevent certain assignees from proceeding in the United States courts.

The restriction was imposed not only to prevent fraudulent transfers, made for the purpose of conferring jurisdiction, but in

[1] ". . . No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

apprehension that promissory notes and like papers might be transferred in good faith by the citizens of one state to those of another, and thus render the maker liable to suit in the Federal court. Bank of United States v. Planters' Bank, 9 Wheat. 909, 6 L. ed. 245.

Except for a short time, when the act of 1875 (18 Stat. at L. 470, chap. 137, Comp. Stat. 1913, § 991[1]), restricted suits "founded on a contract in favor of an assignee," the several statutes on the subject, in force prior to the adoption of § 24, made this limitation on the jurisdiction of United States courts apply to "suits to recover the contents of any promissory note or other chose in action in favor of any assignee" (act of 1789, 1 Stat. at L. 78, § 11, chap. 20; Rev. Stat. § 629; act of 1887, 24 Stat. at L. 553, chap. 373, Comp. Stat. 1913, § 991[1]). These were technical terms of variable meaning. They might have been given a literal construction, in which case the act would not have wholly remedied the evil intended to be corrected. They were also susceptible of a construction so broad as to include subjects far beyond the congressional policy. For a "chose in action embraces in [596] one sense all rights of action." Dundas v. Bowler, 3 McLean, 208, Fed. Cas. No. 4,140. So that if the words of the statute had been given their most comprehensive meaning, every assignee or vendee would have been prevented from suing in the United States court unless the assignor could have maintained the action. It is evident, however, that there was no intent to prevent assignees and purchasers of property from maintaining an action in the Federal court to recover such property, even though the purchaser was an assignee, and the deed might, in a sense, be called a chose in action.

On the other hand, to construe the statute so as to only prohibit suits in such courts by the assignees of notes, drafts, and written promises to pay, would have left open a wide field and enabled assignees of accounts and of claims arising out of breaches of contracts to proceed in the Federal courts, although the parties to the original agreement could not have there sued.

While, therefore, it was admitted in Sere v. Pitot, 6 Cranch, 332, 3 L. ed. 240, that suits to recover the "contents of a chose in action" referred to "assignable paper," yet, in view of the general policy of the act, these words were given a construction so broad as to include suits on accounts and on claims other than those containing written promises to pay.

That ruling, though criticized in Bushnell v. Kennedy, 9 Wall. 303, 19 L. ed. 739, was constantly followed (Sheldon v. Sill, 8 How. 441, 12 L. ed. 1147; Shoecraft v. Bloxham, 124 U. S. 730, 31 L. ed. 574, 8 Sup. Ct. Rep. 686), and it has been settled that the prohibition applied not only to suits on instruments which might be said to have "contents," but also to suits for the recovery of "all debts, and all claims for damages for breach of contract, or for torts connected with contract," but not to suits "to recover possession of the specific thing, or damages for its wrongful caption or detention." Bushnell v. Kennedy, 9 Wall. 390-392, 19 L. ed. 738, 739. Neither did it apply to suit [597] for damages for neglect of duty. Deshler v. Dodge, 16 How. 622, 631, 14 L. ed. 1085, 1088; Ambler v. Eppinger, 137 U. S. 480, 34 L. ed. 765, 11 Sup. Ct. Rep. 173.

Such is still the law under § 24; for, according to the statutory rule for construing the Judicial Code,[2] it may be assumed that the slight difference in language between the act of 1887 (contents of a chose in action in favor of the assignee) and § 24 (suits upon a chose in action in favor of an assignee) was not intended to bring about any change in the law, but merely was a continuation of the existing statute. In continuing the statute Congress also carried forward the construction that the restriction on jurisdiction applied to suits for damages for breach of contract, but did not apply to suits for a breach of duty nor for a recovery of things. It therefore becomes necessary to determine whether these proceedings by bill in equity are suits by assignees on a chose in action; or suits for the recovery of an interest in property by the transferee or assignee.

From the allegations of the two bills it appears that the $50,000, mentioned in the 15th item, and the $120,000, proceeds of the residuum of the estate referred to in the 16th item, had each been invested by the trustee, but whether in real estate, tangible personal property, stocks or bonds is not stated.

If the trust estate consisted of land, it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of § 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the Bushnell Case, noth-

[2] "Sec. 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

ing in § 24 to prevent the holder, [598] by virtue of a bill of sale, from suing for the "recovery of the specific thing, or damages for its wrongful caption or detention." And if the funds had been converted into cash, it was still so far property—in fact instead of in action—that the owner, so long as the money retained its earmarks, could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the trustee, not in opposition to the *cestui que trust*, so as to give him a chose in action, but in possession for his benefit, in accordance with the terms of the testator's will.

It is said, however, that this case does not relate to the sale of land, or of things, or even to a transfer of a definite fund, but to two assignments of $35,000,—to be made out of money or property in the hands of a trustee. It is claimed that this was an assignment of a chose in action within the meaning of § 24 of the Judicial Code. Giving the words of the statute the most extensive construction authorized by previous decisions, they can only refer to a chose in action based on contract. Kolze v. Hoadley, 200 U. S. 83, 50 L. ed. 380, 26 Sup. Ct. Rep. 220. The restriction on jurisdiction is limited to cases where A is indebted to B on an express or implied promise to pay; B assigns this debt or claim to C, and C, as assignee of such debt, sues A thereon or to foreclose the security. Or where A has contracted with B, and B assigns the contract to C, who sues to enforce his rights, by bill for specific performance, or by an action for damages for breach of the contract. Shoecraft v. Bloxham, 124 U. S. 735, 31 L. ed. 576, 8 Sup. Ct. Rep. 686.

But here there was no contract, and this is not a suit for a breach of a contract. For whatever may have been the earlier view of the subject (Holmes, Common Law, 407, 409), the modern cases do not treat the relation between trustee and *cestui que trust* as contractual. The rights of the beneficiary here depended not upon an agreement [599] between him and Braker, but upon the terms of the will creating the trust and the duty which the law imposed upon the trustee because of his fiduciary position. And a proceeding by the beneficiary or his assignee for the enforcement of rights in and to the property, held—not in opposition to but—for the benefit of the beneficiary, could not be treated as a suit on a contract, or as a suit for the recovery of the contents of a chose in action, or as a suit on a chose in action. Upham v. Draper, 157 Mass. 292, 32 N. E. 2; Herrick v. Snow, 94 Me. 310, 47 Atl. 540. See also Edwards v. Bates, 7 Mann. & G. 590, 2 Dowl. & L. 299, 8 Scott, N. R. 406, 13 L. J. C. P. N. S. 156, 8 Jur. 539; Nelson v. Howard, 5 Md. 327.

The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate, with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. Ham v. Van Orden, 84 N. Y. 270; Stringer v. Young, 191 N. Y. 157, 83 N. E. 690; Lawrence v. Bayard, 7 Paige, 70; Woodward v. Woodward, 16 N. J. Eq. 84. The instrument by virtue of which that alienation was evidenced—whether called a deed, a bill of sale, or an assignment—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title, and estate in and to property. Assuming that the transfer was not colorable or fraudulent, the Federal statutes have always permitted the vendee or assignee to sue in the United States courts to recover property or an interest in property when the requisite value and diversity of citizenship existed. Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825. The equity jurisdiction of such courts extends to suits by heirs against executors and administrators (Security Trust Co. v. Black River Nat. Bank, 187 U. S. 228, 47 L. ed. 155, 23 Sup. Ct. Rep. 52), and to suits against [600] trustees for the recovery of an interest in the trust property by the beneficiary or his assignee.

The conclusion that § 24 of the Judicial Code did not deprive the district court of jurisdiction to enforce complainants' interest under the assignments executed by the *cestui que trust* was foreshadowed in Ingersoll v. Coram, 211 U. S. 361, 53 L. ed. 226, 29 Sup. Ct. Rep. 92. That was a proceeding by an assignee to enforce an equitable lien on an heir's interest in an estate. In that case it was claimed that because the assignor could not have sued in the United States court, neither could the assignee maintain his bill therein. The case was disposed of on another ground, but the court said that "it is certainly very disputable if an interest in a distributive share of an estate is within the statute."

That language was used in reference to a suit for the recovery of part of a fund in the hands of an executor, who held primarily for the payment of the testator's debts. There the legatees, distributees, and assignees had no such vested interest in specific property as is the case here, where

all of the property in the hands of the trustee was held for the purpose of paying the income to Braker until he reached the age of fifty-five, when the corpus was to be delivered to him [or to his assignees] in fee. That interest was transferable, and the purchaser was not precluded by § 24 from suing in the United States court for the interest so transferred.

This view of the record makes it unnecessary to discuss the question as to whether the executors of Wood could in any event be treated as assignees of the character referred to in § 24 (Chappedelaine v. Dechenaux, 4 Cranch, 306, 2 L. ed. 629), since their title was cast upon them by operation of law. The nature of the case is also such that we cannot consider the effect of an assignment of $35,000 out of the $50,000, if it shall appear that the trust estate in the hands of the trustee consists of property, and not of money. These are questions which the United States district [601] court for the southern district of New York has jurisdiction to hear and determine between these residents and citizens of different states.

Decrees reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,
v.
LAURENCE B. FINN, Green Garrett, and William Klair, Individually and as Constituting the Railroad Commission of Kentucky, et al.

(See S. C. Reporter's ed. 601–610.)

Evidence — sufficiency — rate-making order.

1. Evidence that a carrier had voluntarily established comparatively low special rates on distillery supplies, and had maintained them for many years after the cessation of the reason assigned for originally introducing them, *viz.*, the encouragement of the distillery business along the carrier's line, and had then withdrawn them, not upon the ground that they were inadequate, but because they gave rise to discrimination, and in so doing had introduced much higher rates, is sufficient to support an order of the state railway commission re-establishing such special rates as the maximum intrastate freight rates on such articles.

[For other cases, see Evidence, XII., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — procedure before railway commission.

2. The procedure under Ky. Stat. § 829, for recovery before the state railroad commission of reparation for payments previously made to a carrier for transportation in excess of the rates found by such commission to be reasonable cannot be said to deny the due process of law guaranteed by U. S. Const., 14th Amend., on the theory that there is no formal issue and no method of requiring the production of evidence, where there were pleadings sufficiently formal, and the carrier was permitted to raise such issues and introduce such evidence as it desired, and there is nothing to show that it suffered for lack of compulsory process against witnesses.

[For other cases, see Constitutional Law, 629–778, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

3. A carrier cannot object on constitutional grounds to the procedure under Ky. Stat. § 829, for the recovery of reparation for payments previously made to it for transportation in excess of the rates found by the state railroad commission to be reasonable, because on the subsequent trial in the courts to enforce the commission's reparation order there is no right to adduce evidence other than such as was presented to the commission unless the court shall first be satisfied that the evidence is such as could not have been produced before the commission with the exercise of reasonable diligence, where there is nothing to show that such carrier has or could have any defense to the payment of reparation that it has not already either interposed or waived in the proceeding before the commission, or to show that it has any evidence to be adduced before the court that it would be prevented from introducing by the effect of this restriction.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

[No. 546.]

Argued December 11 and 14, 1914. Decided January 5, 1915.

APPEAL from the District Court of the United States for the Eastern District of Kentucky to review an order refusing to enjoin the enforcement of rate-making and reparation orders of the state railroad commission. Affirmed.

See same case below, 214 Fed. 465.

The facts are stated in the opinion.

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

On recovery back of excessive payments to public service corporations—see note to Illinois Glass Co. v. Chicago Teleph. Co. 18 L.R.A.(N.S.) 124.

Messrs. Edward S. Jouett and William A. Colston argued the cause, and, with Mr. Henry L. Stone, filed a brief for appellant:

A court has power to enjoin the Commission's order when it is not supported by substantial evidence.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 548, 56 L. ed. 308, 311, 312, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Graham v. Gill, 223 U. S. 643, 56 L. ed. 586, 32 Sup. Ct. Rep. 396; Kentucky R. Tax Cases, 115 U. S. 321, 334, 29 L. ed. 414, 417, 6 Sup. Ct. Rep. 57.

Long continuance of rates raises no presumption of reasonableness.

Memphis Cotton Oil Co. v. Illinois C. R. Co. 17 Inters. Com. 313; Quimby v. Clyde S. S. Co. 12 Inters. Com. Rep. 392; Banner Mill. Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 398; Breese-Trenton Min. Co. v. Wabash R. Co. 19 Inters. Com. Rep. 598; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

The right of the carrier, as a matter of business policy, to make special rates for the increase of his business, has been recognized by this court.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 172, 41 L. ed. 425, 18 Sup. Ct. Rep. 45.

Rates put in force for special purposes are not evidence of reasonableness.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 697, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; Douglas v. Chicago, R. I. & P. R. Co. 21 Inters. Com. Rep. 97.

Was the appellant estopped to raise these distillers' rates?

Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288.

The interlocutory injunction should have been issued.

Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; 22 Cyc. 751, 755, 782, 783, 822, 941; High, Inj. §§ 5, 13, pp. 8, 9, 19, 20; Pacific Teleph. & Teleg. Co. v. Los Angeles, 192 Fed. 1009; New Memphis Gas & Light Co. v. Memphis, *72 Fed. 952*; Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245; Buffalo Gas Co. v. Buffalo, 156 Fed. 370; Spring Valley Water Co. v. San Francisco, 165 Fed. 667; Omaha & C. B. R. Co. v. Interstate Commerce Commission, 222 U. S. 582, 56 L. ed. 324, 32 Sup. Ct. Rep. 833.

A complainant is not entitled to an award of reparation representing the amount of his damages, upon mere proof of the payment of freight at the higher rate condemned by the Commission.

New Orleans Bd. of Trade v. Illinois C. R. Co. 29 Inters. Com. Rep. 32.

The difference between the amount exacted according to an unreasonable rate and what should have been paid under the reasonable rate, does not make even a prima facie case of liability, for the reason that such payment furnishes no evidence of damage.

Lehigh Valley R. Co. v. Clark, 125 C. C. A. 235, 207 Fed. 717; Lehigh Valley Coal Co. v. Meeker, 128 C. C. A. 311, 211 Fed. 785; Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co. 20 Inters. Com. Rep. 49.

The procedure provided by the Kentucky statutes for recovering reparation violates the due process and equal protection clauses of the 14th Amendment to the Federal Constitution.

Hagar v. Reclamation Dist. 111 U. S. 707, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Hurtado v. California, 110 U. S. 536, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; 1 Cooley, Const. Lim. pp. 356, 357; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 240, 41 L. ed. 986, 17 Sup. Ct. Rep. 581; Simon v. Craft, 182 U. S. 436, 45 L. ed. 1170, 21 Sup. Ct. Rep. 836; Twining v. New Jersey, 211 U. S. 100, 53 L. ed. 106, 29 Sup. Ct. Rep. 14; Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; 2 Wigmore, Ev. § 1353; Hovey v. Elliott. 167 U. S. 409, 413, 42 L. ed. 215, 219, 17 Sup. Ct. Rep. 841; Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. ed. 914, 915.

Rate comparisons, to be of any value, must show that the conditions are similar.

Railroad Comrs. v. Denver & R. G. R. Co. 27 Inters. Com. Rep. 522; Dewey Bros. Co. v. Louisville & N. R. Co. 26 Inters. Com. Rep. 723; Crutchfield v. Louisville & N. R. Co. 14 Inters. Com. Rep. 559.

Even where there are two routes between the same points, the rate *via* one route is not shown to be unreasonable because of the mere fact that there is a lower rate *via* the other route.

Charles R. Ball Lumber Co. v. Texas & P. R. Co. 25 Inters. Com. Rep. 437.

Mere statements of ton-mile earnings, without a consideration of the circumstances surrounding the several rates from which comparisons are made, are valueless.

Nebraska State R. Commission v. Chicago, B. & Q. R. Co. 23 Inters. Com. Rep. 121; Acme Cement Plaster Co. v. Chicago G. W. R. Co. 18 Inters. Com. Rep. 19.

The power of a Federal court of equity to enjoin one who is about to do an unlawful act, or is threatening to enforce an unlawful act, is not confined to cases where the unlawful act is the act of a legislative body, but applies equally to every case where the act is violative of the Constitution, whether the act be that of a legislative body, or of an executive body, or of a judicial body.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340.

There is a vast difference between the nature of a hearing which is preliminary to legislative action, and that which precedes judicial action.

Den. ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; State v. Sponaugle, 45 W. Va. 415, 43 L.R.A. 727, 32 S. W. 283.

The reparation statute is not only unconstitutional because denying a hearing, but also because, as construed by the Kentucky court of appeals, § 829 of the Kentucky statutes empowers the Railroad Commission, for something done in the past, by administrative or legislative fiat, to conclusively award the private property of one person to another person for his private use; and, as so construed, the statute takes property without due process of law, and violates the 14th Amendment of the Constitution of the United States.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 172, 44 L. ed. 420, 20 Sup. Ct. Rep. 336.

Mr. Edward W. Hines argued the cause, and, with Mr. James Garnett, Attorney General of Kentucky, and Messrs. J. V. Norman and Charles C. McChord, filed a brief for appellees:

After a motion for an interlocutory injunction has been heard and denied, the court ought not to reconsider the motion except upon additional evidence which could not have been introduced upon the original hearing by the exercise of ordinary diligence.

2 High, Inj. 4th ed. § 1586; Bank of United States v. Schultz, 3 Ohio, 61; Maloney v. King, 30 Mont. 414, 76 Pac. 939.

The orders of the Railroad Commission are not void unless the Commission acted arbitrarily; and the allegation of the amended and supplemental bill, that there was no "substantial evidence" to "support" the orders here attacked, is not sufficient to show arbitrary action on the part of the Commission.

Florida East Coast R. Co. v. United States, 234 U. S. 167, 185, 58 L. ed. 1267, 1271, 34 Sup. Ct. Rep. 867; Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 311, 58 L. ed. 1319, 1327, 34 Sup. Ct. Rep. 814; Tang Tun v. Edsell, 223 U. S. 673, 681, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 359; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357.

The fact that the new rates were from 60 to 100 per cent higher than the old rates which the carrier had voluntarily maintained for many years was substantial evidence that the new rates were too high, in the absence of any explanation by the carrier.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 99, 57 L. ed. 431, 436, 33 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493; Pacific Coast Lumber Mfrs. Asso. v. Northern P. R. Co. 14 Inters. Com. Rep. 23.

The ton-mile earnings alone, in the light of the decisions of the Interstate Commerce Commission, constituted a sufficient basis for the action of the Commission.

Re Investigation of Advances in Rates on Grain, 21 Inters. Com. Rep. 22; Wichita v. Atchison, T. & S. F. R. Co. 9 Inters. Com. Rep. 558.

Even had the Commission based its finding in part upon the theory of estoppel, that finding could not be set aside if it was also based on evidence tending to show that the rates were unreasonable.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

The bill, so far as it seeks to restrain the enforcement of the reparation order, presents no Federal question, and therefore the lower court had no jurisdiction of that branch of the case.

Illinois C. R. Co. v. Paducah Brewery Co. 157 Ky. 357, 163 S. W. 239; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620.

One who would attack a statute as in violation of the Federal Constitution must show that he is within the class which

would be affected by the provision of the statute of which he complains.

Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Collins v. Texas, 223 U. S. 288, 295, 56 L. ed. 439, 443, 32 Sup. Ct. Rep. 286; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Murphy v. California, 225 U. S. 623, 630, 56 L. ed. 1229, 1232, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

Mr. Justice Pitney delivered the opinion of the court:

This case was here on a former occasion (Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48), when an order [603] denying a motion for an interlocutory injunction was affirmed. The suit was brought by the railroad company to enjoin the enforcement of two orders made August 10, 1910, by the Railroad Commission of Kentucky, one of which prescribed maximum rates of freight upon certain intrastate traffic, and the other awarded specified amounts in reparation for payments previously exacted by the carrier for freight transportation in excess of the rates thus established by the Commission as reasonable. One of the grounds of attack upon the rate order was that the Commission had acted arbitrarily, in that there was no evidence before it tending to establish that the rates which the company had maintained were unreasonable. Upon the former appeal we held that since it appeared that there had been a hearing before the Commission, with evidence adduced on each side, and since this was not produced before the court, the general allegations of the bill respecting the effect of the evidence, and the statements contained in the affidavits submitted upon the application for injunction, were insufficient to justify the court in enjoining the rates upon the ground that the Commission either had denied the hearing which the statute contemplated, or by its arbitrary action had been guilty of an abuse of power. With respect to the reparation order, we sustained the action of the court below in declining to determine its validity, upon the ground that the persons in whose favor the award was made had not been brought in as parties.

After our decision, appellant filed an amended and supplemental bill bringing in as defendants the parties in whose favor reparation was awarded, stating with more particularity the grounds upon which that order was attacked, and, with respect to the rate order, setting out as an exhibit a transcript of the evidence introduced before the Commission. Upon this amended and supplemental bill appellant again moved for an interlocutory injunction. [604] The motion was heard before three judges, under § 266, Judicial Code (36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1243), the application for injunction was denied (214 Fed. 465), and the case comes here by direct appeal taken pursuant to the provisions of the same section.

The jurisdiction of the Federal court was invoked because of questions raised under the Constitution of the United States, and not because of diversity of citizenship; but it extends, of course, to the determination of all questions presented, irrespective of the disposition that may be made of the Federal questions, or whether it is necessary to decide them at all. Ohio Tax Cases, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372, and cases cited.

The action of the Commission was based upon Kentucky Statutes: § 816, defining what shall be deemed extortion by a railroad corporation in charging toll or compensation for intrastate transportation; § 820a (the "McChord act"), authorizing the Commission, upon complaint made against a railroad company for charging extortionate freight or passenger rates, to hear the matter, and, if it determines that the company has been guilty of extortion, then to establish a just and reasonable rate for services thereafter to be rendered; and § 829, authorizing the Commission to hear and determine complaints under § 816, and to render such award as may be proper.

It appears that for many years prior to March 25, 1910, the railroad company had voluntarily maintained special rates for the transportation of corn, rye, barley, and malt, and empty barrels, boxes, etc., from three points of origin upon the Ohio river—Louisville, Covington, and Newport—to points of destination in the interior of the state; these rates being allowed only to owners of distilleries, when the commodities in question were used as raw materials or supplies. On the date mentioned, the carrier withdrew these special rates and substituted what are [605] described as the "standard rates," being the same that had been theretofore charged to others than distillers. Thereupon numerous distillery companies complained to the Commission, insisting that the new rates were exorbitant, and that the former rates were just and reasonable. After a hearing the Commission sustained the contention of the petitioners and established the maximum rates now in question, these being the same as the special rates, which, prior to March 25, 1910, the carrier had given to the distillery companies; but by the Commission's order they were made to apply to the commodities men-

tioned, without regard to the use that was to be made of them.

The McChord act, under which the rate order was made, is set forth in Siler v. Louisville & N. R. Co. 213 U. S. 178, 53 L. ed. 754, 29 Sup. Ct. Rep. 451. It provides for notice to the carrier, stating the nature of the complaint or matter to be investigated, and the time and place of hearing it, and requires the Commission to hear such statements, argument, or evidence offered by the parties as the Commission may deem relevant. Section 829 likewise requires notice of the hearing to be given to the company; the evidence is to be reduced to writing, together with the award, and they are to be filed in the office of the clerk of a designated court, and a summons is to be issued requiring the company to appear and show cause why the award should not be satisfied. If the parties fail to appear, judgment is rendered by default; but if trial is demanded, the case is to be tried as ordinary cases are, except that no evidence shall be introduced by either party other than that heard by the Commission, or such as the court shall be satisfied could not have been produced before the Commission by the exercise of reasonable diligence. The judgment and proceedings thereon are to be the same as in ordinary cases. Since the case was here before, the court of appeals of Kentucky, in Illinois C. R. Co. v. Paducah [606] Brewery Co. 157 Ky. 357, 163 S. W. 239, has passed upon § 829, upholding its validity under the state and Federal Constitutions, and construing it as authorizing the Commission to award reparation in money.

The contentions now made by appellants are reducible to two; first, that the rate order is invalid because not supported by substantial evidence; and, second, that the reparation order is invalid for the same reason, and also because the statute pursuant to which it was made violates the "due process" clause of the 14th Amendment.

To deal first with the rate order. In cases arising under the interstate commerce act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside. Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 92, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185. It is contended that the "due process" provision of the 14th Amendment imposes a like rule of procedure upon the states with respect to their exercise of the legislative power of rate-making.

We find it unnecessary to pass upon this question. The McChord act, like the interstate commerce act, contemplates that the Commission bases its determination upon the evidence adduced before it; and it may at least be assumed that the rate order must be held invalid unless it was founded upon substantial evidence. But we agree with the court below that there was substantial evidence to support the order. At the hearing, a Mr. Goodwyn was produced by the company, and made a statement of the facts in its behalf—not under oath, but it was received as evidence in behalf of the company—in substance [607] that the special rates maintained prior to March 25, 1910, had been introduced more than thirty years before, in order to encourage the distillery business along the line of the railroad; that the rates were not raised when the business of the distilleries became prosperous, but were continued as long as the railroad company could continue them with justice to itself; that is to say, to the point where prosecution was threatened by the Interstate Commerce Commission for alleged discrimination; and that in order to remove the discrimination the company had raised the rates charged on grain for distillery purposes in order to make them correspond with those charged on grain used for other purposes. These grain rates were the chief bone of contention. There was some other evidence, but not very much, that bore directly upon the question of the reasonableness of the rates; but it should be said that full opportunity was afforded to the railroad company to adduce such evidence as it desired. And since it appeared that the company, long prior to March 25, 1910, had voluntarily established the comparatively low rates upon a substantial part of their traffic, had maintained them for many years after the reason assigned for originally introducing them had ceased to exist, and had then withdrawn them, not upon the ground that they were inadequate, but because they gave rise to discrimination, and in so doing had introduced rates very much greater, it seems to us that the conduct of the carrier, in the absence of some explanation more conclusive than any that was made, was sufficient basis for a reasonable inference that the special rates in force prior to March 25 upon the distillery supplies were reasonable and adequate compensa-

tion for that and other similar traffic, and that the rates thereafter charged were unreasonably high to the extent of being extortionate. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 99, 57 L. ed. 431, 436, 33 Sup. Ct. Rep. 185. This was sufficient to give jurisdiction to the Commission under the [608] McChord act, and to support the conclusion that it reached.

As to the reparation order, it is further insisted (a) that there was no evidence before the Commission to show that the several parties to whom reparation was awarded had paid freights based upon the rates complained of, or to show the amounts of their payments, or to show that the difference in the freight payments represented damages to which they were entitled; and (b) that so much of the statute (§ 829) as undertakes to provide the procedure for recovering reparation is contrary to the "due process" provision of the 14th Amendment, because in the proceeding before the Commission there is no formal issue and no method of requiring the production of evidence, while in the subsequent trial before the court, based upon the Commission's award, there is no right to adduce evidence other than such as was presented to the Commission, unless the court shall first be satisfied that the evidence is such as could not have been produced before the Commission with the exercise of reasonable diligence.

From the record, however, it appears that in the petition filed by the distillers and distillery companies before the Commission it was alleged that since March 25, 1910, each of the petitioners had been subjected to extortionate charges collected from them by the railroad company, and for which an award of reparation was prayed; the respective amounts thus claimed being particularly specified. The answers of the company admitted that the rates mentioned had been charged, collected, and received by it, but denied that they were extortionate, unjust, or unreasonable, and upon this ground, and no other, denied liability to make reparation. The transcript of the testimony taken before the Commission shows that the several reparation claims were presented, and the following colloquy occurred respecting them: "Mr. McChord (counsel for petitioners): 'Is there any question made as to [609] the amount of those claims?' Mr. Goodwyn: 'We never checked them.' Mr. Dearing (counsel for the railroad company): 'My idea is that the Commission can easily check them, and you and I can check them if we come to the position that they are entitled to the reparation.' Mr. McChord: 'You deny it all?' Mr. Dearing: 'Yes.' Mr. McChord: 'I will put all these claims in as exhibits. Some of these have not been made up by the complainants, and we will want to fill them in later.' Mr. Dearing: 'That will be all right.' Mr. McChord: 'Shall I put them in now?' Mr. Siler: 'Yes, or at any time.'" In short, the record shows that the only question made respecting the reparation claims was the general contention that the rates charged by the company were in fact not unreasonable or extortionate; and that it was in effect conceded that the particular amounts claimed were proper to be awarded as reparation, if the rates charged were determined to be unreasonable and extortionate.

We have already seen that there was evidence to support the Commission's affirmative finding upon the latter point. And this leaves no basis, as we think, for appellant's present attack upon § 829 as repugnant to the due process provision of the 14th Amendment. In the proceeding before the Commission there were pleadings sufficiently formal, and appellant was permitted to raise such issues and introduce such evidence as it desired. There is nothing to show that it suffered for lack of compulsory process against witnesses. As to its right to adduce evidence before the court in the action to enforce payment of the award, its complaint in this regard seems to us at least premature. There is nothing to show that it has or could have any defense to the payment of the reparation that it has not already either interposed or waived in the proceeding before the Commission, or to show that it has any evidence to be adduced before the court that it [610] would be prevented from introducing by the effect of the restriction contained in § 829. This court does not sit to pass upon moot questions; and, as has been often pointed out, it is incumbent upon one who seeks an adjudication that a state statute is repugnant to the Federal Constitution to show that he is within the class with respect to whom it is unconstitutional, and that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Constitution. New York ex rel. Hatch v. Reardon, 204 U. S. 152, 161, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359.

The order of the District Court should be, and it is, affirmed.

JOHN T. HENDRICK, Plff. in Err.,
v.
STATE OF MARYLAND.

(See S. C. Reporter's ed. 610–625.)

Statutes — who may assail validity — discrimination.

1. A resident of the District of Columbia who fails to show that he has complied with the laws in force within the District in respect to registering motor vehicles and licensing operators, or that he has applied to the Maryland commissioner for a local identifying tag or marker, which are prerequisites under Md. Laws 1910, chap. 207, § 140a, to a limited use of the highways without cost by residents of other states, cannot complain that residents of the District of Columbia are not included among those to whom this privilege is granted.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Commerce — state regulation of motor vehicles — congressional inaction.

2. The absence of Federal legislation upon the subject leaves the states free to prescribe uniform regulations reasonably necessary for public safety and order in respect to the operation upon their highways of motor vehicles moving in interstate commerce, and to that end they may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse power of their engines.

[For other cases, see Commerce, I. c; III. d, in Digest Sup. Ct. 1908.]

Commerce — state regulation of motor vehicles — congressional inaction.

3. The requirements of Md. Laws 1910, chap. 207, that motor vehicles be registered, at a cost varying from $6 to $18, according to horse power, and that drivers obtain a license at a cost of $2, and that nonresidents, in order to have a limited use of the

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NOTE. — As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 159.

As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. North Carolina Bd. of Agri. 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

Gradation of automobile excise or license tax according to horse power or seating capacity.

It has been held that the due process clause of the Constitution is not violated by the provisions of an act imposing a license tax according to the horse power of the motor vehicles used, the intent of the legislature in such case being to apportion the charge with some reference to the destructive or wearing power of the motor vehicle; and while the method adopted is not the most scientific basis of measurement of their potency for injury to the roads, it is not without justification. Re Schuler, 167 Cal. 282, 139 Pac. 685.

So, too, in Kane v. State, 81 N. J. L. 594, L.R.A.—, —, Ann. Cas. 1912D, 237, 80 Atl. 453, it was held that a statute fixing registration fees according to the horse power of the machine used was not a property tax, and was not invalid because it was imposed without regard to the value of the property upon which it was laid, since such imposition was a license or privilege tax, which was properly based upon the destruction to the highway done by the machine used.

And a legislative act fixing a fee for registration at $3 for each motor vehicle having a rating of 30 horse power or more, and providing for a fee of $1 for a license to drive a car less than 30 horse power, and $2 for a license to drive cars over that, and providing that the money received for license fees, etc., should be paid to the state treasurer, to be appropriated for use in repairing or improving the roads of the state, was upheld in State, Cleary, Prosecutor, v. Johnston, 79 N. J. L. 49, 74 Atl. 538, as a valid exercise of the police power, not imposing a tax for revenue, but merely fixing a reasonable fee for regulating and supervising motor vehicles.

In Jackson v. Neff, 64 Fla. 326, 60 So. 350, the legislative act involved provided that the owner or operator of every vehicle when used for hire, charter, or when charge was made for the use thereof in any manner or form whatsoever, should pay annually a county license tax of a specified amount, varying, according to the horsepower of the vehicle used, from $5 to $100; and provided further that when such machines were used by the owners or without charge, a specified license fee, varying, according to the horse power of the machine, from $3 to $50, should be paid. The act further provided that the payment of one license tax should exempt the owner from the payment of any other county tax during the year, and it was provided that all moneys derived from such tax should be paid into the road and bridge building funds of the counties, and the failure to comply with the provisions of the act was made a misdemeanor. The Constitution provided that the legislature should provide for a uniform and equal rate of taxation, and should prescribe such regulations as would secure a just valuation of all property, both real and personal, excepting such property as might be accepted by law for municipal, educational, literary, scientific, religious, or charitable purposes; and fur-

highways without cost, must have complied with a similar law in their respective states, and must have secured a local identifying tag or marker, are not so arbitrary or unreasonable as to constitute, when applied to vehicles moving in interstate commerce, a direct and material burden upon such commerce, and they are therefore valid until displaced by Federal legislation covering the subject.

[For other cases, see Commerce, I. c; III. d, in Digest Sup. Ct. 1908.]

Citizens — rights of ingress and egress — state motor vehicles law.

4. The rights of citizens of the United States to pass through the several states are not unconstitutionally interfered with by Md. Laws 1910, chap. 207, § 140a, under which nonresident owners and operators of motor vehicles may have a limited use of the highways of the state without cost only where they have complied with similar legislation in their respective states, and have applied for and obtained a local identifying tag or marker.

[For other cases, see Citizens, II.; Commerce, III. b, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity — discrimination.

5. An automobile owner cannot complain of a discrimination under the provisions of Md. Laws 1910, chap. 207, for the licensing and regulation of motor vehicles, because the fees are graduated according to engine power, where the power of the car owned by him does not appear.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

[No. 77.]

Argued November 11 and 12, 1914. Decided January 5, 1915.

IN ERROR to the Circuit Court of Prince George's County, State of Maryland, to review a conviction for violating the state motor vehicle law. Affirmed.

The facts are stated in the opinion.

Mr. Jackson H. Ralston argued the cause, and, with Messrs. Clement L. Bouvé and William E. Richardson, filed a brief for plaintiff in error:

Passing into or through states of the Union in automobiles is an act of interstate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C.

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ther provided that the legislature should authorize the several counties and cities or towns to assess and impose taxes for county and municipal purposes, and that all property should be taxed upon the principles established for state taxation. And it was further provided that no person should be deprived of property without due process of law. It was held in this case that the power of the legislature was unrestricted to impose ad valorem taxes by a duly enacted statute, where the limitations imposed by the Constitution as to uniform and equal rates and just valuations were observed, and the organic provisions as to due process and equal protection of the law were not violated. And it was held that the tax imposed by the act being manifestly for the privilege of using motor vehicles on the highways, and applicable alike to all owners or operators of motor-driven vehicles, and therefore the power to levy it being ample, there was no unjust discrimination between persons under like conditions and circumstances that denied to anyone the equal protection of the law.

The owners of a motor vehicle are not deprived of due process of law by reason of a provision of an act assigning the duty of determining the horse power of each motor vehicle for the purposes of the act to the department of engineering, where, by the provisions of the act, the owner was given the right to present his entire case to the engineering department, and since, should that department arbitrarily refuse to act upon his application, or act erroneously, he would have his remedy in the courts. Re Schuler, 167 Cal. 282, 139 Pac. 685.

Where it appears that the formula adopted as the basis of determining the horsepower rating, in an act licensing motor vehicles, is well recognized and has been employed by leading manufacturers, the basis is sufficiently definite to justify legislative adoption, although there may be some inaccuracy because of the recent development in engine making. Graves v. Janes, 18 Ohio C. C. N. S. 488.

And there is no delegation of power by the legislature in adopting such formula. Ibid.

An excise tax upon motor vehicles is not invalid because graduated according to seating capacity. Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440.

The municipal ordinance upheld in Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536, imposed an annual license tax of $30 upon automobile trucks and buses, $20 upon automobile seating more than two persons, and $12 upon automobiles seating but two persons; but no point seems to have been made of this feature of the ordinance.

Generally, on the law governing automobiles—see note to Christy v. Elliott, 1 L.R.A.(N.S.) 215; Mark v. District of Columbia, 37 L.R.A.(N.S.) 441, and on the validity of excise or license tax upon automobiles—see notes to Re Hoffert, 52 L.R.A. (N.S.) 949; Re Kessler, L.R.A.1915D, 322.

C. A. 27, 157 Fed. 325, 13 Ann. Cas. 893; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 30 Sup. Ct. Rep. 481, 27 L.R.A.(N.S.) 493, 18 Ann. Cas. 1103.

The matter of interstate transportation of passengers is one capable of uniform regulation and legislation, and is thus exclusively within the domain of Congress, and wholly apart from regulation or interference on the part of the states.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146.

Where, in subjects requiring uniformity of legislation, such as interstate transportation of passengers, the state law comes into direct conflict with the commerce clause, it is illegal, although a bona fide attempt to exercise the police power of the state.

Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Williams v. Fears, 110 Ga. 584, 50 L.R.A. 685, 35 S. E. 699; License Cases, 5 How. 504, 592, 12 L. ed. 256, 296; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The exaction of license and registration fees as conditional to the privilege of the use of the roads of the state of Maryland is an attempt to regulate interstate commerce directly, and imposes a burden on such commerce.

Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Pullman's Palace Car Co. v. Twombly, 29 Fed. 667; Tennessee v. Pullman Southern Car Co. 117 U. S. 51, 29 L. ed. 791, 6 Sup. Ct. Rep. 643; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 215, 41 L. ed. 976, 17 Sup. Ct. Rep. 604; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The Maryland law is unconstitutional as violative of the rights of citizens of the United States to pass into and through Maryland.

8 Cyc. 1042; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Re Charge, Fed. Cas. No. 18,260; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Miller, Const. L. p. 260; Williams v. Fears, 110 Ga. 584, 50 L.R.A. 685, 35 S. E. 699; Moran v. New Orleans, 112 U. S. 69, 27 L. ed. 653, 5 Sup. Ct. Rep. 38; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Cooley, Const. Lim. 5th ed. pp. 601, 602; Cooley, Taxn. 2d. ed. p. 99.

Mr. Osborne I. Yellott also argued the cause and, with Mr. Jackson H. Ralston filed a brief for plaintiff in error.

Mr. Edgar Allan Poe, Attorney General of Maryland, and Mr. Enos S. Stockbridge argued the cause and filed a brief for defendant in error:

Since the early case of Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71, this court has recognized the right of the states to regulate and control their highways under what is termed the "police power."

Cardwell v. American River Bridge Co. 113 U. S. 205, 208, 28 L. ed. 959, 960, 5 Sup. Ct. Rep. 423; Phillips v. Mobile, 208 U. S. 472, 52 L. ed. 578, 28 Sup. Ct. Rep. 370; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 411, 57 L. ed. 1511, 1546, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; Jones v. Brim, 165 U. S. 180, 182, 41 L. ed. 677, 678, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Slaughter-House Cases, 16 Wall. 36, 63, 21 L. ed. 394, 404; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 303, 43 L. ed. 702, 709, 19 Sup. Ct. Rep. 465; Robbins v. Taxing Dist. 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Since the automobile came into more or less common use, this precise question has not been before this court. Various state courts, however, have given it their consideration, and, in conformity with the well-recognized doctrines of this court, have held that such regulations were a proper exercise of this power.

Ruggles v. State, 120 Md. 561, 87 Atl. 1080; Ayres v. Chicago, 239 Ill. 237, 87 N. E. 1073; Com. v. Kingsbury, 199 Mass. 544, 127 Am. St. Rep. 513, 85 N. E. 848; State v. Mayo, 106 Me. 62, 26 L.R.A.(N.S.), 502, 75 Atl. 295, 20 Ann. Cas. 512; Brazier v.

Philadelphia, 215 Pa. 297, 64 Atl. 508, 7 Ann. Cas. 548; Bozeman v. State, 7 Ala. App. 151, 61 So. 604; Unwen v. State, 73 N. J. L. 529, 64 Atl. 163, affirmed in 75 N. J. L. 500, 68 Atl. 110; Kane v. State, 81 N. J. L. 594, L.R.A.—, —, 80 Atl. 453, Ann. Cas. 1912D, 237.

In cases involving the principle here under discussion, counsel have urgently pressed upon the court the doctrine that the subject involved is "commerce," and therefore under the exclusive control of Congress, and that when Congress has taken no action with regard to it, it has willed that the subject should be free from interference of any kind. Arguments of this sort have uniformly been rejected by the courts upon the principle that such subjects are not national in their character, but local, and therefore, although regulation by the states may incidentally affect interstate commerce, nevertheless, such regulation is valid until Congress does act.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 411, 412, 57 L. ed. 1511, 1546, 1547, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Monongahela Nav. Co. v. United States, 148 U. S. 312, 333, 37 L. ed. 463, 470, 13 Sup. Ct. Rep. 622; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Robbins v. Taxing Dist. 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313.

The 14th Amendment was never intended to abridge the police power of the state. Its only purpose was to prevent the state from acting arbitrarily and in a manner having no reasonable relation to the end in view. If the act in question is properly within the police power of the state, this court will not inquire further. The redress of the people who claim to be aggrieved is with the legislature, and not through the courts. This court has often announced that it is not a haven to be sought for relief from ill-advised or unwise legislation.

Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 33, 32 L. ed. 585, 587, 9 Sup. Ct. Rep. 207; L'Hote v. New Orleans, 177 U. S. 587, 596, 44 L. ed. 899, 903, 20 Sup. Ct. Rep. 788; House v. Mayes, 219 U. S. 270, 282, 55 L. ed. 213, 218, 31 Sup. Ct. Rep. 234; Brodnax v. Missouri, 219 U. S. 285, 292, 293, 55 L. ed. 219, 223, 224, 31 Sup. Ct. Rep. 238; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 700, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732.

The plaintiff in error was not, at the time of his arrest for a violation of the act in question, engaged in interstate commerce.

Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 38 L. ed. 962, 968, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Hoke v. United States, 227 U. S. 308, 320, 57 L. ed. 523, 526, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Wabash St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 572, 573, 30 L. ed. 244, 249, 250, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 57 L. ed. 1015, 33 Sup. Ct. Rep. 712.

From very early times, there has been a class of circumstances under which the states or their agents, municipal or private, have been permitted to make and collect a charge for facilities rendered, and such charge has uniformly been held not to be a tax or burden on or interference with interstate commerce in any sense, although it may incidentally affect interstate commerce. For instance:

Toll charges for the use of improved navigable streams—

Kellogg v. Union Co. 12 Conn. 7; Huse v. Glover, 119 U. S. 543, 548, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 214, 29 L. ed. 158, 165, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Monongahela Nav. Co. v. United States, 148 U. S. 312, 333, 37 L. ed. 463, 470, 13 Sup. Ct. Rep. 622; Thames Bank v. Lovell, 18 Conn. 500, 46 Am. Dec. 332.

Bridges over navigable streams—

Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 18 L. ed. 137; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 221, 222, 38 L. ed. 962, 969, 970, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

The use of wharves or docks—

Cannon v. New Orleans, 20 Wall. 577, 22 L. ed. 417; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Northwestern Union Packet Co. v. St. Louis, 100 U. S. 423, 25 L. ed. 688; Vicksburg v. Tobin, 100 U. S. 430, 25 L. ed. 690; Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Ouachita & M. River Packet Co. v. Aiken,

121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313.

The use of roads or streets—

Tomlinson v. Indianapolis, 144 Ind. 142, 36 L.R.A. 413, 43 N. E. 9; Monongahela Nav. Co. v. United States, 148 U. S. 312, 333, 334, 37 L. ed. 463, 470, 471, 13 Sup. Ct. Rep. 622; State, Cleary, Prosecutor, v. Johnston, 79 N. J. L. 49, 74 Atl. 538; Kane v. State, 81 N. J. L. 594, L.R.A.—, —, 80 Atl. 453, Ann. Cas. 1912D, 237.

The improvements are, like wharves and docks, constructed to facilitate commerce in loading and unloading vessels. Regulations of tolls or charges in such cases are mere matters of administration under the entire control of the state.

Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817.

Even if it were shown in this case that the amount of the fees charged as compensation for the use of the improved roads of this state results in a benefit to the state, such fact does not make the fees provided for either unreasonable or a burden on interstate commerce.

Phillips v. Mobile, 208 U. S. 472, 478, 479, 52 L. ed. 578, 580, 581, 28 Sup. Ct. Rep. 370; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 449, 30 L. ed. 976, 978, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Huse v. Glover, 119 U. S. 543, 549, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313.

There can be no dispute but that the citizens of the states and United States have the right to go into and leave any state of this Union without hindrance. This right has been expressly recognized by the courts.

Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452; Slaughter-House Cases, 16 Wall. 36, 75, 21 L. ed. 394, 408.

But the plaintiff in error fails to distinguish between the hindrance or interference by a state with such right, and the undoubted right of a state to protect its own citizens and property, although the exercise of this right by the state may incidentally or remotely affect the right. A very common illustration of this is the unquestioned right of a state under its quarantine law to prohibit the entrance into its territory of persons or property from localities suffering from an epidemic of infectious diseases, without thorough fumigation.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473, 24 L. ed. 527, 531; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 406, 57 L. ed. 1511, 1544, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729.

A state is justified in requiring those who elect to use on its highways a mode of travel that is abnormally destructive to that road, to compensate it for such use.

Kane v. State, 81 N. J. L. 594, L.R.A.—, —, 80 Atl. 453, Ann. Cas. 1912D, 237.

Mr. Justice McReynolds delivered the opinion of the court:

Plaintiff in error was tried before a justice of the peace, Prince George's county, Maryland, upon a charge of violating the motor vehicle law. A written motion to quash the warrant because of conflict between the statute and the Constitution of the United States was denied he was found guilty and fined. Thereupon an appeal was taken to the circuit court,—the highest in the state having jurisdiction,—where the cause stood for trial *de novo* upon the original papers. It was there submitted for determination by the court upon an agreed statement of facts grievously verbose, but in substance as follows:

The cause was originally brought July 27, 1910, before a justice of the peace for Prince George's county by the state against John T. Hendrick for violating § 133 of the motor vehicle law effective July 1, 1910. He is and then was a citizen of the United States, resident and commorant [619] in the District of Columbia. On that day he left his office in Washington in his own automobile and drove it into Prince George's county, and while temporarily there was arrested on the charge of operating it upon the highway without having procured the certificate of registration required by § 133 of the motor vehicle law. He was brought before a justice of the peace and fined $15 after having been found guilty of the charge set out in a warrant duly issued,—a motion to quash having been denied. Whereupon he filed his appeal. At the time and place aforesaid he had not procured the certificate of registration for his automobile required by § 133. Upon the foregoing the court shall determine the questions and differences between the parties and render judgment according as their rights in law may appear in the same manner as if the facts aforesaid were proven upon the trial. Either party may appeal.

The Maryland legislature by an act effective July 1, 1910 (chap. 207, Laws 1910, p. 177), prescribed a comprehensive scheme for licensing and regulating motor vehicles. The following summary sufficiently indicates its provisions:

The governor shall appoint a commissioner of motor vehicles, with power to designate assistants, who shall secure en-

forcement of the statute. Before any motor vehicle is operated upon the highways the owner shall make a statement to the commissioner and procure a certificate of registration; thereafter it shall bear a numbered plate. This certificate and plate shall be evidence of authority for operating the machine during the current year (§ 133). Registration fees are fixed according to horsepower—$6 when 20 or less; $12 when from 20 to 40; and $18 when in excess of 40 (§ 136). No person shall drive a motor vehicle upon the highway until he has obtained at a cost of $2 an operator's license, subject to revocation for cause (§ 137). [620] Any owner or operator of an automobile, nonresident of Maryland, who has complied with the laws of the state in which he resides requiring the registration of motor vehicles, or licensing of operators thereof, etc., may, under specified conditions, obtain a distinguishing tag and permission to operate such machine over the highways for not exceeding two periods of seven consecutive days in a calendar year without paying the ordinary fees for registration and operator's license (§ 140a); but residents of the District of Columbia are not included amongst those to whom this privilege is granted (§ 132). Other sections relate to speed, rules of the road, accidents, signals, penalties, arrests, trials, fines, etc. All money collected under the provisions of the act go to the commissioner, and, except so much as is necessary for salaries and expenses, must be paid into the state treasury to be used in construction, maintaining, and repairing the streets of Baltimore and roads built or aided by a county or the state itself. Section 140a is copied in the margin.[1]

[621] Plaintiff in error maintains that the act is void because—it discriminates against residents of the District of Columbia; attempts to regulate interstate commerce; violates the rights of citizens of the United States to pass into and through the state; exacts a tax for revenue—not mere compensation for the use of facilities—according to arbitrary classifications, and thereby deprives citizens of the United States of the equal protection of the laws.

If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the state we will not assume that, upon a proper showing, this will be denied. The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland commissioner for an identifying tag or marker,—prerequisites to a limited use of the highways without cost by residents of other states under the plain terms of § 140a. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto. New York ex rel. Hatch v. Reardon, 204 U. S. 152, 161, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Williams v. Walsh, 222 U. S. 415, 423, 56 L. ed. 253, 256, 32 Sup. Ct. Rep. 137; Collins v. Texas, 223 U. S. 288, 295, 296, 56 L. ed. 439, 443, 444, 32 Sup. Ct. Rep. 286; Missouri, [622] K. & T. R. Co. v. Cade, 233 U. S. 642, 648, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678, and cases cited.

The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also ab-

[1] "140a. Any owner or operator not a resident of this state, who shall have complied with the laws of the state in which he resides, requiring the registration of motor vehicles or licensing of operators thereof and the display of identification or registration numbers on such vehicles, and who shall cause the identification numbers of such state, in accordance with the laws thereof, and none other, together with the initial letter of said state, to be displayed on his motor vehicle, as in this subtitle provided, while used or operated upon the public highways of this state, may use such highways not exceeding two periods of seven consecutive days in each calendar year, without complying with the provisions of §§ 133 and 137 of this subtitle, if he obtains from the commissioner of motor vehicles and displays on the rear of such vehicle a tag or marker which the said commissioner of motor vehicles shall issue in such form and contain such distinguishing marks as he may deem best; provided that if any nonresident be convicted of violating any provisions of §§ 140b, 140c, 140d, 140e, and 1401 of this subtitle, he shall thereafter be subject to and required to comply with all the provisions of said §§ 133 and 137 relating to the registration of motor vehicles and the licensing of operators thereof; and the governor of this state is hereby authorized and empowered to confer and advise with proper officers and legislative bodies of other states of the Union, and enter into reciprocal agreements under which the registration of motor vehicles owned by residents of this state will be recognized by such other states, and he is further authorized and empowered, from time to time, to grant to residents of other states the privilege of using the roads of this state as in this section provided in return for similar privileges granted residents of this state by such other states."

normally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.

In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines,—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety, and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to [623] inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress. Barbier v. Connolly, 113 U. S. 27, 30, 31, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357; Smith v. Alabama, 124 U. S. 465, 480, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; Holden v. Hardy, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 298, 43 L. ed. 702, 707, 19 Sup. Ct. Rep. 465; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 568, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 291, 58 L. ed. 1312, 1317, 34 Sup. Ct. Rep. 829.

In Smith v. Alabama, 124 U. S. 465, 480, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, consideration was given to the validity of an Alabama statute forbidding any engineer to operate a railroad train, without first undergoing an examination touching his fitness, and obtaining a license, for which a fee was charged. The language of the court, speaking through Mr. Justice Matthews, in reply to the suggestion that the statute unduly burdened interstate commerce and was therefore void, aptly declares the doctrine which is applicable here. He said:

"But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the state or in commerce among the states."

The prescribed regulations upon their face do not appear to be either unnecessary or unreasonable.

In view of the many decisions of this court there can be [624] no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732; Huse v. Glover, 119 U. S. 543, 548, 549, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313; Monongahela Nav. Co. v. United States, 148 U. S. 312, 329, 330, 37 L. ed. 463, 469, 13 Sup. Ct. Rep. 622; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 405, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, and authorities cited. The action of the state must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facilities supplied by the state, the cost of maintaining them,

or the fairness of the methods adopted for collecting the charges imposed; and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable.

There is no solid foundation for the claim that the statute directly interferes with the rights of citizens of the United States to pass through the state, and is consequently bad according to the doctrine announced in Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745. In that case a direct tax was laid upon the passenger for the privilege of leaving the state; while here the statute at most attempts to regulate the operation of dangerous machines on the highways, and to charge for the use of valuable facilities.

As the capacity of the machine owned by plaintiff in error does not appear, he cannot complain of discrimination because fees are imposed according to engine power. Distinctions amongst motor machines and between them and other vehicles may be proper,—essential, indeed,—and those now challenged are not obviously arbitrary or oppressive. The statute is not a mere revenue measure, [625] and a discussion of the classifications permissible under such an act would not be pertinent.

There is no error in the judgment complained of, and it is accordingly affirmed.

NORFOLK & WESTERN RAILWAY COMPANY, Plff. in Err.,
v.
SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased.

(See S. C. Reporter's ed. 625-635.)

Appeal — error in instructions — damages.

It is reversible error to tell the jury when instructing them on the question of damages in an action brought under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), for the benefit of the widow and infant children of a deceased interstate railway employee, that the pecuniary injury suffered in such case is much greater than when the beneficiaries are all adults or dependents who are next of kin.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

[No. 516.]

Argued December 1 and 2, 1914. Decided January 5, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Virginia in favor of plaintiff in an action brought under the employers' liability act. Reversed and remanded for further proceedings.

See same case below, 215 Fed. 687.

The facts are stated in the opinion.

Mr. F. Markoe Rivinus argued the cause, and, with Mr. Theodore W. Reath, filed a brief for plaintiff in error.

Mr. William H. Werth argued the cause and filed a brief for defendant in error:

Mr. Justice McReynolds delivered the opinion of the court:

W. T. Holbrook, a bridge carpenter, aged thirty-eight, and employed by plaintiff in error at a wage of $2.75 per day, was killed by a passing train while at his work in McDowell county, West Virginia, January 4, 1913. He left a widow, thirty-two years old, and five children of [627] one, four, seven, eleven, and fourteen years. The widow qualified as administratrix and instituted this suit under the employers' liability act, approved April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), in behalf of herself and children in the United States district court, western district of Virginia. She charged that the accident resulted from negligence of agents and employees of the raiway company, and at the trial introduced evidence tending to establish this fact. The jury returned a verdict for $25,000 in her favor; judgment thereon was affirmed by the circuit court of appeals (215 Fed. 687); and the cause was brought here.

The only assignment of error now relied upon goes to a single sentence in instruction No. 5, wherein comparison is made between the pecuniary injuries of a widow and infant children and those of adults or mere next of kin. At the instance of the administratrix, the court told the jury (instruction No. 4) that if Holbrook's own negligence contributed proximately to his death, only proportionate damages could be recovered, and then gave instruction No. 5, in the following words:

"The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant chil-

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NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 88.

As to measure of recovery for death caused by negligence—see note to Morgan v. Southern P. Co. 17 L.R.A. 71.

dren as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

"However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary [628] injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding $40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

"(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed, and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

"(2) The jury will also take into consideration the care, attention, instruction, training, advice, and guidance which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

The railway company duly excepted because "the court tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the [629] case of persons suing who were more distantly related." The exception was overruled, and this action is now relied on as material error requiring a reversal.

Under the employers' liability act, where death is instantaneous, the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same. The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from those demanding examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 68, 72, 73, 57 L. ed. 417, 420, 422, 423, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 149, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 175, 176, 57 L. ed. 785, 786, 787, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; North Carolina R. Co. v. Zachary, 232 U. S. 248, 256, 257, 58 L. ed. 591, 594, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed. But there was nothing—indeed there could be nothing—to show the hypothetic injury which might have befallen some unidentified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased [630] husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented,—to indulge in conjecture instead of weighing established facts. Merchants' Mut. Ins. Co. v. Baring, 20 Wall. 159, 161, 22 L. ed. 250, 251.

The facts brought out during the course of the trial were adequate to constitute a strong appeal to the sympathy naturally

engendered in the minds of jurors by the misfortunes of a widow and her dependent children. In such circumstances it was especially important that the charge should be free from anything which they might construe as a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion, or prejudice, or from any other violation of lawful rights. Pleasants v. Fant, 22 Wall. 116, 121, 22 L. ed. 780, 782.

Considering the whole record we feel obliged to conclude that the probable result of the indicated language in instruction No. 5 was materially to prejudice the rights of the railway company. The judgment of the Circuit Court of Appeals is accordingly reversed and the cause remanded to the District Court for the Western District of Virginia for further proceedings in conformity with this opinion.

Judgment reversed.

Mr. Justice McKenna, dissenting:

I am unable to concur in the opinion and judgment of the court. I think the criticism that the railway company makes of the charge of the court to the jury is too severe in inference, and makes a single sentence in a charge which [631] occupies a page of the record exclusively dominant, pushing aside all qualifications and particulars. I do not think this is permissible. The charge of a court to a jury must be considered as a whole, not by isolated sentences, and a jury, as one of the tribunals of the country, must be presumed to have some sense.

The court in the case at bar was confronted with the difficulty with which courts are often confronted, and which no court has yet been able completely to surmount by any form of words,—of bringing home to itself or to a jury the loss to wife and infant children through the death of the husband and father. The court in the present case ventured to say that these relations had something more in them and their destruction had something more of "pecuniary injury" than the injury to "the mere next of kin," and that there might be a loss to infant children greater than to adults. Would any one like to deny it? Would not its denial upset all that is best, in sentiment and duty, in life? And must that sentiment and duty, so potent in motive and conduct, be illegal to emphasize in a court of justice as an interference with the strict standards of the law?

By these standards, I admit, the charge of the court must be determined, and therefore let us turn to them as applied by the district court. The court said the amount of recovery must "be measured by the pecuniary injury suffered by the widow and infant children, as the *direct result* of the death of the husband and father, it not being *permissible for the jury* to go beyond the *pecuniary loss* and give damages for the *loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.*" (Italics mine.) Can there be any mistake in the standard declared by the court? Not love, not sorrow, not mental anguish, not sentiment, but loss in money "as the direct result of the [632] death," and beyond that money loss "it not being permissible for the jury to go." The standard, then, is money loss, or, to use the court's words, "the pecuniary injury suffered." No prompting to or excuse for impulse or passion was given, nor was imagination left any sway. The judgment of the jury was brought and held to the money value of the life destroyed to wife and children dependent upon it. And the elements in the computation were not left undefined. They were enumerated as follows: (1) Earning capacity at time of death and the probability of its continuance. In estimating the latter, and hence the value of it to wife and children, the jury were told to consider the age, health, habits, industry, intelligence, and character of the deceased, and his expectancy of life, as shown by the evidence,—all, I may say in passing, strictly legal elements and none found fault with. (2) Regarding those qualities and his devotion to his parental duties or indifference thereto, as shown by the evidence, the jury were instructed to take into consideration "the care, attention, instruction, training, advice, and guidance" which "he would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit, therefore, to said children, and include the pecuniary value of the same in the damages assessed."

A money standard with careful iteration, it will be observed, is declared throughout, and there is no dispute as to the elements to which it is to be applied, and of which the law assigns to the jury the duty of estimating. I repeat, no error is asserted of these elements or of the estimate of their pecuniary value by the jury, but counsel say that they were made vicious and might have been exaggerated or misunderstood by the comparison made by the court between the widow and children and dependents who were mere next of kin, and between infants and adults. It may be well to give the court's language. [633] After stating that the amount recovered should be measured

by the pecuniary injury suffered, the court added: "However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband or father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the purely pecuniary damages." It is objected that the instruction was error because the court told the jury that the widow and children of the deceased were entitled to "larger damages" than would have been allowable to persons suing who were more distantly related. The first impulse of the mind is against the objection, and the impulse is supported by the deliberate resolution of cases. In Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491, and Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, the same distinctions are expressed. In explanation of those cases counsel say this court announced "the general proposition of law that the rule for damages must differ as the degree of the *proven* dependence of the beneficiary differs;" and add, "but matter suitable in an opinion of an *appellate* court may be inappropriate in a charge to a jury." The latter statement is rather intangible. It cannot be that the law declared by an appellate court is unsuitable to be followed by a trial court. The court, besides, in the pending case, did no more than express the elements of damages as dependent upon the relationship of the deceased to the beneficiaries. The distinction is a natural one, based on the realities of life, and I cannot conceive of a mistake by the jury in its application. There may be, indeed, special cases, and counsel imagines there may be, of crippled or diseased adults or infirm next of kin who, on account of their condition, may be entitled to a special consideration, [634] but the possibility of their existence did not make the instruction of the court erroneous, or that the jury in some way might have made a "comparison between beneficiaries who were before the court and hypothetical beneficiaries who were not in the case at all." In other words, the contention is that the jury was left or invited to conjecture the injury in an extreme example of imaginary dependent next of kin as necessarily below the limit of the injury to the widow or infant children, and this notwithstanding the careful enumeration of the elements of damage contained in the charge of the court. I am unable to yield to the contention. The court only expressed a general distinction, a natural one based on general experience and supported by a difference in legal obligations. It is a distinction recognized by the statute by virtue of which the action was brought as determining the order of precedence of its beneficiaries. The law, therefore, recognizes the fact, and it is not to be put out of view, that there is a difference in the relation of a widow and children to a deceased husband and father, and the relation of the next of kin, whatever be the degree of the dependence of the latter. But, granting I am mistaken in this, and that there may be exceptional cases of dependent next of kin, they do not constitute the rule, and the objection to the charge of the court was too general. The objection was that the instruction took in elements of damage improper to be considered by the jury because the court told "the jury that the widow and infant children of decedent" were "entitled to larger damages than would be the case of persons suing who were more distantly related." It was not pointed out, therefore, that the court was wrong in its generality on account of exceptional instances which were left to the jury to imagine, but universally wrong. In other words, the objection was not, as it now is, that the court committed the case to the imagination of the jury, or made the "relationship [635] itself" of the plaintiff and her children to the deceased a factor to be considered in fixing the amount of pecuniary damages. If the objection had been so special and explicit it might have been yielded to. At any rate, it was wrong because of its generality, and should not now be regarded. The judgment, therefore, should be affirmed.

I am authorized to say that Mr. Justice Day and Mr. Justice Hughes concur in this dissent.

G. W. WATHEN, Appt.,
v.
JACKSON OIL & REFINING COMPANY et al.

(See S. C. Reporter's ed. 635-641.)

Corporations — stockholder's suit — effort to procure action by corporation.

A majority stockholder cannot maintain a suit in a Federal court to restrain

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NOTE.—As to necessity of making corporation a party to a suit by a stockholder in its behalf—see note to Kelly v. Thomas, 51 L.R.A.(N.S.) 123.

On necessity of applying to body of stockholders as a condition of right of stockholders to sue on behalf of corporation—

the corporation, its officers and managers, from complying with a state statute, and to enjoin certain public officers from enforcing its provisions as against the corporation, upon the ground of the unconstitutionality of such statute, where the only attempt to comply with the requirement of equity rule 27, that the bill must show plaintiff's effort to secure action by the corporation, and the cause of his failure, or his reasons for not making such effort, is by asserting that though the directors and officers of the corporation do not wish to comply with the statute, they will do so through fear of its penalties.

[For other cases, see Corporations, 518-524, in Digest Sup. Ct. 1908.]

[No. 79.]

Submitted November 9, 1914. Decided January 11, 1915.

APPEAL from the District Court of the United States for the Southern District of Mississippi to review an order denying a preliminary injunction in a suit by a stockholder to restrain the corporation from complying with, and certain public officers from enforcing, a state statute which he asserts is unconstitutional. Affirmed.

The facts are stated in the opinion.

Mr. **Marcellus Green** submitted the cause for appellant. Mr. Garner Wynn Green was on the brief:

This court has jurisdiction at the suit of appellant.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Mr. **Frank Johnston** submitted the cause for appellees. Mr. Ross A. Collins, Attorney General of Mississippi was on the brief:

A shareholder cannot maintain a bill in equity, or any proceeding of a judicial character, in cases where it is competent for the corporation itself to defend or sue. This is the universal general rule, and the cases in which a shareholder is permitted to maintain a bill against the corporation, or to defend or sue other persons in lieu of the corporation, are exceptional in their character.

Macdougall v. Gardiner, L. R. 1 Ch. Div. 13, 45 L. J. Ch. N. S. 27, 33 L. T. N. S. 521, 24 Week. Rep. 118; Mozley v. Alston, 1 Phill. Ch. 790, 4 Railw. Cas. 636, 16 L. J. Ch. N. S. 217, 11 Jur. 315; Lord v. Copper Miners Co. 2 Phill. Ch. 740, 1 Hall & Tw. 85, 18 L. J. Ch. N. S. 65, 12 Jur. 1059; Foss v. Harbottle, 2 Hare, 461; Bissitt v. Kentucky River Nav. Co. 15 Fed. 353; Bailey v. Birkenhead, L. & C. J. R. Co. 12 Beav. 433, 6 Railw. Cas. 256, 19 L. J. Ch. N. S. 377, 14 Jur. 119; Walker v. Mobile & O. R. Co. 34 Miss. 245; Ellison v. Mobile & O. R. Co. 36 Miss. 572; Durfee v. Old Colony & F. River R. Co. 5 Allen, 242; High, Extr. Legal Rem. § 278; High, Receivers, §§ 288, 289, 293; Farnum v. Ballard Vale Mach. Shop, 12 Cush. 507; Graham v. Boston, H. & E. R. Co. 14 Fed. 753; Samuel v. Holladay, Woolw. 400, Fed. Cas. No. 12,288; Re London & M. Discount Co. L. R. 1 Eq. 277; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; March v. Eastern R. Co. 40 N. H. 548, 77 Am. Dec. 732; Peabody v. Flint, 6 Allen, 52; Brewer v. Boston Theatre, 104 Mass. 378; Hersey v. Veazie, 24 Me. 9, 41 Am. Dec. 364; Memphis v. Dean, 8 Wall. 73, 19 L. ed. 328; Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938; Bacon v. Robertson, 18 How. 480, 15 L. ed. 499; Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186; Ellerman v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 217, 23 Atl. 287; 2 Cook, Stock & Stockholders, § 750.

Mr. Justice **Hughes** delivered the opinion of the court:

The appellant brought this suit in the district court to restrain the Jackson Oil & Refining Company, its manager and officers, from complying with a statute of Mississippi prohibiting employment in described occupations for more than ten hours a day, except in cases of emergency or public necessity (chapter 157, Laws of Mississippi, 1912, p. 165), and to enjoin the other defendants (certain public officers) from enforcing its provisions as against that company.

It was alleged in the bill, in substance, that the defendant corporation was engaged in operating a cotton-seed oil mill of the value of $100,000; that the complainant owned 502 shares of its stock of the par value of $100 each, and of the actual value of $60,000; that the business required that the mill should be operated continuously, both day and night, two shifts of laborers being employed; that the employment was under wholesome conditions, without any detriment to the physical, mental, and moral well-being of those employed; that the statute, if enforced, would work a de-

see note to Continental Securities Co. v. Belmont, 51 L.R.A.(N.S.) 112.

Of necessity of applying to board of directors as a condition of right of stockholder to sue on behalf of the corporation—see note to Fleming v. Warrior Copper Co. 51 L.R.A.(N.S.) 99.

As to equitable suits against directors—see note to Patterson v. Minnesota Mfg. Co. 4 L.R.A. 745.

privation of liberty of contract and of property, and an arbitrary discrimination, contrary to the 14th Amendment; that compliance with the statute would involve greatly increased cost of operation and render the corporation insolvent and its property valueless, to the [639] complainant's injury; that the statute had been sustained by the supreme court of Mississippi in a suit against another manufacturing company; that, although the officers of the defendant corporation desired to disobey the statute, they were complying therewith, being constrained to obedience through fear of the enormous penalties imposed; and that these penalties were so severe that no owner or operator in the position of the defendant corporation could invoke the jurisdiction of a court to test the validity of the statute, except at the risk of confiscation.

Those defendants who were public officers demurred to the bill upon the grounds (among others) that the complainant, as a stockholder of the corporation, had no right to sue; that the bill could not be maintained to restrain the enforcement of the criminal law of the state; and that the statute was constitutional.

An application for a preliminary injunction was heard on the bill and demurrer and was denied, and from the order entered to this effect the complainant appeals to this court. Judicial Code, § 266 [36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1243].

The objection urged below, and repeated here, that the complainant has failed to show any right to maintain this suit, must be sustained. The right of action to restrain the enforcement of the statute as an unconstitutional deprivation of the liberty and property of the corporation was a right existing in the corporation itself, and a stockholder was not entitled to sue without showing to the satisfaction of the court that he had exhausted the means within his reach to obtain action by the corporation in conformity with his wishes. Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 460, 461, 26 L. ed. 827, 832; Detroit v. Dean, 106 U. S. 537, 541, 542, 27 L. ed. 300, 302, 1 Sup. Ct. Rep. 500; Quincy v. Steel, 120 U. S. 241, 248, 30 L. ed. 624, 626, 7 Sup. Ct Rep. 520; Doctor v. Harrington, 196 U. S. 579, 588, 49 L. ed. 606, 610, 25 Sup. Ct. Rep. 355. The former equity rule (rule 94) provided not only that the bill must allege that the suit was "not a collusive one to confer upon a [640] court of the United States jurisdiction of a case of which it would not otherwise have cognizance," but that the bill "must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the share holders, and the cause of his failure to obtain such action." The present rule (rule 27) adds to this provision the words,—"or the reasons for not making such effort;" and these reasons, of course, must be adequate. The rule embraces those cases where the wrong to the corporation arises from unconstitutional legislation. Corbus v. Alaska Treadwell Gold Min. Co. 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. ed. 778, 781, 23 Sup. Ct. Rep. 498; Ex parte Young, 209 U. S. 123, 143, 52 L. ed. 714, 722, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. Here, while it is averred that the suit is not a collusive one in order to confer a jurisdiction which would not otherwise exist, there is no allegation that the complainant has made any request that the corporation should bring the suit to prevent the alleged invasion of its rights; nor does it appear that, by reason of antagonistic control of the corporation, such a request would be futile. Although apparently the holder of a majority of its stock, the complainant does not show any effort whatever to induce the corporation to sue. He contents himself with asserting in effect that, though the directors and officers do not wish to comply with the statute, they will do so through fear of its penalties. But this reason is palpably inadequate, inasmuch as the corporation itself would be entitled to protection against the imposition of such penalties as would virtually deny access to the courts for the protection of rights guaranteed by the Federal Constitution. Ex parte Young, 209 U. S. 147, 52 L. ed. 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. 212 U. S. 53, 54, 53 L. ed. 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 351, 57 L. ed. 1507, 1511, 33 Sup. Ct. Rep. 961; Ohio Tax Cases, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; Wadley Southern R. Co. v. Georgia, decided this day [235 U. S. 651, post, 405, 35 Sup. Ct. Rep. 214]. The allegations of the bill show no [641] ground for dispensing with efforts to procure action by the corporation; and in this view, without discussing the merits of the case, we are of the opinion that the complainant was not entitled to the injunction sought.

Order affirmed.

DOWAGIAC MANUFACTURING COMPANY, Petitioner,
v.
MINNESOTA MOLINE PLOW COMPANY et al. (No. 6.)

DOWAGIAC MANUFACTURING COMPANY, Petitioner,
v.
ERNEST F. SMITH and Luppo W. Zimmer. (No. 7.)

(See S. C. Reporter's ed. 641–651.)

Patents — construction — improvement or new machine.

1. The Hoyt patent, No. 446,230, must be construed as covering only particular improvements in a type of grain drill then in use and well known, and not a new and operative grain drill, in view of the description of the invention in the specifications as relating to "new and useful improvements in grain drills commonly known as 'shoe drills,'" its object being "to provide an independent spring pressure for each of the shoes and covering wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering wheels may be raised from the ground," and of the limitations of the claims in the patent to a suitable construction and arrangement of spring pressure rods in combination with certain correlated elements of the seeding part of a grain drill.

[For other cases, see Patents, 708–760, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — patent case — separation of profits.

2. A patentee suing infringers for profits from sales of infringing machines whose value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features, does not discharge the burden resting upon it of showing what part of the commingled profits was due to the use of its invention, where it neither submitted evidence calculated to effect an apportionment, nor attempted to show that one was impossible.

[For other cases, see Evidence, 782–789, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — patent case — damages for lost sales.

3. There was no adequate basis for an assessment of damages upon the ground of lost sales in a suit by a patentee against sellers of infringing machines, where, although the number of machines sold by the defendants was shown, there was no proof that the plaintiff thereby lost the sale of a like number of machines, or of any definite or even approximate number, and where, during the period of infringement, several other manufacturers were selling machines in large numbers in the same localities in direct competition with the plaintiff's machine and under the evidence it could not be said that, if the sales in question had not been made, the defendant's customers would have bought from the plaintiff rather than from the other manufacturers, and where it did not satisfactorily appear that the plaintiff possessed the means and facilities requisite for supplying the demands of its own customers and of those who purchased the infringing machine.

[For other cases, see Evidence, XII. p, in Digest Sup. Ct. 1908.]

Evidence — relevancy — patent case — reasonable royalty.

4. In the absence of an established royalty the value of what was taken by infringing sales of a patented machine may be shown by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved.

[For other cases, see Evidence, XI. g, in Digest Sup. Ct. 1908.]

Patents — infringement — sales in foreign countries.

5. Sales fully consummated in Canada cannot amount to an infringement of a patent from the United States, since the rights conferred by such patent are, under U. S. Rev. Stat. § 4884, Comp. Stat. 1913, § 9428, wholly confined to the United States and its territories.

[For other cases, see Patents, XIV., in Digest Sup. Ct. 1908.]

Appeal — judgment — reversal for further hearing.

6. Decrees for nominal damages only in a patent infringement suit will be reversed for a new hearing, although supported by the record, where the lack of harmony among the decisions when the hearings before the master were had, bearing upon the apportionment of profits and the admeasurement of damages, resulted in such an imperfect presentation of the evidence as not to afford the data requisite to a final adjustment of the matters in controversy according to their merits.

[For other cases, see Appeal and Error, 5402–5406, in Digest Sup. Ct. 1908.]

[Nos. 6 and 7.]

Argued April 15 and 16, 1913. Decided January 11, 1915.

ON WRITS of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review two decrees which affirmed decrees of the Circuit Court for the District of Minnesota, granting nominal damages only in a suit based upon the infringement of the Hoyt patent, No. 446,230, for a grain drill. Reversed and remanded for a new hearing.

NOTE.—As to burden of proof as to profits in suit for profits from infringement of patent or copyright—see note to Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 41 L.R.A. (N.S.) 653.

On damages for infringement of patents, copyrights, or trademarks as affected by loss of profits—see note to Rose v. Hirsh, 51 L.R.A. 801.

See same case below, 105 C. C. A. 526, 183 Fed. 314.

The facts are stated in the opinion.

Mr. Fred L. Chappell argued the cause and filed a brief for petitioner:

The patent was upheld on the theory that invention was a true combination in—

McSherry Mfg. Co. v. Dowagiac Mfg. Co. 41 C. C. A. 627, 101 Fed. 716; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. 55 C. C. A. 86, 118 Fed. 136; Dowagiac Mfg. Co. v. Fowler, 58 C. C. A. 643, 121 Fed. 988; Dowagiac Mfg. Co. v. Brennan, 62 C. C. A. 257, 127 Fed. 143; Deere & W. Co. v. Dowagiac Mfg. Co. 82 C. C. A. 351, 153 Fed. 177.

The masters herein have not indicated any finding as to the amount of profits or damages, and have not considered the evidence. It is believed, in view of the complexity of the case, that the court should remand the case, with instructions to proceed to a consideration of the evidence, and determine the profits made by defendant, and complainant's loss or damage.

Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co. 141 U. S. 453, 35 L. ed. 814, 12 Sup. Ct. Rep. 49; Hurlbut v. Schillinger, 130 U. S. 472, 32 L. ed. 1016, 9 Sup. Ct. Rep. 584; Rose v. Hirsh, 51 L.R.A. 801, 36 C. C. A. 132, 94 Fed. 177; Warren v. Keep, 155 U. S. 265, 39 L. ed. 144, 15 Sup. Ct. Rep. 83; Coddington v. Propfe, 112 Fed. 1016; Regina Music Box Co. v. Otto, 114 Fed. 505; Holmes v. Truman, 14 C. C. A. 517, 29 U. S. App. 572, 67 Fed. 542; National Folding Box & Paper Co. v. Elsas, 30 C. C. A. 487, 57 U. S. App. 66, 86 Fed. 918.

Damages based upon a loss of complainant's profit are not to be reduced by the deduction of a manufacturers' profit. There were only independently patented structures on sale in the particular territory.

Turrill v. Illinois C. R. Co. 20 Fed. 913; McCreary v. Pennsylvania Canal Co. 141 U. S. 459, 35 L. ed. 817, 12 Sup. Ct. Rep. 40; Brinton v. Paxton, 67 C. C. A. 204, 134 Fed. 80.

General evidence must necessarily be considered.

Suffolk Mfg. Co. v. Hayden, 3 Wall. 315, 18 L. ed. 76; McKeever v. United States, 14 Brodix, 414.

The testimony is too bulky to be taken up in detail by this court. Such work as this is a proper subject for a master in chancery.

Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 225 U. S. 604-623, 56 L. ed. 1222-1229, 32 Sup. Ct. Rep. 691.

Where an inventor has merely made an addition or an improvement upon an old process that was of itself of value, then it is necessary to measure the advance that he has made; but where he has produced an entirely new device, constituting a combination, making up an entirety, as in this case, then he is entitled to the entire profits and damages.

Brennan v. Dowagiac Mfg. Co. 89 C. C. A. 392, 162 Fed. 472; Seymour v. McCormick, 16 How. 488, 14 L. ed. 1027; Elizabeth v American Nicholson Pav. Co. 97 U. S. 126, 24 L. ed. 1000; Hurlbut v. Schillinger, 130 U. S. 456, 32 L. ed. 1011, 9 Sup. Ct. Rep. 584.

It is entirely improper to consider the independently patented features manufactured and sold by third parties.

Brinton v. Paxton, 67 C. C. A. 204, 134 Fed. 81; McCreary v. Pennsylvania Canal Co. 141 U. S. 459, 35 L. ed. 817, 12 Sup. Ct. Rep. 40.

The distinction between a manufacturer and a merchant refers merely to the question of profits. A trespasser is only liable for profits that he has made, as distinguished from damages.

Kissinger-Ison Co. v. Bradford Belting Co. 59 C. C. A. 221, 123 Fed. 93; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 38 L. ed. 103, 14 Sup. Ct. Rep. 295; 11 Brodix, 364.

In rendering to Cæsar what belongs to Cæsar, clearly Hoyt has invented an entire grain drill, and is entitled to the full award.

Mowry v. Whitney, 14 Wall. 651, 20 L. ed. 866; Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 225 U. S. 604-623, 53 L. ed. 1222-1229, 32 Sup. Ct. Rep. 691.

The infringer's conduct has been such as to preclude the belief that it has derived no advantage from the use of the plaintiff's invention.

Brennan v. Dowagiac Mfg. Co. 89 C. C. A. 392, 162 Fed. 476.

Considering the cases of Suffolk Mfg. Co. v. Hayden, 3 Wall. 315, 18 L. ed. 76, and McKeever v. United States, 14 Brodix, 414, it is the duty of the court to reach a conclusion and do justice as well as may be, between the parties, and see to it that the guilty party is punished, and that the innocent does not suffer damage because of the wrongful act of the guilty. If loss must fall on either, it ought to fall upon the guilty party.

Complainant has not adopted any theory, but has adduced testimony as to all the facts.

Tatum v. Gregory, 51 Fed. 447.

As to the statement that there is no liability in Canada, this is entirely unwarranted.

Gouids Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. ed. 987.

Mr. Thomas A. Banning argued the cause and filed a brief for respondents:

There is a difference between the measure of recovery in equity, and that applicable in an action at law.

Coupe v. Royer, 155 U. S. 582, 39 L. ed. 269, 15 Sup. Ct. Rep. 199.

Where there are other machines or devices which the defendant might have made or sold in place of the patented machine or device, the complainant must make comparison between them to determine the relative profits arising from the manufacture or sale, and is to be restricted to those profits which the defendant realized in making and selling the patented machine or device over what he might have made by making and selling those which he could lawfully have made or sold.

Mowry v. Whitney, 14 Wall. 651, 20 L. ed. 866; Tilghman v. Proctor, 125 U. S. 146, 31 L. ed. 667, 8 Sup. Ct. Rep. 894; McCreary v. Pennsylvania Canal Co. 141 U. S. 463, 35 L. ed. 819, 12 Sup. Ct. Rep. 40; Goulds Mfg. Co. v. Cowing, 105 U. S. 255, 26 L. ed. 988, 1 Bann. & Ard. 382, Fed. Cas. No. 5,642; Serrell v. Collins, 1 Fisher, Pat. Cas. 297, Fed. Cas. No. 12,672; Black v. Munson, 2 Bann. & Ard. 625, Fed. Cas. No. 1,463; Locomotive Safety Truck Co. v. Pennsylvania R. Co. 5 Bann. & Ard. 514, 2 Fed. 679; Munson v. New York, 21 Blatchf. 342, 16 Fed. 561; Maier v. Brown, 17 Fed. 737; Creamer v. Bowers, 35 Fed. 207; McMurray v. Emerson, 36 Fed. 903; Mosher v. Joyce, 45 Fed. 206; Hohorst v. Hamburg-American Packet Co. 34 C. C. A. 39, 63 U. S. App. 97, 91 Fed. 660; Rose v Hirsh, 91 Fed. 150; National Folding-Box & Paper Co. v. Dayton Paper Novelty Co. 95 Fed. 995; Wales v. Waterbury Mfg. Co. 41 C. C. A. 250, 101 Fed. 130; Brickill v. New York, 50 C. C. A. 1, 112 Fed. 71; Penfield v. Potts, 61 C. C. A. 371, 126 Fed. 486; Columbia Wire Co. v. Kokomo Steel & Wire Co. 114 C. C. A. 186, 194 Fed. 110.

In applying the doctrine of comparison of profits to ascertain what, if any, profits the defendant has made in a given case, the defendant is manifestly entitled to have adopted as the standard that machine or machines which, while open to the defendant to use or sell, the most nearly approaches the patented machine, or the defendant's machine, in efficiency and salability under the conditions under which the patented machine or defendant's machine is used or sold, and not the most remote in resemblance thereto.

Tomkinson v. Willets Mfg. Co. 34 Fed. 537; Munson v. New York, 21 Blatchf. 342, 16 Fed. 563; P. P. Mast & Co. v. Superior Drill Co. 83 C. C. A. 157, 154 Fed. 53.

The distinction between the manufacturer and the dealer in determining their liability is well recognized by the courts, and in the nature of things must be.

Kissinger-Ison Co. v. Bradford Belting Co. 59 C. C. A. 221, 123 Fed. 93.

In the application of the doctrine of the comparison of profits, the courts have proceeded upon the manifest right of restricting a patentee's recovery to his own special contribution to the art, and refusing him what has been contributed by others. If comparison were not made, the patentee might recover not only the savings or profits that were due to his own special contribution to the art, but also for the contribution of others that had preceded him, and those whose inventions were still covered by existing patents. Thus a defendant might be liable to a number of recoveries for the entire savings or profits that he had realized from the infringement.

Mowry v. Whitney, 14 Wall. 650, 20 L. ed. 865.

Where the patented invention is less than the whole machine, the complainant must apportion between it and the features and inventions of others, patented or unpatented, unless he can show that the machine was not usable or salable without the presence of the patented invention.

Garretson v. Clark, 111 U. S. 121, 28 L. ed. 371, 4 Sup. Ct. Rep. 291; Blake v. Robertson, 94 U. S. 733, 24 L. ed. 246; Keystone Mfg. Co. v. Adams, 151 U. S. 146, 38 L. ed. 105, 14 Sup. Ct. Rep. 295; Star Salt Caster Co. v. Crossman, 4 Bann. & Ard. 567, Fed. Cas. No. 13,320; Kirby v. Armstrong, 10 Biss. 135, 5 Fed. 803; Calkins v. Bertrand, 10 Biss. 494, 8 Fed. 758; Maier v. Brown, 17 Fed. 736; Bostock v. Goodrich, 25 Fed. 819; Reed v. Lawrence, 29 Fed. 918; Hunt Bros. Fruit Packing Co. v. Cassidy, 3 C. C. A. 525, 7 U. S. App. 424, 53 Fed. 261; Untermeyer v. Freund, 7 C. C. A. 183, 20 U. S. App. 32, 58 Fed. 211; Brinton v. Paxton, 67 C. C. A. 204, 134 Fed. 80.

Before the doctrine of the apportionment of profits and damages is applicable to a case, the defendant must show that the patented machine, if the profits on its manufacture and sale are asked as damages growing out of lost sales, or that the infringing machine, if the defendant's profits on it are claimed, is a composite machine, made up of various features or inventions outside of the patent sued on, which probably contributed to the utility or salability of the machine.

Canda Bros. v. Michigan Malleable Iron Co. 81 C. C. A. 420, 152 Fed. 181.

The doctrine of apportionment has not been applied merely to patents claiming a single device, but as well to patents claiming combinations or devices which included the

entire machine,—the very condition which the court considered to exist with the Hoyt patent, and made a ground for the non-application of the doctrine of apportionment.

Blake v. Robertson, 94 U. S. 733, 24 L. ed. 246; Keystone Mfg. Co. v. Adams, 151 U. S. 147, 38 L. ed. 105, 14 Sup. Ct. Rep. 295; McCreary v. Pennsylvania Canal Co. 141 U. S. 459, 35 L. ed. 817, 12 Sup. Ct. Rep. 40; Maier v. Brown, 17 Fed. 736; Hunt Bros. Fruit Packing Co. v. Cassidy, 3 C. C. A. 525, 7 U. S. App. 424, 53 Fed. 261.

The various decisions sustaining the Hoyt patent have treated the Hoyt invention as simply an improvement upon existing grain drills, and not as a grain drill itself.

McSherry Mfg. Co. v. Dowagiac Mfg. Co. 41 C. C. A. 627, 101 Fed. 721; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. 55 C. C. A. 86, 118 Fed. 139; Dowagiac Mfg. Co. v. Brennan, 62 C. C. A. 257, 127 Fed. 145.

Complainant has not shown any net profits from the sale of drills.

Seymour v. McCormick, 16 How. 487, 14 L. ed. 1027; Providence Rubber Co. v. Goodyear, 9 Wall. 802, 19 L. ed. 570; Goulds Mfg. Co. v. Cowing, 105 U. S. 257, 26 L. ed. 988; Wilbur v. Beecher, 1 Fisher, Pat. Rep. 414, Fed. Cas. No. 17,634; Steam Stone Cutter Co. v. Windsor Mfg. Co. 4 Bann. & Ard. 448, Fed. Cas. No. 13,335; Calkins v. Bertrand, 10 Biss. 494, 8 Fed. 757; National Folding-Box & Paper Co. v. Dayton Paper Novelty Co. 95 Fed. 992; Hitchcock v. Tremaine, 5 Fisher, Pat. Cas. 311, Fed. Cas. No. 6,539.

Damages must be proved; they are not to be presumed.

Blake v. Robertson, 94 U. S. 733, 24 L. ed. 246.

The burden is upon the plaintiff, and if he fails to give the necessary evidence, but resorts, instead, to interference and conjecture and speculation, he must fail for want of proof.

Dobson v. Hartford Carpet Co. 114 U. S. 444, 29 L. ed. 178, 5 Sup. Ct. Rep. 945.

To escape the necessity of apportioning the profits or damages, the plaintiff or complainant must show by reliable and tangible evidence that the principle of apportionment is for some reason inapplicable to his case, and that the profits and damages are to be calculated on the whole machine, on the ground that the patented feature confers on the whole machine its entire value as a marketable article.

Garretson v. Clark, 111 U. S. 121, 28 L. ed. 371, 4 Sup. Ct. Rep. 291; Elizabeth v. American Nicholson Pav. Co. 97 U. S. 141, 24 L. ed. 1006; Goulds Mfg. Co. v. Cowing, 105 U. S. 255, 26 L. ed. 988; Dobson v. Hartford Carpet Co. 114 U. S. 445, 29 L. ed. 179, 5 Sup. Ct. Rep. 945; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 553, 29 L. ed. 960, 6 Sup. Ct. Rep. 934; Hurlbut v. Schillinger, 130 U. S. 472, 32 L. ed. 1016, 9 Sup. Ct. Rep. 584; Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co. 141 U. S. 453, 35 L. ed. 814, 12 Sup. Ct. Rep. 49; Sessions v. Romadka, 145 U. S. 45, 36 L. ed. 615, 12 Sup. Ct. Rep. 799; Warren v. Keep, 155 U. S. 268, 39 L. ed. 145, 15 Sup. Ct. Rep. 83; Reed v. Lawrence, 29 Fed. 918; Mosher v. Joyce, 45 Fed. 206; Elgin Wind Power & Pump Co. v. Nichols, 45 C. C. A. 49, 105 Fed. 784.

A patentee who manufactures and sells his invention may recover in the shape of damages the profits which he would have made had he sold the infringing machines, but only to the extent of the sales that he can show that he would have made. There is no presumption that he would have sold the machines which the infringer sold, or any of them. The fact that he had the capacity to manufacture them and to put them on the market is not sufficient to raise a presumption that he would have sold them, or any of them, so as to dispense with the proof that he actually would.

Seymour v. McCormick, 16 How. 486, 14 L. ed. 1026; Dobson v. Hartford Carpet Co. 114 U. S. 443, 29 L. ed. 178, 5 Sup. Ct. Rep. 945; Dobson v. Dornan, 118 U. S. 17, 30 L. ed. 65, 6 Sup. Ct. Rep. 946; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co. 152 U. S. 204, 38 L. ed. 412, 14 Sup. Ct. Rep. 523; Goodyear v. Bishop, 2 Fisher, Pat. Cas. 159, Fed. Cas. No. 5,559; Carter v. Baker, 4 Fisher, Pat. Cas. 420, Fed. Cas. No. 2,472; Buerk v. Imhaeuser, 2 Bann. & Ard. 454, Fed. Cas. No. 2,107; Ingersoll v. Musgrove, 3 Bann. & Ard. 306, Fed. Cas. No. 7,040; Garretson v. Clark, 3 Bann. & Ard. 355, Fed. Cas. No. 5,248; Burdett v. Estey, 5 Bann. & Ard. 308, 3 Fed. 570; Maier v. Brown, 17 Fed. 738; Hall v. Stern, 20 Fed. 789; Reed v. Lawrence, 29 Fed. 919; Roemer v. Simon, 31 Fed. 42; Bell v. United States Stamping Co. 32 Fed. 551; Covert v. Sargent, 38 Fed. 238; Royer v. Shultz Belting Co. 45 Fed. 54; Tatum v. Gregory, 51 Fed. 447; Jennings v. Rogers Silver-Plate Co. 105 Fed. 968; 3 Rob. Patents, § 1063, p. 351.

Where a complainant or plaintiff claims damages on account of lost sales, reduction of prices, or increased expenses, and the defendant is not the only infringer who may have caused such lost sales, reduction of prices, or increased expenses, the plaintiff or complainant must produce tangible and reliable evidence showing what particular part of the lost sales, reduced prices, or increased expenses was occasioned as the

direct result of the defendant's infringement; and without such evidence, no liability on such account, beyond nominal damages, is raised.

Yale Lock Mfg. Co. v. Sargent, 117 U. S. 553, 29 L. ed. 960, 6 Sup. Ct. Rep. 934; Boesch v. Graff, 133 U. S. 705, 33 L. ed. 790, 10 Sup. Ct. Rep. 378.

Manifestly, the profits of a manufacturer afford no criterion by which to determine the profits of a seller of a machine or other article containing the patented invention. The courts have recognized that the two sets of profits are distinct and dissimilar.

Kissinger-Ison Co. v. Bradford Belting Co. 59 C. C. A. 221, 123 Fed. 93.

Mr. Justice Van Devanter delivered the opinion of the court:

We have here to review two decrees dealing with an accounting of profits and an assessment of damages resulting from the infringement of a patent granted [643] February 10, 1891, for certain "new and useful improvements in grain drills, commonly known as 'shoe drills.'" The suits wherein these decrees were rendered were both brought by the same plaintiff, but were against different defendants, charged with separate infringement. The plaintiff, besides owning the patent, was manufacturing and selling drills embodying the patented improvements; and the defendants, who were wholesale dealers in agricultural implements, were selling drills embodying substantially the same improvements. The drills made by the plaintiff were sold under the name "Dowagiac," and the names "McSherry" and "Peoria" were applied to most of the others. The defendants purchased from manufacturers who, as has since been settled, were infringing the plaintiff's rights. At an early stage in the litigation the validity of the patent was sustained, the defendants were held to be infringers, further infringement by them was enjoined, and the cases were referred in the usual way for an accounting of profits and an assessment of damages. 108 Fed. 67, 55 C. C. A. 86, 118 Fed. 136. Upon the evidence submitted the masters reported that the recovery should be limited to nominal damages, and their reports were confirmed by the circuit court. Its action was affirmed by the circuit court of appeals. 105 C. C. A. 526, 183 Fed. 314.

The conclusion that the recovery should be thus restricted was rested upon these grounds: First, that the patent was not for a new and operative drill, but only for designated improvements in a type of drill then in use and well known; second, that the value of drills embodying this invention, as marketable machines, was not wholly attributable to the designated improvements, but was due in a material degree to other essential parts which were not patented; third, that the plaintiff failed to carry the burden, rightly resting upon it, of submitting evidence whereby the profits from the sale of the infringing drills [644] could be apportioned between the patented improvements and the unpatented parts; and, fourth, that, although the number of sales made by the defendants was disclosed, the evidence did not present other data essential to an assessment of the damage sustained by the plaintiff by reason of the defendants' infringement.

Partly because another circuit court of appeals seemingly had reached a different conclusion in other litigation arising out of this patent (see McSherry Mfg. Co. v. Dowagiac Mfg. Co. 89 C. C. A. 26, 160 Fed. 948, 89 C. C. A. 512, 163 Fed. 34; Brennan & Co. v. Dowagiac Mfg. Co. 89 C. C. A. 392, 162 Fed. 472), and partly because of the importance of the questions involved, writs of certiorari were granted, requiring that these cases be certified here for review and determination. See Judicial Code, § 240 [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1217].

Since the writs were granted the rules bearing upon the apportionment of profits in such cases, the relative obligations of the parties to submit evidence looking to an apportionment, and the character of evidence which may be submitted, have been extensively considered and comprehensively stated in Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 225 U. S. 604, 56 L. ed. 1222, 32 Sup. Ct. Rep. 691. What was said there materially lessens our present task.

At the outset it should be observed that, while the defendants were infringers and bound to respond as such to the plaintiff, their infringement was not wanton or wilful. The masters and the courts below expressly so found, and the evidence sustained the finding. The defendants, therefore, were not in the situation of the infringing manufacturer in Brennan & Co. v. Dowagiac Mfg. Co. supra, of whom the circuit court of appeals for the sixth circuit said: "It has made and sold these infringing drills with a purpose to imitate the patentee's construction."

It is quite plain, as we think, that the patent was not for a new and operative grain drill, but only for particular [645] improvements in a type of grain drill then in use and well known. The invention was so described in the specifications forming part of the patent. The inventor there said:

"This invention relates to new and useful improvements in grain drills commonly

known as 'shoe drills;' and it consists in a certain construction and arrangement of parts, as hereinafter more fully set forth, the essential features of which being pointed out particularly in the claims.

"The object of the invention is to provide an independent spring pressure for each of the shoes and covering wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering wheels may be raised from the ground when the implement is not in use, or when transporting it from one field to another."

In keeping with this statement the claims in the patent were limited to a suitable construction and arrangement of spring pressure rods in combination with certain correlated elements of the seeding part of a grain drill,—the part which opens the furrows, guides the seed into them, and then closes them. Of course, this was an important part, but it was only that; for other parts were required to complete the machine and make it operative. Some of these were simple and easily supplied, such as the tongue and attachments to which the horses were hitched. Others were complex and required careful adjustment. This was especially true of the feeding mechanism whereby the grain was fed from the feed box or reservoir into the several hoppers in continuous, uniform, and precisely measured streams, so that it might be deposited in the furrows evenly and in suitable quantity. Only when all the parts were present and so adjusted as to perform their respective functions was the drill a practical and successful machine. In this respect no change resulted from the invention covered by the patent. It effected material [646] improvements in one part, but did not obviate or diminish the necessity for the others.

We think the evidence, although showing that the invention was meritorious and materially contributed to the value of the infringing drills as marketable machines, made it clear that their value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features. The masters and the courts below so found, and we should hesitate to disturb their concurring conclusions upon this question of fact, even had the evidence been less clear than it was.

In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. But as the drills were sold in completed and operative form, the profits resulting from the several parts were necessarily commingled. It was essential, therefore, that they be separated or apportioned between what was covered by the patent and what was not covered by it; for, as was said in Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. supra (p. 615): "In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains." In the nature of things the profits pertaining to the patented improvements had to be ascertained before they could be recovered by the plaintiff, and therefore it was required to take the initiative in presenting evidence looking to an apportionment. Referring to a like situation, it was said in the case just cited (p. 617): "The burden of apportionment was then logically with the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention." But the plaintiff did not conform to this rule. It neither submitted evidence calculated to effect an apportionment, nor attempted to show that one was impossible; and this, although the [647] evidence upon the accounting went far towards showing that there was no real obstacle to a fair apportionment. Certainly no obstacle was interposed by the defendants. It well may be that mathematical exactness was not possible, but, as is shown in Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. supra (pp. 617, 620-622), that degree of accuracy is not required, but only reasonable approximation, which usually may be attained through the testimony of experts and persons informed by observation and experience. Testimony of this character is generally helpful and at times indispensable in the solution of such problems. Of course, the result to be accomplished is a rational separation of the net profits so that neither party may have what rightfully belongs to the other, and it is important that the accounting be so conducted as to secure this result, if it be reasonably possible. As was said in Tilghman v. Proctor, 125 U. S. 136, 145, 31 L. ed. 664, 667, 8 Sup. Ct. Rep. 894: "It is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged."

Coming to the question of damages,[1] we

[1] Rev. Stat. § 4921, Comp. Stat. 1913, § 9467, provides that "upon a decree being

think the masters and the courts below were right in holding that the evidence did not present sufficient data to justify an assessment of substantial damages.

[648] While the number of drills sold by the defendants was shown, there was no proof that the plaintiff thereby lost the sale of a like number of drills or of any definite or even approximate number. During the period of infringement several other manufacturers were selling drills in large numbers in the same localities in direct competition with the plaintiff's drill, and under the evidence it could not be said that, if the sales in question had not been made, the defendants' customers would have bought from the plaintiff rather than from the other manufacturers. Besides, it did not satisfactorily appear that the plaintiff possessed the means and facilities requisite for supplying the demands of its own customers and of those who purchased the infringing drills. There was therefore no adequate basis for an assessment of damages upon the ground of lost sales.

As the exclusive right conferred by the patent was property, and the infringement was a tortious taking of a part of that property, the normal measure of damages was the value of what was taken. So, had the plaintiff pursued a course of granting licenses to others to deal in articles embodying the invention, the established royalty could have been proved as indicative of the value of what was taken, and therefore as affording a basis for measuring the damages. Philp v. Nock, 17 Wall. 460, 462, 21 L. ed. 679; Birdsall v. Coolidge, 93 U. S. 64, 70, 23 L. ed. 802, 805; Clark v. Wooster, 119 U. S. 322, 326, 30 L. ed. 392, 393, 7 Sup. Ct. Rep. 217; Tilghman v. Proctor, 125 U. S. 136, 143, 31 L. ed. 664, 666, 8 Sup. Ct. Rep. 894. But, as the patent had been kept a close monopoly, there was no established royalty. In that situation it was permissible to show the value by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved. Not improbably such proof was more difficult to produce, but it was quite as admissible as that of an established royalty. In Suffolk Mfg. Co. v. Hayden, 3 Wall. 315, 320, 18 L. ed. 76, 78, where a like situation was presented, this court [349] said that "in order to get at a fair measure of damages, or even an approximation of it, general evidence must necessarily be resorted to." See also Washington, A. & G. Steam Packet Co. v. Sickles, 19 Wall. 611, 617, 22 L. ed. 203, 204; Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 198, 26 L. ed. 975, 978. And in many cases in the other Federal courts the damages have been assessed upon proof of a reasonable royalty. The practice is illustrated by the following extract from the opinion in Hunt Bros. Fruit-Packing Co. v. Cassiday, 12 C. C. A. 316, 318, 29 U. S. App. 116, 64 Fed. 585, 587: "The plaintiff was clearly entitled to damages for the infringement. If there had been an established royalty, the jury could have taken that sum as the measure of damages. In the absence of such royalty, and in the absence of proof of lost sales or injury by competition, the only measure of damages was such sum as, under all the circumstances, would have been a reasonable royalty for the defendant to have paid. This amount it was the province of the jury to determine. In so doing, they did not make a contract for the parties, but found a measure of damages." True, some courts have regarded Coupe v. Royer, 155 U. S. 565, 39 L. ed. 263, 15 Sup. Ct. Rep. 199, as impliedly holding that this practice was not permissible, but the decision does not admit of such an interpretation. In that case—an action at law—there was no proof of what would have been a reasonable royalty, but only of what the defendant had made or might have made out of the infringement; and all that the court held was (a) that the damages were not to be measured by what the defendant had gained or might have gained, but by what the plaintiff had lost, and (b) that, as the evidence disclosed "no license fee, no impairment of the plaintiff's market, in short, no damages of any kind," the verdict could not exceed a nominal sum. In Cassidy v. Hunt, 75 Fed. 1012, where the scope of that decision was carefully considered by one of the circuit judges for the ninth circuit, the conclusion was reached that it did not militate against an assessment of damages upon the basis of what would have been [650] a reasonable royalty; and a like view was expressed and applied by the circuit court of appeals for the third circuit in McCune v. Baltimore & O. R. Co. 83 C. C. A. 175, 154 Fed. 63, and Bennis

rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. *And the court* shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case." See Birdsall v. Coolidge, 93 U. S. 64, 69, 23 L. ed. 802, 804; Tilghman v. Proctor, 125 U. S. 136, 148, 31 L. ed. 664, 666, 8 Sup. Ct. Rep. 84.

Car Box Co. v. J. G. Brill Co. 119 C. C. A. 229, 200 Fed. 749, 762, and by the circuit court of appeals for the sixth circuit in United States Frumentum Co. v. Lauhoff, 216 Fed. 611. But, although the plaintiff was entitled to prove what would have been a reasonable royalty, and thereby show a proper basis for an assessment of damages, no proof upon that subject was presented.

There are still other grounds upon which damages may be assessed in infringement cases, as where hurtful competition is shown, but the present record does not require that they be specially noticed.

Some of the drills, about 261, sold by the defendants, were sold in Canada, no part of the transaction occurring within the United States, and as to them there could be no recovery of either profits or damages. The right conferred by a patent under our law is confined to the United States and its territories (Rev. Stat. § 4884, Comp. Stat. 1913, § 9428), and infringement of this right cannot be predicated of acts wholly done in a foreign country. See United Dictionary Co. v. G. & C. Merriam Co. 208 U. S. 260, 265, 52 L. ed. 478, 480, 28 Sup. Ct. Rep. 290. The case of Gould's Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. ed. 987, is cited as holding otherwise, but is not in point. There the defendant made the infringing articles in the United States. Here, while they were made in the United States, they were not made by the defendants. The latter's infringement consisted only in selling the drills after they passed out of the makers' hands. The place of sale is therefore of controlling importance here.

Ordinarily what has been said would lead to an affirmance of the decrees below. But there are special reasons why a final disposition of the cases should not be made upon the present record at this time. The patent was valid and the invention meritorious. The infringing sales [651] covered 2,500 or more drills, the profits were substantial, and the damages, if rightly measured, were evidently more than nominal. The hearings before the masters were had prior to the decision in Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 225 U. S. 604, 56 L. ed. 1222, 32 Sup. Ct. Rep. 691, at a time when the decisions bearing upon the apportionment of profits, as also upon the admeasurement of damages, were not harmonious; and this resulted in the evidence being so imperfectly presented as not to afford the data requisite to a final adjustment of the matters in controversy according to their merits.

The decrees are accordingly reversed, without costs, with directions to recommit the cases to a master in order that the questions involved in the original reference may be heard anew upon the evidence heretofore taken and such further evidence as may be submitted, and for further proceedings in conformity with this opinion.

Decrees reversed.

Mr. Justice McReynolds did not participate in the consideration or decision of these cases.

WADLEY SOUTHERN RAILWAY COMPANY
v.
STATE OF GEORGIA.

(See S. C. Reporter's ed. 651–669.)

Error to state court — scope of review — statutory construction.

1. A ruling of a state court that an order of the state railroad commission, directing a railway company to discontinue the practice of demanding prepayment of freight from one connecting carrier while not exacting it from another, is authorized by a statute requiring railways to furnish customary facilities for the exchange of freight, and empowering the commission to prevent unjust discrimination, is binding on the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — prohibiting discrimination by railway company.

2. Due process of law is not denied a railway company, contrary to U. S. Const., 14th Amend., by an order of a state railroad commission, made under legislative authority, directing the company to discontinue its practice of demanding prepayment of freight from one carrier while not exacting it from another.

[For other cases, see Constitutional Law, 516–518, 591–604, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — excessive penalties.

3. A state statute under which enormous penalties are imposed upon a railway

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 531.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

company for violating lawful administrative orders of the state railroad commission is void under U. S. Const., 14th Amend., although such orders are made after full hearing before the commission, if access to the courts to test the constitutional validity of the commission's orders is denied, or if the right of review actually given is one of which the carrier may avail itself only at the risk of having to pay such penalties if the order is found to be valid.

[For other cases, see Constitutional Law, IV. a, 3, b; IV. b., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — excessive penalties.

4. Authorizing the imposition upon a railway company of a penalty of $5,000 per day for violating a lawful administrative order of the state railroad commission, as is done by Ga. Civ. Code, 1911, § 2667, does not deny the company the equal protection of the laws or due process of law, contrary to U. S. Const., 14th Amend., where, under § 2625 of the Georgia Code, the carrier has the right to a judicial review of the validity of such order by a suit against the commission.

[For other cases, see Constitutional Law, IV. a, 3, b; IV. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — excessive penalties.

5. A carrier which, after reasonable notice of the making of an administrative order by the state railroad commission, failed to resort to the safe, adequate, and available remedy under Ga. Civ. Code, 1911, § 2625, by which it could test the validity of such order by a suit in the courts against the commission, but instead attacked its validity when sued under § 2667, for the penalty which that section imposes for violations of such order, and which may be any amount, up to $5,000 a day, could be subjected to such penalty, where that defense proved unsuccessful, without denying the equal protection of the laws or due process of law guaranteed by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. a, 3, b; IV. b, in Digest Sup. Ct. 1908.]

[No. 27.]

Argued January 30, 1914. Decided January 11, 1915.

As to state decisions and laws as rules of decision in Federal Courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Mitchell v. Burlington, 18 L. ed. U. S. 351; Elmendorf v. Taylor, 6 L. ed. U. S. 290; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 380.

As to what constitutes due process of law —see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On right to appeal to court from decision of Railroad Commission—see note to Illinois C. R. Co. v. Dodd, 49 L.R.A.(N.S.) 565.

As to excessive penalty as denial of due process of law—see note to State v. Crawford, 46 L.R.A.(N.S.) 1039.

Demanding prepayment of freight from one connecting carrier while not exacting it from another as amounting to unjust discrimination.

In Little Rock & M. R. Co. v. St. Louis & S. W. R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775, the court held that an interstate carrier does not subject another carrier to an undue or unreasonable disadvantage by requiring prepayment of freight on *all* property received from it at a given station, *although not making* this requirement of other individuals and competing carriers at such station.

To the same effect is Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407.

In Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158, affirming 4 Inters. Com. Rep. 249, 51 Fed. 465, the court held that a provision of the interstate commerce act forbidding discrimination between connecting lines was not violated by receiving, without prepayment of charges, goods from one locality, and requiring prepayment on goods coming from another locality.

And under the North Carolina statute a carrier may require prepayment from any shipper at its choice (in this case a connecting carrier) even though it does not demand it from others. Randall v. Richmond & D. R. Co. 108 N. C. 612, 13 S. E. 137.

In Southern Indiana Exp. Co. v. United States Exp. Co. 35 C. C. A. 172, 92 Fed. 1022, affirming 88 Fed. 659, the court held that an express company need not take express matter without prepayment of charges from one connecting company, though it did so from others, saying: "The furnishing of equal facilities without discrimination does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the carriage of articles of trade and commerce to all carriers, because it extends credit for such services to others."

In Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033, however, the court held that the refusal of an express company to take matter from one company without prepayment of charges, when it did so from others, was unlawful discrimination.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed a judgment of the Superior Court of Jefferson County, in that state, enforcing a penalty imposed by statute upon a railway company for its violation of administrative orders of a state railroad commission. Affirmed.

See same case below, 137 Ga. 497, 73 S. E. 741.

Statement by Mr. Justice Lamar:

Adrian, Georgia, a station on the Wadley Southern Railway, is 10 miles from Rockledge, where the road connects with the Macon & Dublin R. R., and 27 miles from Wadley, where it connects with the Central of Georgia Railway. In consequence of this connection with both roads, goods could be shipped from Macon to Adrian, over either route. It was, however, to the interest of the [653] Wadley Southern to have such freight routed *via* the Central, because it thereby secured the haul of 27 miles from Wadley to Adrian instead of the 10-mile haul when goods were routed *via* Rockledge. In addition to this, the Central owned all of the stock in the Wadley Southern, and allowed it more than a mileage proportion in the division of the through rate. For these reasons, the Wadley made the Central its preferred connection, and received from it goods for Adrian without requiring the prepayment of freight, while refusing at Rockledge to receive goods shipped from Macon over the Macon & Dublin R. R. unless the charges to Adrian were prepaid. Merchants shipping *via* Rockledge contended that this was an unjust discrimination, and made complaint to the railroad commission, which, after "hearing evidence and argument of counsel," passed an order, dated March 12, 1910, requiring "the Wadley Southern to desist from such discrimination, and on and after the receipt of the order, to afford shippers *via* Rockledge the same facilities for the interchange of freight that was afforded shippers over the line of the Central, *via* Wadley." On March 14, 1910, a copy of this order was received by the Wadley Southern, which, however, did not institute any proceeding to test its validity in the courts of Fulton county having jurisdiction of "suits against the commission or its orders" (Ga. Code, § 2625). Instead, the company, on April 4, 1910, notified the commission that it would decline to comply with the order on the ground that it was void. Accordingly, on May 26, 1910,—more than two months after the order was served,—a penalty suit was brought against the carrier by the state, in which it was alleged that, on *divers* days, the Wadley Southern had violated the order of the commission, and asking that a *single* penalty "not to exceed $5,000," should be imposed under the terms of the act of August 26, 1907. That statute provides that all corporations [654] and persons subject to the public utility law "shall comply with every order made by the commission *under authority of law*," and any corporation or person which neglects to comply with such order shall "forfeit to the state of Georgia not more than $5,000 for each and every offense, the amount to be fixed by the presiding judge. . . . Every violation . . . of any such order shall be a separate and distinct offense," and, "*in case of the continued violation, every day the violation thereof takes place shall be deemed a separate and distinct offense.*"

In its answer to this penalty suit the Wadley Southern denied that it had been guilty of any unjust discrimination, and contended that the order of the commission, and the statute, on which it was based, in violation of the provisions of the 14th Amendment, took property without due process of law, and also that the penalty statute operated to deny the carrier the equal protection of the law. In the trial before a jury there was testimony on the question as to whether there had been any discrimination and whether any difference in treatment was not justified by the difference in conditions. There was also evidence tending to show that the business of some shippers, through Rockledge, had suffered in consequence of the delay and expense incident to the requirement that freight on goods consigned to Adrian should be prepaid at Wadley. The jury returned a verdict in favor of the state, and the judge imposed a fine of $1,000 on the defendant. The case was then taken to the supreme court of Georgia, where the judgment was affirmed (137 Ga. 497, 73 S. E. 741), and the case is here on a writ of error, which raises the question as to whether the order and the statute under which it was made violate the provisions of the 14th Amendment.

Mr. T. M. Cunningham, Jr., argued the cause, and, with Mr. A. R. Lawton, filed a brief for plaintiff in error:

The statutes of the state of Georgia, which impose the penalties and punishments for violation of an order of the railroad commission, are contrary to the 14th Amendment of the Constitution of the United States, as being a denial of due process of law and equal protection of law.

Ex parte Young, 209 U. S. 163, 52 L. ed. 730, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consoli-

dated Gas Co. 212 U. S. 53, 53 L. ed. 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The constitutionality of a statute is to be determined not according to the grace or favor of the officials who act under it, but according to the terms of the statute itself.

Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; Roller v. Holly, 176 U. S. 409, 44 L. ed. 524, 20 Sup. Ct. Rep. 410.

The order of the railroad commission is contrary to the 14th Amendment of the Constitution of the United States, in that it is an arbitrary and unreasonable exercise of the police power of the state, and beyond the same, and in substance and effect deprives the plaintiff in error of its property without due process of law, and denies it the equal protection of law.

1. The facts are reviewable by this court.

Washington ex rel. Oregon R & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277.

2. The case is not one of unjust discrimination.

Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 21 L.R.A.(N.S.) 982, 94 C. C. A. 217, 168 Fed. 161, 16 Ann. Cas. 613; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 4 Inters. Com. Rep. 537, 59 Fed. 400, affirmed in 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Randall v. Richmond & D. R. Co. 108 N. C. 612, 13 S. E. 137; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465, affirmed in 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; Coles v. Central R. & Bkg. Co. 86 Ga. 251, 12 S. E. 749; State v. Wrightsville & T. R. Co. 104 Ga. 437, 30 S. E. 891; Central of Georgia R. Co. v. Augusta Brokerage Co. 122 Ga. 650, 69 L.R.A. 119, 50 S. E. 473.

3. Applicable cases of the Supreme Court of the United States on the 14th Amendment are—

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 989; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246, 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339.

Mr. James K. Hines argued the cause, and, with Mr. T. S. Felder, Attorney General of Georgia, filed a brief for defendant in error:

No precise definition of due process of law has ever been formulated by this court.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Missouri P. R. Co. v. Humes, 115 U. S. 512, 519, 29 L. ed. 463, 465, 6 Sup. Ct. Rep. 110; Dent v. West Virginia, 129 U. S. 114, 123, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; Holden v. Hardy, 169 U. S. 366, 368, 42 L. ed. 780, 781, 18 Sup. Ct. Rep. 383; Orient Ins. Co. v. Daggs, 172 U. S. 557, 563, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; French v. Barber Asphalt Paving Co. 181 U. S. 324, 329, 45 L. ed. 879, 884, 21 Sup. Ct. Rep. 625; Ballard v. Hunter, 204 U. S. 241, 255, 51 L. ed. 461, 471, 27 Sup. Ct. Rep. 261.

Due process of law implies and requires conformity to those immutable and fundamental principles of justice which inhere in the very idea of free government.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 277, 15 L. ed. 372, 374; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Davis v. Texas, 139 U. S. 651, 652, 35 L. ed. 300, 301, 11 Sup. Ct. Rep. 675; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 266, 41 L. ed. 995, 17 Sup. Ct. Rep. 992; Ballard v. Hunter, 204 U. S. 241, 255, 51 L. ed. 461, 471, 27 Sup. Ct. Rep. 261.

When notice and opportunity for a hearing are given, the fundamental idea of due process of law is complied with.

Lasere v. Rochereau, 17 Wall. 437, 21 L. ed. 694; McVeigh v. United States, 11 Wall. 267, 20 L. ed. 82.

Due process of law secures a citizen against any arbitrary deprivation of his property.

Hagar v. Reclamation Dist. 111 U. S. 701, 707, 28 L. ed. 569, 571, 4 Sup. Ct. Rep. 663; Tracy v. Ginzberg, 205 U. S. 170, 178, 51 L. ed. 755, 760, 27 Sup. Ct. Rep. 461.

It is the province of the supreme court of a state to construe its own Constitution and laws.

Columbus Southern R. Co. v. Wright, 151 U. S. 470, 475, 38 L. ed. 238, 241, 14 Sup. Ct. Rep. 396; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 508, 46 L. ed. 298, 302, 22 Sup. Ct. Rep. 95; Barrington v. Missouri, 205 U. S. 483, 486, 51 L. ed. 890, 894, 27 Sup. Ct. Rep. 582; West v. Louisiana, 194 U. S. 258, 261, 48 L. ed. 965, 968, 24 Sup. Ct. Rep. 650.

Penal statutes are to be construed strictly.

United States v. Athens Armory, 35 Ga. 344, Fed. Cas. No. 14,473; Renfroe v. Colquitt, 74 Ga. 619; Austin v. State, 71 Ga. 595.

The safeguards thrown around the persons and corporations affected by this statute are such as to rob it of the charge of imposing such enormous and grossly excessive penalties as to render it unconstitutional.

In the first place, such persons and corporations are entitled to a hearing before the railroad commission of Georgia.

Wadley Southern R. Co. v. State, 137 Ga. 497, 73 S. E. 741.

In the second place, provision is made for the institution of suit against the railroad commission of Georgia when its acts are illegal and unconstitutional.

Georgia Civ. Code, 1911, §§ 2625, 2667.

In the third place, no suit can be brought against any person or corporation under this statute until directed by the governor of the state.

In the fourth place, the penalty shall consist of a sum not more than $5,000 for each and every offense, the amount to be fixed by the presiding judge.

There is a vast difference between the statute involved in this case, and the statutes involved in the case of Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

This order does not require the defendant to enter into any contract with the Macon, Dublin, & Savannah Railroad Company.

And it is within the power of the commission to make rules and regulations preventing unjust discrimination in the transportation of freight.

Augusta Brokerage Co. v. Central of Georgia R. Co. 121 Ga. 48, 48 S. E. 714; Wadley Southern R. Co. v. State, 137 Ga. 497, 73 S. E. 741; Logan v. Central R. Co. 74 Ga. 684; Macon, D. & S. R. Co. v. Graham, 117 Ga. 555, 43 S. E. 1000.

Freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to contract as one chooses.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

This right is subject, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of health, safety, morals, and welfare of those subject to its jurisdiction.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 568, 55 L. ed. 339, 31 Sup. Ct. Rep. 238.

The government may deny liberty of contract by regulating or forbidding any contract reasonably calculated to injuriously affect the public interest.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 169, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164.

The state may create and regulate local facilities, and adopt protective means of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 353, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Whosoever devotes his property to a public use subjects the same to a reasonable public control and regulation.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 264, 46 L. ed. 1151, 1156, 22 Sup. Ct. Rep. 900.

Independent of statute, every common carrier must carry for all to the extent of its capacity, without undue or unreasonable discrimination, either in charges or facilities.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 674, 28 L. ed. 291, 294, 4 Sup. Ct. Rep. 185.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

1. As a general rule, the carrier has the option to demand payment of freight in advance or on delivery. And, as there is a lien on the goods to secure the payment of charges, it is often a matter of indifference whether the freight is collected at the beginning or at the end of the transportation. The law has therefore always recognized that the company could exercise the one option or the other, according to the convenience of the parties, the course of trade, the sufficiency of the goods to pay the accruing charges, and other like considerations.

2. What was true between carrier and shipper was [657] likewise true between carrier and its connections. But there is a conflict in the authorities as to how far this common-law right has been modified by those statutes which, while not requiring absolute uniformity, do prohibit unjust discrimination. On the one hand, it is argued that the carrier has the right to make connections, establish joint routes and through rates for the purpose of facilitating and increasing its business. As an in-

cident of this right it is said that the carrier may enforce the common-law rule and accept goods with or without the prepayment of freight, its decision being determined by the relation between the two companies, the amount of business interchanged, the solvency of the carrier against which the balance generally exists, the latter's promptness in settlement, and other like matters which, while aiding some of the carriers, do not increase the rates charged to the shipper in whose interest the laws against discrimination have been passed. Among the cases which hold that such difference in treatment is not an unjust discrimination, prohibited by statute, is Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407. There the circuit court of appeals for the fifth circuit held that, under the interstate commerce law, a common carrier might demand prepayment from one connection and not from another. Cf. Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 668, 28 L. ed. 292, 4 Sup. Ct. Rep. 185. A different view of the question has been taken by other courts (Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033), including the supreme court of Georgia, which, in the present case, held that the statute requiring railroads to furnish customary facilities for the interchange of freight, empowering the commission to prevent unjust discrimination, authorized that body to pass an order directing the Wadley Southern R. R. to discontinue the practice of requiring the Macon & Dublin Railroad to prepay freight to Adrian, while making no such demand from the Central Railway. This construction of the state statute is binding [658] here, and leaves for consideration the question as to whether such an order violated the provisions of the 14th Amendment.

3. On that branch of the case the Wadley Southern has made many assignments of error. It contends, in effect, that without due process of law the order deprives it of the liberty of contract; takes from it a valuable right of property, and deprives it of the profit it could have made in the exercise of the long-recognized common-law right to demand prepayment of freight from one connection without being compelled to make a similar demand from all other connections.

The section of the Code under which the order was made did not expressly provide for notice and an opportunity to be heard; but the supreme court of Georgia held that it must be construed in connection with other parts of the railroad commission law which did contain such provisions. As said in Louisville & N. R. Co. v. Garrett, 231 U. S. 313, 58 L. ed. 242, 34 Sup. Ct. Rep. 48: "It may be assumed that the statute . . . forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence, and arguments submitted, and a determination by the commission" as to whether the discrimination complained of was unjust. "But on these conditions being fulfilled . . . the appropriate questions for the courts would be whether the commission acted within the authority duly conferred by the legislature . . . ; whether the commission went beyond the domain of the state's legislative power and violated the constitutional rights of property by imposing confiscatory requirements." The Georgia court has likewise held that where the statute gave the commission jurisdiction of the subject, its orders are binding unless shown to have been unreasonable, or to have violated some statutory or constitutional right. Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817 (6a), 836, L.R.A. 1915E, 902, 80 S. E. 327.

[659] In this case the commission dealt with a practice found to be unjustly discriminatory, but the order did not, as claimed, interfere with the carrier's legitimate right of management nor deprive it of any right of contract. It did not require the Wadley road, either at Rockledge or at Wadley, to receive, without prepayment of freight, goods whose value was insufficient to pay charges if the consignee should decline to accept them on arrival. Neither did it deprive the Wadley Southern of the right to solicit and encourage shipments via the Central. The order only prohibited a practice which had proved so preferential to some shippers and communities and so harmful to others as to amount to unjust discrimination. And while the Wadley Southern had the right to increase its earnings by encouraging shipments over the Central Railway so as to secure the longer haul and greater than mileage proportion of the joint rate, yet that right had to be exercised in subordination to the command of the statute prohibiting unjust discrimination. The supreme court of Georgia has ruled that the order was made in compliance with the requirements of the statute, and was not unreasonable or arbitrary. That decision is controlling so far as the state law is concerned, and there is, of course, nothing in the provisions of the Federal Constitution which prevents the states from prohibiting and punishing unjust discrimination of its patrons by a public carrier.

4. The Wadley Southern insists, however, that even if the commission had the power to make the order, the judgment imposing

a fine of $1,000 for its violation should nevertheless be set aside for the reason that the statute—authorizing so enormous a penalty as $5,000 a day for violating lawful orders of the commission—operated to prevent an appeal to the courts by the carrier for the purpose of determining whether the order was lawful, and therefore binding; or arbitrary and unreasonable, and therefore invalid. In support of this contention it [660] cites Ex parte Young, 209 U. S. 163, 52 L. ed. 730, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. 212 U. S. 53, 53 L. ed. 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

It is, however, contended that those cases related to penalties for charging rates higher than those which had been established by the legislature without any hearing having been given to the carriers as to what were reasonable rates, and are not applicable to a case like this, where the order was made after a full hearing had been given by the commission to the Wadley Southern.

This contention would have been well founded if this and other hearings of a like nature before the commission had resulted in orders which had the characteristics of a final judgment. But this was not so, for they were not conclusive. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. Their lawfulness was treated by the Georgia court in the present case as open to inquiry, when the company was sued for the penalty. The question of their validity was also open to inquiry, in equity proceedings, in the state court, where they would have been set aside if found to be arbitrary and unreasonable, or to have violated some statutory or constitutional right. Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817 (6a), 836, L.R.A.1915E, 902, 80 S. E. 327; State v. Western & A. R. Co. 138 Ga. 835, 76 S. E. 577; Southern R. Co. v. Atlantic Sand & Supply Co. 135 Ga. 50, 68 S. E. 807. Such orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property. Louisville & N. R. Co. v. Garrett, 231 U. S. 313, 58 L. ed. 242, 34 Sup. Ct. Rep. 48, and cases cited. And this right to a judicial determination exists whether the deprivation is by a rate statute—passed without a hearing (as in the Young and Consolidated Gas Cases); or by administrative orders of a commission, made after a hearing (as in the Garrett Case, supra). For rates made by the general assembly, or administrative orders made by a commission, are both legislative in their nature (Garrett Case, supra; Grand Trunk Western R. Co. v. Railroad Commission, 221 [661] U. S. 403, 55 L. ed. 787, 31 Sup. Ct. Rep. 537), and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 174, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Missouri P. R. Co. v. Nebraska, 217 U. S. 207, 54 L. ed. 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; San Joaquin & K. R. Canal & Irrig. Co. v. Stanislaus County, 233 U. S. 459, 58 L. ed. 1046, 34 Sup. Ct. Rep. 652; Bacon v. Rutland R. Co. 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Detroit & M. R. Co. v. Michigan R. Commission, 235 U. S. 402, ante, 288, 35 Sup. Ct. Rep. 126.

The methods by which this right to a judicial review are secured vary in different jurisdictions. In some states there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the commission. Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; State ex rel. Railroad Commission v. Oregon R. & Nav. Co. 68 Wash. 160, 167, 123 Pac. 3; Seward v. Denver & R. G. R. Co. 17 N. M. 557, 46 L.R.A. (N.S.) 242, 131 Pac. 980. Cf. Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957, 989. In others, by proceedings in equity. In the Federal courts the method of procedure, when administrative orders are attacked as unconstitutional, is now regulated by § 266 of the Judicial Code [36 Stat. at L. 1162, chap. 231], as amended (37 Stat. at L. 1014, chap. 160, Comp. Stat. 1913, § 1243). But in whatever method enforced, the right to a judicial review must be substantial, adequate, and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.

5. As statutes establishing railroad commissions and providing penalties for violations of legislative orders are of recent origin the cases discussing the subject are [662] comparatively few. See Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 529

(4), 549 (14, 15) (1892); Louisville & N. R. Co. v. McChord, 103 Fed. 225 (1900); Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 101, 46 L. ed. 105, 22 Sup. Ct. Rep. 30 (1901); Consolidated Gas Co. v. Mayer, 146 Fed. 154 (1906); Ex parte Wood, 155 Fed. 190 (1907); Consolidated Gas Co. v. New York, 157 Fed. 849 (1907); Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764 (1908); Willcox v. Consolidated Gas Co. 212 U. S. 53, 53 L. ed. 400, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034 (1909); Missouri P. R. Co. v. Nebraska, 217 U. S. 207, 54 L. ed. 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989 (1910) (building spur tracks); Missouri P. R. Co. v. Tucker, 230 U. S. 340, 349, 57 L. ed. 1507, 1510, 33 Sup. Ct. Rep. 961 (1913); Bonnett v. Vallier, 136 Wis. 193 (15, 16) 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Coal & Coke R. Co. v. Conley, 67 W. Va. 132, 67 S. E. 613, and the present case of Wadley Southern R. Co. v. State, 137 Ga. 497, 73 S. E. 741.

These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders, but depends upon a showing of extrinsic facts. A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands [663] of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid.

The first case which deals with the question is Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 529 (4), 549 (14, 15), decided in 1892. There statutory provisions imposing penalties tending to embarrass a party in appealing for protection against taking property without due process of law were held to be void. In Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 101, 46 L. ed. 105, 22 Sup. Ct. Rep. 30 (1901), it was pointed out that an act which opened the doors of the courts, but placed upon the litigant a penalty for failure to make good his defense, which was so great as to deter him from asserting that which he believed to be his right, was tantamount to a denial of the equal protection of the law.

Later the matter was elaborately discussed, most carefully considered, and finally decided in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where a statute fixed rates, and, though it afforded no opportunity for a judicial hearing to determine whether the rates were confiscatory, yet imposed heavy and cumulative penalties for collecting other than those statutory rates. Those rates had not been established in pursuance of a plenary power of the legislature, but, in view of constitutional limitations, the rates were valid only if they were found to be reasonable. Whether they were reasonable or not was not apparent on the face of the statute, but was dependent upon the proof of extrinsic facts. How doubtful and uncertain that then was is illustrated by the fact that in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 472, 473, 57 L. ed. 1570, 1571, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, these legislative rates were subsequently held to be confiscatory as to some carriers, and as to others not confiscatory.

It was in the light of the fact that the penalty was imposed [664] for charging other than those statutory rates, whose reasonableness was a matter of doubt and uncertainty, that this court in the Young Case, speaking through Mr. Justice Peckham, pointed out that a law which in terms or by the operation of deterrent penalties made statutes or orders of a commission conclusive as to the sufficiency of rates would be unconstitutional. He summed up the discussion as follows: "It may, therefore, be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law, in terms, prohibited the company from seeking judicial construction of laws which deeply affect its rights." Like views were expressed as to the invalidity of the heavy

penalties involved in the Consolidated Gas Case, 212 U. S. 53, 53 L. ed. 400, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034. But the penalty provisions were separable, and their invalidity did not defeat the balance of the statute (54).

The Young and Consolidated Gas Cases both related to rate statutes, while in Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 207, 54 L. ed. 727, 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989, the statute imposed a fine for the carrier's failure, on demand, to construct spur tracks to elevators. After showing that if the absolute requirement of the statute to build was to be construed as being applicable only when the demand was reasonable, this court said that even on that construction the railroads must refrain from paying "at the peril of a fine, if they turn out wrong in their guess that in the particular case the court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act."

In Missouri P. R. Co. v. Tucker, 230 U. S. 340, 349, 57 L. ed. 1507, 1510, 33 Sup. Ct. Rep. 961, the [665] question was presented in still a different aspect. The statutory rate on the shipment of oil involved in that case was $12 a barrel. The act provided that if the carrier charged in excess of such rates it should be liable to any person injured in the sum of $500 as liquidated damages, to be recovered by an action in any court of competent jurisdiction. The carrier, instead of charging the statutory rate of $12, charged the old rate of $15.02, and the shipper sued to recover $500 as damages for collecting $3.02 too much. The act made no provision for a hearing in advance to determine whether the statutory rate of $12 was reasonable. The state court, however, held that as the statute did not forbid such judicial investigation, the carrier had the right, when sued for a penalty, to defend by showing that the statutory rates were unreasonable. But, as was pointed out in the decision of this court, the right to a hearing by way of defense after the $15.02 had been collected failed to recognize "the real plight of the carrier" (349). For, when the oil was tendered for shipment, it had to be accepted at the rate of $12, and thus be illegally deprived of $3.02 if the statutory rate of $12 was confiscatory; or else, the carrier had to charge its existing rate of $15, and run the risk of having to pay more than a hundred times the amount of the over charge if the new $12-rate was ultimately sustained. Of course the right to make a defense, at the risk of having to pay such an enormous penalty, was merely illusory. For, if such penal statutes were indeed constitutional, the carrier, in every instance, would submit to the deprivation of some of its property, under a rate of doubtful validity, rather than run the risk of paying out all of its property by way of penalties imposed in the event the rate should ultimately be sustained.

The supreme court of Wisconsin in Bonnett v. Vallier, 136 Wis. 193 (15, 16), 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885, for the same reason, held a penalty statute void which imposed cumulative fines for [666] failing to comply with indefinite and uncertain regulations as to the construction of tenement houses.

The question also was carefully considered in Coal & Coke R. Co. v. Conley, 67 W. Va. 132, 67 S. E. 613, where it was held that enormous and accruing penalties could not be imposed for charging more than statutory rates of uncertain reasonableness.

6. In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself.

In considering that question in the present case, the constitutionality of the act involved is not to be decided by the conduct of the plaintiff in error, nor by the fact that the state only asked a penalty for one day's disobedience instead of many. Neither can the statute be construed as a single legislative act. It must be treated as part of a system of laws creating the railroad commission, defining its powers, and subjecting it to suit.

This point is brought out in the statement of the brief of the attorney general and counsel for the state, wherein it is said that "the safeguards thrown around persons and corporations affected by this [penalty statute] are such as to rob it of the charge of imposing such enormous and grossly excessive penalties as to render it unconstitutional. In the first place, such persons and corporations are entitled to a hearing before the commission [a contention already discussed]. And, in the second place, provision is made for the institution of suits against the railroad commission of Georgia when its acts are illegal or unconstitutional (Civil Code [Ga.] 1911, §

2625)." From an examination of that section of the Code it is quite clear that it recognizes the right to a judicial review [667] of administrative orders. Until it has been given a contrary construction by the state court, it must be here construed in such a way as to leave it valid, and as conferring that sort of right which furnishes the adequate and available remedy which meets the requirement of the Constitution. Any other construction would not only impute to the legislature an intent to deny the equal protection of the law, and to permit the carrier to be deprived of property without due process of law, but it would operate to nullify the penalty section as a whole. Giving, then, § 2625 that construction which makes it constitutional, and it appears that the laws of Georgia gave to the Wadley Southern R. R. Co. the right to a judicial review of the order of March 12, 1910, by a suit against the commission.

7. The only question, then, left for determination, is whether, in view of such right, the penalty can be collected for the violation of an order not known to be valid at the date of the disobedience sought to be punished. On that question, little can be found in the books. But on principle, and on the authority of all that has been said on the subject, there is no room to doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do.

In Cotting v. Kansas City Stock Yards Co. Justice Brewer first pointed out that there might be a distinction between punishing for acts done before and for those done after the validity of the rate statute had been settled, saying:

"It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and if extreme or cumulative penalties are imposed only after there has [668] been a final determination of the validity of the statute, the question would be very different from that here presented."

Another case dealing more directly with the question is that of State ex rel. Railroad Commission v. Oregon R. & Nav. Co. 68 Wash. 160, 123 Pac. 3. The act there under consideration imposed a punishment for violating orders of the commission, but gave the carrier adequate and available remedy by conferring upon it the right to a hearing in court as to their legality, otherwise it was to be treated as conclusive. Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535. In a suit for the recovery of the statutory penalty for failing to build a station, as required by the commission, the court said: "The railroad company having failed to review the order, as it was permitted to do under the act, the order became, in the language of the statute, 'final and conclusive.' . . ."

Coal & Coke R. Co. v. Conley, supra, contains a very full discussion of the subject. In that case the statute imposed a penalty for charging rates other than those prescribed in a legislative act, which, however, was altogether silent upon the subject of a judicial review as to the reasonableness of the rates. The court recognized that if that silence was to be construed into a denial of the right to a hearing in court, the penalty provision would be void. It held, however, that the failure of the penalty statute to say anything about the right of review could not be construed into a denial of that right. That conclusion, and the further holding that penalties could not accrue while the question of the validity of the rates was being determined in appropriate judicial proceedings instituted in a court of equity for that purpose, are specially applicable here. For the Georgia Code, instead of being silent on the subject, contains a section which punishes a violation of "lawful orders," and another provision, in the same chapter, which expressly contemplates that proceedings [669] may be brought against the commission to test the validity of its orders.

If the Wadley Southern Railroad Company had availed itself of that right, and —with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If, in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.

But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful.

The judgment of the Supreme Court of Georgia is affirmed.

ARIZONA & NEW MEXICO RAILWAY COMPANY, Plff. in Err.,
v.
THOMAS P. CLARK.

(See S. C. Reporter's ed. 669-682.)

Courts — jurisdiction — effect of admission of state — waiver.

1. Any irregularity in transferring to the Federal district court for the district of Arizona a suit begun prior to statehood in a territorial court, based upon the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), is waived where defendant answered upon the merits the amended complaint filed in the Federal court, without questioning the jurisdiction.

[For other cases, see Courts, III. b, in Digest Sup. Ct. 1908.]

Evidence — confidential communications — physician and patient — waiver.

2. Neither the testimony of other witnesses, offered by the patient, nor his own voluntary testimony as to his physical condition at the time of his examination by a physician, nor any averments in the pleadings, amount to a waiver of his privilege, under Ariz. Rev. Stat. 1901, § 2535, subd. 6, against the disclosure by the physician of any communications made by the patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of the patient, which, according to the proviso in that section, may be waived only in the event that the patient offers himself as a witness and voluntarily testifies with reference to the "communications" made by him to the physician.

[For other cases, see Evidence, X. e, in Digest Sup. Ct. 1908.]

[No. 347.]

Argued and submitted December 1, 1914.
Decided January 11, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the District of Arizona, in favor of plaintiff, in a suit under the Federal employers' liability act. Affirmed.

See same case below, 125 C. C. A. 305, 207 Fed. 817.

The facts are stated in the opinion.

Mr. John A. Garver argued the cause and filed a brief for plaintiff in error:

At the time of the application for the removal of the case at bar, no case in the state court arising under the Federal employers liability act could be removed to any court of the United States. Where such an action is brought in the state court, the defendant has no power to remove it into the Federal court, even though it arises under a Federal law and there is, in addition, diversity of citizenship.

Lee v. Toledo, St. L. & W. R. Co. 193 Fed. 685; McChesney v. Illinois C. R. Co. 197 Fed. 85.

Counsel for the respondent contends that an order of removal was not necessary, and that the filing of the petition and bond in the state court in itself effected a removal. That is undoubtedly so, where all the requirements of the statute are duly complied with.

New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 141, 26 L. ed. 96, 98; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 14, 26 L. ed. 643, 645; National S. S. Co. v. Tugman, 106 U. S. 118, 122, 27 L. ed. 87, 89, 1 Sup. Ct. Rep. 58.

But it is not true where the statutory requirements have not been complied with.

Stone v. South Carolina, 117 U. S. 430, 432, 29 L. ed. 962, 963, 6 Sup. Ct. Rep. 799; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 243, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692.

Not only was no certified copy of the record entered in the Federal court, in the present case, but there is absolutely no evidence that any copy of the record in the state court was ever entered in the Federal court. The United States district court is a court of limited jurisdiction, and can acquire jurisdiction only in the manner prescribed by statute; and it has no more power to proceed with an action commenced in the state court, until a certified copy of the record has been duly lodged with it, than an appellate court has to review the decision of a lower court before the record in that court has been properly certified to it.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1.

On the admissibility, as *res gestæ*, of statements or declarations made by injured person to physician while latter was examining him in order to qualify as a witness—see note to Shaughnessy v. Holt, 21 L.R.A. (N.S.) 826.

As to waiver of privilege as to communication between physician and patient—see notes to Epstein v. Pennsylvania R. Co. 48 L.R.A.(N.S.) 395; and Western Travelers' Acci. Asso. v. Munson, 1 L.R.A.(N.S.) 1068.

As to who, aside from the patient, may waive privilege as to communication between physician and patient—see note to National Annuity Asso. v. McCall, 48 L.R.A.(N.S.) 418.

Blitz v. Brown, 7 Wall. 693, 19 L. ed. 280; Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 512, 33 L. ed. 433, 435, 10 Sup. Ct. Rep. 177.

The failure to file the record within thirty days may be waived.

St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 216, 27 L. ed. 703, 704, 2 Sup. Ct. Rep. 498.

But it cannot be waived altogether, and the court cannot proceed with the action until the record has been filed.

Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 14, 26 L. ed. 643, 645.

The mere fact that this question of jurisdiction was not raised in the lower courts is of no consequence. It could not be waived. Parties are not permitted to litigate their issues in a court, unless that court has been clothed with power to determine them. Jurisdiction cannot be conferred upon a court of limited jurisdiction by consent; and by joining issue in the Federal court, and proceeding to trial there, and afterwards reviewing the judgment in the circuit court of appeals, the railway company was not precluded from raising the point for the first time in this court.

Crehore v. Ohio & M. R. Co. 131 U. S. 240, 243, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692.

Indeed if the plaintiff in error had not raised the point, the court itself would have done so, on its own motion, if its attention had been called to it.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Metcalf v. Watertown, 128 U. S. 586, 589, 32 L. ed. 543, 544, 9 Sup. Ct. Rep. 173; Parker v. Ormsby, 141 U. S. 81, 83, 35 L. ed. 654, 655, 11 Sup. Ct. Rep. 912.

The privilege given by statute was clearly waived by the plaintiff in the present case.

Capron v. Douglass, 193 N. Y. 11, 20 L.R.A.(N.S.) 1003, 85 N. E. 827; Morris v. New York, O. & W. R. Co. 148 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410.

The principle is similar to that which is recognized in the case of attorney and client, where, if the communication is made in the presence of a third person, the privilege is waived.

Doheny v. Lacy, 168 N. Y. 213, 61 N. E. 255; Thompson v. Cashman, 181 Mass. 36, 62 N. E. 976.

Messrs. William C. McFarland and John A. Garver also filed a brief for plaintiff in error:

Whether the district court of the United States for the district of Arizona had or had not jurisdiction of this cause, brought before this honorable court upon writ of error to the United States circuit court of appeals for the ninth circuit, is a question that this court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits. Consent or acquiescence of the parties cannot confer jurisdiction.

Parker v. Ormsby, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; M'Donald v. Smalley, 1 Pet. 620, 7 L. ed. 287; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.

The courts of the United States inferior to this court have not jurisdiction except as conferred by Congress. Congressional legislation is necessary to enable those courts, after admission into the Union, to take jurisdiction of cases previously commenced in the courts of the territory, and not finally adjudged before the admission of such territory to the Union.

Koenigsberger v. Richmond Silver Min. Co. 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. Rep. 751; Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922; United States Exp. Co. v. Kountze Bros, 8 Wall. 342, 19 L. ed. 457; Baker v. Morton, 12 Wall. 150, 20 L. ed. 262.

An examination of the enabling act discloses that the jurisdiction of such causes as the instant case, pending in a territorial court at the time of the transition from territorial to state government, is, by operation of law, transferred to the proper state court.

United States v. Alamogordo Lumber Co. 121 C. C. A. 162, 202 Fed. 700.

Where a state court has lawfully acquired jurisdiction of a cause, no transfer of that jurisdiction to a national court can be made otherwise than according to the provisions of a law authorizing it.

Bluebird Min. Co. v. Murray, 45 Fed. 388.

The jurisdiction of the United States district court in the state, and of its clerk, over this case and its files and records, has never attached, because the case has never been removed from the proper state court to which the enabling act transferred it.

United States v. Alamogordo Lumber Co. supra.

The maxim that consent cannot give jurisdiction applies. The parties did not and could not waive the question involved.

Home L. Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68; Removal Cases, 100 U. S. 474, 25 L. ed. 600; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.

Between courts having concurrent jurisdiction, the one which first obtains posses-

sion of a controversy must be allowed to dispose of it finally. The enabling act expressly and definitely gave first and exclusive jurisdiction of this cause to the state court upon the admission of the territory to the Union, to be devested only in the manner and within the time prescribed by the act.

Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470.

The instant case presents the question of the assumption of jurisdiction by succession, and not by removal. The procedure for acquiring either way, however, is wholly statutory, and rules applicable to rights under removal are pertinent to the questions of jurisdiction by succession. Where a petition and bond have been filed with the state court, that court is ousted of its jurisdiction, and the parties may not force a resumption of jurisdiction by the state court by consent.

Home L. Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68; Lawton v. Blitch, 30 Fed. 641.

The evidence of Dr. Stark shows that his opinion as an expert was based upon objective as well as subjective symptoms, the former not being within the general rule of privilege.

Union P. R. Co. v. McMican, 114 C. C. A. 311, 194 Fed. 395.

Mr. William M. Seabury submitted the cause for defendant in error:

The making or the refusal to make an order, by the state court, has no effect whatever upon the jurisdiction of the Federal court, which in a removable cause vests *eo instanti* upon the filing of the proper application and bond in the state court.

National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 15, 26 L. ed. 643, 646; Kern v. Huidekoper, 103 U. S. 485, 490, 26 L. ed. 354, 356; Loop v. Winters, 115 Fed. 362; Hubbard v. Chicago, M. & St. P. R. Co. 176 Fed. 394; Mannington v. Hocking Valley R. Co. 183 Fed. 140; Lund v. Chicago, R. I. & P. R. Co. 78 Fed. 385; Eisenmann v. Delmar's Nevada Gold Min. Co. 87 Fed. 250; Burke v. Bunker Hill & S. Min. & Concentrating Co. 46 Fed. 644.

Whatever rights the plaintiff in error had in the premises were in the nature of a privilege personal to it, which was the subject of waiver, and which was, in fact, waived by the conduct to which we have already adverted.

Louisville & N. R. Co. v. Fisher, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 69; Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; Re Moore, 209 U. S. 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706; Davies v. Lathrop, 21 Blatchf. 164, 13 Fed. 565.

Even supposing there were irregularities in the transfer, yet the Federal court's jurisdiction vested.

Bryant Bros. Co. v. Robinson, 79 C. C. A. 259, 149 Fed. 327.

Mr. Justice Pitney delivered the opinion of the court:

This action, brought by Clark against the railway company, was commenced in January, 1912, in the district court of the fifth judicial district of the then territory of Arizona. It was based upon the Federal employers' liability act of 1908 (35 Stat. at L. 65, chap. 149), as amended in 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662). The complaint alleged that while defendant was engaging in commerce between the territories of Arizona and New Mexico as a common carrier by railroad, and while plaintiff was employed by defendant in such commerce, he sustained certain personal injuries through the negligence of defendant and its employees, for which he claimed damages in the amount of $40,000. After the action was commenced, and on February 14, 1912, the territory of Arizona became a state, and the further proceedings (improperly, it is said), were conducted in the district court of the United States for the district of Arizona. In that court plaintiff filed a first and a second amended complaint, and defendant, having unavailingly moved to strike the latter from the files, upon grounds not necessary to be specified, answered upon [673] the merits, without interposing any objection to the jurisdiction of the court. A trial by jury was had, resulting in a verdict and judgment for plaintiff, and this was removed by defendant's writ of error to the United States circuit court of appeals for the ninth circuit, where the judgment was affirmed (125 C. C. A. 305, 207 Fed. 817). The present writ of error was then sued out.

Two matters only require particular discussion. The enabling act of June 20, 1910, under which Arizona was admitted as a state (36 Stat. at L. 577, chap. 310, § 33), provided in effect that actions which, at the date of admission, were pending in the territorial courts (other than the supreme court), should be transferred to and proceed in the proper Federal court in cases where, if they had been begun within a state, the Federal court would have had exclusive original jurisdiction, and that where the cause of action was one of which the state and Federal courts would have concurrent jurisdiction, the action should be transferred to and proceed in the appropriate

state court, but in this case might be transferred to the Federal court upon application of any party, to be made as nearly as might be in the manner provided for removal of causes from state to Federal courts.

The present action being one of which the Federal and state courts have concurrent jurisdiction, it is insisted that upon the commencement of statehood, it should have been transferred to the proper state court, subject to removal to the Federal court upon application made in due form for that purpose; that in fact the files and records in the territorial court were never transferred to the proper state court, or to any state court; and that a certain petition of plaintiff, which appears in the record, wherein he prayed for the removal of the cause from the state to the Federal court, was insufficient and inefficacious for the purpose, for want of compliance with certain of the requirements of the removal statute. It is further insisted [674] that in the enabling act it was the intention of Congress to provide for the removal of actions from the state to the Federal courts only in case they might have been removed if the action had not been commenced until after the admission of the territory as a state; and that, under the express prohibition contained in the amendment of § 6 of the employers' liability act, passed April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), shortly before the passage of the enabling act, and which declares that "no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States" (re-enacted as § 28, Judicial Code [36 Stat. at L. 1094, chap. 231, Comp. Stat. 1913, § 1010]), actions of this character were not removable under the general provisions of § 33 of the enabling act.

We need spend no time upon these questions, since there is no ground for denying the jurisdiction of the district court of the United States over the subject-matter, the objections urged are of such a nature that they might be waived, and the record shows that they were waived by the action of defendant in permitting the cause to proceed in the Federal court, and answering there upon the merits, without objection based upon the grounds now urged or any jurisdictional grounds. The action being one arising under a law of the United States, and the requisite amount being in controversy, the Federal district court had original jurisdiction under § 24, Judicial Code. The removal proceedings were in the nature of process to bring the parties before that court, and the voluntary appearance of the parties there was equivalent to a waiver of any formal defects in such proceedings. Mackay v. Uinta Development Co. 229 U. S. 173, 176, 57 L. ed. 1138, 1139, 33 Sup. Ct. Rep. 638. The case of United States v. Alamogordo Lumber Co. 121 C. C. A. 162, 202 Fed. 700, cited by plaintiff in error, is clearly distinguishable, for timely objection was there made.

The second matter requiring mention is the alleged error of the trial court in excluding the evidence of two [675] physicians called by defendant for the purpose of testifying to the results of a personal examination of plaintiff shortly after he received the injuries for which damages were claimed. The trial court based the rulings upon an Arizona statute (Rev. Stat. 1901, § 2535, subdiv. 6), which reads as follows:

"6. A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of such patient: Provided, That if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney [*sic*]."

A material part of the injury complained of was the loss of the sight of plaintiff's left eye; and because this was set forth in the pleadings, and upon the trial plaintiff testified personally in regard to his injuries, mentioning the loss of sight and pain in the eye, and called as a witness a nurse who attended him after the accident, and who testified as to the condition of the eye, it is insisted that plaintiff in effect consented to the examination of the physicians with respect to his condition. The argument is that the statute was intended to protect persons in the confidential disclosures that may be necessary in regard to their physical condition, but was not intended to close the lips of physicians where the patient voluntarily publishes the facts to the world. In support of this, plaintiff in error cites two cases from the New York court of appeals,—Morris v. New York, O. & W. R. Co. 148 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410, and Capron v. Douglass, 193 N. Y. 11, 20 L.R.A.(N.S.) 1003, 85 N. E. 827. But the New York statute[1] is materially different from that of Arizona. [676] The

[1] Extracts from the New York Code of Civil Procedure.

"Sec. 834. A person duly authorized to practise physic or surgery . . . shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was nec-

purpose of the latter enactment is very clearly expressed in its language. Without the consent of the patient, the physician's testimony is excluded with respect to two subjects: (a), any communication made by the patient with reference to any physical or supposed physical disease, and (b), any knowledge obtained by personal examination of such patient. And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies "with reference to such communications." We would have to ignore the plain meaning of the words in order to hold, as we are asked to do, that the testimony of other witnesses offered by the patient, or the testimony of the patient himself with reference to other matters than communications to the physician, or any averments contained in the pleadings, but not in the testimony, amount to a waiver of the privilege. The enactment contemplates that the physician receives in confidence what his patient tells him, and also what the physician learns by a personal examination of the patient. It contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent.

The express object is to exclude the physician's testimony, at the patient's option, respecting knowledge [677] gained at the bedside, in view of the very delicate and confidential nature of the relation between the parties. The statute recognizes that they do not stand on equal terms. The patient is more or less suffering from pain or weakness, distracted by it, ignorant of the nature or extent of his injury or illness, driven by necessity to call in a professional adviser, sometimes with little freedom of choice; he relies, perforce, upon the physician's discretion, as well as upon his skill and experience, and is obliged by the circumstances of his own condition not only to make an explanation of his ailment or injury, so far as it may be within his knowledge and may be communicable by word of mouth, but also to submit to the more intimate disclosure involved in a physical examination of his person. The physician, on the other hand, is in the full possession of his faculties, and of that knowledge which is power. Manifestly, the patient occupies, for the time, a dependent position. The chief policy of the statute, as we regard it, is to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences. The question of dealing justly as between the patient and third parties is a secondary consideration.

It is a mistake, we think, to regard the patient's disclosures—whether verbal or physical—as voluntary in the full sense; they are believed by him to be necessary for the restoration of health or the preservation of life or limb. But, at least, if he has command of his mind and memory, the patient may somewhat control the extent of his disclosures by word of mouth, and may be able afterwards to testify respecting them; while, if he submits himself to a physical examination at the hands of the physician, he cannot know in advance the nature or extent of what the physician will learn, cannot confine the disclosure to the present ailment or injury, and cannot afterwards testify respecting its results, excepting as the physician may inform [678] him of them. And, in many cases, the physician may, with perfectly proper motives, withhold from the patient the results of the physical examination and his deductions therefrom.

We cannot, therefore, without encroaching upon the domain of legislation, declare that there is no substantial ground for a distinction between the information the physician gains from verbal communications made by the patient and the far wider knowledge that he derives from his personal examination of the patient. Certainly it cannot be said that when the patient afterwards has occasion to make averments and adduce evidence respecting the nature of the ailment or injury, he thereby necessarily publishes to the world the facts as disclosed to the physician through the physical examination. In many cases this must be very far from true; the patient having no access to the facts as thus disclosed excepting with the consent of the physician. The language of the statute, as we think, shows a recognition of this, and also of the fact that when the patient himself has occasion to testify respecting his ailment or disease, he often must do so without knowing the range or the character of the testimony that might be given by the physician, and without any means

essary to enable him to act in that capacity. . . ."

. . . . . .

"Sec. 836. The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the . . . patient; . . . The waivers herein provided for must be made in open court on the trial of the action or proceeding, and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver. . . ."

of contradicting it. In order to prevent the patient from being subjected to this disadvantage, the act gives him the option of excluding the physician's evidence entirely by himself refraining from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment.

The framer of the act was careful to choose language that recognizes the distinction between (a) communications made by the patient and (b) knowledge obtained by the doctor through a personal examination of the patient. The New York statute, which, so far as we have observed, was the first to establish a privilege with respect [679] to the knowledge gained by a physician while attending a patient in a professional capacity, recognizes no such distinction. Nor does it define with precision what conduct on the part of the patient shall constitute a waiver of the privilege. Hence the courts of that state deemed themselves at liberty to determine this question upon general principles, derived from the supposed policy of the law. Not only, therefore, are the decisions of the courts of that state, and of other states having statutes formed upon the same model, valueless as guides to the meaning of the statute here in question, but the very fact that the legislature of Arizona departed from the form of the New York statute indicates that it did so because it had a different purpose to express. We are unable to see anything that would justify us in refusing judicial recognition to a distinction thus laid hold of by the lawmaking body in defining the extent and conditions of the privilege.

To construe the act in accordance with the contention of plaintiff in error would not only be a departure from its language, but would render it inapplicable in all cases where the "physical or supposed physical disease" is the subject of judicial inquiry, and where any averment respecting it is made in pleading, or evidence upon the subject is introduced at the trial in behalf of the patient. This would deprive the privilege of the greater part of its value, by confining its enjoyment to the comparatively rare and unimportant instances where the patient might have no occasion to raise an issue or introduce evidence on the subject, or where the patient's disease might happen to be under investigation in a controversy between other parties. We are constrained to reject this construction.

The other questions that are raised require no special mention. It is sufficient to say that we find no error warranting a reversal of the judgment.

Judgment affirmed.

[680] Mr. Justice Hughes, dissenting:

I am unable to agree to the approval of the ruling which excluded the physician's testimony. It should be supposed that it was the legislative intent to protect the patient in preserving secrecy with respect to his ailments, and not to give him a monopoly of testimony as to his condition while under treatment. Here, not only did the plaintiff introduce the evidence of his nurse, describing in detail his bodily injuries and the medical treatment, but the plaintiff offered himself as a witness and voluntarily testified as to his bodily condition. His testimony covered the time during which he was under the physician's examination, and it was upon this testimony that he sought to have the extent of his injuries determined by the jury and damages awarded accordingly. To permit him, while thus disclosing his physical disorders, to claim a privilege in order to protect himself from contradiction by his physician as to the same matter, would be, as it seems to me, so inconsistent with the proper administration of justice that we are not at liberty to find a warrant for this procedure in the statute, unless its language prohibits any other construction. See Hunt v. Blackburn, 128 U. S. 464, 470, 32 L. ed. 488, 491, 9 Sup. Ct. Rep. 125; Epstein v. Pennsylvania R. Co. 250 Mo. 1, 25, 48 L.R.A.(N.S.) 394, 156 S. W. 699; Roeser v. Pease, 37 Okla. 222, 227, 131 Pac. 534; Forrest v. Portland R. Light & P. Co. 64 Or. 240, 129 Pac. 1048; Capron v. Douglass, 193 N. Y. 11, 20 L.R.A.(N.S.) 1003, 85 N. E. 827; 4 Wigmore, Ev. § 2389 (2).

As I read the Arizona statute, it was framed not to accomplish, but to prevent, such a result. We have not been referred to any construction of it by either the territorial or state court, and we must construe it for ourselves. To my mind, its meaning is that if the patient voluntarily testifies as to his physical condition at the time of the examination, he cannot shut out his physician's testimony as to the same subject. To reach the contrary [681] conclusion, emphasis is placed on the words "such communications" in the proviso, and it is insisted that the proviso was to apply only if the plaintiff testifies as to what he *told* the physician. I think that this is altogether too narrow. When the patient submits himself to an examination, he as truly communicates his condition to the physician as if he tells him in words. Although the patient were dumb, his submission to in-

spection in order that he might be treated would be none the less a communication of what is thus made known. That is the very ground of the privilege. Nor does the fact that the statute, with unnecessary diffuseness, refers in the sentence defining the privilege to "any communication" or "any knowledge obtained by personal examination" limit the natural meaning of the proviso. In saying that "if a person offer himself as a witness and voluntarily testify with reference to such communications," it is to be deemed "a consent" to the physician's testifying, the proviso may be, and I think should be, taken to embrace implied as well as express communications. I can find no reasonable basis for a distinction. It is said that the plaintiff may not know what the physician has observed or what testimony he may give. But when the plaintiff testifies, he invites analysis and contradiction, and in contemplation of law he asks to have his statement judged by what is shown to be the truth of the matter. If the plaintiff testifies as to what he told the physician, it is conceded that the physician may be examined, and the obvious reason is that the plaintiff is not to be permitted to insist upon his privilege as to what he himself is disclosing. This is the policy of the statute, and it governs equally, as I read it, when the plaintiff testifies as to his physical condition at the time he submits himself to the physician's examination. The words "such communications" are broad enough to cover all communications for the purpose of treatment, whether by utterance or by what is usually more revealing—the [682] yielding of one's body to the scrutiny of the practitioner. To repeat, it seems to me that the statute was intended to make it impossible for the plaintiff to claim the privilege when he himself has testified as to the subject of it.

As in this view competent, and presumably important, evidence was excluded, I think that the judgment should be reversed.

I am authorized to say that Mr. Justice Day concurs in this dissent.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[683] EX PARTE: IN THE MATTER OF JARED FLAGG, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Prohibition or Mandamus.

Messrs. Robert C. Beatty and Wade H. Ellis for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

October 26, 1914. Denied.

F. W. RITTERBUSCH, as County Treasurer, etc., et al., Appellants, v. ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY. [No. 73.]

Appeal—from circuit court of appeals—jurisdiction.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Oklahoma enjoining the collection of certain taxes upon railway property.

See same case below, 117 C. C. A. 154, 198 Fed. 46.

Mr. Charles West for appellants.

Mr. S. T. Bledsoe for appellee.

October 26, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MD., Plaintiff in Error, v. FRED H. POETKER, Receiver, etc. [No. 302.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Pike County in that state in favor of plaintiff in an action upon the official bond of a bank cashier.

See same case below, 180 Ind. 255, 102 N. E. 372.

Mr. Charles Martindale for plaintiff in error.

Messrs. Frank S. Roby and Ward H. Watson for defendant in error.

October 26, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) [684] First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 895, 30 Sup. Ct. Rep. 693; May v. Illinois, 232 U. S. 720, 58 L. ed. 814, 34 Sup. Ct. Rep. 602; (2) McCorquodale v. Texas, 211 U. S. 432, 437, 53 L. ed. 269, 270, 29 Sup. Ct. Rep. 146; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510; Lewiston v. Chamberlain, 234 U. S. 751, 58 L. ed. 1576, 34 Sup. Ct. Rep. 775.

HENRY D. HOTCHKISS, as Trustee, etc., Appellant, v. IRVING L. ERNST et al., as Trustees, etc. [No. 629.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the District Court for the Southern District of New York dismissing a petition for the review of an order made by a referee in bankruptcy.

See same case below, 216 Fed. 102.

Messrs. Abram I. Elkus and William A. Barber for appellant.

Mr. Daniel P. Hays for appellees.

October 26, 1914. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of Coder v. Arts, 213 U. S. 223, 234, 235, 53 L. ed. 772, 777, 778. 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 118, 56 L. ed. 118, 119, 32 Sup. Ct. Rep. 67; James v. Stone, 227 U. S. 410, 411, 57 L. ed. 573, 574, 33 Sup. Ct. Rep. 351; Synnott v. Tombstone Consol. Mines Co. 234 U. S. 749, 58 L. ed. 1575, 34 Sup. Ct. Rep. 674.

Russell Sage Raphael, Appellant, v. Wasatch & Jordan Valley Railroad Company et al. [No. 115.]

Appeal—from circuit court of appeals—jurisdiction.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Utah dismissing the bill in a suit to foreclose a mortgage.

See same case below, 120 C. C. A. 184, 201 Fed. 854.

Messrs. Delos McCurdy, Thomas Bracken, and Hiram E. Booth for appellant.

Messrs. Joel F. Vaile, Henry McAllister, Jr., Waldemar Van Cott, E. M. Allison, Jr., and William D. Riter for appellees.

October 26, 1914. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 479, 53 L. ed. 605, 611, 29 Sup. Ct. Rep. 341; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

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[685] Mohawk Overall Company et al., Plaintiffs in Error, v. Hooker, Corser, & Mitchell Company. [No. 520.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of New York in and for the County of Schenectady in that state to review an order entered pursuant to the mandate of the court of appeals affirming an order of the Appellate Division of the Supreme Court, Third Department, which had affirmed an order of a Special Term of the Supreme Court denying a motion to vacate a *subpœna duces tecum.*

See same case below, in New York court of appeals, 210 N. Y. 474, 104 N. E. 925.

Messrs. William Dewey Loucks and Frederick S. Tyler for plaintiffs in error.

Messrs. Clarke C. Fitts and Robert C. Bacon for defendant in error.

October 26, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 895, 30 Sup. Ct. Rep. 693; May v. Illinois, 232 U. S. 720, 58 L. ed. 814, 34 Sup. Ct. Rep. 602; (2) Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Jack v. Kansas, 199 U. S. 372, 379, 380, 50 L. ed. 234, 236, 26 Sup. Ct. Rep. 73, 4 Ann. Cas. 689; Twining v. New Jersey, 211 U. S. 78, 93, 53 L. ed. 97, 103, 29 Sup. Ct. Rep. 14.

Commonwealth Trust Company, Plaintiff in Error, v. Albert A. Trocon et al. [No. 526.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Scott County in that state adjudging a lien upon railway property in favor of a bridge company.

Mr. Carr W. Taylor for plaintiff in error.

Mr. William C. Scarritt for defendants in error.

October 26, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Mallers v. Commercial Loan & T. Co. 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 895, 30 Sup. Ct. Rep. 693; Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699; Lewiston v. Chamberlain, 234 U. S. 751, 58 L. ed. 1576, 34 Sup. Ct. Rep. 775; (2) Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 58 L. ed. 204, 34 Sup. Ct. Rep. 90; Holden Land & Live Stock Co. v. Interstate Trading Co. 233 U. S. 536, 58 L. ed. 1083, 34 Sup. Ct. Rep. 661.

Atlantic Coast Lumber Corporation, Plaintiff in Error, v. O. G. Minshew. [No. 564.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of South Carolina to review a decree which affirmed a decree of the Circuit Court of Marion County in that state avoiding a conveyance of standing timber because of delay in cutting and removing the same.

See same case below, 98 S. C. 8, 81 S. E. 1027.

Mr. P. A. Willcox for plaintiff in error.

Mr. J. J. Darlington for defendant in error.

[686] October 26, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 599, 600, 57 L. ed. 982-984, 33 Sup. Ct. Rep. 609; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Ennis Waterworks v. Ennis, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767.

United States, Plaintiff in Error, v. Holland-America Line. [No. 409.]

Aliens — immigration — maintenance and medical care — liability of steamship company.

In Error to the United States Circuit

Court of Appeals for the Second Circuit to review a judgment which affirmed the dismissal by the District Court for the Southern District of New York of a complaint in an action by the United States to recover from an ocean carrier the expenses of maintenance and medical care and treatment of alien immigrants afflicted with diseases not requiring deportation, brought to the United States by such carrier and held for examination as to their right to enter.

See same case below, 128 C. C. A. 632, 212 Fed. 116.

Mr. Assistant Attorney General Wallace for plaintiff in error.

Mr. Lucius H. Beers for defendant in error.

November 2, 1914. Judgment affirmed by an equally divided court, and cause remanded to the District Court of the United States for the Southern District of New York.

ANTONIO MARIA PERALTA et al., Appellants, v. STATE OF CALIFORNIA et al. [No. 61.]

Appeal—from circuit court of appeals—jurisdiction.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California in favor of defendants in a suit to quiet title.

See same case below, 105 C. C. A. 491, 182 Fed. 755.

Messrs. W. W. Allen, Andrew Wilson, Wm. H. H. Hart for appellants.

Messrs. Charles E. Wilson, Edward J. McCutcheon, Samuel Knight, U. S. Webb, James A. Johnson, Maxwell Evarts, Charles H. Lovell, Richard Bayne, E. S. Pillsbury, A. A. Moore, F. D. Madison, Alfred Sutro, Oscar Sutro, Aldis B. Browne, Alex. Britton, Evans Browne, Chas. A. Beardsley, F. H. Powers, Joseph Paxton Blair for appellees.

November 2, 1914. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of (1) Castro v. United States, 3 Wall. 46, 49, 50, 18 L. ed. 163, 164; Caillot v. Dectken, 113 U. S. 215, 28 L. ed. 983, 5 Sup. Ct. Rep. 432; Richardson v. Green, 130 U. S. 104, 111, 32 L. ed. 872, 874, 9 Sup. Ct. Rep. 443; Green v. Elbert, 137 U. S. 615, 621, 34 L. ed. 792, 11 Sup. Ct. Rep. 188; (2) Villabolos v. United States, 6 How. 81, 90, 91, 12 L. ed. 352, 356, 357; Hewitt v. Filbert, 116 U. S. 142, 145, 29 L. ed. 581, 582, 6 Sup. Ct. Rep. 319; Jacobs v. George, 150 U. S. 415, 417, 37 L. ed. 1127, 1128, 14 Sup. Ct. Rep. 159.

[687] ELIZA M. BRITTON, etc., Plaintiff in Error, v. AUGUSTIN B. WHEELER. [No. 343.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court for the Parish of Orleans in that state in favor of plaintiff in an action for separation *a mensa et thoro.*

See same case below, 134 La. 63, 63 So. 624.

Messrs. Charles Louque and Edmund Burke for plaintiff in error.

Messrs. George Denegre and Victor Leovy for defendant in error.

November 2, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Spies v. Illinois, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22; Erie R. Co. v. Purdy, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605; (2) Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 895, 30 Sup. Ct. Rep. 693; John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; McDonald v. Oregon R. & Nav. Co. 233 U. S. 665, 58 L. ed. 1145, 34 Sup. Ct. Rep. 772.

MELVIN W. MILLS, Appellant, v. TERRITORY OF NEW MEXICO. [No. 20.]

Appeal—from territorial supreme court—following decision below.

Appeal from the Supreme Court of the Territory of New Mexico, to review a decree which affirmed a decree of the District Court of Santa Fe County in that territory in favor of plaintiff in a suit on the bond of a bank which was a depositary of territorial moneys.

See same case below, 16 N. M. 555, 120 Pac. 325.

Mr. Julius Staab for appellant.

Mr. Frank W. Clancy for appellee.

November 2, 1914. Decree affirmed with costs, and cause remanded to the Supreme Court of the State of New Mexico. Treat v. Grand Canyon R. Co. 222 U. S. 448, 452, 56 L. ed. 265, 266, 32 Sup. Ct. Rep. 125; Straus v. Foxworth, 231 U. S. 162, 169, 170, 58 L. ed. 168, 171, 172, 34 Sup. Ct. Rep. 42; Phœnix R. Co. v. Landis, 231 U. S. 578–580, 58 L. ed. 377, 380, 34 Sup. Ct. Rep. 179; Work v. United Globe Mines, 231 U. S. 595, 599, 58 L. ed. 389, 392, 34 Sup. Ct. Rep. 274; Arizona ex rel. Gaines v. Copper Queen Consol. Min. Co. 233 U. S. 87, 93, 94, 58 L. ed. 863, 866, 867, 34 Sup. Ct. Rep. 546.

C. J. RIXEY, an Insane Person, by C. J. RIXEY, JR., Appellant, v. ROBERT H. COX, Sergeant of the City of Alexandria, Va. [No. 26.]

Appeal—from district court—frivolous Federal question.

Appeal from the District Court of the United States for the Eastern District of Virginia to review a decree which denied relief by habeas corpus to a person in custody in a hospital for the criminal insane.

Messrs. John L. Jeffries and James R. Caton for appellant.

Messrs. Samuel W. Williams, John Garland Pollard, and Christopher B. Garnett for appellee.

November 2, 1914. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of (1) Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 [688] U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; Cassidy v. Colorado, 223 U. S. 707, 56 L. ed. 622, 32 Sup. Ct. Rep. 518; (2) Re Converse, 137 U. S. 624, 632, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191; Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 393, 46 L. ed. 1209, 1216, 22 Sup. Ct. Rep. 811; Jacobson v. Massachusetts, 197 U. S. 11, 25-27, 49 L. ed. 643, 649, 650, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

WASHINGTON DREDGING & IMPROVEMENT COMPANY, Plaintiff in Error, v. STATE OF WASHINGTON, E. V. Bussell, et al. [No. 16.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Thurston County in that state dismissing the complaint in a suit to vacate certain judgments affecting the title to tide lands.

See same case below, 53 Wash. 700, 101 Pac. 885.

Messrs. W. F. Hays, Hannis Taylor, Charles E. Shepard for plaintiff in error

Messrs. William M. Watson, James B. Metcalfe, Richard A. Ballinger, Alfred Battle, James A. Kerr, Corwin S. Shank, W. V. Tanner, G. E. de Steigner, Geo. B. Cole, Carroll B. Graves, W. B. Stratton, Frank P. Lewis, Lewis Henry Legg, E. C. Lindley, Charles W. Bunn, James B. Murphy, Ira Bronson, John C. Higgins, and W. H. Bogle for defendants in error.

November 2, 1914. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of Washington Dredging & Improv. Co. v. Washington, 231 U. S. 742, 58 L. ed. 463, 34 Sup. Ct. Rep. 318, and cases there cited.

WILLIAM RABB, Plaintiff in Error, v. STATE OF LOUISIANA. [No. 33.]

Error to state court—Federal question—decision on non-Federal ground.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a conviction in the Criminal District Court for the Parish of Orleans in that state for operating a banking game.

See same case below, 130 La. 370, 57 So. 1008.

Mr. Paul A. Sompayrac for plaintiff in error.

Messrs. R. G. Pleasant and St. Clair Adams for defendant in error.

November 2, 1914. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Kansas City Star Co. v. Julian, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406; Adams v. Russell, 229 U. S. 353, 57 L. ed. 1224, 33 Sup. Ct. Rep. 846; Holden Land & Live Stock Co. v. Interstate Trading Co. 233 [689] U. S. 536, 58 L. ed. 1083, 34 Sup. Ct. Rep. 661.

J. A. MILLER, Trustee, etc., Appellant, v. FIRST NATIONAL BANK OF ALBUQUERQUE. [No. 35.]

Appeal—from territorial supreme court—following decision below.

Appeal from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court of Bernalillo County in that territory sustaining a chattel mortgage as against the trustee in bankruptcy of the chattel mortgagor.

See same case below, 16 N. M. 497, 121 Pac. 31.

Messrs. O. N. Marron and Francis E. Wood for appellant.

Mr. A. B. McMillen for appellee.

November 2, 1914. *Per Curiam:* Decree affirmed with costs, upon the authority of Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 290, 291, 53 L. ed. 997, 1002, 1003, 29 Sup. Ct. Rep. 614; and cause remanded to the Supreme Court of the State of New Mexico.

MOUND CITY COMPANY, Appellant, v. ROBERT H. CASTLEMAN et al. [No. 13.]

Appeal—from circuit court of appeals—jurisdiction.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Missouri dismissing a partition suit.

See same case below, 110 C. C. A. 55, 187 Fed. 921.

Messrs. Chester H. Krum and Ben T. Castleman for appellant.

Messrs. John Cosgrove and William M. Williams for appellees.

November 9, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

PEOPLE OF THE STATE OF ILLINOIS, SUING BY THE CANAL COMMISSIONERS, Plaintiffs in Error, v. PITTSBURGH, FORT WAYNE, & CHICAGO RAILWAY COMPANY et al. [No. 23.]

Error to state court—Federal question—decision on non-Federal ground.

In Error to the Supreme Court of the State [690] of Illinois to review a decree which affirmed a decree of the Superior Court of Cook County in that state dismissing a bill to enjoin the operation of a railway in a city street.

See same case below, 244 Ill. 166, 91 N. E. 48.

Messrs. William Ritchie and Samuel B. King for plaintiffs in error.

Messrs. Frank J. Loesch, Timothy J. Scofield, Charles F. Loesch, and James Stillwell for defendants in error.

November 9, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 249, 58 L. ed. 204, 205, 34 Sup. Ct. Rep. 90; Holden Land & Live Stock Co. v. Interstate Trading Co. 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661.

TWIN FALLS CANAL COMPANY, Plaintiff in Error, v. STATE OF IDAHO et al. [No. 36.]

Error to state court—Federal question—decision on non-Federal ground.

In Error to the Supreme Court of the State of Idaho to review an order granting a writ of mandate to compel irrigation companies to issue stock to purchasers of state lands.

See same case below, 21 Idaho, 410, L.R.A. —, —, 121 Pac. 1039.

Messrs. Arthur M. Bowen and Joseph G. Hedrick for plaintiff in error.

Messrs. J. H. Peterson and Edwin G. Davis for defendants in error.

November 9, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 249, 58 L. ed. 204, 205, 34 Sup. Ct. Rep. 90; Holden Land & Live Stock Co. v. Interstate Trading Co. 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661.

J. F. SMITH et al., Plaintiffs in Error, v. GEORGE LEAVENWORTH. [No. 41.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancery Court of Coahoma County in that state apportioning accreted lands between riparian owners.

See same case below, 101 Miss. 238, 57 So. 803.

[691] Mr. O. G. Johnston for plaintiffs in error.

Mr. Gerald FitzGerald for defendant in error.

November 9, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Rogers v. Jones, 214 U. S. 196, 204, 53 L. ed. 965, 969, 29 Sup. Ct. Rep. 635; Wood v. Chesborough, 228 U. S. 672, 677, 57 L. ed. 1018, 1020, 33 Sup. Ct. Rep. 706; (2) Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; De Bearn v. Safe Deposit & T. Co. 233 U. S. 24, 34, 58 L. ed. 833, 837, 34 Sup. Ct. Rep. 584; McDonald v. Oregon R. & Nav. Co. 233 U. S. 665, 670, 58 L. ed. 1145, 1148, 34 Sup. Ct. Rep. 772; (3) New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691; Gring v. Ives, 222 U. S. 365, 370, 56 L. ed. 235, 237, 32 Sup. Ct. Rep. 167; Ennis Waterworks v. Ennis, 233 U. S. 652, 58 L. ed. 1139, 34 Sup. Ct. Rep. 767.

JOHN JENKINS, Appellant, v. MAXWELL LAND GRANT COMPANY. [No. 57.]

Appeal—from territorial supreme court—review of facts.

Appeal from the Supreme Court of the Territory of New Mexico to review a decree

which affirmed a decree of the District Court of Colfax County in that territory in favor of defendant, in an action in ejectment.

See same case below, 15 N. M. 281, 107 Pac. 739.

Mr. Frank T. Cheetham for appellant.

Mr. Charles A. Spiess for appellee.

November 9, 1914. *Per Curiam:* Judgment affirmed with costs upon the authority of Gildersleeve v. New Mexico Min. Co. 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; Harrison v. Perea, 168 U. S. 311, 323, 42 L. ed. 478, 482, 18 Sup. Ct. Rep. 129; William W. Bierce v. Hutchins, 205 U. S. 340, 344, 51 L. ed. 828, 832, 27 Sup. Ct. Rep. 524; and cause remanded to the Supreme Court of the State of New Mexico.

OSWALD WEST, as Governor, et al., Plaintiffs in Error, v. CORVALLIS & EASTERN RAILROAD COMPANY. [No. 105.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Oregon to review a decree which reversed a decree of the Circuit Court for Marion County in that state dismissing a suit to enjoin the state land board from selling or disposing of certain tide lands.

See same case below, 61 Or. 359, 121 Pac. 418.

Mr. A. M. Crawford for plaintiffs in error.

Messrs. William D. Fenton and Joseph Paxton Blair for defendant in error.

November 16, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Preston v. Chicago, 226 U. S. 447, 450, 57 L. ed. 293, 295, 33 Sup. Ct. Rep. 177; McDonald v. Oregon R. & Nav. Co. 233 U. S. 665, 58 L. ed. 1145, 34 Sup. Ct. Rep. 772; California ex rel. Hastings v. Jackson, 112 U. S. 233, 236, 28 L. ed. 712, 714, 5 Sup. Ct. Rep. 113; (2) Marshall v. Dye, 231 U. S. 250, 58 L. ed. 206, 34 Sup. Ct. Rep. 92.

EDWARD S. GARD, Plaintiff in Error, v. PEOPLE OF THE STATE OF ILLINOIS. [No. 264.]

Error to state court—Federal question.

In Error to the [692] Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Criminal Court of Cook County in that state adjudging a person to be guilty of contempt.

See same case below, 259 Ill. 238, 102 N. E. 255.

Mr. James Hartnett for plaintiff in error.

Messrs. Patrick J. Lucey and Lester H. Strawn for defendant in error.

November 16, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Gring v. Ives, 222 U. S. 365, 370, 56 L. ed. 235, 237, 32 Sup. Ct. Rep. 167; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Ennis Waterworks v. Ennis, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767.

PETER H. ANDERSON et al., Appellants, v. SWEDISH EVANGELICAL MISSION COVENANT OF AMERICA et al. [No. 64.]

Federal court—jurisdiction—Federal question.

Appeal from the District Court of the United States for the Northern District of Illinois to review a decree dismissing the bill in a suit to set aside an arbitration award and the various adjudications of the courts thereon.

Mr. Axel Chytraus for appellants.

Mr. Silas H. Strawn for appellee.

November 30, 1914. *Per Curiam:* Decree affirmed with costs, upon the authority of White Star Min. Co. v. Hultberg; Johnson v. White Star Min. Co.; Anderson v. White Star Min. Co. 205 U. S. 540, 51 L. ed. 921, 27 Sup. Ct. Rep. 794.

WILLIAM R. COWAN, Plaintiff in Error, v. PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN E. W. WAYMAN, State's Attorney. [No. 90.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of ouster rendered by the Circuit Court for Cook County in that state against persons assuming to act as a corporation without being legally incorporated.

See same case below, 247 Ill. 357, 93 N. E. 349.

Mr. Harry S. Mecartney [693] for plaintiff in error.

Mr. Patrick J. Lucey for defendant in error.

November 30, 1914. *Per Curiam:* Dismissed for the want of jurisdiction, upon the authority of Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Deming v. Carlisle Packing Co. 226 U. S. 102, 107, 57 L. ed. 140, 143, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 599, 600, 57 L. ed. 983, 984, 33 Sup. Ct. Rep. 609 (see Shedd v. Illinois, 217 U. S. 597, 54 L. ed. 896, 30 Sup. Ct. Rep. 696).

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, v. LENA HANSON, as Executrix, etc. [No. 596.]

Error to state court—Federal question.

In Error to the Circuit Court of Ozaukee County, State of Wisconsin, to review a judgment, affirmed by the Supreme Court of that state, in favor of plaintiff in an action for death brought against a railway company.

See same case below, in Wisconsin Supreme Court, 157 Wis. 455, 146 N. W. 524.

Mr. C. H. Van Alstine for plaintiff in error.

George D. Van Dyke for defendant in error.

November 30, 1914. *Per Curiam:* Dismissed for the want of jurisdiction, upon the authority of Spies v. Illinois, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22; Erie R. Co. v. Purdy, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605; Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 58 L. ed. 1202, 34 Sup. Ct. Rep. 739; Willoughby v. Chicago, 235 U. S. 45, ante, 123, 35 Sup. Ct. Rep. 23.

OREGON SHORT LINE RAILROAD COMPANY, Plaintiff in Error, v. CHARLOTTE A. HOMER. [No. 109.]

Carriers—limiting baggage liability—published tariffs.

In Error to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court of Salt Lake County in that state enforcing on interstate carriers liability for the full value of lost and damaged baggage, notwithstanding a limitation of liability contained in the carrier's published tariffs.

See same case below, 42 Utah, 15, 128 Pac. 522.

Messrs. George H. Smith and Henry W. Clark for plaintiff in error.

No counsel appeared for defendant in error.

December 7, 1914. *Per Curiam:* Judgment reversed with costs, and case remanded for further proceedings upon the authority of Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, 34 Sup. Ct. Rep. 526.

JOHN F. DOYLE and John F. Doyle, Jr., Individually and as Copartners, Trading as John F. Doyle & Son, Appellants, v. GEORGE J. SCHMIDHEISER, Trustee, etc. [No. 424.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit [694] Court of Appeals for the Third Circuit to review a decision which revised an order of the District Court for the Eastern District of Pennsylvania reversing an order of a referee in bankruptcy confirming the sale of a liquor license.

See same case below, 126 C. C. A. 143, 209 Fed. 1.

Mr. John P. Connelly for appellants.

Mr. Otto Wolff, Jr., for appellee.

December 7, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45; Duryea Power Co. v. Sternbergh, 218 U. S. 299, 54 L. ed. 1047, 31 Sup. Ct. Rep. 25; Pennsylvania v. York Silk Mfg. Co. 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 601.

MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY CO., Plaintiff in Error, v. JOSEPH LEORA, by John Leora, His Guardian *ad Litem.* [No. 488.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court for Douglas County in that state in favor of plaintiff in a personal injury action against an interstate carrier.

See same case below, 156 Wis. 386, 146 N. W. 520.

Mr. William A. Hayes for plaintiff in error.

Mr. W. P. Crawford for defendant in error.

December 7, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Spies v. Illinois, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22; Erie R. Co. v. Purdy, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605; Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 58 L. ed. 1202, 34 Sup. Ct. Rep. 739; Willoughby v. Chicago, 235 U. S. 45, ante, 123, 35 Sup. Ct. Rep. 23. (See Chicago, M. & St. P. R. Co. v. Hanson, 235 U. S. 693, supra, 429, 35 Sup. Ct. Rep. 206. Decided Nov. 30, 1914.)

EX PARTE: IN THE MATTER OF LEO M. FRANK, Petitioner. [No. —, Original.]

Error to state court—Federal question.

Application for the allowance of a Writ of Error to review a judgment which affirmed a conviction of murder rendered in the Superior Court of Fulton County in that state.

See same case below, 142 Ga. 741, L.R.A. 1915D, 817, 83 S. E. 645.

Messrs. Louis Marshall and Henry A. Alexander for petitioner.

No counsel appeared for respondent.

December 7, 1914. Denied.

STATE OF MISSOURI EX REL. ST. JOSEPH WATER COMPANY, Plaintiff in Error, v. JACOB GEIGER et al., etc. [No. 83.]

Error to state court—Federal question.

[695] In Error to the Supreme Court of the State of Missouri to review a judgment refusing to coerce by mandamus payment at contract rates for water furnished to a state hospital.

See same case below, 246 Mo. 74, 154 S. W. 486.

Mr. John E. Dolman for plaintiff in error.

Mr. Vinton Pike for defendants in error.

December 14, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Thomas v. Iowa, 209 U. S. 258, 262, 263, 52 L. ed. 782, 783, 28 Sup. Ct. Rep. 487; Bowe v. Scott, 233 U. S. 658, 663, 664, 58 L. ed. 1141, 1144, 1145, 34 Sup. Ct. Rep. 769; (2) Kansas City Star Co. v. Julian, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510; Lewiston v. Chamberlain, 234 U. S. 751, 58 L. ed. 1576, 34 Sup. Ct. Rep. 775.

THE STATE OF WASHINGTON EX REL. GRANT SMITH et al., Plaintiffs in Error, v. THE CITY OF SEATTLE. [No. 476.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Washington to review a judgment which reversed a judgment of the Superior Court for Kings County in that state awarding a mandamus to compel the levy of supplemental reassessments for a public improvement.

See same case below, 74 Wash. 438, 133 Pac. 1005.

Messrs. Harold Preston, George Donworth, and Elmer E. Todd for plaintiffs in error.

Mr. Howard A. Hanson for defendant in error.

December 14, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 44, 45 L. ed. 415, 417, 21 Sup. Ct. Rep. 256; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, ante, 127, 35 Sup. Ct. Rep. 21.

DAVID LAMAR, Appellant, v. MAURICE SPLAIN, United States Marshal, etc., et al. [No. 523.]

Appeal—moot case.

Appeal from the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District denying a petition for habeas corpus.

See same case below, 42 App. D. C. 300.

Mr. Henry E. Davis for appellant.

Mr. Solicitor General Davis for appellees.

December 14, 1914. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; Security Mut. L. Ins. Co. v. Prewitt, 200 U. S. 446, 50 L. ed. 545, 26 Sup. Ct. Rep. 314; Richardson v. McChesney, 218 U. S. 487, 492, 54 L. ed. 1121, 1122, 31 Sup. Ct. Rep. 43.

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[696] RUSSO-CHINESE BANK, Petitioner, v. NATIONAL BANK OF COMMERCE OF SEATTLE. [No. 620.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. W. H. Chickering, George H. Whipple, and Warren Cranston Gregory for petitioner.

No counsel appeared for respondent.

October 19, 1914. Granted.

UNITED STATES, Petitioner, v. NORTHERN PACIFIC RAILWAY COMPANY. [No. 624.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Solicitor General Davis for petitioner.

No counsel appeared for respondent.

October 19, 1914. Granted.

UNITED STATES, Petitioner, v. CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY. [No. 630.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Underwood for petitioner.

Messrs. William Warner, O. H. Dean, and O. M. Spencer for respondent.

October 19, 1914. Granted.

MAX G. COHEN, Petitioner, v. UNITED STATES. [No. 518.]

Petition for a Writ of Certiorari [697] to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 130 C. C. A. 417, 214 Fed. 23.

Mr. Thomas Mannix for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

October 19, 1914. Denied.

EMANUEL C. DREW, Petitioner, v. UNITED STATES. [Nos. 528, 529.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. E. Smitherman and H. Garland Dupre for petitioner.

Mr. Solicitor General Davis for respondent.

October 19, 1914. Denied.

PARIS JARRELL et al., Petitioners, v. JAMES O. COLE et al. [No. 565.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, L.R.A.—, —, 131 C. C. A. 589, 215 Fed. 315.

Mr. John E. Blake, *in propria persona*, for petitioners.

No counsel appeared for respondents.

October 19, 1914. Denied.

OSCAR J. WEEKS, etc., Petitioner, v. UNITED STATES. [No. 574.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, L.R.A. 1915B, 651, 132 C. C. A. 436, 216 Fed. 292.

Mr. Walter Jeffreys Carlin for petitioner.

No counsel appeared for respondent.

October 19, 1914. Denied.

THE LAGONDA MANUFACTURING COMPANY, Petitioner, v. ELLIOTT COMPANY. [No. 633.]

[698] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 131 C. C. A. 158, 214 Fed. 578.

Messrs. J. E. Bowman, Border Bowman, Charles Neave, and Paul A. Staley for petitioner.

Messrs. George H. Parmelee and Clarence P. Byrnes for respondent.

October 19, 1914. Denied.

ARTHUR S. PERRY et al., Petitioners, v. WEED CHAIN TIRE GRIP COMPANY. [No. 639.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 132 C. C. A. 415, 215 Fed. 921.

Messrs. Obed C. Billman and Frank E. Rapp for petitioners.

Mr. Frederick S. Duncan for respondent.

October 19, 1914. Denied.

FORTER-MILLER ENGINEERING COMPANY et al., Petitioners, v. MORGAN CONSTRUCTION COMPANY et al. [No. 641.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 130 C. C. A. 97, 213 Fed. 451.

Messrs. Melville Church and Clarence P. Byrnes for petitioners.

Messrs. Marshall A. Christy, J. Nota McGill, and Frederick P. Fish for respondents.

October 19, 1914. Denied.

LAURA G. ROGERS, Petitioner, v. NATIONAL CITY BANK OF CHICAGO et al. [No. 650.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 132 C. C. A. 533, 216 Fed. 473.

Messrs. B. C. Bachrach and A. R. Hulbert for petitioner.

Messrs. Joseph H. Defrees and Marquis Eaton for respondents.

October 19, 1914. Denied.

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[699] CHARLES W. ANDERSON, Collector, etc., Petitioner, v. THE FORTY-TWO BROADWAY COMPANY. [No. 623.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for petitioner.

Mr. Roger S. Baldwin for respondent.

October 26, 1914. Granted.

JOPLIN MERCANTILE COMPANY et al., Petitioners, v. UNITED STATES. [No. 648.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. C. H. Montgomery and Paul A. Ewert for petitioners.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

October 26, 1914. Granted.

NELSON LAND & CATTLE COMPANY, Petitioner, v. GEORGE H. SMITH. [No. 646.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 128 C. C. A. 512, 212 Fed. 56.

Messrs. Carr W. Taylor and William H. Thompson for petitioner.

No counsel appeared for respondent.

October 26, 1914. Denied.

WILLIAM L. NORTON, Petitioner, v. UNITED STATES. [No. 649.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 123 C. C. A. 609, 205 Fed. 593.

Messrs. Delbert J. Haff, William C. Dennis, and F. D. McKenney for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

October 26, 1914. Denied.

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[700] THE STAFFORD COMPANY, Petitioner, v. COLDWELL-GILDARD COMPANY et al. [No. 651.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, on first appeal, 121 C. C. A. 110, 202 Fed. 744; on second appeal, 130 C. C. A. 114, 213 Fed. 469.

Messrs. Benjamin Phillips and Wilmarth H. Thurston for petitioner.

Mr. William K. Richardson for respondents.

October 26, 1914. Denied.

CHAMPION FIBRE COMPANY, Petitioner, v. R. E. RUSSELL. [No. 654.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 131 C. C. A. 259, 214 Fed. 963, 7 N. C. C. A. 911.

Mr. Alfred S. Barnard for petitioner.

Messrs. Mark W. Brown and Robert Ransom Williams for respondent.

October 26, 1914. Denied.

ROY S. ANDERSON, as Trustee, etc., Petitioner, v. J. O. and N. B. CHENAULT. [No. 657.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 125 C. C. A. 616, 208 Fed. 400.

Mr. R. S. Wimberly for petitioner.

Messrs. J. O. and N. B. Chenault, respondents, *pro sese*.

October 26, 1914. Denied.

ISIDOR STRAUS, et al., Trading, etc., as R. H. Macy & Company, Appellant, v. NOTASEME HOSIERY COMPANY. [No. 540.]

Mr. Edmond E. Wise for appellants.

Messrs. E. Hayward Fairbanks and James H. Griffin for appellee.

October 26, 1914. Appeal dismissed, and writ of certiorari granted.

[701] RUSSELL SAGE RAPHAEL, Petitioner, v. WASATCH & JORDAN VALLEY RAILROAD COMPANY et al. [No. 115.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 120 C. C. A. 184, 201 Fed. 854.

Messrs. Delos McCurdy, Thomas Bracken, and Hiram E. Booth for petitioner.

Messrs. Joel F. Vaile, Henry McAllister, Jr., Waldemar Van Cott, E. M. Allison, Jr., and William D. Riter for respondents.

October 26, 1914. Denied.

MINERALS SEPARATION, LIMITED, et al., Petitioners, v. JAMES M. HYDE. [No. 652.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Henry D. Williams, F. D. McKenney, and O. W. McConnell for petitioners.

Messrs. Thomas F. Sheridan, K. R. Babbitt, Walter A. Scott, J. Bruce Kremer, and George L. Wilkinson for respondent.

November 2, 1914. Granted.

H. B. BORLAND, Petitioner, v. CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE, etc. [No. 655.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 133 C. C. A. 82, 216 Fed. 878.

Messrs. Allen G. Mills and Fred E. Newton for petitioner.

Mr. Alvin H. Culver for respondent.

November 2, 1914. Denied.

MARIE H. KELLY, Petitioner, v. ILLINOIS STATE TRUST COMPANY. [No. 666.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 131 C. C. A. 635, 215 Fed. 567.

Messrs. Harrison Musgrave and William [702] S. Oppenheim, for petitioner.

Mr. Lindorf O. Whitnel for respondent.

November 2, 1914. Denied.

GEORGE D. HOWELL, Petitioner, v. MECHANICS & METALS NATIONAL BANK et al. [No. 660.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 131 C. C. A. 309, 215 Fed. 1.

Messrs. William F. Henney and William Edmond Curtis for petitioner.

Messrs. Walter C. Noyes and Joseph M. Hartfield for respondents.

November 9, 1914. Denied.

CLAUDE M. DEAN, Petitioner, v. R. BEALE DAVIS, Jr., Trustee, etc., et al. [No. 681.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 128 C. C. A. 658, 212 Fed. 88.

Mr. C. V. Meredith for petitioner.

Mr. Richard B. Davis for respondents.

November 16, 1914. Denied.

BANKERS SURETY COMPANY, Petitioner, v. ELKHORN RIVER DRAINAGE DISTRICT. [No. 684.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 130 C. C. A. 650, 214 Fed. 342.

Messrs. William C. Prentiss and Walter L. Clark for petitioner.

No counsel appeared for respondent.

November 16, 1914. Denied.

FLORENCE S. BACHE, Petitioner, v. UNITED STATES. [No. 677.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Mr. Henry Wollman for petitioner.

Mr. Solicitor General Davis for respondent.

November 30, 1914. [703] Denied.

L. D. GEORGE LUMBER COMPANY, Inc., Petitioner, v. L. L. DAUGHERTY et al. [No. 693.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 131 C. C. A. 254, 214 Fed. 958.

Messrs. John A. Lamb and Claude A. Swanson for petitioner.

No counsel appeared for respondents.

November 30, 1914. Denied.

LUCIUS E. JUDSON, as Trustee, etc., Petitioner, v. WILLIAM A. NASH, as Trustee, etc., et al. [No. 682.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Oscar A. Lewis for petitioner.

Mr. John M. Bowers for respondents.

December 7, 1914. Granted.

OGDEN M. REID, Petitioner, v. JAMES C. FARGO, as President of the American Express Company et al. [No. 689.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Howard S. Harrington and Oscar R. Houston for petitioner.

Messrs. Charles C. Burlingham and Walter F. Taylor for respondents.

December 7, 1914. Granted.

MAHLON GROO, Petitioner, v. CHARLOTTE ANITA WHITNEY. [No. 674.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of [704] Columbia.

See same case below, 42 App. D. C. 381.

Mr. William M. Lewin for petitioner.

No counsel appeared for respondent.

December 7, 1914. Denied.

W. H. BORDEN, Petitioner, v. ARCTIC LUMBER COMPANY. [No. 699.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 127 C. C. A. 486, 211 Fed. 50.

Mr. J. C. Campbell for petitioner.

Mr. James A. Kerr for respondent.

December 14, 1914. Denied.

MARY F. RAINEY, as Administratrix, etc., Petitioner, v. W. R. GRACE & COMPANY. [No. 708.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, L.R.A.—, —, 132 C. C. A. 509, 216 Fed. 449.

Mr. William H. Gorham for petitioner.

No counsel appeared for respondent.

December 14, 1914. Denied.

UNIVERSAL FILM MANUFACTURING COMPANY, Petitioner, v. S. COPPERMAN, Doing Business as Thalia Music Hall, et al. [No. 711.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 218 Fed. 577.

Mr. Waldo G. Morse for petitioner.

Mr. Samuel F. Frank for respondents.

December 14, 1914. Denied.

PORTER L. PAYLOR, Petitioner, v. THE UNITED STATES. [No. 714.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 42 App. D. C. 428.

Messrs. Daniel W. Baker and Thomas C. [705] Bradley for petitioner.

No counsel appeared for respondent.

December 14, 1914. Denied.

NEW YORK LIFE INSURANCE COMPANY, Petitioner, v. EFFIE J. GOULD DUNLEVY. [No. 703.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Edward J. McCutchen and James H. McIntosh for petitioner.

No counsel appeared for respondent.

December 21, 1914. Granted.

STANLEY BROWN, Petitioner, v. PACIFIC COAST COAL COMPANY. [No. 728.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Charles F. Consaul and Charles C. Heltman for petitioner.

January 5, 1915. Granted.

E. I. DU PONT DE NEMOURS POWDER COMPANY, Petitioner, v. WILLIAM H. SCHLOTTMAN. [No. 732.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 218 Fed. 353.

Messrs. Wm. H. Button, J. P. Laffey, and F. DeC. Faust for petitioner.

Messrs. L. Laflin Kellogg and Abram J. Rose for respondent.

January 5, 1915. Denied.

LEHIGH VALLEY COAL COMPANY, Petitioner, v. STANISLAW YENSAVAGE. [No. 733.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 218 Fed. 547.

Messrs. Allan McCulloh and Charles W. [706] Pierson for petitioner.

Messrs. George C. Holt and Alvin C. Cass for respondent.

January 5, 1915. Denied.

DENVER CHEMICAL MANUFACTURING COMPANY, Petitioner, v. THOMAS LILLEY et al. [No. 717.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 133 C. C. A. 73, 216 Fed. 869.

Mr. Henry D. Estabrook for petitioner.

No counsel appeared for respondents.

January 11, 1915. Denied.

CHARLES C. MOORE et al., Petitioners, v. F. L. DONAHOO et al. [No. 721.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 133 C. C. A. 171, 217 Fed. 177.

Messrs. E. J. McCutchen, Alexander Britton, Evans Browne, A. Crawford Greene, and F. W. Clements for petitioners.

Mr. Jeremiah F. Sullivan for respondents.

January 11, 1915. Denied.

JAMES J. FLETCHER et al., Petitioners, v. UNITED STATES. [No. 730.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, on first appeal, 42 App. D. C. 53; on second appeal, 42 App. D. C. 511.

Messrs. Henry E. Davis and James A. O'Shea for petitioners.

The Solicitor General and Mr. Assistant Attorney General Wallace for respondent.

January 11, 1915. Denied.

UNITED STATES, Petitioner, v. MRS. RUDOLPH H. THEURER et al. [No. 739.]

Petition [707] for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 130 C. C. A. 370, 213 Fed. 964.

The Solicitor General for petitioner.

Mr. Henry P. Dart for respondents.

January 11, 1915. Denied.

DAVID P. CLARK, Petitioner, v. SCHIERLE TOY & NOVELTY COMPANY. [No. 750.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 133 C. C. A. 490, 217 Fed. 760.

Messrs. H. A. Toulmin and Melville Church for petitioner.

Mr. William R. Wood for respondent.

January 11, 1915. Denied.

EMERSON & NORRIS COMPANY, Petitioner, v. SIMPSON BROTHERS CORPORATION. [No. 754.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, on first appeal, 121 C. C. A. 113, 202 Fed. 747; on second appeal, 131 C. C. A. 121, 214 Fed. 572.

Mr. R. A. Parker for petitioner.

Mr. Frederick L. Emery for respondent.

January 11, 1915. Denied.

HENRY H. FAY et al., Plaintiffs in Error, v. UNITED STATES. [No. 210.]

In Error to the United States Circuit Court of Appeals for the First Circuit.

Mr. John L. Hall for plaintiffs in error.

The Attorney General for defendant in error.

October 13, 1914. Judgment reversed and cause remanded for further proceedings in conformity to law, per stipulation of counsel, and on motion of Mr. Solicitor General Davis for the [708] defendant in error.

PENNSYLVANIA RAILROAD COMPANY, Appellant, v. INTERSTATE COMMERCE COMMISSION et al. [No. 21.]

Appeal from the United States Commerce Court.

Messrs. Francis I. Gowen and Frederic D. McKenney for appellant.

Messrs. P. J. Farrell and A. M. Liveright for appellees.

October 13, 1914. Dismissed with costs, on motion of Mr. Frederic D. McKenney for the appellant, and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania.

JAMES HAMILTON LEWIS and Rose Lewis, his Wife, Plaintiffs in Error, v. EDITH KRIEG. [No. 22.]

In Error to the Supreme Court of the State of Washington.

Mr. James B. Howe for plaintiffs in error.

No counsel appeared for defendant in error.

October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error.

CLARK RUFFCORN et al., Plaintiffs in Error and Appellants, v. BOARD OF SUPERVISORS OF HARRISON COUNTY, IOWA, et al. [No. 32.]

In Error to the District Court of the United States for the Southern District of Iowa.

Mr. William R. Green for plaintiffs in error and appellants.

No counsel appeared for defendants in error.

October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error and appellants.

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[709] BENJAMIN MEISNER et al., Plaintiffs in Error, v. PEOPLE OF THE STATE OF MICHIGAN. [No. 182.]

In Error to the Recorder's Court of the City of Detroit, State of Michigan.

Mr. Fred A. Baker for plaintiffs in error.

Mr. Richard I. Lawson for defendant in error.

October 13, 1914. Dismissed per stipulation.

PACIFIC STATES SUPPLY COMPANY, Appellant, v. CITY AND COUNTY OF SAN FRANCISCO et al. [No. 211.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Samuel M. Shortridge for appellant.

Messrs. Percy V. Long and Jesse H. Steinhart for appellees.

October 13, 1914. Dismissed with costs, on motion of counsel for the appellant.

GERMAN BANK OF CARROLL COUNTY, IOWA, et al., Plaintiffs in Error, v. WILLIAM R. LEE, Receiver, etc. [No. 282.]

In Error to the District Court of the United States for the Southern District of Iowa.

Mr. B. I. Salinger for plaintiffs in error.

No counsel appeared for defendant in error.

October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error.

STEPHEN CANAVAN, Appellant, v. JESUS ROMERO, Sheriff, etc. [No. 299.]

Appeal from the District Court of the United States for the District of New Mexico.

Mr. Edward A. Mann for appellant.

No counsel appeared for appellee.

October 13, 1914. Dismissed with costs, on motion of counsel for the appellant.

[710] Southern Railway Company, Plaintiff in Error, v. Deaver-Jeter Company. [No. 314.]

In Error to the Supreme Court of the State of South Carolina.

Messrs. Benjamin L. Abney and John K. Graves for plaintiff in error.

No counsel appeared for defendant in error.

October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error.

Citizens Trust Company et al., Appellants, v. Edgar M. Tilt, Trustee, etc. [No. 319.]

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Wayne Dumont and Fred W. Van Blarcom for appellants.

No counsel appeared for appellee.

October 13, 1914. Dismissed with costs, on motion of counsel for the appellants.

Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company, Plaintiff in Error, v. State of Indiana. [No. 530.]

In Error to the Supreme Court of the State of Indiana.

Mr. S. O. Pickens for plaintiff in error.

Mr. Thomas M. Honan for defendant in error.

October 13, 1914. Dismissed with costs, per stipulation.

Carl Oliver, Plaintiff in Error, v. State of Texas. [No. 296.]

In Error to the Court of Criminal Appeals of the State of Texas.

Messrs. Cecil H. Smith, Aldis B. Browne, Alex. Britton, and Evans Browne for plaintiff in error.

Mr. B. F. Looney for defendant in error.

October 13, 1914. Dismissed with costs, pursuant to the Tenth Rule.

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[711] Northern Pacific Railway Company, Plaintiff in Error, v. Wilfred L. Gifford. [No. 359.]

In Error to the Supreme Court of the State of Idaho.

See same case below, 25 Idaho, 196, 136 Pac. 1131.

Messrs. James E. Babb and Charles W. Bunn for plaintiff in error.

No counsel appeared for defendant in error.

October 16, 1914. Dismissed with costs on motion of counsel for the plaintiff in error.

Citizens Insurance Company, of Missouri, Appellant, v. Matt C. Clay et al. [No. 38.]

Appeal from the District Court of the United States for the Eastern District of Kentucky.

See same case below, on motion for preliminary injunction, 197 Fed. 435.

Messrs. Seymour Edgerton, John G. Johnson, and Thomas Bates for appellant.

Mr. James Garnett for appellees.

October 21, 1914. Dismissed with costs, per stipulation of counsel.

Western Union Telegraph Company, Plaintiff in Error, v. J. C. Major, Jr. [No. 137.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Messrs. Rush Taggart, George H. Fearons, Robert M. Hughes, and Francis Raymond Stark for plaintiff in error.

No counsel appeared for defendant in error.

October 21, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error.

Alois B. Renehan et al., Appellants, v. Tina Haffner Retsch. [No. 24.]

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. A. B. Renehan for appellants.

Mr. T. B. Catron for appellee.

October 23, 1914. Dismissed with costs on motion of counsel for the appellants, and cause remanded to the Supreme Court of the [712] State of New Mexico.

J. A. Folger, Petitioner, v. Kate C. Putnam, Administratrix, etc., et al. [No. 114.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 114 C. C. A. 513, 194 Fed. 793.

Mr. Walter D. Mansfield for petitioner.

Mr. Edward M. Cleary for respondents.

October 26, 1914. Dismissed with costs, on motion of counsel for the petitioner.

Juan M. Ceballos and John M. Fiske v. Anderson C. Wilson. [No. 2.]

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Mr. Richard V. Lindabury for appellant.

Mr. William Osgood Morgan for appellee.

October 29, 1914. Stricken from the docket.

NATIONAL DISCOUNT COMPANY, Appellant, v. JOHN S. SHEPPARD, JR., Trustee, etc., et al. [No. 42.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 117 C. C. A. 224, 198 Fed. 464.

Messrs. William J. Wallace, S. C. Sugarman, and Charles H. Fuller for appellant.

Messrs. Sol. M. Stroock and Daniel P. Hays for appellees.

October 29, 1914. Dismissed per stipulation.

JEHU H. CLENDANIEL, Plaintiff in Error, v. HONORABLE HENRY C. CONRAD, Associate Judge of the State of Delaware, et al. [No. 60.]

In Error to the Supreme [713] Court of the State of Delaware.

See same case below, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915B, 968.

Mr. James L. Wolcott for plaintiff in error.

Messrs. J. J. Darlington and Robert H. Richards for defendants in error.

November 2, 1914. Dismissed with costs pursuant to the Fifteenth Rule.

CLARENCE H. VENNER, Appellant, v. CHICAGO CITY RAILWAY COMPANY et al. [No. 65.]

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 118 C. C. A. 210, 200 Fed. 1023.

Messrs. Elijah N. Zoline and William R. Harr for appellant.

Messrs. George W. Miller, William H. Sexton, John W. Beckwith, John Maxey Zane, and Harry P. Weber for appellees.

November 5, 1914. Dismissed per stipulation.

UNITED STATES OF AMERICA, Plaintiff in Error, v. THEODORE WEISBERGER, Maude Weisberger, His Wife, and Empire States Surety Company. [No. 695.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

No counsel appeared for plaintiff in error.

Mr. George A. King for defendants in error.

November 16, 1914. Docketed and dismissed and mandate granted on motion of Mr. George A. King for the defendants in error.

CONCEPCIÓN VEVE DE BELAVAL et al., Appellants, v. FAJARDO SUGAR GROWERS ASSOCIATION. [No. 128.]

Appeal from the Supreme Court of Porto Rico.

Messrs. Frank Antonsanti and Frederick S. Tyler for appellants.

No counsel appeared for appellees.

November 30, 1914. Dismissed with costs, on motion of Mr. Frederick S. Tyler for the appellants.

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[714] F. B. WILLIAMS CYPRESS COMPANY, Ltd., Plaintiff in Error, v. STATE OF LOUISIANA. [No. 215.]

In Error to the Supreme Court of the State of Louisiana.

Mr. Charlton R. Beattie for plaintiff in error.

No counsel appeared for defendant in error.

November 30, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error.

WILLIAM KNAPP et al., Partners, etc., Plaintiffs in Error, v. EVERETT P. HOLDEN. [No. 301.]

In Error to the Supreme Court of the State of Ohio.

Mr. Constant Southworth for plaintiffs in error.

Mr. Charles M. Cist for defendant in error.

November 30, 1914. Judgment affirmed with costs, per stipulation of counsel.

EDWARD J. ROBISON et al., Plaintiffs in Error, v. FRANK S. FISHBACK. [No. 108.]

In Error to the Supreme Court of the State of Indiana.

Mr. Merrill Moores for plaintiffs in error.

No counsel appeared for defendant in error.

December 4, 1914. Dismissed with costs, pursuant to the Tenth Rule.

CHAN KUM, Appellant, v. SAMUEL W. BACKUS, Commissioner of Immigration. [No. 366.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Corry M. Stadden for appellant.

No counsel appeared for appellee.

December 14, 1914. Dismissed with costs, and mandate granted, on motion of counsel for the appellant.

[715] MARIE CARDONNEL, Appellant, v. SAMUEL W. BACKUS, Commissioner of Immigration, etc. [No. 111.]

Appeal from the District Court of the United States for the Northern District of California.

Messrs. Marshall B. Woodworth, Charles H. Merillat, and Charles J. Kappler for appellant.

No counsel appeared for appellee.

December 18, 1914. Dismissed with costs, pursuant to the Tenth Rule.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, v. W. H. ATON PIANO COMPANY. [No. 178.]

In Error to the Circuit Court of Sauk County, State of Wisconsin.

Mr. C. H. Van Alstine for plaintiff in error.

No counsel appeared for defendant in error.

January 5, 1915. Dismissed, on motion of counsel for the plaintiff in error.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, v. CHARLES G. UBER et al. [No. 179.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. C. H. Van Alstine for plaintiff in error.

No counsel appeared for defendants in error.

January 5, 1915. Dismissed, on motion of counsel for the plaintiff in error.

PHILADELPHIA & READING RAILWAY COMPANY, Plaintiff in Error, v. J. GOLDMAN. [No. 176.]

In Error to the Court of Law and Chancery of the City of Norfolk, State of Virginia.

Messrs. Robert M. Hughes, Junior, and Theodore [716] W. Reath for plaintiff in error.

No counsel appeared for defendant in error.

January 6, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

VICKSBURG WATER WORKS COMPANY, Plaintiff in Error, v. E. FORD. [No. 113.]

In Error to the Supreme Court of the State of Mississippi.

Mr. J. C. Bryson for plaintiff in error.

No counsel appeared for defendant in error.

January 7, 1915. Dismissed with costs, pursuant to the Tenth Rule.

TWIN CITY SEPARATOR COMPANY et al., Plaintiffs in Error, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al. [No. 123.]

In Error to the Supreme Court of the State of Minnesota.

Mr. Frank Healy for plaintiffs in error.

Messrs. Amasa C. Paul and Daniel Fish for defendants in error.

January 11, 1915. Dismissed with costs, pursuant to the Tenth Rule.

ISIDOR STRAUS et al., Copartners, etc., Plaintiffs in Error, v. AMERICAN PUBLISHERS' ASSOCIATION et al. [No. 324.]

In Error to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 119 C. C. A. 544, 201 Fed. 306.

Mr. Edmond E. Wise for plaintiffs in error.

Mr. Stephen H. Olin for defendants in error.

July 18, 1914. Dismissed pursuant to the Twenty-eighth Rule.

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[717] MOBILE & OHIO RAILROAD COMPANY, Plaintiff in Error, v. GREENWALD & CHAMPENOIS, a partnership, etc. [No. 207.]

In Error to the Supreme Court of the State of Mississippi.

Messrs. L. E. Jeffries and S. R. Prince for plaintiff in error.

No appearance for defendant in error.

August 17, 1914. Dismissed pursuant to the Twenty-eighth Rule.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1914.

Vol. 236.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1914.

T. B. COPPAGE, Plff. in Err.,
v.
STATE OF KANSAS.

(See S. C. Reporter's ed. 1-42.)

Constitutional law — due process of law — liberty to contract.

1. Whatever either employer or employee has the right, under the due process of law clause of U. S. Const., 14th Amend., to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment or of its continuance, if it be terminable at will.

[For other cases, see Constitutional Law, 605-607, in Digest Sup. Ct. 1908.]

Constitutional law — police power.

2. A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power.

[For other cases, see Constitutional Law, IV. c, in Digest Sup. Ct. 1908.]

Constitutional law — police power — relation of statute to declared purpose.

3. To punish an employer or his agent for simply proposing certain terms of employment under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose, in a statute, of repressing coercion, duress, or undue influence.

[For other cases, see Constitutional Law, IV. c, in Digest Sup. Ct. 1908.]

Constitutional law — police power — public welfare.

4. The several states are debarred by U. S. Const., 14th Amend., from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights

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NOTE.—As to what constitutes due process of law generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On constitutionality of statutes forbidding employer from insisting that employee shall withdraw from or refrain from joining labor union as a condition of employment or continued employment—see notes to Adair v. United States, 52 L. ed. U. S. 436, and Coppage v. Kansas, L.R.A.1915C, 960.

As to constitutionality of statute restricting contracts and business—see note to State v. Loomis, 21 L.R.A. 789.

As to statutory restrictions on contract between master and servant—see notes to Com. v. Perry, 14 L.R.A. 325, and Ramsey v. People, 17 L.R.A. 853.

cannot, of itself, be denominated public welfare, and treated as a legitimate object of the police power.

[For other cases, see Constitutional Law, IV. c, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — liberty — forbidding discrimination against union labor.

5. The rights of personal liberty and property are infringed without due process of law, contrary to U. S. Const., 14th Amend., by Kan. Laws 1903, chap. 222, under which, as construed and applied by the highest state court, an employer or his agent may be criminally punished for having prescribed as a condition upon which one may secure employment under, or remain in the service of, such employer (the employment being terminable at will) that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employee being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice.

[For other cases, see Constitutional Law, 436–440, 605–607, in Digest Sup. Ct. 1908.]

[No. 48.]

Submitted October 30, 1914. Decided January 25, 1915.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a conviction in the District Court of Bourbon County, in that state, under an information charging a violation of a statute of the state forbidding employers to exact a promise not to join or retain membership in a labor organization as a condition of securing or retaining employment. Reversed and remanded for further proceedings.

See same case below, 87 Kan. 752, 125 Pac. 8.

The facts are stated in the opinion.

Messrs. R. R. Vermilion and W. F. Evans submitted the cause for plaintiff in error:

The law deprives the plaintiff in error of liberty and property without due process of law.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Atchison, T. & S. F. R. Co. v. Brown, 80 Kan. 312, 23 L.R.A.(N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 514; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118; State v. Coppage, 87 Kan. 752, 125 Pac. 8; State ex rel. Smith v. Daniels, 118 Minn. 155, 136 N. W. 584; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

The law violates the 14th Amendment to the Constitution of the United States in that it denies persons within its jurisdiction the equal protection of the laws.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 112, 46 L. ed. 109, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 514; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; State v. Coppage, 87 Kan. 752, 125 Pac. 8; State v. Haun, 61 Kan. 154, 47 L.R.A. 360, 59 Pac. 340; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

The law cannot be sustained as a proper exercise of the police power of the state.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 514; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

Mr. John S. Dawson, Attorney General of Kansas, submitted the cause for defendant in error. Mr. J. I. Sheppard was on the brief:

If all men are to be equal within the law, as provided for in the 14th Amendment; if the laboring man is to be the equal of the corporate officer; if the wage earner is to be the equal of his employer; if the poor man is to be the equal of the rich man; if the 14th Amendment is not to be distorted into a rod of oppression,—then the law under which this prosecution was based is in furtherance of that Amendment, and not in derogation thereof.

Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310, 9 Am. Crim. Rep. 169.

Similar cases are distinguishable from the case at bar.

Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A 748, 91 Am. St. Rep. 934, 90 N. W. 1098; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118; Adair v. United States, 208 U. S. 175, 52 L. ed. 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 514.

Mr. Justice Pitney delivered the opinion of the court:

In a local court in one of the counties of Kansas, plaintiff in error was found guilty and adjudged to pay a fine, with imprisonment as the alternative, upon an information charging him with a violation of an act of the legislature of that state, approved March 13, 1903, being chap. 222 of the Session Laws of that year, found also as §§ 4674 and 4675, Gen. Stat. (Kan.) 1909. The act reads as follows:

An Act to Provide a Penalty for Coercing or Influencing or Making Demands upon or Requirements of Employees, Servants, Laborers, and Persons Seeking Employment.

Be it enacted, etc.:

Section 1. That it shall be unlawful for any individual or member of any firm, or any agent, officer, or employee of any company or corporation, to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation.

Section 2. Any individual or member of any firm, or any [7] agent, officer, or employee of any company or corporation violating the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than $50, or imprisoned in the county jail not less than thirty days.

The judgment was affirmed by the supreme court of the state, two justices dissenting (87 Kan. 752, 125 Pac. 8), and the case is brought here upon the ground that the statute, as construed and applied in this case, is in conflict with that provision of the 14th Amendment of the Constitution of the United States which declares that no state shall deprive any person of liberty or property without due process of law.

The facts, as recited in the opinion of the supreme court, are as follows: About July 1, 1911, one Hedges was employed as a switchman by the St. Louis & San Francisco Railway Company, and was a member of a labor organization called the Switchmen's Union of North America. Plaintiff in error was employed by the railway company as superintendent, and as such he requested Hedges to sign an agreement, which he presented to him in writing, at the same time informing him that if he did not sign it he could not remain in the employ of the company. The following is a copy of the paper thus presented:

Fort Scott, Kansas, ———, 1911.

Mr. T. B. Coppage, Superintendent Frisco Lines, Fort Scott:

We, the undersigned, have agreed to abide by your request, that is, to withdraw from the Switchmen's Union, while in the service of the Frisco Company.

(Signed) ———————

Hedges refused to sign this, and refused to withdraw from the labor organization. Thereupon plaintiff in error, as such superintendent, discharged him from the service of the company.

[8] At the outset, a few words should be said respecting the construction of the act. It uses the term "coerce," and some stress is laid upon this in the opinion of the Kansas supreme court. But, on this record, we have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employee by means unlawful without the act. In the case before us, the state court treated the term "coerce" as applying to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employee. In this sense we must understand the statute to have been construed by the court, for in this sense it was enforced in the present case; there being no finding, nor any evidence to support a finding, that plaintiff in error was guilty in any other sense. The entire evidence is included in the bill of exceptions returned with the

writ of error, and we have examined it to the extent necessary in order to determine the Federal right that is asserted (Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277, and cases cited). There is neither finding nor evidence that the contract of employment was other than a general or indefinite hiring, such as is presumed to be terminable at the will of either party. The evidence shows that it would have been to the advantage of Hedges, from a pecuniary point of view and otherwise, to have been permitted to retain his membership in the union, and at the same time to remain in the employ of the railway company. In particular, it shows (although no reference is made to this in the opinion of the court) that, as a member of the union, he was entitled to benefits in the nature of insurance to the amount of $1,500, which he would have been obliged to forego if he had ceased to be a member. But, aside from this matter of pecuniary interest, there is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not [9] a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests. Of course, if plaintiff in error, acting as the representative of the railway company, was otherwise within his legal rights in insisting that Hedges should elect whether to remain in the employ of the company or to retain his membership in the union, that insistence is not rendered unlawful by the fact that the choice involved a pecuniary sacrifice to Hedges. Silliman v. United States, 101 U. S. 465, 470, 471, 25 L. ed. 987-989; Hackley v. Headley, 45 Mich. 569, 576, 8 N. W. 511; Emery v. Lowell, 127 Mass. 138, 141; Custin v. Viroqua, 67 Wis. 314, 320, 30 N. W. 515. And if the right that plaintiff in error exercised is founded upon a constitutional basis, it cannot be impaired by merely applying to its exercise the term "coercion." We have to deal, therefore, with a statute that, as construed and applied, makes it a criminal offense, punishable with fine or imprisonment, for an employer or his agent to merely prescribe, as a condition upon which one may secure certain employment or remain in such employment (the employment being terminable at will), that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employee being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice.

In Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, this court had to deal with a question not distinguishable in principle from the one now presented. Congress, in § 10 of an act of June 1, 1898, entitled, "An Act Concerning Carriers Engaged in Interstate Commerce and Their Employees" (30 Stat. at L. 424, 428, chap. 370), had enacted "that any employer subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member [10] of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization . . . is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof . . . shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars." Adair was convicted upon an indictment charging that he, as agent of a common carrier subject to the provisions of the act, unjustly discriminated against a certain employee by discharging him from the employ of the carrier because of his membership in a labor organization The court held that portion of the act upon which the conviction rested to be an invasion of the personal liberty as well as of the right of property guaranteed by the 5th Amendment, which declares that no person shall be deprived of liberty or property without due process of law. Speaking by Mr. Justice Harlan, the court said (p. 174): "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with

the services of such [11] employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage [the employee in that case] because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."

Unless it is to be overruled, this decision is controlling upon the present controversy; for if Congress is prevented from arbitrary interference with the liberty of contract because of the "due process" provision of the 5th Amendment it is too clear for argument that the states are prevented from the like interference by virtue of the corresponding clause of the 14th Amendment; and hence, if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employee with loss of employment, or discriminating against him because of his membership in a labor organization, it is unconstitutional for a state to similarly punish an employer for requiring his employee, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed.

It is true that, while the statute that was dealt with in the Adair Case contained a clause substantially identical with the Kansas act now under consideration,—a clause making it a misdemeanor for an employer to require an employee or applicant for employment, as a condition of such employment, to agree not to become or remain a member of a labor organization,—the conviction was [12] based upon another clause, which related to discharging an employee because of his membership in such an organization; and the decision, naturally, was confined to the case actually presented for decision. In the present case, the Kansas supreme court sought to distinguish the Adair decision upon this ground. The distinction, if any there be, has not previously been recognized as substantial, so far as we have been able to find. The opinion in the Adair Case, while carefully restricting the decision to the precise matter involved, cited (208 U. S. on page 175), as the first in order of a number of decisions supporting the conclusion of the court, a case (People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 188) in which the statute denounced as unconstitutional was in substance the counterpart of the one with which we are now dealing.

But, irrespective of whether it has received judicial recognition, is there any real distinction? The constitutional right of the employer to discharge an employee because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employee an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Can the legislature in effect require either party at the beginning to act covertly; concealing essential terms of the employment—terms to which, perhaps, the other would not willingly consent—and revealing them only when it is proposed to insist upon them as a ground for terminating the relationship? Supposing an employer is unwilling to have in his [13] employ one holding membership in a labor union, and has reason to suppose that the man may prefer membership in the union to the given employment without it—we ask, can the legislature oblige the employer in such case to refrain from dealing frankly at the outset? And is not the employer entitled to insist upon equal frankness in return? Approaching the matter from a somewhat different standpoint, is the employee's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will? And does not the ordinary contract of employment include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any

inconsistent exercise of his constitutional rights?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from Adair v. United States.

The decision in that case was reached as the result of elaborate argument and full consideration. The opinion states (208 U. S. 171): "This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion [14] which, in its judgment, is consistent with both the words and spirit of the Constitution, and is sustained as well by sound reason." We are now asked, in effect, to overrule it; and in view of the importance of the issue we have reexamined the question from the standpoint of both reason and authority. As a result, we are constrained to reaffirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to restate some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property —partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. To *avoid possible misunderstanding*, we should here emphasize, what has been said before, that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. As has [15] been many times stated, this court deals not with moot cases or abstract questions, but with the concrete case before it. California v. San Pablo & T. R. Co. 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876; Richardson v. McChesney, 218 U. S. 487, 492, 54 L. ed. 1121, 1122, 31 Sup. Ct. Rep. 43; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 648, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678. We do not mean to say, therefore, that a state may not properly exert its police power to prevent coercion on the part of employers towards employees, or *vice versa*. But, in this case, the Kansas court of last resort has held that Coppage, the plaintiff in error, is a criminal, punishable with fine or imprisonment under this statute, simply and merely because, while acting as the representative of the railroad company, and dealing with Hedges, an employee at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the company or would agree to refrain from association with the union while so employed. This construction is, for all purposes of our jurisdiction, conclusive evidence that the state of Kansas intends by this legislation to punish conduct such as that of Coppage, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. St. Louis South Western R. Co. v. Arkansas, 235 U. S. 350, 362, ante, 265, 271, 35 Sup. Ct. Rep. 99, and cases cited. Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a [16] purpose which would be a proper object for the exercise of that power. "Its true character cannot be changed by its collocation," as Mr. Justice Grier said in the Passenger

Cases, 7 How. 458, 12 L. ed. 775. It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a state, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the 14th Amendment of its effective force in this regard. We, of course, do not intend to attribute to the legislature or the courts of Kansas any improper purpose or any want of candor; but only to emphasize the distinction between the form of the statute and its effect as applied to the present case.

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the act to the public health, safety, morals, or general welfare? None is suggested, and we are unable to conceive of any. The act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general [17] welfare. If they were, a different question would be presented.

As to the interest of the employed, it is said by the Kansas supreme court to be a matter of common knowledge that "employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed, a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment, in declaring that a state shall not "deprive any person of life, liberty, or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights, and debars the states from any unwarranted interference with either.

And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those [18] inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercises for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 Sup. Ct. Rep. 761; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, ex-

pressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial independence." In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the 14th Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting [19] so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare," and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

It is said in the opinion of the state court that membership in a labor organization does not necessarily affect a man's duty to his employer; that the employer has no right, by virtue of the relation, "to dominate the life nor to interfere with the liberty of the employee in matters that do not lessen or deteriorate the service;" and that "the statute implies that labor unions are lawful and not inimical to the rights of employers." The same view is presented in the brief of counsel for the state, where it is said that membership in a labor organization is the "personal and private affair" of the employee. To this line of argument it is sufficient to say that it cannot be judicially declared that membership in such an organization has no relation to a member's duty to his employer; and therefore, if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employee is consistent with the satisfactory performance of the duties of the employment.

Of course we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions, nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. Can it be doubted that a [20] labor organization—a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with nonunion men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any nonunion man? (In all cases we refer, of course, to agreements made voluntarily, and without coercion or duress as between the parties. And we have no reference to questions of monopoly, or interference with the rights of third parties or the general public. These involve other considerations, respecting which we intend to intimate no opinion. See Curran v. Galen, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; Jacobs v. Cohen, 183 N. Y. 207, 213, 214, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Brennan v. United Hatters, 73 N. J. L. 729, 738, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 169, 9 Ann. Cas. 698, 702). And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not; and since the relation of employer and employee is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.

When a man is called upon to agree not to become or remain a member of the union while working for a particular employer, he is in effect only asked to deal openly and frankly with his employer, so as not to retain the employment upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the [21] employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employee.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer em-

ployment on any other; for "it takes two to make a bargain." Having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general. For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct.

So much for the reason of the matter, let us turn again to the adjudicated cases.

The decision in the Adair Case is in accord with the almost unbroken current of authorities in the state courts. In many states enactments not distinguishable in principle from the one now in question have been passed, but, except in two instances (one, the decision of an inferior court in Ohio, since repudiated; the other, the decision now under review), we are unable to find that they have been judicially enforced. It is not too much to say that such laws have by common consent been treated as unconstitutional, for while many state courts of last resort have adjudged them void, we have found no decision by such a court [22] sustaining legislation of this character, excepting that which is now under review. The single previous instance in which any court has upheld such a statute is Davis v. State (1893) 30 Ohio L. J. 342, 11 Ohio Dec. Reprint, 894, where the court of common pleas of Hamilton county sustained an act of April 14, 1892 (89 Ohio Laws, 269), which declared that any person who coerced or attempted to coerce employees by discharging or threatening to discharge them because of their connection with any lawful labor organization should be guilty of a misdemeanor, and upon conviction fined or imprisoned. We are unable to find that this decision was ever directly reviewed; but in State v. Bateman (1900) 10 Ohio S. & C. P. Dec. 68, 7 Ohio N. P. 487, its authority was repudiated upon the ground that it had been in effect overruled by subsequent decisions of the state supreme court, and the same statute was held unconstitutional.

The right that plaintiff in error is now seeking to maintain was held by the supreme court of Kansas, in an earlier case, to be within the protection of the 14th Amendment, and therefore beyond legislative interference. In Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936, the court had under consideration chapter 120 of the Laws of 1897 (Gen. Stat. 1901, §§ 2425, 2426), which declared it unlawful for any person, company, or corporation, or agent, officer, etc., to prevent employees from joining and belonging to any labor organization, and enacted that any such person, company, or corporation, etc., that coerced or attempted to coerce employees by discharging or threatening to discharge them because of their connection with such labor organization should be deemed guilty of a misdemeanor, and upon conviction subjected to a fine, and should also be liable to the person injured in punitive damages. It was attacked as violative of the 14th Amendment, and also of the Bill of Rights of the state [23] Constitution.[1] The court held it unconstitutional, saying: "The right to follow any lawful vocation and to make contracts is as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature without violating the letter and spirit of the Constitution. Every citizen is protected in his right to work where and for whom he will. He may select not only his employer, but also his associates. He is at liberty to refuse to continue to serve one who has in his employ a person, or an association of persons, objectionable to him. In this respect the rights of the employer and employee are equal. Any act of the legislature that would undertake to impose on an employer the obligation of keeping in his service one whom, for any reason, he should not desire, would be a denial of his constitutional right to make and terminate contract and to acquire and hold property. Equally so would be an act the provisions of which should be intended to require one to remain in the service of one whom he should not desire to serve. . . . The busi-

[1] Constitution of the state of Kansas. . . . Bill of Rights.

Section 1. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

. . . . . .

Section 18. All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay.

ness conducted by the defendant was its property, and in the exercise of this ownership it is protected by the Constitution. It could abandon or discontinue its operation at pleasure. It had the right, beyond the possibility of legislative interference, to make any contract with reference thereto not in violation of law. [24] In the operation of its property it may employ such persons as are desirable, and discharge, without reason, those who are undesirable. It is at liberty to contract for the services of persons in any manner that is satisfactory to both. No legislative restrictions can be imposed upon the lawful exercise of these rights."

In Atchison, T. & S. F. R. Co. v. Brown, 80 Kan. 312, 23 L.R.A.(N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346, the same court passed upon chapter 144 of the Laws of 1897 (Gen. Stat. 1901, §§ 2421-2424), which required the employer, upon the request of a discharged employee, to furnish in writing the true cause or reason for such discharge. The railway company did not meet this requirement, its "service letter," as it was called, stating only that Brown was discharged "for cause," which the court naturally held was not a statement of the cause. The law was held unconstitutional, upon the ground (80 Kan. 315) that an employer may discharge his employee for any reason, or for no reason, just as an employee may quit the employment for any reason, or for no reason; that such action on the part of employer or employee, where no obligation is violated, is an essential element of liberty in action; and that one cannot be compelled to give a reason or cause for an action for which he may have no specific reason or cause, except, perhaps, a mere whim or prejudice.

In the present case the court did not repudiate or overrule these previous decisions, but, on the contrary, cited them as establishing the right of the employer to discharge his employee at any time, for any reason, or for no reason, being responsible in damages for violating a contract as to the time of employment, and as establishing, conversely, the right of the employee to quit the employment at any time, for any reason, or without any reason, being likewise responsible in damages for a violation of his contract with the employer. The court held the act of 1903 that is now in question to be distinguishable from the [25] act of 1897, upon grounds sufficiently indicated and answered by what we have already said.

In five other states the courts of last resort have had similar acts under consideration, and in each instance have held them unconstitutional. In State v. Julow (1895) 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781, the supreme court of Missouri dealt with an act (Missouri Laws 1893, p. 187) that forbade employers, on pain of fine or imprisonment, to enter into any agreement with an employee requiring him to withdraw from a labor union or other lawful organization, or to refrain from joining such an organization, or to "by any means attempt to compel or coerce any employee into withdrawal from any lawful organization or society." In Gillespie v. People (1900) 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007, the supreme court of Illinois held unconstitutional an act (Hurd's Stat. 1899, p. 844) declaring it criminal for any individual or member of any firm, etc., to prevent or attempt to prevent employees from forming, joining, and belonging to any lawful labor organization, and that any such person "that coerces or attempts to coerce employees by discharging or threatening to discharge them because of their connection with such lawful labor organization" should be guilty of a misdemeanor. In State ex rel Zillmer v. Kreutzberg (1902) 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098, the court had under consideration a statute (Wisconsin Laws 1899, chap. 332) which, like the Kansas act now in question, prohibited the employer or his agent from coercing the employee to enter into an agreement not to become a member of a labor organization, as a condition of securing employment or continuing in the employment, and also rendered it unlawful to discharge an employee because of his being a member of any labor organization. The decision related to the latter prohibition, but this was denounced [26] upon able and learned reasoning that has a much wider reach. In People v. Marcus (1906) 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118, the statute dealt with (N. Y. Laws 1887, chap. 688), as we have already said, was in substance identical with the Kansas act. These decisions antedated Adair v. United States. They proceed upon broad and fundamental reasoning, the same in substance that was adopted by this court in the Adair Case, and they are cited with approval in the opinion (208 U. S. 175). A like result was reached in State ex rel. Smith v. Daniels (1912) 118 Minn. 155, 136 N. W. 584, with respect to an act that, like the Kansas statute, forbade an employer to require an employee or person seeking employment, as a condition of such employment, to make an agreement that the employee would not become or remain a member of a labor organization. This was

held invalid upon the authority of the Adair Case. And see Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500, 513.

Upon both principle and authority, therefore, we are constrained to hold that the Kansas act of March 13, 1903, as construed and applied so as to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment under or remain in the service of such employer, that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the "due process" clause of the 14th Amendment, and therefore void.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes, dissenting:

I think the judgment should be affirmed. In present conditions a workman not unnaturally may believe that [27] only by belonging to a union can he secure a contract that shall be fair to him. Holden v. Hardy, 169 U. S. 366, 397, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 570, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, and Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, should be overruled. I have stated my grounds in those cases and think it unnecessary to add others that I think exist. See further, Vegelahn v. Guntner, 167 Mass. 92, 104, 108, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Plant v. Woods, 176 Mass. 492, 505, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. I still entertain the opinions expressed by me in Massachusetts.

Mr. Justice Day, dissenting:

The character of the question here involved sufficiently justifies, in my opinion, a statement of the grounds which impel me to dissent from the opinion and judgment in this case. The importance of the decision is further emphasized by the fact that it results not only in invalidating the legislation of Kansas, now before the court, but necessarily decrees the same fate to like legislation of other states of the Union.[2] This far-reaching result is attained because the statute is declared to be an infraction [28] of the constitutional protection afforded under the 14th Amendment to the Federal Constitution, which declares that no person shall be deprived of life, liberty, or property without due process of law. The right of contract, it is said, is part of the liberty of the citizen, and to abridge it, as is done in this case, is declared to be beyond the legislative authority of the state.

That the right of contract is a part of individual freedom within the protection of this Amendment, and may not be arbitrarily interfered with, is conceded. While this is true, nothing is better settled by the repeated decisions of this court than that the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interests of the public health, safety, and welfare, and such limitations may be declared in legislation of the state. It would unduly extend what I purpose to say in this case to refer to all the cases in which this doctrine has been declared. One of them is: Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586. In that case, it was declared, and in varying form has been repeated many times since:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally [29] speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

[2] Statutes like the Kansas statute have been passed in California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico, and Wisconsin. Bulletin of the Bureau of Labor Statistics No. 148, volumes 1 and 2; Labor Laws of the United States.

See also Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Muller v. Oregon, 208 U. S. 412, 421, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 202, 55 L. ed. 167, 180, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. ed. 1155, 1160, 34 Sup. Ct. Rep. 761. The Erie Railroad Case is a very recent deliverance of this court upon the subject, wherein it was declared:

"But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 565, 55 L. ed. 328, 337, 31 Sup. Ct. Rep. 259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612."

It is therefore the thoroughly established doctrine of this court that liberty of contract may be circumscribed in the interest of the state and the welfare of its people. Whether a given exercise of such authority transcends the limits of legislative authority must be determined in each case as it arises. The preservation of the police power of the states, under the authority of which that [30] great mass of legislation has been enacted which has for its purpose the promotion of the health, safety, and welfare of the public, is of the utmost importance. This power was not surrendered by the states when the Federal Constitution was adopted, nor taken from them when the 14th Amendment was ratified and became a part of the fundamental law of the Union. Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Of the necessity of such legislation, the local legislature is itself the judge, and its enactments are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious, and hence out of place in a government of laws, and not of men, and irreconcilable with the conception of due process of law. McGehee on Due Process of Law, page 306, and cases from this court therein cited.

By this it is not meant that the legislative power is beyond judicial review. Such enactments as are arbitrary or unreasonable, and thus exceed the exercise of legislative authority in good faith, may be declared invalid when brought in review by proper judicial proceedings. This is necessary to the assertion and maintenance of the supremacy of the Constitution.

Conceding, then, that the right of contract is a subject of judicial protection, within the authority given by the Constitution of the United States, the question here is, was the power of the state so arbitrarily exercised as to render its action unconstitutional and therefore void? It is said that this question is authoritatively determined in this court, in the case of Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764. In that case, a statute passed by the Congress of the United States, under supposed sanction of the power to regulate interstate commerce, was before this court, and it was there decided that the right of contract protected by the 5th Amendment to the Constitution, [31] providing that no peron shall be deprived of life, liberty, or property without due process of law, avoided a statute which undertook to make it a crime to discharge an employee simply because of his membership in a labor organization. The feature of the statute which is here involved, making it an offense to require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become a member of any labor corporation, association, or organization,—a provision exactly similar to that of the Kansas statute now under consideration,—was not before the court upon the charge made or the facts shown, and this provision was neither considered nor decided upon in reaching the conclusion that an employer could not be made a criminal because he discharged an employee simply because of his membership in a labor organization. In the course of the opinion

this fact was more than once stated, and the question before the court declared to be:

"May Congress make it a criminal offense against the United States—as by the 10th section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization?"

Such was the question before the court, and that there might be no mistake about it, at the close of the opinion, the part of the act upon which the defendant in that case was convicted was declared to be separable from the other parts of the act, and that feature of the statute the only subject of decision. Mr. Justice Harlan, concluding the opinion of the court, said:

"We add that since the part of the act of 1898 upon which the first count of the indictment is based, and upon which alone the defendant was convicted, *is severable from its other parts*, and as what has been said is sufficient to [32] dispose of the present case, *we are not called upon to consider other and independent provisions of the act*, such, for instance, as the provisions relating to arbitration. *This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employee from its service because of his being a member of a labor organization.*" (Italics mine.)

In view of the feature of the statute involved, the charge made, and this express reservation in the opinion of the court as to other features of the statute, I am unable to agree that that case involved or decided the one now at bar.

There is nothing in the statute now under consideration which prevents an employer from discharging one in his service at his will. The question now presented is, May an employer, as a condition of present or future employment, require an employee to agree that he will not exercise the privilege of becoming a member of a labor union, should he see fit to do so? In my opinion, the cases are entirely different, and the decision of the questions controlled by different principles. The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many states, by virtue of express statutes passed for that purpose, and, being legal, and acting within their constitutional rights, the right to join them, as against coercive action to the contrary, may be the legitimate subject of protection in the exercise of the police authority of the states. This statute, passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken precisely to define, has for its avowed [33] purpose the protection of the exercise of a legal right, by preventing an employer from depriving the employee of it as a condition of obtaining employment. I see no reason why a state may not, if it chooses, protect this right, as well as other legal rights.

But it is said that the contrary must necessarily result, if not from the precise matter decided in the Adair Case, then from the principles therein laid down, and that it is the logical result of that decision that the employer may, as a condition of employment, require an obligation to forego the exercise of any privileges because of the exercise of which an employee might be discharged from service. I do not concede that this result follows from anything decided in the Adair Case. That case dealt solely with the right of an employer to terminate relations of employment with an employee, and involved the constitutional protection of his right so to do, but did not deal with the conditions which he might exact or impose upon another as a condition of employment.

The act under consideration is said to have the effect to deprive employers of a part of their liberty of contract, for the benefit of labor organizations. It is urged that the statute has no object or purpose, express or implied, that has reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving him who has property of some part of his "financial independence."

But this argument admits that financial independence is not independence of law or of the authority of the legislature to declare the policy of the state as to matters which have a reasonable relation to the welfare, peace, and security of the community.

This court has many times decided that the motives of legislators in the enactment of laws are not the subject of judicial inquiry. Legislators, state and Federal, are entitled to the presumption that their action has been in [34] good faith and because of conditions which they deem proper and sufficient to warrant the action taken. Speaking for this court in Ex parte McCardle, 7 Wall. 506, 514, 19 L. ed. 264, 265, Chief Justice Chase summed up the doctrine in a sentence when he said: "We are not at

liberty to inquire into the motives of the legislature; we can only examine into its power under the Constitution." In Cooley's Constitutional Limitations, 7th ed. 257, that eminent author says: "They [the courts] must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." Soon Hing v. Crowley, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730. "We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it." Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 480, 46 L. ed. 283, 287, 22 Sup. Ct. Rep. 176.

The act must be taken as an attempt of the legislature to enact a statute which it deemed necessary to the good [35] order and security of society. It imposes a penalty for "coercing or influencing or making demands upon or requirements of employees, servants, laborers, and persons seeking employment." It was in the light of this avowed purpose that the act was interpreted by the supreme court of Kansas, the ultimate authority upon the meaning of the terms of the law. Of course, if the act is necessarily arbitrary and therefore unconstitutional, mere declarations of good intent cannot save it, but it must be presumed to have been passed by the legislative branch of the state government in good faith, and for the purpose of reaching the desired end. The legislature may have believed, acting upon conditions known to it, that the public welfare would be promoted by the enactment of a statute which should prevent the compulsory exaction of written agreements to forego the acknowledged legal right here involved, as a condition of employment in one's trade or occupation.

It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They cannot put in terms that are against public policy either as it is deemed by the courts to exist at common law, or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the state. It is no answer to say that the greater includes the less, and that because the employer is free to employ, or the employee to refuse employment, they may agree as they please. This matter is easily tested by assuming a contract of employment for a year and the insertion of a condition upon which the right of employment should continue. The choice of such conditions is not to be regarded as wholly unrestricted because the parties may agree or not, as they choose. And if the state may prohibit [36] a particular stipulation in an agreement because it is deemed to be opposed in its operation to the security and well being of the community, it may prohibit it in any agreement, whether the employment is for a term or at will. It may prohibit the attempt in any way to bind one to the objectionable undertaking.

Would anyone contend that the state might not prohibit the imposition of conditions which should require an agreement to forego the right on the part of the employee to resort to the courts of the country for redress in the case of disagreement with his employer? While the employee might be discharged in case he brought suit against an employer if the latter so willed, it by no means follows that he could be required, as a condition of employment, to forego a right so obviously fundamental as the one supposed. It is therefore misleading to say that the right of discharge necessarily embraces the right to impose conditions of employment which shall include the surrender of rights which it is the policy of the state to maintain.

Take another illustration: The right to exclude a foreign corporation from carrying on a purely domestic business in the state has been distinctly recognized by decisions of this court; yet it has been held, and is now settled law, that it is beyond the authority of the state to require a corporation doing business of this character to file in the office of the secretary of state a

written agreement that it will not remove a suit, otherwise removable, to a Federal court of the United States. Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365. In that case, the right to exclude was held not to include the right to impose any condition under which the corporation might do business in the state. In that connection this court said:

"A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in Cancemi's Case, 18 N. Y. 128, be tried, in any other manner than by a jury of twelve men, although he consent in open [37] court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may, no doubt, waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." Home Ins. Co. v. Morse, 20 Wall. 445, 451, 22 L. ed. 365, 368.

It may be that an employer may be of the opinion that membership of his employees in the National Guard, by enlistment in the militia of the state, may be detrimental to his business. Can it be successfully contended that the state may not, in the public interest, prohibit an agreement to forego such enlistment as against public policy? Would it be beyond a legitimate exercise of the police power to provide that an employee should not be required to agree, as a condition of employment, to forego affiliation with a particular political party, or the support of a particular candidate for office? It seems to me that these questions answer themselves. There is a real, and not a fanciful, distinction between the exercise of the right to discharge at will and the imposition of a requirement that the employee, as a condition of employment, shall make a particular agreement to forego a legal right. The *agreement* may be, or may be declared to be, against public policy, although the right of discharge remains. When a man is discharged, the employer exercises his right to declare such action necessary because of the exigencies of his business, or as the result of his judgment for other reasons sufficient to himself. When he makes a stipulation of the character here involved essential to future employment, he is not exercising a right to discharge, and may not wish to discharge the employee when, at a [38] subsequent time, the prohibited act is done. What is in fact accomplished, is that the one engaging to work, who may wish to preserve an independent right of action, as a condition of employment, is coerced to the signing of such an agreement against his will, perhaps impelled by the necessities of his situation. The state, within constitutional limitations, is the judge of its own policy and may execute it in the exercise of the legislative authority. This statute reaches not only the employed, but, as well, one seeking employment. The latter may never wish to join a labor union. By signing such agreements as are here involved he is deprived of the right of free choice as to his future conduct, and must choose between employment and the right to act in the future as the exigencies of his situation may demand. It is such contracts, having such effect, that this statute and similar ones seek to prohibit and punish as against the policy of the state.

It is constantly emphasized that the case presented is not one of coercion. But in view of the relative positions of employer and employed, who is to deny that the stipulation here insisted upon and forbidden by the law is essentially coercive? No form of words can strip it of its true character. Whatever our individual opinions may be as to the wisdom of such legislation, we cannot put our judgment in place of that of the legislature and refuse to acknowledge the existence of the conditions with which it was dealing. Opinions may differ as to the remedy, but we cannot understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power. Wherein is the right of the employer to insert this stipulation in the agreement any more sacred than his right to agree with another employer in the same trade to keep up prices? He may think it quite as essential to his "financial independence," and so in truth it may be if he alone is to be considered. But it is too late to deny that the legislative [39] power reaches such a case. It would be difficult to select any subject more intimately related to good order and the security of the community than that under consideration—whether one takes the view that labor organizations are advantageous or the reverse. It is certainly as much a matter for legislative consideration and action as contracts in restraint of trade.

It is urged that a labor organization—a voluntary association of working men—has the constitutional right to deny membership to any man who will not agree that during

such membership he will not accept or retain employment in company with non-union men. And it is asserted that there cannot be one rule of liberty for the labor organization and its members and a different and more restrictive rule for employers.

It, of course, is true, for example, that a church may deny membership to those who unite with other denominations, but it by no means follows that the state may not constitutionally prohibit a railroad company from compelling a working-man to agree that he will, or will not, join a particular church. An analogous case, viewed from the employer's standpoint, would be: Can the state, in the exercise of its legislative power, reach concerted effort of employees, intended to coerce the employer as a condition of hiring labor, that he shall engage in writing to give up his privilege of association with other employers in legal organizations, corporate or otherwise, having for their object a united effort to promote by legal means that which employers believe to be for the best interest of their business?

I entirely agree that there should be the same rule for employers and employed, and the same liberty of action for each. In my judgment, the law may prohibit coercive attempts, such as are here involved, to deprive either of the free right of exercising privileges which are theirs within the law. So far as I know, no law has undertaken [40] to abridge the right of employers of labor in the exercise of free choice as to what organizations they will form for the promotion of their common interests, or denying to them free right of action in such matters.

But it is said that in this case all that was done in effect was to discharge an employee for a cause deemed sufficient to the employer,—a right inherent in the personal liberty of the employer protected by the Constitution. This argument loses sight of the real purpose and effect of this and kindred statutes. The penalty imposed is not for the discharge, but for the attempt to coerce an unwilling employee to agree to forego the exercise of the legal right involved as a condition of employment. It is the requirement of such agreements which the state declares to be against public policy.

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employee, as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employee as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

If one prohibitive condition of the sort here involved may be attached, so may others, until employment can only be had as the result of written stipulations, which shall deprive the employee of the exercise of legal rights which are within the authority of the state to protect. While this court should, within the limitations of the constitutional guaranty, protect the free right of contract, it is not less important that the state be given the right to exert its legislative authority, if it deems best to do so, for the protection of rights which inhere in the privileges of the citizen of every free country.

[41] The supreme court of Kansas, in sustaining this statute, said that "employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof," and in reply to this it is suggested that the law cannot remedy inequalities of fortune, and that so long as the right of property exists, it may happen that parties negotiating may not be equally unhampered by circumstances.

This view of the Kansas court, as to the legitimacy of such considerations, is in entire harmony, as I understand it, with the former decisions of this court in considering the right of state legislatures to enact laws which shall prevent the undue or oppressive exercise of authority in making contracts with employees. In Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, this court, considering legislation limiting the number of hours during which laborers might be employed in a particular employment, said:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and

the legislature may properly interpose its authority. . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to [42] the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer.'" (Page 397.)

This language was quoted with approval in Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 570, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259, in which a statute of Iowa was sustained, prohibiting contracts limiting liability for injuries, made in advance of the injuries received, and providing that the subsequent acceptance of benefits under such contracts should not constitute satisfaction for injuries received after the contract. Certainly it can be no substantial objection to the exercise of the police power that the legislature has taken into consideration the necessities, the comparative ability, and the relative situation of the contracting parties. While all stand equal before the law, and are alike entitled to its protection, it ought not to be a reasonable objection that one motive which impelled an enactment was to protect those who might otherwise be unable to protect themselves.

I therefore think that the statute of Kansas, sustained by the supreme court of the state, did not go beyond a legitimate exercise of the police power, when it sought, not to require one man to employ another against his will, but to put limitations upon the sacrifice of rights which one man may exact from another as a condition of employment. Entertaining these views, I am constrained to dissent from the judgment in this case.

I am permitted to say that Mr. Justice Hughes concurs in this dissent.

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[43] ROBERT D. KINNEY, Plff. in Err.,
v.
PLYMOUTH ROCK SQUAB COMPANY and International Trust Company and Elmer C. Rice, Trustees.

(See S. C. Reporter's ed. 43-49.)

Appeal and error — prosecution in forma pauperis — meritorious case.

1. The allowance of the right to prosecute a writ of error from the Federal Supreme Court *in forma pauperis* under the act of July 20, 1892 (27 Stat. at L. 252, chap. 209), as amended by the act of June 25, 1910 (36 Stat. at L. 866, chap. 435, Comp. Stat. 1913, § 1626), depends upon the exercise of the same discretion as to the meritorious character of the cause to the same extent provided under the statute before the amendment, the sole effect of which is to bring defendants within the statute, and to extend its provisions so as to embrace proceedings on application for the allowance of a writ of error or appeal from or to the Federal Supreme Court and the circuit courts of appeals, and the appellate proceedings in such courts.

[For other cases, see Appeal and Error, IV. 1, 1, in Digest Sup. Ct. 1908.]

Appeal and error — prosecution in forma pauperis — meritorious case.

2. A suit based upon the theory of the existence of a default judgment of a Federal district court, brought after two different circuit courts of appeals had decided that the clerk of the former court had rightfully refused to enter such judgment because the writ bore a wrong return day, and after one of such decisions had been affirmed by the Federal Supreme Court on motion, is so lacking in merit as to require the refusal of an application under the act of July 20, 1892 (27 Stat. at L. 252, chap. 209), as amended by the act of June 25, 1910 (36 Stat. at L. 866, chap. 435, Comp. Stat. 1913, § 1626), for leave to prosecute *in forma pauperis* a writ of error from the Federal Supreme Court to a circuit court of appeals to review a judgment in such suit which affirmed a judgment of a district court, holding that the default judgment had no existence.

[For other cases, see Appeal and Error, IV. 1, 1, in Digest Sup. Ct. 1908.]

[No. —.]

Decided January 18, 1915.

ON APPLICATION at Chambers for leave to docket and prosecute without prepayment of fees, a writ of error from the Federal Supreme Court to review a judgment of the Circuit Court of Appeals for the First Circuit which affirmed a judgment of the District Court of Massachusetts in favor of defendant in an action on an alleged judgment. Denied.

The facts are stated in the opinion.

Mr. Robert D. Kinney, *in propria persona*, for the petition.

Mr. Chief Justice White delivered the opinion of the court:

Prosecuting a writ of error in this case, allowed by a circuit judge, the plaintiff in error asks to be permitted to docket the cause and conduct the proceedings *in forma* [44] *pauperis*. The matter is governed by

the act of July 20, 1892, chap. 209, 27 Stat. at L. p. 252, as amended by the act of June 25, 1910, chap. 435, 36 Stat. at L. 866, Comp. Stat. 1913, § 1626. We summarize their provisions, reproducing, however, in full, the 1st section as amended by the act of 1910, as that was the only portion of the original act changed by the amendment, printing in italics the provisions added, and putting in brackets, with a line of erasure, the words omitted in the amendment.

"Sec. 1. That any citizen of the United States, entitled to commence *or defend* any suit or action, *civil or criminal*, in any court of the United States, may, *upon the order of the court*, commence and prosecute *or defend* to conclusion any [~~such~~] suit or action, *or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that, in the opinion of the court, such appeal or writ of error is not taken in good faith*, without being required to prepay fees or costs *or for the printing of the record in the appellate court*, or give security therefor, before or after bringing suit or action, *or upon suing out a writ of error or appealing*, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action *or of such writ of error or appeal*, [~~which he is about to commence~~] or to give security for the same, and that he believes *that* he is entitled to the redress he seeks by such suit or action *or writ of error or appeal*, and setting forth briefly the nature of his alleged cause of action *or appeal*."

The 2d section provides for permission to proceed as a poor person after commencement of suit. The 3d governs the conduct of court officers in cases coming under the statute. The 4th authorizes the appointment by the court of an attorney to represent poor persons "if it deems the cause worthy of a trial," and empowers the court at any stage after permitting proceedings as a poor person to dismiss the suit "if it be made to appear that the allegations [45] of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious." The 5th and last section points out the manner of entering judgment concerning costs in cases under the statute.

Prior to the amendment of 1910, on the face of the statute three things were certain: (a) that the statute imposed no imperative duty to grant a request to proceed as a poor person, but merely conferred authority to do so when the fact of poverty was established and the case was found not to be frivolous; that is, was considered to be sufficiently meritorious to justify the allowance of the request; (b) that there was no power to grant such a request when made by a defendant; and (c) that there was also no authority to allow a party to proceed as a poor person in appellate proceedings in this court or the circuit courts of appeals. Bradford v. Southern R. Co. 195 U. S. 243, 49 L. ed. 178, 25 Sup. Ct. Rep. 55. Clarifying the 1st section as amended by these considerations, it becomes clear that the sole change operated by the amendment was to bring defendants within the statute, and to extend its provisions so as to embrace, first, proceedings on application for the allowance of a writ of error or appeal to this court and the circuit court of appeals, and second, the appellate proceedings in such courts. This being true, it is clear that as to the new subjects, the allowance of the right in those cases was made to depend upon the exercise of the same discretion as to the meritorious character of the cause to the same extent provided under the statute before amendment. That is to say, there is no ground for a contention that at one and the same time the statute brought certain proceedings within its scope and yet exempted them from its operation. Indeed, this conclusion is not alone sustained by the implication resulting from the fact that the safeguards provided for the exercise of the authority found in the statute as originally enacted were not changed by the amendment, but further plainly results from the express provisions of the amended section [46] manifesting the purpose to subject the granting of the right in both the new instances provided for, to the exercise of the judicial discretion to determine the poverty and good faith of the applicant and the meritorious character of the cause in which the relief was asked.

Under the assumption that the affidavit as to poverty is sufficient, we come to the merits, in other respects, of the application. There is a failure, however, to comply with the requirement that a statement be made, briefly setting forth the cause of action relied upon, since the petition only refers to an assignment of errors which it is said will be found in the written transcript which it is proposed to docket when the request the petitioner makes is allowed. As this is the first case coming to our attention under the amended statute, and the omission was probably inadvertent, without making a precedent for future cases we consider the case for the purpose of determining whether it is of such a character as to justify the allowance of the relief prayed.

On October 14, 1909, Robert D. Kinney, the petitioner, caused a writ of attachment to issue against the defendant to recover damages in the amount of $18,309.84. This

writ was made returnable before the circuit court of the United States for the district of Massachusetts on the first Monday of December following; that is to say, on December 6th, 1909. On October 26th, service was made of the writ, together with a declaration concerning the claim for damages. Before the return day (December 6th, 1909), Kinney left with the clerk the writ and the declaration, along with an order directing the clerk to enter the action and his appearance therein. The return day stated in the writ having expired, and the defendant not having entered its appearance, Kinney, on the 20th of December, 1909, instructed the clerk to enter a default against the defendant, and some days thereafter, that is, on December 27th, 1909, he sent to the clerk a written motion for entry of judgment, with [47] directions to assess the plaintiff's damages at $19,026.98 as per an inclosed statement. The clerk declined to comply on the ground that the writ was made returnable on a day other than the first day of some statutory term of the court, as required by the rules. When the first day of the next term arrived, that is, February 23, 1910, the clerk caused the case to be entered, and on the following day the defendant appeared and some time after filed a demurrer and answer.

Without taking further steps in the cause, Kinney commenced an action in the eastern district of Pennsylvania against the surety on the bond of the clerk to recover damages alleged to have been suffered by a violation of duty committed by the clerk in failing to enter the writ of attachment, and to note the default under the circumstances which we have stated. After issue joined, the case was decided against Kinney on two grounds: first, that the action of the clerk complained of was rightful, and second, that even if it was assumed to be wrongful, there was no proof of damage suffered, as there was nothing to show that the corporation against whom the attachment was issued had any funds in its hands belonging to the defendant. 182 Fed. 1005. In the circuit court of appeals for the third circuit, on April 12th, 1911, this judgment was affirmed, the court resting its conclusion solely on the ground that the action of the clerk in refusing to enter the judgment as requested was rightful, and therefore no cause of action in favor of Kinney arose therefrom. 108 C. C. A. 455, 186 Fed. 477. And in this court, to which the case was brought on error, the judgment of the court of appeals was, on motion, affirmed, December 18th, 1911. 222 U. S. 283, 56 L. ed. 200, 32 Sup. Ct. Rep. 101. On February 15th following, in the attachment suit in the district court of Massachusetts, Kinney asked that the default as originally asked by him be entered *nunc pro tunc*. The motion was set down for hearing for a day in March, and, the petitioner not appearing, on hearing defendant [48] it was dismissed. In the meanwhile, pending action on this petition, on February 28th a new attachment proceeding was sought to be begun by Kinney, based upon the theory of the existence of a judgment against the defendant in the original proceeding, and a writ of attachment which was made returnable on a day other than the first day of the following term was presented to the clerk with the request that he affix the seal of the court to it, which he declined to do on the ground of an improper return day. And the district court refusing to command the clerk to comply with the request, mandamus proceedings were commenced in the circuit court of appeals for the first circuit to compel the clerk to comply. The court refused the mandamus upon the ground that because of the wrong return day, the clerk had rightfully refused, supporting its conclusions by the same line of reasoning which caused the district court in the eastern district of Pennsylvania and the circuit court of appeals for the third circuit in the cases to which we have previously referred to decide that the original action of the clerk in refusing to file because of a wrong return day was right. 120 C. C. A. 315, 202 Fed. 137. Thereupon the suit before us was commenced in March, 1913, in the district court of Massachusetts, to recover on a judgment against the defendant upon the assumption that such a judgment had been rendered in the original suit; and after issue joined there was a judgment in favor of the defendant company on the ground that there was no such judgment in said suit, the court again directly upholding the rightfulness of the action of the clerk in having originally refused to enter the cause because of the wrong return day. This judgment was affirmed by the circuit court of appeals in a careful opinion sustaining the same view, (214 Fed. 766), and it is this judgment that is intended to be brought under review in the proceedings, which it is prayed may be conducted *in forma pauperis*. And the assignments of error [49] but challenge, for reasons which it is unnecessary to recapitulate, the lawfulness of the action of the clerk in originally refusing to comply with the request to file the attachment proceedings and enter the default judgment and assess the damages before the first day of the term following the issue of the writ, and therefore but assail all the various opinions and judgments to which we have referred in stating the history of the case.

Under these circumstances we think it is manifest that no ground is shown for the allowance of the prayer of the petition. The case proceeds upon the erroneous assumption that a judgment was rendered in a cause which is yet pending and undisposed of; in other words, the case assumes as a basis for relief the existence of that which does not exist. It seeks collaterally to attack that which was only susceptible of being assailed directly. It disregards the conclusive effect of the judgments as to the want of merit in the claim rendered in the courts of the first and third circuits, and by implication disregards the legal consequences necessarily arising from the former action of this court. Indeed, irrespective of these considerations, to the end that frivolous and fruitless litigation may cease, we say that we are clearly of the opinion that the absolute want of merit in the case is demonstrated by the views expounded in the opinions of the courts of the first and third circuits to which we have referred concerning the rightfulness of the action of the clerk in refusing to file the papers and enter the judgment for damages under the circumstances disclosed. The prayer of the petition is denied.

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[50] DAVID YOST v. DALLAS COUNTY.

(See S. C. Reporter's ed. 50–58.)

Equity — jurisdiction — enforcement of judgment on county bonds.

1. The equitable jurisdiction of a Federal district court does not extend to the appointment of its own officer to apportion and collect a tax to satisfy its judgment on county bonds issued in aid of railway construction unless the state has authorized such a proceeding, although the remedy at law by mandamus to compel the proper county officials to levy and collect the tax conformably to state law has proved ineffectual.

[For other cases, see Equity, 264–272, in Digest Sup. Ct. 1908.]

Taxes — collection by court.

2. Authority given by Mo. Rev. Stat. 1909, § 11,417, to the circuit court, to enforce "by mandamus or otherwise" an order to the county court to have a tax assessed, etc., will be construed, in the absence of a decision of the Missouri supreme court to the contrary, as not empowering the circuit court to collect the tax, but only allowing the resort to other means the mandamus to compel the county court to do so.

[For other cases, see Taxes, 619–622, in Digest Sup. Ct. 1908.]

[No. 604.]

Argued January 6, 1915. Decided January 18, 1915.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting questions as to whether a Federal District Court has jurisdiction to appoint its own officer to apportion and collect a tax to satisfy a judgment on county bonds. Answered in the negative.

The facts are stated in the opinion.

Mr. Harry J. Cantwell argued the cause and filed a brief for David Yost:

The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty, in any case, in favor of another jurisdiction.

Chicot County v. Sherwood, 148 U. S. 534, 37 L. ed. 548, 13 Sup. Ct. Rep. 695.

The means to be employed by the United States courts, in the enforcement of their lawful jurisdiction, are limited only by the determination of whether such means are necessary and agreeable to the principles and usages of law.

Hills & Co. v. Hoover, 220 U. S. 335, 337, 55 L. ed. 487, 488, 31 Sup. Ct. Rep. 402, Ann. Cas. 1912C, 562; Holland v. Challen, 110 U. S. 24, 28 L. ed. 55, 3 Sup. Ct. Rep. 495; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Chicot County v. Sherwood, supra.

Counties and other municipal corporations, when acting for the particular advantage of the particular corporation, and not from considerations connected with the government of the state at large, are to be regarded as private corporations. There is no qualification of this rule when the creation of the debt and of the means to pay it are specially authorized by the legislature of the state.

Murray v. Charleston, 96 U. S. 445, 24 L. ed. 763; State ex rel. Abel v. Gates, 190 Mo. 558, 2 L.R.A.(N.S.) 152, 89 S. W. 881; State ex rel. Dickason v. County Ct. 128 Mo. 438, 31 S. W. 23; Lincoln County v. Luning, 133 U. S. 529, 531, 33 L. ed. 766, 767, 10 Sup. Ct. Rep. 363.

There is no distinction between counties

NOTE.—Generally on the jurisdiction of equity where remedy at law exists—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R. Co. v. Central Stock-Yards & T. Co. 6 L.R.A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

On right of creditor of taxing district to invoke aid of court to obtain satisfaction of debt, where ordinary remedies are not available—see note to Preston v. Sturgis *Mill. Co.* 32 L.R.A.(N.S.) 1020.

and cities or towns as regards their liability for obligations created in their business capacity, or in the method of enforcement of the obligations.

Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Mt. Pleasant v. Beckwith, 100 U. S. 524, 525, 25 L. ed. 701; Lincoln County v. Luning, 133 U. S. 531, 33 L. ed. 767, 10 Sup. Ct. Rep. 363.

The special tax imposed by the legislature of the state of Missouri upon the property in Dallas county is a special charge, analogous to internal improvement charges. It bears no relation to ordinary taxes for the maintenance of local government. The creation of the debt by the authority of the legislature, the provisions of the legislative act definitely fixing the property upon which it should be charged, and requiring the enforcement of the charge for the payment of the debt, created a charge against definite specific property. Such charges are not taxes in the ordinary sense. As to special internal improvement taxes chargeable against particular districts, which this essentially is, the supreme court of Missouri has held that the limitations and requirements even of the state Constitution, requiring certain formalities by certain persons in order to create a "tax," are not applicable to such special assessments or charges.

Farrar v. St. Louis, 80 Mo. 379; Fruin-Bambrick Constr. Co. v. St. Louis Shovel Co. 211 Mo. 532, 111 S. W. 86; Ray County use of Common School Fund v. Bentley, 49 Mo. 236; State ex rel. Dickason v. County Ct. 128 Mo. 438, 31 S. W. 23.

The charge here is a charge imposed by law. It is made fixed, definite, and certain, as to amount and the property upon which it is to be charged, by the law of the state and the judgment of the court. It does not require, nor is it dependent upon, the sanction of the agents of the defendant. The persons upon the assessment list are charged by the judgment with their proportion of the debt ascertained. In such a case the language of the court in King v. United States, 99 U. S. 233, 25 L. ed. 374, although that referred to a national tax, is pertinent, to wit: "The facts being established on which the tax rested, the law made the assessment (levy in this case), and an action of debt could be maintained to recover it, though no officer had made an assessment."

Ibid.; Dollar Sav. Bank v. United States, 19 Wall. 227-240, 22 L. ed. 80-82; Meriwether v. Muhlenburg County Ct. 120 U. S. 357, 30 L. ed. 654, 7 Sup. Ct. Rep. 563; Thompson v. United States, 103 U. S. 484, 26 L. ed. 523; Lee County v. Rogers (Lee County v. United States) 7 Wall. 175, 19 L. ed. 162.

The county court is not even a necessary factor in the allowance of ordinary demands against the county in Missouri, so completely is that body under the judicial control.

Givens v. Daviess County, 107 Mo. 608, 17 S. W. 998.

The specific performance of the acts necessary to secure payment being required by the state of Missouri, the judiciary of the state not being limited in the powers it may exercise to secure specific performance, there being no discretion in the agent as to performance, and the judiciary of the state of Missouri being expressly permitted in similar cases to secure specific performance by the substitution of another to perform when the agent first commanded refuses to perform,—the United States courts may exercise the same powers, because such powers are "agreeable to the usages and principles of law."

Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Holland v. Challen, 110 U. S. 24, 28 L. ed. 55, 3 Sup. Ct. Rep. 495; Louisiana v. Jumel, 107 U. S. 728, 27 L. ed. 454, 2 Sup. Ct. Rep. 128; Lee County v. Rogers (Lee County v. United States), 7 Wall. 175, 19 L. ed. 162.

This being a case in which equity has original jurisdiction, any of the usual equitable remedies may be applied; and equity rule No. 8 is applicable.

Walla Walla v. Walla Walla Water Co. 172 U. S. 12, 43 L. ed. 346, 19 Sup. Ct. Rep. 77; Davies v. Corbin, 112 U. S. 40, 28 L. ed. 629, 5 Sup. Ct. Rep. 4; Gibson v. Shufeldt, 122 U. S. 38, 30 L. ed. 1087, 7 Sup. Ct. Rep. 1066; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 21 L. ed. 43; Hills & Co. v. Hoover, 220 U. S. 335, 337, 55 L. ed. 487, 488, 31 Sup. Ct. Rep. 402, Ann. Cas. 1912C, 562; May v. May, 167 U. S. 310, 42 L. ed. 179, 17 Sup. Ct. Rep. 824; Boyce v. Grundy, 3 Pet. 210, 213, 7 L. ed. 655, 656; Clark v. Wooster, 119 U. S. 326, 30 L. ed. 393, 7 Sup. Ct. Rep. 17; Street, Fed. Eq. Pr. § 52; Pendleton v. Perkins, 49 Mo. 567.

The power of equity courts, in a case wherein the court has, under the Federal Constitution, jurisdiction, because of diverse citizenship, to protect the rights of a suitor, when usual grounds for equitable relief are set up, is now undoubted—even though there may thereby be involved control of matters of revenue and taxation. The exercise of the equity powers cannot be, and is not, confined to cases where debtors seek relief from the imposition of an unlawful tax, for creditors who are, by contract, entitled to the proceeds of a lawful tax, are as properly entitled to the exercise of equitable relief. This exercise of equitable powers can be denied only when there is a legislative provision denying it. In

the case at bar there is no legislative provision denying it. On the contrary, there are legislative provisions of the state of Missouri requiring its exercise. The legislature of Missouri has placed all of the agents of these municipalities under the supervision and control of the judiciary. The highest judicial authority of the state asserts the power of equity courts to control taxation, at the private suit of anyone interested, as part of its general equity jurisdiction.

Newmeyer v. Missouri & M. R. Co. 52 Mo. 81, 14 Am. Rep. 394; Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 411, 30 L. ed. 728, 7 Sup. Ct. Rep. 599; Crampton v. Zabriskie, 101 U. S. 609, 25 L. ed. 1071; Dill. Mun. Corp. §§ 1488, 1489; Davies v. Corbin, 112 U. S. 40, 28 L. ed. 629, 5 Sup. Ct. Rep. 4; Gibson v. Shufeldt, 122 U. S. 38, 30 L. ed. 1087, 7 Sup. Ct. Rep. 1066; 1 Story, Eq. Jur. p. 539, § 519; Blackbourne v. Webster, 2 P. Wms. 632; Atty Gen. v. Heelis, 2 Sim. & Stu. 67, 2 L. J. Ch. 189, 25 Revised Rep. 153; Atty. Gen. ex rel. Izard v. Brown, 1 Swanst 265; Stanly County v. Coler, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; New Orleans v. Warner, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44.

Mandamus is but one of the means of securing the specific performance of an act which the suitor has the right to have performed. It is not an end; it is but one of the means of securing specific performance.

Antoni v. Greenhow, 107 U. S. 781, 27 L. ed. 473, 2 Sup. Ct. Rep. 91; Davenport v. Dodge County, 105 U. S. 237, 243, 26 L. ed. 1018, 1021.

The right to the levy being fixed by the sovereign power of the state, and so determined by the court, the agents of the debtors can have no will contrary to the will of the state. The debt is liquidated and certain; the property upon which it is a charge, the *pro rata* which each owner should pay, is already definitely fixed by the sovereign power of the state, and by judicial determination. The court is asked to make effective that which it has already decreed,—which it had the unquestioned right to decree.

State ex rel. Dickason v. County Ct. 128 Mo. 438, 31 S. W. 23; Greene County v. Daniel, 102 U. S. 194, 26 L. ed. 100; Carter County v. Sinton, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650; Hawley v. Fairbanks (Hawley v. United States) 108 U. S. 543, 27 L. ed. 820, 2 Sup. Ct. Rep. 846.

The distinction between compelling, by mandamus or otherwise, a sovereign state to perform an act against its express will, and compelling by mandamus (or by substitute performance if mandamus be not obeyed, the performance of a ministerial act by the mere agent of a defendant debtor, when the state expressly requires the act to be done, and when the state expressly authorizes the judiciary to employ other means, in addition to mandamus, to secure performance,—is a vital distinction. This case is therein distinguishable from every other case that has come to the Supreme Court, except; Lee County v. Rogers (Lee County v. United States) 7 Wall. 175, 19 L. ed. 162, and Stansell v. Levee Board, 13 Fed. 851, where the court below exercised exactly the same powers as are here sought to be invoked. The opinion of the Supreme Court of the United States, however, does not comment upon the decree below, but the decree below stood and was enforced.

See Russell v. Stansell, 105 U. S. 303, 26 L. ed. 989.

The powers of the state, as well as the powers of the United States, are denied and defied by the agents of this corporation, now in contempt of both.

Poindexter v. Greenhow, 114 U. S. 295, 298, 29 L. ed. 194, 195, 5 Sup. Ct. Rep. 903, 962.

Every case decided by the Supreme Court of the United States, which may be cited in denial of the award of relief to the plaintiff herein, is distinguishable from the case at bar in one or more of the following particulars. That in such cases (a) no ordinary ground of equity jurisdiction was stated; (b) that the legal remedies had not first been pursued; (c) that the state had not authorized the tax, or the means of enforcement; (d) that there was discretion to be exercised with which the judiciary was not specially authorized to interfere,—all of these objections are removed in this case, and Lee County v. Rogers, supra, is a precedent in point.

Mr. John S. Haymes argued the cause, and, with Mr. J. W. Miller, filed a brief for Dallas County:

Mandamus is the proper remedy, both in the state courts of Missouri and in the Federal courts, to compel a municipality to levy a tax to satisfy a judgment.

State ex rel. Baker v. Fraker, 166 Mo. 130, 65 S. W. 720; Knox County v. Aspinwall, 24 How. 376, 16 L. ed. 735; Riggs v. Johnson County, 6 Wall. 166, 18 L. ed. 768; Dill. Mun. Corp. § 1507; Chanute v. Trader, 132 U. S. 211, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; Harshman v. County Ct. (United States ex rel. Harshman v. County Ct.) 122 U. S. 318, 30 L. ed. 1155, 7 Sup. Ct. Rep. 1171; Heine v. Levee Comrs. 19 Wall. 660, 22 L. ed. 226.

The failure of the instrumentalities ap-

pointed by law to make mandamus effectual does not destroy the remedy.

Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Heine v. Levy Comrs. 19 Wall. 660, 22 L. ed. 226; Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140.

The appointment of a commissioner or other person to apportion and collect taxes involves an unwarranted exercise of the taxing power.

Cooley, Const. Lim. 3d ed. *525; Re Chicago, 64 Fed. 899; Heine v. Levee Comrs. 19 Wall. 660, 22 L. ed. 226; Campbellsville Lumber Co. v. Hubbert, 50 C. C. A. 435, 112 Fed. 722; South Dakota v. North Carolina, 192 U. S. 319, 48 L. ed. 461, 24 Sup. Ct. Rep. 269; Kansas City v. Hannibal & St. J. R. Co. 81 Mo. 293; DeArman v. Williams, 93 Mo. 163, 5 S. W. 904; State ex rel. Brumbaugh v. Kansas City, St. J. & C. B. R. Co. 149 Mo. 645, 51 S. W. 479; McPike v. Pen, 51 Mo. 63.

The Federal courts are limited in their jurisdiction.

United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259; Cary v. Curtis, 3 How. 236, 11 L. ed. 576; Stevenson v. Fain, 195 U. S. 165, 49 L. ed. 142, 25 Sup. Ct. Rep. 6; Re Cilley, 58 Fed. 977.

Courts of equity have their limits.

Morris v. Parry, 110 Mo. App. 683, 85 S. W. 620; Snell, Eq. p. 4; Pom. Eq. Jur. § 47; Sell v. West, 125 Mo. 631, 46 Am. St. Rep. 508, 28 S. W. 969; Thompson v. Allen County, 115 U. S. 554, 555, 29 L. ed. 473, 474, 6 Sup. Ct. Rep. 140.

No duty necessary to the taxing power can be performed by other than the particular person or tribunal designated by law, upon the theory that it is ministerial, or otherwise.

Kansas City v. Hannibal & St. J. R. Co. 81 Mo. 294; State ex rel. Brumbaugh v. Kansas City, St. J. & C. B. R. Co. 149 Mo. 645, 51 S. W. 479; St. Louis & S. F. R. Co. v. Appearson, 97 Mo. 300, 10 S. W. 478; Walkley v. Muscatine, 6 Wall. 481, 18 L. ed. 930; Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; South Dakota v. North Carolina, 192 U. S. 319, 48 L. ed. 461, 24 Sup. Ct. Rep. 269; Haine v. Levee Comrs. 19 Wall. 655, 22 L. ed. 223; Barkley v. Levee Comrs. 93 U. S. 258, 23 L. ed. 893; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; Street Grading Dist. v. Hagadorn, 108 C. C. A. 429, 186 Fed. 451.

There are other reasons of the most substantial character why the district court cannot exercise the power of taxation as sought in the case at bar.

It would interfere with the state's right of existence.

Ray County use of Common School Fund v. Bentley, 49 Mo. 236; Hannibal & St. J. R. Co. v. Marion County, 36 Mo. 303; State ex rel. Chouteau v. Leffingwell, 54 Mo. 472; Opinion on Twp. Organization Law, 55 Mo. 296; Washer v. Bullitt County, 110 U. S. 564, 28 L. ed. 251, 4 Sup. Ct. Rep. 249; Heine v. Levee Comrs. 19 Wall. 655, 22 L. ed. 223; Snell, Eq. p. 16; Pom. Eq. Jur. § 131.

The state has the right to regulate the transfer of property within its bounds.

J. M. Atherton Co. v. Ives, 20 Fed. 895; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858.

It is difficult to understand why this is not an effort to accomplish indirectly that which cannot be done directly, namely, the exercise by the Federal government of the power of direct taxation, which is prohibited by art. 1, § 9, of the Constitution of the United States.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The levy and collection of taxes, as asked by plaintiff, cannot be justified under equity rule No. 8.

Hudson v. Parker, 156 U. S. 284, 39 L. ed. 426, 15 Sup. Ct. Rep. 450, 9 Am. Crim. Rep. 91; 11 Cyc. 474; Saylor v. Taylor, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 480; Ward v. Chamberlain, 2 Black, 437, 17 L. ed. 323; Lee County v. Rogers (Lee County v. United States) 7 Wall. 175, 19 L. ed. 162; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858.

There is no warrant, under the Missouri laws, for this proceeding.

St. Louis, I. M. & S. R. Co. v. St. Louis, 92 Mo. 166, 4 S. W. 664; State ex rel. Brumbaugh v. Kansas City, St. J. & C. B. R. Co. 149 Mo. 645, 51 S. W. 479; Kansas City v. Hannibal & St. J. R. Co. 81 Mo. 294; St. Louis & S. F. R. Co. v. Apperson, 97 Mo. 300, 10 S. W. 478.

Mr. Justice Holmes delivered the opinion of the court:

This case comes here upon a certificate from the circuit court of appeals. It is a suit in equity and the bill was dismissed by the district court. The facts alleged are, in short, as follows: A statute of Missouri incorporated the Laclede & Fort Scott Railroad, and authorized counties to invest in its stock and bonds, and to issue county bonds in order to pay for the same. The appellee did so, afterwards defaulted upon its bonds, and the appellant recovered judgment upon them in the same district court

for over a million dollars. Under the laws in force when the bonds were issued it was the duty of the county officers to levy and collect annually a tax of 30 per cent of the amount of the bonds issued, but this duty never has been performed, and the county officers evade service of writs of mandamus, or, if served, refuse to obey the writs. [55] There is no other mode of obtaining satisfaction, and the duties of levying and assessing the tax are only those of apportioning the tax among the taxable inhabitants on the basis of the last previous assessment which has been made, and of collecting it. The prayer is for the appointment of a commissioner to levy, to collect, and pay over the tax according to the Missouri law. The questions certified are:

"1. Has a district court of the United States, sitting as a court of equity, jurisdiction of such a cause?

"2. When a judgment has been recovered on the law side of a district court of the United States of competent jurisdiction, against a county of the state of Missouri, on its bonds issued by authority of law, and the laws of that state in force at the time the bonds were issued authorized such county to levy and collect taxes to pay such bonds, and the county has no funds in its treasury which can be applied to the payment of the judgment, and its property is, under the laws of the state, exempt from seizure and sale under execution; when the officers charged by the laws of the state with the duty to levy and collect taxes to pay such judgment refuse so to do, when the court in which such judgment was rendered has a number of times issued writs of mandamus commanding such officials to levy the taxes which they were authorized and which it was their duty to levy to pay such judgment, but these officials have, when possible, evaded service of these writs, and when served have wilfully and defiantly refused to obey the writs of mandamus, and the fact has been conclusively demonstrated by the proceedings at law that the plaintiff is utterly remediless at law by mandamus or otherwise for the failure of the county to pay, and the refusal of the officers of the county to discharge their duty to levy and collect taxes, and therewith to pay his judgment; and when the last previous assessment was made which, by the statute in force at the time the contract [56] was made, was authorized and made the basis of the levy of the amount to which the plaintiff is now entitled under his judgment and writs of mandamus, so that no act of discretion is required to levy and collect it, but only the clerical or ministerial acts of apportioning the amount among the assessed values of the taxables specified in the last previous assessment, placing it on the tax books and collecting it of the persons and property liable therefor, has the Federal court of the district in which the judgment was rendered, and the futile writs of mandamus issued, and, when possible, served, the jurisdiction and authority in equity to appoint a commissioner, receiver, or other officer to make the apportionment and to collect the amounts which the owner of the judgment is entitled to have collected from the parties and properties liable therefor."

The fundamental consideration for answering these questions is that the obligation upon which the judgment was recovered was an obligation under, not paramount to, the authority of the state. It is true that the district court of the United States had jurisdiction of the suit upon the contract, but the extent of the obligation imposed was determined by the statutes of Missouri, not by the Constitution of the United States or any extraneous source, the Constitution only requiring that the obligation of the contract should not be impaired by subsequent state law. The plaintiff, by bringing suit in the United States court, acquired no greater rights than were given to him by the local statutes. The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending on the sovereignty of the state, and therefore limited in whatever way the state saw fit to limit it when, so to speak, it contracted to give the remedy. It is established that "taxes of the nature now in question can only be levied and collected in the manner provided" by the statute, and therefore that it is impossible [57] for the courts to substitute their own appointee in place of the one contemplated by the act. Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 298, 30 L. ed. 1161, 1166, 7 Sup. Ct. Rep. 1190. The Missouri case referred to in that decision states a rule that we believe always to have been recognized in that state and others, as well as reinforced by other decisons of this court. Kansas v. Hannibal & St. J. R. Co. 81 Mo. 285, 293; St. Louis & S. F. R. Co. v. Apperson, 97 Mo. 300, 306, 10 S. W. 478; Rees v. Watertown, 19 Wall. 107, 117, 22 L. ed. 72, 75; Heine v. Levee Comrs. 19 Wall. 655, 658, 22 L. ed. 223, 225; Barkley v. Levee Comrs. 93 U. S. 258, 265, 23 L. ed. 893, 896; Meriwether v. Garrett, 102 U. S. 472, 501, 26 L. ed. 197, 200; Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140, s. c. below, 4 Ky. L. Rep. 98, 101, 13 Fed. 97. The rule has other applications; e. g., Smith v. Reeves, 178 U. S. 436, 445, 44 L. ed. 1140, 1145, 20 Sup. Ct. Rep. 919; United

States v. Kaufman, 96 U. S. 567, 569, 24 L. ed. 792.

It is unnecessary to repeat the strong and already often-repeated language of this court that will be found at the pages of the reports referred to. Some of it may go farther than was necessary or than we should be prepared to go in a different case, but to the extent of the principles that we have laid down we apprehend that it is not open to debate. It hardly could be except upon the question of construction: how far the liability to the tax was bound up with the mode of collection provided. But as the tax depended for its creation upon a sovereign act of the state, and was confided for its enforcement to officers of the state, it is decided that it cannot be enforced by others. The fact that it falls upon people who are not parties to the contract or the suit is an additional consideration in favor of the result; which no one would doubt if the judgment had been recovered and the present proceeding brought in another state. Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place. Authority is given by Missouri Rev. Stat. 1909, § 11,417, to the circuit court [58] to enforce "by mandamus or otherwise" an order to the county court to have the tax assessed, etc. But the words "or otherwise" do not authorize the circuit court to collect the tax, but only allow the resort to other means beside mandamus to compel the county court to do so. At least until the supreme court of Missouri says otherwise, we should read them in that sense. We answer both questions: No.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

JOHN T. REYNOLDS, Plff. in Err.,
v.
WILLIAM M. FEWELL.

(See S. C. Reporter's ed. 58–67.)

Indians — descent — Creek allotments.

1. A noncitizen, though not entitled to the allotment of a distributive share of the Creek tribal lands, nevertheless, if an heir under the Creek laws, takes an allotment made on behalf of a deceased Creek citizen under the original Creek agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), which, in § 28, refers to the Creek tribal laws of descent and distribution to ascertain the persons entitled to the property, despite the provision of the concluding paragraph of that section that the approved rolls shall be the final rolls of citizenship upon which allotments of all lands "shall be made, and to no other persons" since this paragraph, when read in the light of § 3 of that act, under which all lands are to be allotted "among the citizens of the tribe" so as "to give each an equal share of the whole in value as nearly as may be," manifestly refers to those who are to receive allotments if living, and to those on whose behalf allotments are to be made if they have died, in which case the allotment of the distributive share which would go to the enrolled citizen if living is to go to his heirs.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Courts — rules of decision — Indian descent.

2. Uncertainty and ambiguity in the Creek tribal laws of descent and distribution will not justify the Federal Supreme Court in disturbing a local rule of property established by repeated decisions that an intermarried noncitizen may inherit from his deceased intestate citizen wife or child.

[For other cases, see Courts, VII., in Digest Sup. Ct. 1908.]

Indians — descent — Creek allotment.

3. No purpose to interpret the reference in the original Creek agreement of March 1, 1901 (31 Stat. at L. 861, chap. 676), §§ 7, 28, to the Creek tribal laws of descent and distribution as controlling the devolution of the lands of a deceased Creek-allottee, or of an allotment on behalf of a deceased Creek citizen, nor to define the content and significance of such laws, can be gathered from the provisions of the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), substituting the Arkansas laws of descent and distribution for the Creek laws, with the proviso that Creek heirs, if there were such, shall take to the exclusion of others.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 102.]

Argued December 7 and 8, 1914. Decided January 18, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Tulsa County, in that state, in favor of plaintiff in an action to recover certain lands allotted under the original Creek agreement. Affirmed.

See same case below, 34 Okla. 112, 124 Pac. 623.

The facts are stated in the opinion.

Mr. William R. Lawrence argued the cause and filed a brief for plaintiff in error:

The words of a statute are not to be taken literally when it would lead to inconsistency, absurd consequences, and injustice. The reason of the law in such case should prevail over its letter.

United States v. Kirby, 7 Wall. 482, 19

L. ed. 278; Hanger v. Abbott, 6 Wall. 532, 18 L. ed. 939; Montgomery v. Hernandez, 12 Wheat. 129, 6 L. ed. 575; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634.

The spirit as well as the letter of the statute must be respected; and where the whole context of the law demonstrates a particular intent to effect a certain object, implication may be used to aid the intent.

Durousseau v. United States, 6 Cranch, 307, 3 L. ed. 232; Ex parte Ellis, 11 Cal. 222; Suckley v. Furse, 15 Johns. 338; People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243.

The decision in De Graffenreid v. Iowa Land & T. Co. 20 Okla. 711, 95 Pac. 624, cannot be taken to have made an absolute rule of property in such state, because it is but the first decision, and, further, it does not construe and determine the application of a state statute of the devolution of real property, but is the construction of a statute of the United States fixing the descent of property, at the time of the descent, within the jurisdiction exclusively of the courts of the United States, and which is yet left open for final determination by the highest court of the land. In other words, the question is Federal, instead of state. There is not any positive law or rule of comity requiring the court to follow the supreme court of Oklahoma in construing United States statutes.

The doctrine of *stare decisis* is not absolute.

Grimes v. Byrne, 2 Minn. 89, Gil. 72.

Mere precedent alone is not sufficient to establish a principle which is not founded on sound reason, and does not tend to the purposes of justice.

Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334, and note.

A question not settled by positive legislation will not be considered settled by a single decision.

Smith v. Smith, 13 La. 441; State v. Williams, 13 S. C. 546.

A decision by a state court as to the construction of an act of Congress governing mining claims should not be followed if it is wrong, under the doctrine of *stare decisis*, or on the ground that it has become a settled rule of property, when the construction of the statute has not been settled by the Supreme Court of the United States.

Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 27 Colo. 1, 50 L.R.A. 209, 83 Am. St. Rep. 17, 59 Pac. 607, 20 Mor. Min. Rep. 192.

Whenever the intent of a law or agreement becomes a debatable question, and there is *nothing* on the face of the statute to clearly *indicate such intent*, then such minor and subsidiary rules by which courts are guided in determining the true construction are applied.

Rodgers v. United States, 185 U. S. 86, 46 L. ed. 817, 22 Sup. Ct. Rep. 582; White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; Sutherland, Stat. Constr. § 2; State v. Phœnix Ins. Co. 92 Tenn. 420, 21 S. W. 893.

Mr. F. W. Clements also argued the cause for plaintiff in error.

Mr. Joseph C. Stone argued the cause, and, with Mr. Henry B. Martin, filed a brief for defendant in error:

A noncitizen of the Creek Nation was not excluded from taking as an heir of a deceased citizen who died without receiving his allotment.

De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; Leak Glove Mfg. Co. v. Needles, 16 C. C. A. 132, 32 U. S. App. 461, 69 Fed. 69; Davison v. Gibson, 5 C. C. A. 543, 12 U. S. App. 362, 56 Fed. 443; Porter v. Brook (W. D. Ind. Terr. not reported); Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Skelton v. Dill, 235 U. S. 206, ante, 198, 35 Sup. Ct. Rep. 60; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430.

The heirs took the allotment by inheritance, and not as allottees, and as of the date of the death of their ancestor, each enrolled citizen's right to an allotment vesting as of April 1st, 1899.

Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Shellenbarger v. Fewel, 34 Okla. 79, 124 Pac. 617; Ground v. Dingman, 33 Okla. 760, 127 Pac. 1078; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Goodrich v. O'Connor, 52 Tex. 375; Wardlow v. Miller, 69 Tex. 395, 6 S. W. 292; Waterman v. Charlton, 102 Tex. 510, 120 S. W. 171; Clark v. Lord, 20 Kan. 390.

By Creek descendants is meant persons of Creek blood, although not enrolled.

Lamb v. Baker, 27 Okla. 739, 117 Pac. 189.

The decision in De Graffenreid v. Iowa Land & T. Co. has become a rule of property.

De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; Lamb v. Baker, 27 Okla. 739, 117 Pac. 189; Sanders v. Sanders, 28 Okla. 59, 117 Pac. 338; Hughes Land Co. v. Bailey, 30 Okla. 194, 120 Pac. 290; Divine v. Harmon, 30 Okla. 820, 121 Pac. 219; Morley v. Fewel, 32 Okla. 452, 122 Pac. 700; Shellenbarger v. Fewel, 34 Okla. 79, 124 Pac. 617; Reynolds v. Fewel, 34

Okla. 112, 124 Pac. 623; Bilby v. Brown, 34 Okla. 738, 126 Pac. 1024; Ground v. Dingman, 33 Okla. 760, 127 Pac. 1078; Woodward v. De Graffenried, 36 Okla. 81, 131 Pac. 162.

The land was alienable at the time of the conveyances involved.

Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Reed v. Welty, 197 Fed. 419; Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529; Deming Invest. Co. v. Bruner Oil Co. 35 Okla. 395, 130 Pac. 1157; Bilby v. Gilliland, 41 Okla. 150, 137 Pac. 687; Skelton v. Dill, 235 U. S. 206, ante, 198, 35 Sup. Ct. Rep. 60; Franklin v. Lynch, 233 U. S. 269, 58 L. ed. 954, 34 Sup. Ct. Rep. 505.

Mr. Justice Hughes delivered the opinion of the court:

The defendant in error brought this action to recover certain lands which had been allotted under the original Creek agreement (act of March 1, 1901, chap. 676, 31 Stat. at L. 861; 32 Stat. at L. 1971). The allotments described in the complaint had been made on behalf of two deceased Creeks, Minnie Solander and her infant daughter, Hettie L. Solander; that is, the respective allotments ran to the "heirs" of each. The defendant in error claimed under a lease, executed on September 7, 1905, by George A. Solander, the surviving husband of Minnie Solander, and father of the other decedent. At the time of the death of his wife and daughter, as for some years previously, George A. Solander "resided in the Creek Nation," but he was not a citizen of that Nation. The plaintiff in error claimed under a conveyance from Phœbe B. Trusler, an enrolled Creek, who, as the sister of Minnie Solander, was the nearest relative of Indian blood. The question was whether George A. Solander was entitled to take as "heir," despite [60] the fact that he was not a Creek citizen. It was answered by the state court in the affirmative. 34 Okla. 112, 124 Pac. 623.

While the complaint embraced a portion of the lands allotted on behalf of Minnie Solander, as well as lands allotted on behalf of Hettie L. Solander, it appears from the record that the judgment related exclusively to the latter. According to the agreed statement of facts, Hettie L. Solander was born on February 22, 1899, and died on November 17, 1899, before receiving her allotment, and leaving her father and aunt surviving. She was entitled to be enrolled, and was enrolled, as a member of the tribe, and the allotment on her behalf was made to her "heirs," without further description, on December 4, 1901, under the second paragraph of § 28 of the act of 1901, supra, and the tribal deed was thereafter executed accordingly. Section 28 is as follows:

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled, 'An Act for the Protection of the People of the Indian Territory, and for Other Purposes' [30 Stat. at L. 502, chap. 517], shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens so entitled to enrolment, [61] up to and including the first day of July, nineteen hundred and then living, shall be placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

We are thus referred to the "laws of descent and distribution of the Creek Nation" to ascertain the persons entitled to the property. This explicit and determinative reference disposes of the contention that George A. Solander, although he might be an "heir" under the Creek laws, nevertheless could not take the lands in controversy because, being a noncitizen, he was not entitled to the allotment of a distributive share of the tribal lands in his own right. It is sought to find support for this contention in the concluding paragraph of § 28, above quoted, which provides that the approved rolls shall be the final rolls of citizenship, upon which "allotment of all lands . . . shall be made, and to no

other persons." But this paragraph should be read in the light of § 3 of the act of 1901, supra, under which all lands were to be allotted "among the citizens of the tribe" so as "to give each an equal share of the whole in value, as nearly as may be." The persons who were to receive these equal portions were those duly ascertained and enrolled, and the rolls approved by the Secretary of the Interior were to be final with respect to membership in the tribe and the corresponding determination of the distributive shares of the tribal lands. Thus, the provision of the last paragraph of § 28 had manifest regard to those who were to receive allotments if living, [62] and to those on whose behalf allotments were to be made if they had died. In the latter case, the allotment of the distributive share which would have gone to the enrolled citizen, if living, was to go to his "heirs." One who took as such "heir" would be none the less entitled because he might have in addition an allotment in his own right as a member of the tribe; that would not be a disturbance of the principle of equality in distribution which was so emphatically laid down. Nor, on the other hand, would one be excluded from taking, if he were a described "heir," by reason of the fact that he could not himself have received a distributive share as an enrolled citizen. The right of such "heir" to take would not be determined by reference to his status as a citizen or noncitizen, or by his right to a distributive share of the tribal lands as one enrolled, but by the status of the decedent and the fact that he was an "heir" of the decedent within the statutory definition.

We have recently had occasion to review the course of legislation with respect to the distribution of the property of Creek intestates. Washington v. Miller, 235 U. S. 422, ante, 295, 35 Sup. Ct. Rep. 119; Sizemore v. Brady, 235 U. S. 441, ante, 308, 35 Sup. Ct. Rep. 135. The Creek Nation, as a "distinct political society" (Cherokee Nation v. Georgia, 5 Pet. 1, 16, 8 L. ed. 25, 30), had its own laws governing the devolution of the property of its citizens. When Congress put in force in the Indian Territory certain general laws of Arkansas, including chapter 49 of Mansfield's Digest, relating to descents and distributions, it provided that "the judicial tribunals of the Indian Nations" should retain exclusive jurisdiction in all cases in which members of the Nation should be the only parties, and that to such cases the laws of Arkansas should not apply. Act of May 2, 1890, chap. 182, §§ 30, 26 Stat. at L. 81, 94, 95. In 1897, however, it was provided that the laws of the United States and of the *state of Arkansas* in force in the Indian Territory should "apply to all persons therein, irrespective of race" (act of June 7, 1897, chap. 3, 30 Stat. at L. 62, 83); and in 1898, Congress [63] abolished the tribal courts and prohibited the enforcement of the tribal laws. Act of June 28, 1898, chap. 517, §§ 26, 28, 30 Stat. at L. 495, 504. The original Creek agreement of 1901, supra, operated again to make effective, for the purposes stated, the Creek tribal laws with respect to "descent and distribution" of the property of Creek intestates (see §§ 7 and 28), and the provisions having this import remained in force until their repeal in the following year. Act of May 27, 1902, chap. 888, 32 Stat. at L. 245, 258, 32 Stat. at L. 742; supplemental agreement, act of June 30, 1902, chap. 1323, § 6, 32 Stat. at L. 500, 501.

The Creek laws thus made controlling are set forth in the agreed statement as follows:

"Sec. 6. Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children, the nearest relation shall inherit the property. Laws of Muscogee Nation, 1880, p. 132.

"Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one half of the estate, if there are no other heirs, and an heir's part, if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner. Laws of Muscogee Nation, 1880, p. 60.

"Sec. 1. All noncitizens, not previously adopted, and being married to citizens of this Nation, or having children entitled to citizenship, shall have a right to live in this Nation and enjoy all the privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands. Laws of the Muscogee Nation, 1890, p. 60."

See Perryman's Compiled Creek Laws of 1890, § 6, p. 32; § 8, p. 76; § 1, p. 66; Bledsoe's Indian Land Laws, 2d ed. §§ 829-831.

It will be observed that §§ 6 and 8 make no distinction between citizens and noncitizens. Under § 8, it is "the [64] lawful or acknowledged wife" or "husband" that is entitled to take. If a noncitizen within this description was to have "an heir's part," there would seem to be no reason for construing § 6 so as to exclude a noncitizen father of a deceased citizen, when the father is the "nearest relation." And it is contended by the defendant in error that the provision of § 1, above quoted, only de-

barred the noncitizen husband, or noncitizen father, from taking a membership interest in the tribal property, that is, from being counted as one of the *units* in the final distribution of the tribal lands, and did not deprive him of the right to take the part of an heir or next of kin in whatever property had come to be owned individually by the deceased wife or child.

While the agreed statement asserts that the laws above quoted are the "only" Creek statutes "in relation to descent and distribution" at the time in question, the plaintiff in error insists that we should take judicial notice of numerous other provisions of the Creek laws which it is urged must control. Thus we are referred—taking those statutes which are most nearly in point—to §§ 299 and 300 of McKellop's Compilation (1893) of Creek Laws to the effect that "no noncitizen shall, on account of marriage with a citizen of this Nation, acquire any right pertaining or belonging to a citizen of this Nation," and that "no noncitizen shall have the right to reside in or to own any improvement in this Nation, except as provided for in the treaties between this Nation and the United States;" and also to § 108 (McKellop's Comp. 1900), apparently approved October 30, 1894, that "no noncitizen shall be permitted to own houses or fences of any kind within the Nation, or any interest therein," and that "any purchase, grant, lease, or other conveyance of lands of the Muskogee Nation, or title or claim thereto given by any citizen or person claiming to be a citizen, contrary to § 2116 of the United States Intercourse Laws," shall be void.

[65] It is not certain that any of these last-mentioned provisions was intended to apply to the succession of a husband or father in case of intestacy. On the other hand, the acquisition of property rights within the Nation by an intermarried person, although a noncitizen, was distinctly recognized by the Creek act of April 6, 1894 (McKellop's Comp. 1900, §§ 76, 77), relating to the jurisdiction of the tribal courts. This act provided:

"Sec. 76. The courts of this Nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this Nation, and situated in the same, by noncitizens who have intermarried with citizens of this Nation, and by reason of such marriage secured rights and privileges in this Nation under which such property was acquired and accumulated by them. The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried noncitizens of our Nation who, by virtue of this intermarriage with citizens, acquired such property rights and privileges, and that irrespective of whether such controversies are between noncitizens and citizens of the Muskogee Nation or between any persons whomsoever, who claim in this Nation property rights under and through such intermarried noncitizens which are by them acquired in the manner aforesaid; and all persons hereafter intermarrying with citizens of this Nation shall thereby be deemed to consent that the courts of this Nation exercise jurisdiction over all property rights and privileges that they acquire in this Nation by virtue of their said marriage.

"Sec. 77. All property brought into this Nation by noncitizens in consequence of intermarriage of such noncitizens with citizens of this Nation shall likewise be under the jurisdiction of the courts of this Nation."

That the intermarried noncitizen could inherit under the tribal laws appears to have been the conclusion reached [66] in an unreported case (Porter v. Brook) in the United States court for the western district of the Indian Territory, and this ruling was followed by the supreme court of the state of Oklahoma in the case of De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624. It was held that a noncitizen husband, while by reason of the fact of his nonmembership he was not to be counted in determining the distributive shares for the purpose of allotment to, or in the right of, enrolled members of the tribe, was entitled under the tribal laws to take an heir's part of the lands which had been allotted to his deceased citizen wife. In that case the descent was controlled by the provision of § 7 of the original Creek agreement that the land allotted should descend to the heirs of the allottee "according to the laws of descent and distribution of the Creek Nation," the same expression that is used in § 28.

This decision as to the right of intermarried noncitizens to inherit has been repeatedly followed and has become a rule of property which, recognizing the importance of the security of titles, we should not disturb unless it is clearly wrong. But so far from the case being one of manifest error, it is apparent from the review of their provisions that the most that can be said is that the Creek laws were uncertain and ambiguous, and that their proper construction as an original question might be regarded as doubtful. It is true, of course, as urged by the plaintiff in error, that we are not dealing with a statute of a state, the meaning of which is necessarily settled by the state court, but even where we have undoubted right of review we ought not to

overturn, in a case at most debatable, a local rule of construction which for years has governed transfers of property. See Nadal v. May, 233 U. S. 447, 454, 58 L. ed. 1040, 1041, 34 Sup. Ct. Rep. 611.

It is insisted that the supplemental Creek agreement of 1902 (supra), in § 6, contains an interpretation by Congress of the words used in §§ 7 and 28 of the act of 1901. But we do not so read the later statute. Its evident [67] purpose was not to interpret the reference in the act of 1901 to the Creek laws of "descent and distribution," or to define the content and significance of such laws, but to supersede the former provision and to establish another rule. The previous provision with respect to descent and distribution according to the Creek laws was expressly repealed, and it was provided that "the descent and distribution" should be in accordance with chapter 49 of Mansfield's Digest of the statutes of Arkansas, with the proviso that Creek heirs, if there were such, should take to the exclusion of others. This was a recognition of dissatisfaction with the provision of the original agreement which made the Creek laws controlling, but the meaning and application of that provision in the cases governed by it were in no way affected.

We are therefore of the opinion that George A. Solander was entitled to the land which was allotted on behalf of his infant daughter, and, as in the case of an allotment of this sort, the restriction upon alienation was not applicable, he had the right to make the conveyance under which the defendant in error claims. Skelton v. Dill, 235 U. S. 206, ante, 198, 35 Sup. Ct. Rep. 60.

The judgment of the state court is affirmed.

Judgment affirmed.

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[68] JOHN H. SHELLENBARGER, Plff. in Err.,
v.
WILLIAM M. FEWELL.

(See S. C. Reporter's ed. 68-70.)

This case is governed by the decision in Reynolds v. Fewell, ante, 465.

[No. 103.]

Argued December 7 and 8, 1914. Decided January 18, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Tulsa County, in that state, in *favor of* plaintiff in an action to recover certain lands allotted under the original Creek agreement. Affirmed.

See same case below, 34 Okla. 79, 124 Pac. 617.

The facts are stated in the opinion.

Mr. William R. Lawrence argued the cause and filed a brief for plaintiff in error:

Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments of the same legislative body, there is found contradiction, when there was evidently no intention of such contradiction one of another.

Cooley, Const. Lim. 49, 50; Endlich, Interpretation of Statutes, § 1.

The words of a statute are not to be taken literally when it would lead to inconsistency, absurd consequences, and injustice. The reason of the law in such cases should prevail over its letter.

United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Hanger v. Abbott, 6 Wall. 532, 18 L. ed. 939.

Applying the rules of construction of the common law to laws of descent, an alien cannot inherit, in the absence of an express provision therefor, for he has no inheritable blood. It is contrary to the laws of all nations to allow an alien to become owner in fee of the lands of a country not his own.

Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 480; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634.

The spirit as well as the letter of the statute must be respected; and where the whole context of the law demonstrates a particular intent to effect a certain object, implication may be used to aid the intent.

Durousseau v. United States, 6 Cranch, 307, 3 L. ed. 232; Ex parte Ellis, 11 Cal. 222; Suckley v. Furse, 15 Johns. 338; People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243.

The decision in De Graffenreid v. Iowa Land & Trust Co. 20 Okla. 687, 95 Pac. 624, cannot be taken to have made an absolute rule of property.

Grimes v. Byrne, 2 Minn. 89, Gil. 72; Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334; Smith v. Smith, 13 La. 441; State v. Williams, 13 S. C. 546; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 27 Colo. 1, 50 L.R.A. 209, 83 Am. St. Rep. 17, 59 Pac. 607, 20 Mor. Min. Rep. 192.

Mr. F. W. Clements also argued the cause for plaintiff in error.

Messrs. Grant Foreman and James D. Simms filed a brief as *amici curiæ:*

When Minnie Solander died, on October 1, 1899, though she was entitled to receive

an allotment of Creek tribal lands, none having been selected by or for her, she was seised of no estate, legal or equitable, in the lands of the Creek Nation, and her heirs took nothing at that time by right of inheritance from her.

McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Brady v. Sizemore, 33 Okla. 169; Brann v. Bell, 192 Fed. 427; Franklin v. Lynch, 233 U. S. 269, 58 L. ed. 954, 34 Sup. Ct. Rep. 505.

When the allotment was made to the heirs of Minnie Solander, after the death of Minnie Solander, and after the death of Hettie Solander, the allotment was a direct grant to such heirs, who took by purchase, and the title vested in the heirs only, who were to be identified on the date of the allotment, and not on the date of the death of Minnie Solander.

Brown v. Belmarde, 3 Kan. 41; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302.

Mr. Joseph C. Stone argued the cause, and, with Mr. Henry B. Martin, filed a brief for defendant in error.

For contentions of counsel, see their brief as reported in Reynolds v. Fewell, ante, 465.

Mr. Justice Hughes delivered the opinion of the court:

Minnie Solander, a Creek, died intestate on October 8, 1899, leaving her husband, George Solander (who resided [69] in the Creek Nation, but was not a citizen thereof), her child, Hettie L. Solander, and her sister, Phoebe Trusler, surviving. Hettie L. Solander died intestate on December 19, 1899[1], without husband or issue; her father and aunt (above mentioned) survived her. Minnie Solander was duly enrolled as a member of the Creek tribe, and, after the death of herself and her daughter, an allotment was made to her "heirs" of certain land, the title to which is here in controversy. Her husband, George Solander, on April 27, 1906, executed a conveyance of this land to William M. Fewell, who brought the present action in ejectment against the plaintiff in error, John H. Shellenbarger; the latter claimed the property under a deed from Phœbe Trusler, the nearest relative of Indian blood.

The supreme court of the state of Oklahoma held that the husband, although a noncitizen, had title to the lands allotted on behalf of his wife, and that they passed under his conveyance. 34 Okla. 79, 124 Pac. 617. And this writ of error has been sued out.

The record in this case does not show the date of the allotment made on behalf of Minnie Solander,[2] but the state court concluded "from the admissions in the agreed statement of facts and the briefs of both parties" that the allotment had been selected, and the certificate issued, under the original Creek agreement of March 1, 1901, 31 Stat. 861, chap. 676. This has also been assumed in the argument here. The case is, therefore, controlled by § 28 of the act of 1901, supra, which provides that the lands to which the deceased member of the tribe would have been entitled, if living, should "descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted . . . accordingly." Under [70] these laws, according to the settled rule of construction, George Solander was entitled to the property and had the right to convey. Reynolds v. Fewell, 236 U. S. 58, ante, 465, 35 Sup. Ct. Rep. 230.

The question whether the persons entitled to take lands allotted under § 28 on behalf of a deceased member of the tribe should be ascertained by reference to the time of the death of the decedent, or by reference to the date of the allotment, has been discussed in the briefs, but is not material here, inasmuch as, in either event, George Solander took all the lands in question; it is not necessary to inquire whether an undivided interest should be treated as one passing in the first instance to his daughter, and on her death to him.

Judgment affirmed.

SIMON LESSER, Plff. in Err.,
v.
JAMES R. GRAY.

(See S. C. Reporter's ed. 70–75.)

Error to state court — Federal question — bankruptcy case.

1. A contention seasonably made that, because a bankruptcy court adjudicated the debt in suit to be not provable, the proceedings in bankruptcy and the discharge of

[1] The date of her death is given in the agreed statement in No. 102, Reynolds v. Fewell, 236 U. S. 58, ante, 465, 35 Sup. Ct. Rep. 230, as November 17, 1899.

[2] The date of this allotment is stated in the record in No. 102, Reynolds v. Fewell, 236 U. S. 58, ante, 465, 35 Sup. Ct. Rep. 230, as December 3, 1901.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter,

the defendant constituted no bar to a recovery thereon in a state court, raises a Federal question which will support a writ of error from the Federal Supreme Court to the state court to review a final judgment for defendant.

[For other cases, see Appeal and Error, 1940-1962, in Digest Sup. Ct. 1908.]

Bankruptcy — effect on executory contract — disallowance of claim — discharge — res judicata.

2. The dismissal by a state court of a suit against a partner upon a claim against the bankrupt estate of the partnership and its members for damages arising out of the failure of the firm, after the institution of the bankruptcy proceedings, to perform an executory contract for the purchase of merchandise to be delivered to the firm from time to time, was proper, where the bankruptcy court disallowed the claim and granted a discharge, even if the view of both the bankruptcy and state courts that the contract was terminated by the involuntary bankruptcy proceedings, and therefore no legal injury resulted, was erroneous, since in that case there was a breach of the contract, and the partnership became liable for the resulting damage, from which liability the partner was released by his discharge.

[For other cases, see Bankruptcy, XI., in Digest Sup. Ct. 1908.]

[No. 110.]

Submitted December 9, 1914. Decided January 18, 1915.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Atlanta, in that state, in favor of defendant in a suit against a former member of a bankrupt partnership. Affirmed.

See same case below, 8 Ga. App. 605, 70 S. E. 104.

The facts are stated in the opinion.

Mr. **Henry A. Alexander** submitted the cause for plaintiff in error. Messrs. C. Henry Cohen and Rodney S. Cohen were on the brief:

The petition showed that the plaintiff's claim had been adjudged by the bankruptcy court, to which it had been presented for proof, to be not provable, and a discharge in bankruptcy operates to relieve the bankrupt from his provable debts only.

Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232; Crawford v. Burke, 195 U. S. 176, 186, 49 L. ed. 147, 150, 25 Sup. Ct. Rep. 9; Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493; Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 448, 53 L. ed. 591, 593, 29 Sup. Ct. Rep. 332; Zavelo v. Reeves, 227 U. S. 625, 632, 57 L. ed. 676, 679, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; Moch v. Market Street Nat. Bank, 47 C. C. A. 49, 107 Fed. 897; Hamilton v. McCroskey, 112 Ga. 651, 37 S. E. 859; Graham v. Richerson, 115 Ga. 1002, 42 S. E. 374; Williams & Co. v. United States Fidelity & G. Co. 11 Ga. App. 635, 75 S. E. 1067; Haber-Blum-Bloch Hat Co. v. Friesleben, 5 Ga. App. 123, 62 S. E. 712; Baker v. Hooks, 6 Ga. App. 121, 64 S. E. 573; National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131; Wight v. Gottschalk, — Tenn. —, 43 L.R.A. 193, 48 S. W. 140; Dight v. Chapman, 44 Or. 272, 65 L.R.A. 793, 75 Pac. 585; Sayre v. Glenn, 87 Ala. 631, 6 So. 45; Glenn v. Howard, 65 Md. 61, 3 Atl. 895; Deane v. Caldwell, 127 Mass. 244; Paddleford v. State, 57 Miss. 121; Heywood v. Shreve, 44 N. J. L. 94; Manion v. Campbell, 10 Mo. App. 92; Eberhardt v. Wood, 2 Tenn. Ch. 488; Collier, Bankr. 9th ed. p. 384; Remington, Bankr. § 628.

Trustees in bankruptcy or receivers in equity have the option, if they deem it to the advantage of their estate, to adopt and carry out executory contracts.

United States Trust Co. v. Wabash Western R. 150 U. S. 287, 300, 37 L. ed. 1085, 1088, 14 Sup. Ct. Rep. 86; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. Rep. 206.

This option is incompatible with the idea that adjudication in bankruptcy terminates and destroys the executory contracts of the bankrupt.

The merest reading of the decision of the court shows that it was not a "denial" of the claim. It was a judgment that, there having been no breach of the contract at the date of the filing of the petition, it was therefore not provable. A decision on this

4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the *Supreme* Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of decisions of state courts in cases involving questions of bankruptcy—see note to Thompson v. Fairbanks, 49 L. ed. U. S. 577.

As to adjudication of bankruptcy of member of firm as affecting rights of firm creditors—see note to American Steel & Wire Co. v. Coover, 30 L.R.A. (N.S.) 787.

As to discharge of partnership liability in individual bankruptcy proceedings—see note to Loomis v. Wallblom, 69 L.R.A. 771.

ground, that a claim is not provable, is not the equivalent of a judgment "denying" the claim. It means only that, the claim being immature, the bankruptcy court has no jurisdiction to deal with it, either to declare it valid or invalid. Such decision is analogous to the judgment of a court of general jurisdiction sustaining a plea in abatement based on the ground of the prematurity of the suit. The effect of such a judgment is to adjudicate not the validity or invalidity of the cause of action, but to declare only that that particular court had then no power to pass upon it.

23 Cyc. 1147, 1151, 1231.

This question, whether the contract had or had not been avoided by the adjudication, was manifestly not before the bankruptcy court. It had been wholly removed from the field of controversy by the explicit statement of the trustees that the contract had not been avoided.

Reynolds v. Stockton, 140 U. S. 254, 270, 35 L. ed. 464, 469, 11 Sup. Ct. Rep. 773.

When a claim is presented to a bankruptcy court for allowance, the first question to be determined by the court is whether it has jurisdiction, or, in other words, whether the claim is provable. If that question be answered in the affirmative, then the court may proceed to pass upon the validity or invalidity of the claim. But if the court concludes that the claim is not provable, it can go no further, because by this judgment it has decreed its own lack of power to proceed further. If it should attempt nevertheless to adjudicate the merits of the claim, the act would be beyond its judicial authority, and its words would be merely *obiter dicta*, and without judicial force. This limitation upon the power of the court is inherent in the very nature of judicial action, and applies equally to all courts, including those of bankruptcy jurisdiction.

Bryan v. Bernheimer, 181 U. S. 188, 197, 45 L. ed. 814, 819, 21 Sup. Ct. Rep. 557.

This court has jurisdiction.

Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; Dimock v. Revere Copper Co. 117 U. S. 559, 29 L. ed. 994, 6 Sup. Ct. Rep. 855; Long v. Bullard, 117 U. S. 617, 29 L. ed. 1004, 6 Sup. Ct. Rep. 917; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Winchester v. Heiskell, 119 U. S. 450, 30 L. ed. 462, 7 Sup. Ct. Rep. 281; Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176; Acme Harvester Co. v. Beckman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96; Zavelo v. Reeves, 227 U. S. 625, 628, 57 L. ed. 676, 677, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664.

Messrs. **Alexander C. King** and **Charles T. Hopkins** submitted the cause for defendant in error:

It is only where one of the parties sets up a title, privilege, right, claim, or immunity under some Federal authority, and the decision is adverse to the claim thus set up, that the right to review such decision on writ of error is conferred upon the Supreme Court of the United States.

Missouri ex rel. Carey v. Adriano, 138 U. S. 496, 500, 34 L. ed. 1012, 1014, 11 Sup. Ct. Rep. 385; 3 Foster, Fed. Pr. 4th ed. § 500, p. 2000; Holden Land & Live Stock Co. v. Inter State Trading Co. 233 U. S. 536, 58 L. ed. 1083, 34 Sup. Ct. Rep. 661.

Therefore where suit is brought against a party and he files a plea of bankruptcy, setting up his discharge, and the plea is sustained, the plaintiff cannot maintain a writ of error to the Supreme Court of the United States, as the decision has been in favor of the claim set up under the Federal authority.

Linton v. Stanton, 12 How. 423, 13 L. ed. 1050; Smalley v. Laugenour, 196 U. S. 93, 49 L. ed. 400, 25 Sup. Ct. Rep. 216.

The adjudication in bankruptcy canceled the contract, and left the plaintiff in error with no legal claim for the damages asserted.

22 Am. & Eng. Enc. Law, 2d ed. 202, 30 Cyc. 654; McElheney v. Jasper Trading Co. 12 Ga. App. 790, 78 S. E. 727; Griggs v. Swift, 82 Ga. 393, 5 L.R.A. 405, 14 Am. St. Rep. 176, 9 S. E. 1062; Re Imperial Brewing Co. 143 Fed. 579; Re Jefferson, 93 Fed. 948; Bray v. Cobb, 100 Fed. 270; Re Inman & Co. 171 Fed. 185, 175 Fed. 313; Re Merrill & Baker, 108 C. C. A. 390, 186 Fed. 314; Re American Vacuum Cleaner Co. 192 Fed. 940; Re Hays, F. & W. Co. 117 Fed. 879; Malcomson v. Wappoo Mills, 88 Fed. 680.

Mr. Justice **McReynolds** delivered the opinion of the court:

Lesser brought suit in the city court of Atlanta against Gray and another, once members of Inman & Company, for damages alleged to have resulted from breach of contract by the firm. A demurrer was sustained and final judgment rendered for defendant; this was affirmed by the court of appeals of Georgia (8 Ga. App. 605, 70 S. E. 104), and the matter is here upon writ of error.

A motion to dismiss must be denied. Plaintiff in error seasonably set up and claimed that, because the bankruptcy court adjudicated his debt to be not provable (Re Inman & Co. 175 Fed. 312), the pro-

ceedings in bankruptcy and discharge of defendant constituted no bar to a recovery thereon in the state court. A Federal issue is raised and we cannot say that it is too frivolous to give jurisdiction. Rector v. City Deposit Bank Co. 200 U. S. 405, 411, 50 L. ed. 527, 529, 26 Sup. Ct. Rep. 289.

The following summary adequately indicates the essentials of the original petition:

Inman & Company, a copartnership composed of Gray and [72] others, in July, 1907, agreed to purchase from Lesser 500 bales of patches—cotton bagging—to be delivered during the twelve months commencing September 1, 1907. About one third was delivered and paid for prior to May 4, 1908, at which time an involuntary petition in bankruptcy was filed against the firm and its members. Shortly thereafter all were adjudicated bankrupts. Trustees were appointed, and in July, 1908, Gray obtained his discharge. Prior to the bankruptcy proceedings there was no breach or disavowal of the contract, and thereafter no demand for further deliveries nor offer to make any.

In February, 1909, Lesser presented a claim against the estate for his alleged loss. The trustees objected on several grounds. Among others these were specified: "That said claim is not a provable claim in bankruptcy under the provisions of the bankrupt act; that said claim on its face shows that at the time of the filing of the petition in said cause, and at the date of adjudication, the merchandise, the subject-matter of the claim, had not been delivered to the bankrupts as provided under the contract of sale therein set forth, but that all of said merchandise that had been delivered, to wit, the amount of 174 bales, had been paid for. . . . Said proof shows that at the date of the adjudication, as well as the filing of the petition, no breach of said contract had occurred. . . . Your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy, and, therefore, that the same is not a provable debt."

The referee disallowed the claim, and the United States district court approved his action for reasons stated in a written opinion incorporated in the petition.

"Petitioner shows that the defendants have failed under said contract to accept and pay for 326 bales of patches at the contract price, and petitioner having retained said goods, defendants are indebted to him for the difference between the contract price and the market price at the [73] time and place of delivery under said contract; . . . that his said claim having been disallowed and adjudicated not provable in bankruptcy, the said discharges of the defendants are no bar to the prosecution of this suit, and the plea of bankruptcy is not available to the defendants;" and he prays for judgment.

In support of the demurrer defendant Gray maintains: (1) The plaintiff sustained no legal injury. Before any breach of the contract an involuntary petition in bankruptcy, afterwards sustained, was commenced against the partnership and its members; the partnership was dissolved, the contract rendered impossible of performance and annulled by the law; and whatever loss resulted was *damnum absque injuria*. (2) If there ever was a valid claim, defendant's discharge in bankruptcy acquitted it. (3) The matter was submitted to a competent court of bankruptcy with exclusive jurisdiction, which disallowed the demand; no appeal was taken; and the question became *res judicata*.

The plaintiff in error insists: That he suffered legal damage because the contract of purchase was not fully complied with. "Under the classification of the act, claims are either provable or not provable;" when of the former class, they are dischargeable; when of the latter, they are not dischargeable. His "claim had been adjudged by the bankruptcy court, to which it had been presented for proof, to be not provable," and therefore the discharge constitutes no bar to his right to recover against the defendant.

Section 2 of the bankruptcy law (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), invests courts of bankruptcy with jurisdiction to "(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; . . . (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination [74] of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; . . . (10) consider and confirm, modify, or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." A "'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." (§ 1.) "A discharge in bankruptcy shall release a bankrupt from

all of his provable debts." (§ 17.) Debts of the bankrupt may be proved and allowed against his estate which are founded upon an open account, or upon a contract, express or implied; and unliquidated claims may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed. (§ 63.)

A bankruptcy court in which an estate is being administered has full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based. This is essential to the performance of the duties imposed upon it. When an alleged debt or obligation is ascertained to be invalid—without lawful existence—the claim based thereon is necessarily disallowed. A disallowed claim and a nonprovable debt are not identical things; and a failure accurately to observe the distinction has led to confusion in argument.

The United States district court, being of opinion that an implied condition in Lesser's contract terminated it when the involuntary bankruptcy proceeding was begun, held that the bankrupt incurred no obligation to pay damage by reason of the firm's failure fully to comply therewith. [75] Accordingly the judgment in respect of the claim presented by plaintiff against the estate was that it be disallowed because without foundation,—not that he had a nonprovable debt.

The petition in the cause now under review was properly dismissed. If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach, and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge. In this state of the record we will not enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer. No effort was made by plaintiff in error to secure a review of the action of the bankruptcy court in the direct way prescribed by the statute, and that result may not be obtained indirectly through the present proceeding. The judgment of the court below is affirmed.

LIEUTENANT COLONEL DANIEL C. STEARNS, Appt.,

v.

BRIGADIER GENERAL GEORGE H. WOOD.

(See S. C. Reporter's ed. 75-78.)

Appeal — from district court — Federal question — moot case.

An appeal will not lie to the Federal Supreme Court from a decree of a district court in a suit brought by a major in the inspector general's department of the Ohio National Guard, to test the validity under the Federal Constitution of general orders of the state adjutant general, issued conformably to the commands of the War Department, which regulate the members, officers, and organization of the state militia, and direct that upon any declaration of war all furloughs shall be revoked, and all the officers and soldiers shall assemble and proceed wherever directed by the President, whether within or without the United States, where his personal rights are not directly threatened or violated, and his present rank remains undisturbed, although, under such orders, the maximum rank of senior officers in his department is reduced to that of lieutenant colonel.

[For other cases, see Appeal and Error, 987-989, in Digest Sup. Ct. 1908.]

[No. 647.]

Argued and submitted December 18, 1914.
Decided January 18, 1915.

APPEAL from the District Court of the United States for the Northern District of Ohio to review a decree dismissing a bill which seeks to enjoin the state adjutant general from enforcing certain general orders issued conformably to the commands of the War Department, regulating the state National Guard. Dismissed.

The facts are stated in the opinion.

Messrs. **Harvey R. Keeler** and **Fred C. Geiger** submitted the cause for appellant.

Mr. **Hubert J. Turney** argued the cause, and, with Messrs. Nathan William MacChesney and Don R. Sipe, filed a brief for appellee.

Mr. Justice **McReynolds** delivered the opinion of the court:

This is a direct appeal from the district court, which held that the original bill states no cause of action. It must be dismissed unless the case involves the construction or application of the Constitution of the United States, or the constitutionality of a Federal statute is fairly drawn in question.

The only serious attempt to show that appellant has a direct personal interest in the subject presented is found in the section of the bill which alleges that he is now serving as a major in the inspector general's department of the [77] Ohio National Guard, and is aggrieved because defendant

NOTE.—On direct review in Federal Supreme Court, of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

Wood, the adjutant general of the state, is about to put into full force and effect a general order issued by command of the Secretary of War, and known as circular No. 8, which, without right or authority, directs that the maximum rank of senior officers in complainant's department shall be a lieutenant colonel, and if this is done he will be prevented from attaining and serving in the higher rank permitted by the existing laws of Ohio.

Sec. 3 of the military law (act of January 21, 1903, chap. 196), 32 Stat. at L. 775, as amended by the act of May 27, 1908, chap. 204, 35 Stat. at L. 399, Comp. Stat. 1913, § 3044, provides that on and after January 21, 1910, the organization, armament, and discipline of the organized militia in the several states, territories, and the District of Columbia, shall be the same as that which is now or may hereafter be prescribed for the regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. Exercising his discretion, the Secretary of War directed the issuance of circular No. 8, to become effective January 1, 1914. It is comprehensive in terms and prescribes general regulations concerning the members, officers, and organization of the state militia. The validity of the order is denied.

The bill further avers that the adjutant general of Ohio has issued an order with respect to the mobilization of the National Guard of that state, wherein he commands that upon any declaration of war all furloughs shall be revoked and all the officers and soldiers shall assemble and proceed wherever directed by the President, whether within or without the United States. The validity of this is also denied.

The brief in behalf of appellant states that "this action is a test case brought by an officer of the National Guard against the adjutant general of Ohio, who are nominal complainant and respondent, and involves the construction [78] of certain constitutional provisions, as follows:" art. I., § 8, ¶ 16; the 2d Amendment; the 10th Amendment; art I., § 8, ¶ 15; the Preamble to the Constitution; the provision making the President commander in chief of the militia when called into the Federal service; the power granted to Congress to raise and support armies. "The action also seeks a construction with respect to the right of the President and Congress over the National Guard of the several states, and the status and legal relation of the officers thereof to the War Department; and raises the further question whether the National Guard or organized militia may be used without the territorial limits of the United States, as such."

The general orders referred to in the bill do not directly violate or threaten interference with the personal rights of appellant—a major in the National Guard, whose present rank remains undisturbed. He is not, therefore, in position to question their validity; and certainly he may not demand that we construe orders, acts of Congress, and the Constitution for the information of himself and others, notwithstanding their laudable feeling of deep interest in the general subject. The province of courts is to decide real controversies, not to discuss abstract propositions. Little v. Bowers, 134 U. S. 547, 557, 33 L. ed. 1016, 1020, 10 Sup. Ct. Rep. 620; California v. San Pablo & T. R. Co. 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876; Richardson v. McChesney, 218 U. S. 487, 492, 54 L. ed. 1121, 1122, 31 Sup. Ct. Rep. 43; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 648, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678.

We cannot consider the points suggested, and the appeal is dismissed.

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[79] GEORGE BURDICK, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 79-95.)

Pardon — effect — necessity of acceptance.

1. A pardon from the President, to be effective, must be accepted by the person to whom it is tendered.

[For other cases, see Pardon, III., in Digest Sup. Ct. 1908.]

Witnesses — privilege — effect of rejected pardon.

2. The tender of a pardon from the President does not destroy the privilege of a witness against self-crimination, but he may reject the pardon and refuse to testify on the ground that his testimony may have an incriminating effect.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[No. 471.]

Argued December 16, 1914. Decided January 25, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment for contempt for refusing to testify before the grand jury. Reversed, with directions to dismiss the proceedings and discharge the plaintiff in error from custody.

See same case below, 211 Fed. 492.

The facts are stated in the opinion.

Mr. Henry A. Wise argued the cause and filed a brief for plaintiff in error:

The proceeding before the grand jury was a "criminal case," within the meaning of the 5th Amendment to the Constitution.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

Plaintiff in error was privileged to decline to answer the questions, upon the ground that his answers thereto might tend to criminate him.

1 Burr's Trial, 244; Counselman v. Hitchcock, 142 U. S. 564, 35 L. ed. 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Sanderson's Case, 3 Cranch, C. C. 638, Fed. Cas. No. 12,297.

The refusal of a witness to answer questions upon the ground that his answers many tend to criminate him does not constitute either an admission or proof of his guilt of any offense.

30 Am. & Eng. Enc. Law, 1170; Rose v. Blakemore, Ryan & M. 382; Phelin v. Kenderdine, 20 Pa. 354; State v. Bailey, 54 Iowa, 414, 6 N. W. 589; Dorendinger v. Tschechtelin, 12 Daly, 34; 1 Greenl. Ev. 16th ed. § 469d; Wigmore, Ev. § 2272; Wilson v. United States, 149 U. S. 60, 37 L. ed. 650, 13 Sup. Ct. Rep. 765; Fitzpatrick v. United States, 178 U. S. 304, 315, 44 L. ed. 1078, 1083, 20 Sup. Ct. Rep. 944; Boyle v. Smithman, 146 Pa. 255, 23 Atl. 397; Beach v. United States, 46 Fed. 754.

The President was without power to issue any pardon to plaintiff in error; and consequently the warrant tendered is null, void, and of no effect.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Cooley, Const. Lim. p. 11; Ex parte Wells, 18 How. 307, 15 L. ed. 421; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; 20 Ops. Atty. Gen. 330; 24 Am. & Eng. Enc. Law, 575, 576; 2 Hawk. P. C. chap. 37, § 9, p. 543; Re Nevitt, 54 C. C. A. 622, 117 Fed. 448; 11 Ops. Atty. Gen. 227; Howard's Case, T. Raym. 13; United States v. Klein, 13 Wall. 128, 20 L. ed. 519; Armstrong's Foundry, 6 Wall. 766, 18 L. ed. 882; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426; Lapeyre v. United States, 17 Wall. 191, 21 L. ed. 606; Osborn v. United States, 91 U. S. 474, 23 L. ed. 388; Wallach v. Van Riswick, 92 U. S. 202, 23 L. ed. 473; United States v. Padelford, 9 Wall. 531, 19 L. ed. 788; Armstrong v. United States, 13 Wall. 155, 20 L. ed. 615; Pargoud v. United States, 13 Wall. 157, 20 L. ed. 646.

Plaintiff in error having refused to accept the tendered pardon, the same is of no effect.

United States v. Wilson, 7 Pet. 150, 8 L. ed. 640; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; Cooley, Const. Law, 3d ed. p. 115.

The decision of the court below is equivalent to the conviction of plaintiff in error of an offense against the United States without trial by jury, and consequently in violation of his rights under the Constitution of the United States.

24 Am. & Eng. Enc. Law, 579; 11 Ops. Atty. Gen. 227; Dominick v. Bowdoin, 44 Ga. 357; Manlove v. State, 153 Ind. 80, 53 N. E. 385; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People v. Marsh, 125 Mich. 410, 51 L.R.A. 461, 84 Am. St. Rep. 584, 84 N. W. 472; United States v. Armour & Co. 142 Fed. 808.

The tendered pardon is not an equivalent of the constitutional privilege of plaintiff in error.

Counselman v. Hitchcock, 142 U. S. 564, 35 L. ed. 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Cooley, Const. Lim. pp. 5, 365.

Messrs. Henry A. Wise and Henry W. Sackett also filed a brief for plaintiff in error:

The interpretation of the language of the Constitution conferring the pardoning power upon the President, "and he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment" (art. 2, § 2, subdiv. 1), contended for by the United States, stretches the actual language of the Constitution in that it makes the word "offenses" connote conjectural or purely hypothetical offenses, in addition to ascertained events. Assuming for the sake of argument that this construction is permissible, upon a mere examination of the language, then there is presented a case in which there is a choice between two permissible constructions, and in such a case the court must choose the one which is most in harmony with the Constitution taken as a whole, and with the spirit of our institutions.

Gibbons v. Ogden, 9 Wheat. 1, 188, 6 L. ed. 23, 68; Legal Tender Cases, 12 Wall. 457, 531, 532, 20 L. ed. 287, 305, 306; Ex parte Griffin, 17 Am. L. Reg. 358.

The construction of the words conferring the pardoning power that is contended for by the United States would tend to destroy some of the most essential safeguards of free government. It would pervert the grand jury, which in its origin was an institution which stood as a barrier against persecution by the Crown, into an instrument of inquisition that might be used by the executive department for the purpose of

throttling the free and wholesome criticism of the acts of public officials. It would tend to destroy to a dangerous degree the separation of powers between the executive and the judicial branches of the government, and in practical effect would arm the executive with summary powers which ought to be possessed only by the judicial branch. It would inevitably create the possibility of putting into effect a system of censorship of news concerning the acts of public officials, and tend to the creation of a secret and powerful bureaucracy.

Ex parte Bain, 121 U. S. 1, 10, 11, 30 L. ed. 849, 852, 853, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; Kilbourn v. Thompson, 103 U. S. 169, 190, 26 L. ed. 377, 386.

Solicitor General **Davis** argued the cause and filed a brief for defendant in error:

The President has the power to pardon a person for an offense of which he has not been convicted.

3 Co. Inst. 233, chap. 105; 4 Bl. Com. chap. XXVI. subdiv. IV. chaps. XXVIII., XXXI.; 6 Laws of England (Halsbury) p. 404; 20 Ops. Atty. Gen. 339; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Dominick v. Bowdoin, 44 Ga. 357; Grubb v. Bullock, 44 Ga. 379; Com. v. Bush, 2 Duv. 264; State v. Woolery, 29 Mo. 300.

The president's power of pardon is not subject to legislation, and Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders (United States v. Klein, 13 Wall. 128, 141, 20 L. ed. 519, 523). It cannot be interrupted, abridged, or limited by any legislative enactment.

The Laura (Pollock v. Bridgeport S. B. Co.) 114 U. S. 411, 414, 29 L. ed. 147, 148, 5 Sup. Ct. Rep. 881; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366.

A pardon may be granted for the purpose of affording to a witness immunity from prosecution.

Brown v. Walker, 161 U. S. 591, 601, 40 L. ed. 819, 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The immunity afforded by the pardons is as broad as the protection afforded by the constitutional provision against compelling a person to be a witness against himself.

Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Hale v. Henkel, 201 U. S. 43, 68, 50 L. ed. 652, 663, 26 Sup. Ct. Rep. 370; Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358.

No formal acceptance is necessary to give effect to the pardons.

Re Callicot, 8 Blatchf. 89, Fed. Cas. No. 2,323.

Mr. Justice **McKenna** delivered the opinion of the court:

Error to review a judgment for contempt against Burdick upon presentment of the Federal grand jury for [85] refusing to answer certain questions put to him in an investigation then pending before the grand jury into alleged custom frauds in violation of §§ 37 and 39 of the Criminal Code of the United States [35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, §§ 10201, 10203].

Burdick first appeared before the grand jury and refused to answer questions as to the directions he gave and the sources of his information concerning certain articles in the New York Tribune regarding the frauds under investigation. He is the city editor of that paper. He declined to answer, claiming upon his oath, that his answers might tend to criminate him. Thereupon he was remanded to appear at a later day, and upon so appearing he was handed a pardon which he was told had been obtained for him upon the strength of his testimony before the other grand jury. The following is a copy of it:

"Woodrow Wilson, President of the United States of America, to all to whom these presents shall come, Greeting:

"Whereas George Burdick, an editor of the New York Tribune, has declined to testify before a Federal grand jury now in session in the southern district of New York, in a proceeding entitled, 'United States v. John Doe and Richard Roe,' as to the sources of the information which he had in the New York Tribune office, or in his possession, or under his control at the time he sent Henry D. Kingsbury, a reporter on the said New York Tribune, to write an article which appeared in the said New York Tribune in its issue of December 31st, 1913, headed, 'Glove Makers' Gems May Be Customs Size,' on the ground that it would tend to incriminate him to answer the questions; and,

"Whereas, the United States attorney for the southern district of New York desires to use the said George Burdick as a witness before the said grand jury in the said proceeding for the purpose of determining whether any employee of the Treasury Department at the customhouse, [86] New York city, has been betraying information that came to such person in an official capacity; and,

"Whereas, it is believed that the said George Burdick will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

"Now, therefore, be it known, that I,

Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said George Burdick a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter, or thing concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.

"In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed. Done at the city of Washington this fourteenth day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth."

He declined to accept the pardon or answer questions as to the sources of his information, or whether he furnished certain reporters information, giving the reason, as before, that the answers might tend to criminate him. He was presented by the grand jury to the district court for contempt, and adjudged guilty thereof and to pay a fine of $500, with leave, however, to purge himself by testifying fully as to the sources of the information sought of him, "and in event of his refusal or failure to so answer, a [87] commitment may issue in addition until he shall so comply," the court deciding that the President has power to pardon for a crime of which the individual has not been convicted and which he does not admit, and that acceptance is not necessary to toll the privilege against incrimination.

Burdick again appeared before the grand jury, again was questioned as before, again refused to accept the pardon, and again refused to answer upon the same grounds as before. A final order of commitment was then made and entered, and he was committed to the custody of the United States marshal until he should purge himself of contempt, or until the further order of the court. This writ of error was then allowed.

The question in the case is the effect of the unaccepted pardon. The Solicitor General, in his discussion of the question, following the division of the district court, contends (1) that the President has power to pardon an offense before admission or conviction of it, and (2) the acceptance of the pardon is not necessary to its complete exculpating effect. The conclusion is hence deduced that the pardon removed from Burdick all danger of accusation or conviction of crime, and that, therefore, the answers to the questions put to him could not tend to or accomplish his incrimination.

Plaintiff in error counters the contention and conclusion with directly opposing ones, and makes other contentions which attack the sufficiency of the pardon as immunity and the power of the President to grant a pardon for an offense not precedently established nor confessed nor defined.

The discussion of counsel is as broad as their contentions. Our consideration may be more limited. In our view of the case it is not material to decide whether the pardoning power may be exercised before conviction. We may, however, refer to some aspects of the contentions of plaintiff in error, although the case may be brought to [88] the narrow question, Is the acceptance of a pardon necessary? We are relieved from much discussion of it by United States v. Wilson, 7 Pet. 150, 8 L. ed. 640. Indeed, all of the principles upon which its solution depends were there considered and the facts of the case gave them a peculiar and interesting application.

There were a number of indictments against Wilson and one Porter, some of which were for obstructing the mail and others for robbing the mail and putting the life of the carrier in jeopardy. They were convicted on one of the latter indictments, sentenced to death, and Porter was executed in pursuance of the sentence. President Jackson pardoned Wilson, the pardon reciting that it was for the crime for which he had been sentenced to suffer death, remitting such penalty with the express stipulation that the pardon should not extend to any judgment which might be had or obtained against him in any other case or cases then pending before the court for other offenses wherewith he might stand charged.

To another of the indictments Wilson withdrew his plea of not guilty and pleaded guilty. Upon being arraigned for sentence the court suggested the propriety of inquiring as to the effect of the pardon, "although alleged to relate to a conviction on another indictment." Wilson was asked if he wished to avail himself of the pardon, to which he answered in person that "he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid sentence in this particular case, of the pardon referred to."

The judges were opposed in opinion and certified to this court for decision two propositions which were argued by the district attorney of the United States, with one only of which we are concerned. It was as follows: "2. That the prisoner can, under this conviction, derive no advantage

from the pardon, without bringing the same judicially before the court by plea, motion, or otherwise." [89] There was no appearance for Wilson. Attorney General Taney (afterwards chief justice of this court) argued the case on behalf of the United States. The burden of his argument was that a pardon, to be effective, must be accepted. The proposition was necessary to be established, as his contention was that a plea of the pardon was necessary to arrest the sentence upon Wilson. And he said, speaking of the pardon, "It is a grant to him [Wilson]; it is his property; and he may accept it or not, as he pleases;" and, further: "It is insisted that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the court cannot notice it, nor allow it to prevent them from passing sentence. The whole current of authority establishes this principle." The authorities were cited and it was declared that "the necessity of pleading it, or claiming it in some other manner, grows out of the nature of the grant. He must accept it."

There can be no doubt, therefore, of the contention of the Attorney General, and we have quoted it in order to estimate accurately the response of the court to it. The response was complete and considered the contention in two aspects: (1) a pardon as the act of the President, the official act under the Constitution; and (2) the attitude and right of the person to whom it is tendered. Of the former it was said that the power had been "exercised from time immemorial by the executive of that nation [England], whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." From that source of authority and principle the court deduced and declared this conclusion: "A pardon is an act of grace, proceeding from the power intrusted with the execution of [90] the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the *private* [italics ours] though official act of the executive magistrate, delivered to the individual for whose benefit it is intended." In emphasis of the official act and its functional deficiency if not accepted by him to whom it is tendered, it was said: "A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on."

Turning, then, to the other side, that is, the effect of a pardon on him to whom it is offered, and completing its description and expressing the condition of its consummation, this was said: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the government in the case at bar, was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the "private" act, the "private deed," of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance.

Indeed, the grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by [91] confession of guilt implied in the acceptance of a pardon may be rejected,—preferring to be the victim of the law rather than its acknowledged transgressor,—preferring death even to such certain infamy. This, at least theoretically, is a right, and a right is often best tested in its extreme. "It may be supposed," the court said in United States v. Wilson, "that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment."

The case would seem to need no further comment, and we have quoted from it not only for its authority, but for its argument. It demonstrates by both the necessity of the acceptance of a pardon to its legal efficacy, and the court did not hesitate in decision, as we have seen, whatever the alternative of acceptance,—whether it be death or lesser penalty. The contrast shows the right of the individual against the exercise of executive power not solicited by him nor accepted by him.

The principles declared in United States v. Wilson have endured for years; no case has reversed or modified them. In Ex parte Wells, 18 How. 307, 310, 15 L. ed. 421, 423,

this court said: "It was with the fullest knowledge of the law upon the subject of pardons and the philosophy of government in its bearing upon the Constitution when this court instructed Chief Justice Marshall" to declare the doctrine of that case. And in Com. v. Lockwood it was said by Mr. Justice Gray, speaking for the supreme judicial court of Massachusetts, he then being a member of that court, it is within the election of a defendant "whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional)." 109 Mass. 323, 339, 12 Am. Rep. 699. The whole discussion of the learned justice will repay a reference. He cites and reviews [92] the cases with the same accurate and masterful consideration that distinguished all of his judicial work, and the proposition declared was one of the conclusions deduced.

United States v. Wilson, however, is attempted to be removed as authority by the contention that it dealt with conditional pardons, and that, besides, a witness cannot apprehend from his testimony a conviction of guilt, which conviction he himself has the power to avert, or be heard to say that the testimony can be used adversely to him, when he himself has the power to prevent it by accepting the immunity offered him. In support of the contentions there is an intimation of analogy between pardon and amnesty, cases are cited, and certain statutes of the United States are adduced whereby immunity was imposed in certain instances, and under its unsolicited protection testimony has been exacted against the claim of privilege asserted by witnesses. There is plausibility in the contentions; it disappears upon reflection. Let us consider the contentions in their order:

(1) To hold that the principle of United States v. Wilson was expressed only as to conditional pardons would be to assert that the language and illustrations which were used to emphasize the principle announced were meant only to destroy it. Besides, the pardon passed on was not conditional. It was limited in that—and only in that—it was confined to the crime for which the defendant had been convicted and for which he had been sentenced to suffer death. This was its emphasis and distinction. Other charges were pending against him, and it was expressed that the pardon should not extend to them. But such would have been its effect without expression. And we may say that it had more precision than the pardon in the pending case. Wilson had been indicted for a specific statutory crime, convicted, and sentenced to suffer death. It was to the crime so defined and established that the [93] pardon was directed. In the case at bar nothing is defined. There is no identity of the offenses pardoned, and no other clue to ascertain them but the information incorporated in an article in a newspaper. And not that entirely, for absolution is declared for whatever crimes may have been committed or taken part in "in connection with any other article, matter, or thing concerning which he [Burdick] may be interrogated."

It is hence contended by Burdick that the pardon is illegal for the absence of specification, not reciting the offenses upon which it is intended to operate; worthless, therefore, as immunity. To support the contention cases are cited. It is asserted, besides, that the pardon is void as being outside of the power of the President under the Constitution of the United States, because it was issued before accusation, or conviction or admission of an offense. This, it is insisted, is precluded by the constitutional provision which gives power only "to grant reprieves and pardons for offenses against the United States," and it is argued, in effect, that not in the imagination or purpose of executive magistracy can an "offense against the United States" be established, but only by the confession of the offending individual or the judgment of the judicial tribunals. We do not dwell further on the attack. We prefer to place the case on the ground we have stated.

(2) May plaintiff in error, having the means of immunity at hand, that is, the pardon of the President, refuse to testify on the ground that his testimony may have an incriminating effect? A superficial consideration might dictate a negative answer, but the answer would confound rights which are distinct and independent.

It is to be borne in mind that the power of the President under the Constitution to grant pardons and the right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,—to leave to each [94] its proper place. In this as in other conflicts between personal rights and the powers of government, technical—even nice—distinctions are proper to be regarded. Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal. It is true we have said (Brown v. Walker, 161 U. S. 601, 605, 40 L. ed. 822, 824, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644) that the law regards only mere penal consequences, and not "the personal disgrace or opprobrium

attaching to the exposure" of crime, but certainly such consequence may influence the assertion or relinquishment of a right. This consideration is not out of place in the case at bar. If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law. It supposed only a possibility of a charge of crime, and interposed protection against the charge, and, reaching beyond it, against furnishing what might be urged or used as evidence to support it.

This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law given protection against a sinister use of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.

It is of little service to assert or deny an analogy between amnesty and pardon. Mr. Justice Field, in Knote v. United States, 95 U. S. 149, 153, 24 L. ed. 442, 443, said that "the distinction between them is one rather of philological interest than of legal importance." This is so as to their ultimate effect, but there are incidental differences of importance. They [95] are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the state, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the state. Amnesty is usually general, addressed to classes or even communities,—a legislative act, or under legislation, constitutional or statutory,—the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted, there is affirmative evidence of acceptance. Examples are afforded in United States v. Klein, 13 Wall. 128, 20 L. ed. 519; Armstrong's Foundry, 6 Wall. 766, 18 L. ed. 882; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426. See also Knote v. United States, supra. If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion.

Judgment reversed, with directions to dismiss the proceedings in contempt, and discharge Burdick from custody.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[96] WILLIAM L. CURTIN, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 96, 97.)

This case is governed by the decision in Burdick v. United States, ante, 476.

[No 472.]

Argued December 16, 1914. Decided January 25, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment for contempt for refusing to testify before the grand jury. Reversed, with directions to dismiss the proceedings and discharge the plaintiff in error from custody.

See same case below, 211 Fed. 492.

The facts are stated in the opinion.

Mr. Henry A. Wise argued the cause, and, with Mr. Henry W. Sackett, filed a brief for plaintiff in error.

Solicitor General Davis argued the cause and filed a brief for defendant in error.

For contentions of counsel, see their briefs as reported in Burdick v. United States, ante, 476.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error was argued and submitted at the same time as Burdick v. United States, just decided [236 U. S. 79, ante, 476, 35 Sup. Ct. Rep. 267.] Its purpose is to review a judgment for contempt against Curtin upon presentment of the Federal grand jury for refusing to answer certain questions in the same proceeding considered in the Burdick Case in regard to a certain article published in the New York Tribune. Curtin is a reporter on that paper. He declined to answer the questions, on the ground that the answers would tend to incriminate him. At a subsequent hearing a pardon issued by the President was offered him (it was the same in substance as that offered Burdick), and he was again questioned. He declined to receive the pardon or to answer the questions, on the same ground as before. He was, on presentment of the grand jury, adjudged guilty of [97]

contempt, fined as Burdick was, with the same leave to purge himself of the contempt, the court deciding that the pardon was valid and sufficient for immunity. Upon Curtin again refusing to answer, the judgment was made absolute and he was committed to the custody of the United States marshal.

It will be observed, therefore, the case is almost identical in its facts with the Burdick Case and exactly the same in principle. On the authority of that case, therefore, the judgment is reversed and the case remanded, with instruction to dismiss the proceedings in contempt and discharge Curtin from custody.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

JAMES H. DUFFY, Appt.,
v.
WILLIAM CHARAK, Trustee in Bankruptcy of the Estate of Jules & Frederic Company.

(See S. C. Reporter's ed. 97-100.)

Chattel mortgage — recording — change of possession.

The property covered by an unrecorded chattel mortgage is delivered to and retained by the mortgagee within the meaning of Mass. Rev. Laws, chap. 198, § 1, invalidating such mortgages against others than the parties thereto unless there is such delivery and retention of the property, where, the mortgaged property having been attached by a third person, the mortgagee afterwards, but on the same day, put in a keeper, subject to the possession of the sheriff's officer, and on the next day notified the deputy sheriff of his claim, and also gave notice to the mortgagor that the property was in his possession, and that he intended to foreclose.

[For other cases, see Chattel Mortgage, III., in Digest Sup. Ct. 1908.]

[No. 120.]

Argued January 14, 1915. Decided January 25, 1915.

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of Massachusetts in favor of the trustee in bankruptcy in a suit to obtain the surrender of the proceeds of a sale under an unrecorded chattel mortgage. Reversed.

See same case below, 119 C. C. A. 191, 200 Fed. 747.

The facts are stated in the opinion.

Mr. James H. Duffy, *in propria persona*, argued the cause and filed a brief for appellant:

An attaching officer has only a special property in attached chattels; the general property is not changed.

Grant v. Lyman, 4 Met. 470.

The attachment would not prevent the debtor from conveying, mortgaging, or assigning the property, subject to the attachment.

Ibid.; Fettyplace v. Dutch, 13 Pick. 388, 23 Am. Dec. 688.

A possession taken under the mortgage satisfied the statutory requirement of delivery.

Tatman v. Humphrey, 184 Mass. 361, 63 L.R.A. 738, 100 Am. St. Rep. 562, 68 N. E. 844; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Blanchard v. Cooke, 144 Mass. 207, 11 N. E. 83; Bennett v. Bailey, 150 Mass. 257, 22 N. E. 916; Coggan v. Ward, 215 Mass. 13, 102 N. E. 336; Keepers v. Fleitmann, 213 Mass. 210, 100 N. E. 333.

Actual delivery was not necessary. Even if the actual delivery on March 2 be ignored, a symbolical delivery on May 24 was sufficient notice of the existence of the mortgage, and the appellant's claim thereunder was sufficient; and such notice was given on May 24 by the placing of the appellant's keeper on the premises, and on May 25 by a written notice.

Clark v. Williams, 190 Mass. 222, 76 N. E. 723; Mann v. Huston, 1 Gray, 250, Whitaker v. Sumner, 20 Pick. 399; Appleton v. Bancroft, 10 Met. 231.

The sheriff merely placed a keeper in the store. He did not remove goods. This constituted only a lien on the goods. It did not change the title to the property. It only held the property provisionally for a charge.

Coverdale v. Aldrich, 19 Pick. 394.

The owner was free to sell or mortgage.

Parsons v. Merrill, 5 Met. 356; Whipple v. Thayer, 16 Pick. 25, 26 Am. Dec. 626; First Ward Nat. Bank v. Thomas, 125 Mass. 278; Horne v. Briggs, 98 Mass. 510.

The right of the mortgagee to enter the premises and secure a lien by the presence of his keeper was not defeated by the presence of the sheriff's keeper.

Fettyplace v. Dutch, 13 Pick. 388, 23 Am. Dec. 688; Grant v. Lyman, 4 Met. 470; Arnold v. Brown, 24 Pick. 89, 35 Am. Dec. 296;

NOTE.—On necessity of change of possession to uphold judicial sale, or sale under chattel mortgage, as against creditors—see note to Taylor v. Wooden, 36 L.R.A.(N.S.) 1018.

As to effect of chattel mortgagee taking possession before any specific lien or right of creditors has attached—see note to Martin v. Holloway, 25 L.R.A.(N.S.) 110.

Smith v. Condon, 174 Mass. 550, 75 Am. St. Rep. 372, 55 N. E. 324; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Mann v. Huston, 1 Gray, 250.

In the holding of the two keepers there was a "qualified" control in the mortgagee's keeper; and when the sheriff's keeper was removed, the mortgagee's keeper held full control of the entire property.

Fettyplace v. Dutch, 13 Pick. 388, 23 Am. Dec. 688.

The attachment does not inure to the benefit of the trustee. It was wholly discharged by failure of the trustee to preserve the attachment for the benefit of the estate.

Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Davis v. Crompton, 85 C. C. A. 633, 158 Fed. 735; Zartman v. First Nat. Bank, 216 U. S. 134, 54 L. ed. 418, 30 Sup. Ct. Rep. 368.

The provisions of the bankruptcy act should not be used to supplant the appellant's lien with one of no greater merit.

Thompson v. Fairbanks, supra.

Mr. William Charak, *in propria persona*, argued the cause and filed a brief for appellee:

Under the findings of fact by the referee and district judge, by which the parties are bound, the property claimed under the mortgage was never "delivered to and retained by the mortgagee," thus invalidating the mortgage as to all persons other than the mortgagor and the mortgagee.

Wright v. Tetlow, 99 Mass. 397; Porter v. Stuart, 203 Mass. 46, 89 N. E. 118.

The statute requires a "delivery" of the mortgaged goods to, as well as a retention by, the mortgagee. The appellant has not shown, nor does the record disclose, a "delivery" of possession other than that alleged as of March 2, 1909, described by the referee and district judge as "merely colorable," and "not bona fide," and such as "would tend to enable parties to practise the very fraud which the statute as to unrecorded mortgages of personal property was intended to prevent."

Moore v. Reading, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760.

If the mortgage could have been lawfully defeated by an attaching creditor for want of record or possession, it can and ought to be so defeated in the bankruptcy proceedings as now pending.

Ibid.; Clark v. Williams, 190 Mass. 219, 76 N. E. 723; Dempsey v. Gardner, 127 Mass. 381, 34 Am. Rep. 389; Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding by a trustee in bankruptcy to obtain the surrender of the proceeds of goods in possession of the appellant, and sold by him under an agreement with the trustee, without prejudice to the rights of the parties in the property. The petition in bankruptcy was filed on May 26, 1909. The appellant claims under a mortgage to him for $5,675, made on March 2, 1909, but admits that $4,175 of this sum was a pre-existing debt, and claims only $1,500, lent on the day when the mortgage was given. The mortgage was not recorded, and on May 24, 1909, the goods were attached by a third person, the shop where they were was closed, and no more business was done. Afterwards on the same day the mortgagee put in a keeper, subject to the possession of the sheriff's officer. On May 25 he notified the deputy sheriff of his claim, and also gave notice to the bankrupt that the property was in his possession, and that he intended to foreclose. The latter notice was recorded on May 26, after the filing of the petition in bankruptcy on that day. Under the Massachusetts laws the unrecorded mortgage was invalid [99] against others than the parties unless the property was delivered to and retained by the mortgagee (Rev. Laws, chap. 198, § 1). The district court and the circuit court of appeals held the mortgage void on the ground that the deputy sheriff's possession was exclusive, and that therefore what was done by the mortgagee on May 24 and 25 had no effect. 193 Fed. 533, 119 C. C. A. 191, 200 Fed. 747. The main question before us is whether this ruling is right.

We may assume that the trustee in bankruptcy is not a party within the meaning of the Massachusetts act. For although there have been decisions by the courts of the United States that the assignee under former acts is the bankrupt, that is to say, that he is a universal successor, who, like the executor, represents the person of him to whom he succeeds, the supreme court of the state has established the construction of the Massachusetts statute. Humphrey v. Tatman, 198 U. S. 91, 93, 49 L. ed. 956, 958, 25 Sup. Ct. Rep. 567; Haskell v. Merrill, 179 Mass. 120, 124, 60 N. E. 485; Clark v. Williams, 190 Mass. 219, 223, 76 N. E. 723. We assume, on the other hand, that if possession was delivered and retained, within the meaning of the act, at any time before the bankruptcy, the title of the mortgagee will be good. Blanchard v. Cooke, 144 Mass. 207, 227, 11 N. E. 83; Keepers v. Fleitmann, 213 Mass. 210, 211, 100 N. E. 333; Humphrey v. Tatman, supra. Moreover, a taking possession under the power in the mortgage is a delivery that satisfies the statute. Keepers v. Fleitmann,

supra. So the issue is narrowed to the precise point of the ruling below.

We agree that the possession of the deputy sheriff was exclusive, and that there cannot be two possessions properly so called at the same time. But that which would be deemed a delivery sufficient to make a sale good as against attaching creditors also satisfies the statute. Clark v. Williams, 190 Mass. 219, 222, 76 N. E. 723; Wright v. Tetlow, 99 Mass. 397, 400. And it is familiar that what [100] is called a change of possession may be accomplished when the goods are in the hands of a third person claiming a lien. Hallgarten v. Oldham, 135 Mass. 1, 9, 10, 46 Am. Rep. 433; Union Trust Co. v. Wilson, 198 U. S. 530, 536, 49 L. ed. 1154, 1155, 25 Sup. Ct. Rep. 766. Accordingly, goods under attachment may be sold or mortgaged upon notice to the officer, as effectively as if a true delivery took place. Grant v. Lyman, 4 Met. 470, 477; Mann v. Huston, 1 Gray, 250, 253; Clark v. Williams, supra. The acts of the appellant had the same effect as if the mortgagor had been present and assenting (Keepers v. Fleitmann, 213 Mass. 210, 100 N. E. 333), and we see in the attachment no sufficient ground for denying him his security. The mortgage embraced after-acquired property, with power of sale and substitution in the mortgagor, but we assume that it was good under Massachusetts law. Blanchard v. Cook, 144 Mass. 207, 11 N. E. 83; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306.

Whether or not the lien of the attachment should be preserved for the benefit of the estate, and whether it still is open to the Bankruptcy Court to make an order to that effect if, on due notice, it should seem just, is not before us. No such order has been made. The decree will be reversed without prejudice to further action upon that point.

Decree reversed.

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[101] BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Petitioner,

v.

HOME SAVINGS BANK.

(See S. C. Reporter's ed. 101-105.)

Appeal — necessity of exception — question apparent on the record.

1. No exception or bill of exceptions is necessary to bring up for review a ruling of a Federal circuit court sustaining a demurrer to one of the defenses set up in the answer, there being nothing in the record to indicate a waiver of defendant's rights.

[For other cases, see Appeal and Error, 3427-3433, in Digest Sup. Ct. 1908.]

Municipal corporations — powers — issuing negotiable certificates of indebtedness.

2. Authority to issue certificates of indebtedness in negotiable form to provide for the payment of the purchase price of ballot machines was included in the powers conferred upon municipalities by Colo. Const. art. 7, § 8, and Laws 1905, chap. 101, § 6, to provide for such payment by the "issuance of interest-bearing bonds, certificates of indebtedness, or other obligations."

[For other cases, see Municipal Corporations, II. d; II. e, 1, in Digest Sup. Ct. 1908.]

[No. 126.]

Argued January 15, 1915. Decided January 25, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Colorado in favor of plaintiff in an action upon a municipal certificate of indebtedness. Affirmed.

See same case below, 118 C. C. A. 256, 200 Fed. 28.

The facts are stated in the opinion.

Mr. Charles R. Brock argued the cause, and, with Messrs. I. N. Stevens, and Milton Smith, and William H. Ferguson, filed a brief for petitioner:

An exception to the ruling of the trial court upon a demurrer to a pleading is not a condition precedent to the right to have that ruling reviewed upon writ of error, and such an exception is unauthorized by any rule which has ever been known or recognized, either at common law or in the Federal courts of the United States.

Barnes v. Scott, 29 Fla. 285, 11 So. 48; 3 Bl. Com. p. 372; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 52; Consumers' Cotton-Oil Co. v. Ashburn, 26 C. C. A. 436, 52 U. S. App. 258, 81 Fed. 331; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Clune v. United States, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; 1 Co. Litt. § 155b, note; Doty v. Jewett, 22 Blatchf. 65, 19 Fed. 337; 3 Enc. Pl. & Pr. 378, 464; Francisco v. Chicago & A. R. Co. 79 C. C. A. 292, 149 Fed. 354, 9 Ann. Cas. 628; Ghost v. United States, 94 C. C. A. 253, 168 Fed. 841; Hanna v. Maas, 122 U. S. 24, 30 L. ed. 1117, 7 Sup. Ct. Rep. 1055; Hopkins, New Fed. Eq. Rules, pp. 10, 11; Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180

Fed. 368; Lowry v. Mt. Adams & E. P. Incline Plane R. Co. 68 Fed. 827; Mitsui v. St. Paul F. & M. Ins. Co. 120 C. C. A. 280, 202 Fed. 26; Newport News & M. Valley R. Co. v. Pace, 158 U. S. 36, 39 L. ed. 887, 15 Sup. Ct. Rep. 743; Potter v. United States, 58 C. C. A. 231, 122 Fed. 49; Preble v. Bates, 40 Fed. 745; Pickett v. Legerwood, 7 Pet. 144, 8 L. ed. 638; Pittsburgh, C. & St. L. R. Co. v. Heck, 102 U. S. 120, 26 L. ed. 58; Rogers v. Burlington, 3 Wall. 654, 18 L. ed. 79; Stephen, Pl. Tyler's ed. p. 142; Suydam v. Williamson, 20 How. 427, 15 L. ed. 978; Tullis v. Lake Erie & W. R. Co. 44 C. C. A. 597, 105 Fed. 554; Webb v. National Bank, 77 C. C. A. 143, 146 Fed. 717.

Neither § 8 of article 7 of the Constitution of Colorado, nor the act of 1905, authorizes the board of county commissioners of the city and county of Denver to issue negotiable certificates of indebtedness; and the certificate and coupon sued upon, being negotiable in form, are therefore absolutely void.

Barnett v. Denison, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819; Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; Coffin v. Kearney County, 6 C. C. A. 288, 12 U. S. App. 562, 57 Fed. 139; German Ins. Co. v. Manning, 95 Fed. 597; Hedges v. Dixon County, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; Nashville v. Ray, 19 Wall. 468, 22 L. ed. 164; Merrill v. Monticello, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; Ashuelot Nat. Bank v. School Dist. 5 C. C. A. 468, 12 U. S. App. 340, 56 Fed. 197; Ottawa v. Carey, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361; Swanson v. Ottumwa, 131 Iowa, 547, 5 L.R.A.(N.S.) 860, 106 N. W. 9, 9 Ann. Cas. 1117; West Plains Twp. v. Sage, 16 C. C. A. 553, 32 U. S. App. 725, 69 Fed. 943.

Even if the constitutional provision and statute in question should be held to authorize the issuance of negotiable bonds, the security sued on in this action is not a bond, and is not negotiable, and therefore the plaintiff took it subject to any equities existing between the county and the payee.

2 Dill. Mun. Corp. 5th ed. pp. 1273, 1284, 1295; Nashville v. Ray, 19 Wall. 468, 22 L. ed. 164; Watson v. Huron, 38 C. C. A. 264, 97 Fed. 449; West Plains Twp. v. Sage, 16 C. C. A. 553, 32 U. S. App. 725, 69 Fed. 943.

Mr. John Maxey Zane argued the cause, and, with Messrs. Charles F. Morse and Charles W. Waterman, filed a brief for respondent:

Section 8 of article 7 of the Constitution of the state of Colorado, and § 2342 of the Revised Statutes of Colorado, authorized the board of county commissioners of the city and county of Denver to issue negotiable certificates of indebtedness for voting machines.

D'Esterre v. Brooklyn, 90 Fed. 586; Ashley v. Presque Isle County, 8 C. C. A. 455, 16 U. S. App. 656, 709, 60 Fed. 55; Cadillac v. Woonsocket Inst. for Sav. 7 C. C. A. 574, 16 U. S. App. 545, 58 Fed. 935; Carter County v. Sinton, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390; Dill. Mun. Corp. 5th ed. §§ 882, 886, 897, p. 1402; Rathbone v. Hopper, 57 Kan. 240, 34 L.R.A. 674, 45 Pac. 610; Vicksburg v. Lombard, 51 Miss. 111; Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; Klamath Falls v. Sachs, 35 Or. 325, 76 Am. St. Rep. 501, 57 Pac. 329; Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960; Winston v. Ft. Worth, — Tex. Civ. App. —, 47 S. W. 740; Jefferson v. Jennings Bkg. & T. Co. 35 Tex. Civ. App. 74, 79 S. W. 876; West Plains Twp. v. Sage, 16 C. C. A. 553, 32 U. S. App. 725, 69 Fed. 943; Geer v. Ouray County, 38 C. C. A. 250, 97 Fed. 435; Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306; Howard v. Kiowa County, 73 Fed. 406; Waite v. Santa Cruz, 89 Fed. 619, 184 U. S. 302, 46 L. ed 552, 22 Sup. Ct. Rep. 327; Cripple Creek v. Adams, 36 Colo. 320, 85 Pac. 184; Thomas v. Grand Junction, 13 Colo. App. 80, 56 Pac. 665.

The distinction sought to be drawn between bonds and certificates of indebtedness is wholly illusory.

Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Mercer County v. Hacket, 1 Wall. 83, 17 L. ed. 548; Humboldt Twp. v. Long, 92 U. S. 642, 23 L. ed. 752; Provident Life & T. Co. v. Mercer County, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788; Cripple Creek v. Adams, 36 Colo. 320, 85 Pac. 184; Amey v. Allegheny City, 24 How. 364, 16 L. ed. 614; Christie v. Duluth, 82 Minn. 202, 84 N. W. 754.

On the principle of *noscitur a sociis*, or what is very much the same thing, the principle of *ejusdem generis*, since it is conceded that the word "bonds" in this connection means negotiable bonds, it follows necessarily that the certificates of indebtedness authorized to be issued are negotiable certificates.

Endlich, Interpretation of Statutes, § 400.

Such a certificate as was here given is in form a negotiable instrument.

Independent School Dist. v. Hall, 113 U. S. 135, 28 L. ed. 954, 5 Sup. Ct. Rep. 371; Cripple Creek v. Adams, 36 Colo. 320, 85 Pac. 184; Humboldt Twp. v. Long, 92 U. S.

642, 23 L. ed. 752; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520.

The ruling of the circuit court of appeals upon the necessity of an exception to the sustaining of the demurrer to the third defense, while immaterial in the case, is yet justified by the authorities.

Rogers v. Burlington, 3 Wall. 654, 18 L. ed. 79; Suydam v. Williamson, 20 How. 427, 15 L. ed. 978; Gorman v. Lenox, 15 Pet. 115, 10 L. ed. 680; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Mitsui v. St. Paul F. & M. Ins. Co. 120 C. C. A. 280, 202 Fed. 27; Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420.

The point raised by the demurrer to the third defense was immaterial in any event, since the same question was raised by the second defense. Therefore the ruling of the circuit court of appeals, that an exception was necessary to preserve the ruling of the demurrer, likewise is immaterial.

Chambers County v. Clews, 21 Wall. 317, 22 L. ed. 517; Grand Chute v. Winegar, 15 Wall. 355, 21 L. ed. 170; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the respondent upon a certificate of indebtedness and an interest coupon attached to the same, against the petitioner. There was a verdict and judgment for the plaintiff and the circuit court of appeals affirmed the judgment. 118 C. C. A. 256, 200 Fed. 28. The plaintiff held the instrument by indorsement, and was found to have purchased it in good faith before maturity, but the defendant denied the authority to issue the certificate in negotiable form, and sought to raise the question by its third defense, which set up failure of consideration. There was a demurrer to this defense, which was sustained by the circuit court, and the trial took place upon the other issues. The circuit court of appeals declined to consider the correctness of this ruling because no exception was taken to it. But [104] no exception or bill of exceptions is necessary to open a question of law already apparent on the record, and there is nothing in the record that indicates a waiver of the defendant's rights. Therefore we must consider the merits of the defense. Nalle v. Oyster, 230 U. S. 165, 57 L. ed. 1439, 33 Sup. Ct. Rep. 1043.

The certificate recites the allowance of a claim for ballot machines by the board of county commissioners of the city and county of Denver, and goes on, "the board of county commissioners being authorized thereto by the laws of the state of Colorado, act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of $11,250, with interest on this sum, from the date hereof, at the rate of 5 per cent per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached." This certificate was one of ten issued to provide for the payment for ballot machines, and the Constitution of the state authorized provision for payment in such case "by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificate of indebtedness, or other be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par." Art. 7, § 8, as amended November 6, 1906. A statute in like words previously had been passed, to be effective if the amendment to the Constitution should be adopted, as it was. Laws of 1905, chap. 101, § 6. See Rev. Stat. 1908, § 2342. The defense that we are considering is that the foregoing words did not warrant making the certificates of indebtedness negotiable, relying especially upon Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559. But the argument seems to us to need no extended answer. The power to issue certificates of indebtedness or bonds is given in terms, and [105] it is contemplated that these instruments may be sold to raise money for the purpose named. But, however narrowly we may construe the power of municipal corporations in this respect, when they are authorized to raise money by the sale of bonds we must take it that they are authorized to put the bonds in the form that would be almost a necessary condition to obtaining a purchaser,—the usual form in which municipal bonds are put upon the market. Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 276, 43 L. ed. 689, 698, 19 Sup. Ct. Rep. 390. What is true about bonds is true about certificates of indebtedness. Indeed, it is difficult to see any distinction between the two as they are commonly known to the business world. The essence of each is that they contain a promise under the seal of the corporation, to pay a certain sum to order or to bearer. We are of opinion that the board of county commissioners was authorized to issue certificates in the negotiable form. Carter County v. Sinton, 120 U. S. 517, 525, 30 L. ed. 701, 703, 7 Sup. Ct. Rep. 650; Gelpcke v. Dubuque, 1 Wall. 175, 203, 17 L. ed. 520, 524; Cadillac v. Woonsocket Inst. for Sav. 7 C. C. A. 574, 16 U. S. App.

545, 58 Fed. 935, 937; Ashley v. Presque Isle County, 8 C. C. A. 455, 16 U. S. App. 656, 709, 60 Fed. 55, 67; D'Esterre v. Brooklyn, 90 Fed. 586, 590; Dill. Mun. Corp. 5th ed. § 882.

Judgment affirmed.

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[106] UNITED STATES, Appt.,
v.
BENJAMIN F. JONES, Jr., Administrator, etc.

(See S. C. Reporter's ed. 106–115.)

Federal succession tax — vested or contingent interest — refunding.

The beneficial distributive interests of the next of kin of a person dying intestate on June 28, 1902, had not become absolutely vested in possession or enjoyment three days later, in the sense of the provision of the act of June 27, 1902 (32 Stat. at L. 406, chap. 1160), for the refunding of succession taxes collected on contingent beneficial interests not vested prior to July 1, 1902, where, at that date, no administrator had been appointed, the debts and expenses had not been ascertained, what, if anything, would remain after their payment, was uncertain, and the time had not come for distribution.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

[No. 450.]

Argued December 9, 1914. Decided January 25, 1915.

APPEAL from the Court of Claims to review a judgment for the refunding of a succession tax. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Thompson argued the cause and filed a brief for appellant:

The thing taxed was the right of succession.

Knowlton v. Moore, 178 U. S. 41–56, 44 L. ed. 969–975, 20 Sup. Ct. Rep. 747; Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59.

The distributive shares of the two legatees became vested, within the meaning of the act of June 13, 1898, at the moment of the intestate's death, and subject to taxation, regardless of the fact that the administrator, under the state law, had the right to retain possession of the distributive shares for a period extending beyond July 1, 1902.

Beer v. Moffatt, 126 C. C. A. 503, 209 Fed. 779; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621.

Mr. Barry Mohun argued the cause and filed a brief for appellee:

The liability for the tax under this law depended not upon the mere vesting, in a technical sense, of title to the gift, but upon the actual possession or enjoyment thereof, during the existence of the law.

Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; Westhus v. Union Trust Co. 90 C. C. A. 441, 164 Fed. 795.

If the opinion in Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621, is to be broadly construed as holding that the tax attached at once upon the death of an intestate or a testator (where the will contained absolute bequests), it will place it in direct conflict with the opinions in the Vanderbilt and Fidelity Trust Company Cases.

It would also put it in conflict with the case of Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212, cited with approval in the case of Knowlton v. Moore, 178 U. S. 55, 44 L. ed. 975, 20 Sup. Ct. Rep. 747, and also in conflict with the case of Mason v. Sargent, 104 U. S. 689, 26 L. ed. 894, the opinion in which is quoted from with approval in Knowlton v. Moore, 178 U. S. 75, 44 L. ed. 983, 20 Sup. Ct. Rep. 747.

See also Sturges v. United States, 117 U. S. 363, 29 L. ed. 920, 6 Sup. Ct. Rep. 767, decided on the authority of Mason v. Sargent, supra, and Wright v. Blakeslee, 101 U. S. 174, 25 L. ed. 1048.

The briefest consideration of the real nature of the tax negatives the idea of its imposition as of the date of death.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; United States v. Perkins, 163 U. S. 625, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; Hanson, Death Duties, 6th ed. p. 29.

It has been twice held by this court that the taxes which were by the first sentence

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Note.—On repeal of statute imposing succession tax as affecting estate of one who died before the repealing act took effect—see note to Trippet v. State, 8 L.R.A. (N.S.) 1210.

As to taxes on succession and collateral inheritance, generally,—see notes to Re Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

of the refunding act directed to be refunded were the same as those which were by the second sentence forbidden to be collected.

Vanderbilt v. Eidman, 196 U. S. 480, 500, 49 L. ed. 563, 570, 25 Sup. Ct. Rep. 331; United States v. Fidelity Trust Co. 222 U. S. 158, 159, 56 L. ed. 137, 141, 32 Sup. Ct. Rep. 59.

The words of the refunding act, "absolutely vested in possession or enjoyment," mean either actual possession or the existence of the immediate right thereto.

Smith v. West, 103 Ill. 332; Gates v. Seibert, 157 Mo. 254, 80 Am. St. Rep. 625, 57 S. W. 1065; 8 Words & Phrases, 7303; Lane v. Goudge, 9 Ves. Jr. 225, 7 Revised Rep. 163; Fearne, Contingent Remainders, p. 2.

Both taxing and refunding acts are *in pari materia*, and it will be presumed, if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.

Reiche v. Smythe, 13 Wall. 162, 165, 20 L. ed. 566, 567.

The word "contingent" is not used in the refunding act in a strictly legal sense.

Vanderbilt v. Eidman, 196 U. S. 493, 49 L. ed. 567, 25 Sup. Ct. Rep. 331.

The requirement that the interest must be "absolutely" vested in possession or enjoyment is one of very broad effect.

1 Am. & Eng. Enc. Law, 2d ed. 208; Rapalje & L. Dict.; Bouvier's Law Dict.

Appellee not only had physical possession of the assets of the estate, but in him was vested the legal title thereto.

Byers v. McAuley, 149 U. S. 608, 615, 37 L. ed. 867, 871, 13 Sup. Ct. Rep. 906; Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 229, 47 L. ed. 147, 155, 23 Sup. Ct. Rep. 52; Harrison v. Perea, 168 U. S. 311, 321, 42 L. ed. 478, 482, 18 Sup. Ct. Rep. 129; Carroll v. United States, 13 Wall. 151, 153, 20 L. ed. 565, 566; 14 Cyc. 112; Goodrich v. Ferris, 214 U. S. 71, 80, 81, 53 L. ed. 914, 918, 919, 29 Sup. Ct. Rep. 580.

The case of Farrell v. United States, 167 Fed. 639, is directly in point.

The whole act is obviously remedial in character, and entitled to that construction which will carry out the liberal purpose of Congress at the time of its enactment.

Beley v. Naphtaly, 169 U. S. 353, 360, 42 L. ed. 775, 777, 18 Sup. Ct. Rep. 354.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to recover a succession tax paid under §§ 29 and 30 of the act of June 13, 1898 (30 Stat. at L. 448, 464, chap. 448, Comp. Stat. 1913, § 6144). The facts are these: Adelaide P. Dalzell, a [109] resident of Allegheny county, Pennsylvania, died intestate June 28, 1902, leaving personal property of considerable value, and being survived by two daughters as her only next of kin. July 14, 1902, an administrator was appointed and the property was committed to his charge for the purposes of administration. Under the local law the debts of the intestate and the expenses of administration were to be paid out of the property, and what remained was to be distributed in equal shares between the two daughters, but distribution could not be made for several months after the appointment of the administrator. In regular course the debts and expenses were ascertained and paid, and this left for distribution property of the value of $219,341.74. The collector of internal revenue then collected from the administrator, without protest from him, a succession tax of $3,290.12 upon the distributive shares of the daughters, and the tax was covered into the Treasury. About seven months after paying the tax the administrator sought, in the mode prescribed, to have it refunded under § 3 of the act of June 27, 1902 (32 Stat. at L. 406, chap. 1160), but the Secretary of the Treasury denied the application. The administrator then brought this suit and the court of claims gave judgment in his favor. — Ct. Cl. —. A reversal of the judgment is sought by the United States.

By § 29 of the act of 1898 an executor, administrator, or trustee having in charge any legacy or distributive share arising from personal property, and passing from a decedent to another by will or intestate laws, was subjected to a tax graduated according to the value of the beneficiary's interest in the property and the degree of his kinship to the decedent. Interests which were contingent and uncertain were not affected, but only those whereof the beneficiary had become invested with a present right of possession or enjoyment. Vanderbilt v. Eidman, 196 U. S. 480, 491-495, 498, 49 L. ed. 563, 567-570, 25 Sup. Ct. Rep. 331. Section 29 was [110] repealed April 12, 1902, but the repeal was not to take effect until July 1, 1902, and was not to prevent the collection of any tax imposed prior to that date. 32 Stat. at L. 96, chap. 500, §§ 7, 8, 11, Comp. Stat. 1913, § 6144.

As before indicated, the claimant principally relies upon § 3 of the act of June 27, 1902, supra. It reads as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal

property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled, 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the commissioner of internal revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

In construing this section this court said in Vanderbilt v. Eidman, supra (p. 500):

"It is, we think, incontrovertible that the taxes which the 3d section of the act of 1902 directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section and cause its provisions to produce inexplicable conflict. From this it results that [111] the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named, within the intendment of the subsequent sentence. In other words, the statute provided for the refunding of taxes collected under the circumstances stated and at the same time forbade like collections in the future."

This view was repeated in United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59.

The decisive question, therefore, in the present case, is whether the beneficial interests of the daughters, upon which the tax was collected, had become absolutely vested in possession or enjoyment prior to July 1, 1902, or were at that time contingent. If they had become so vested, the effort to recover the tax must fail; but, if they were contingent, the tax must be refunded. Recognizing that this is so, counsel for the United States insists that the distributive interests to which the daughters succeeded became vested in the full sense of the statute the moment the intestate died, which was three days before July 1, 1902. The court below rejected this contention and held that those interests did not become so vested until the daughters were entitled to receive their respective shares in the property remaining after the debts and expenses were paid, which was not until several months after July 1, 1902.

The question should, of course, be determined with due regard to the situation to which the refunding statute was addressed.

The tax imposed by the act of 1898 was purely a succession tax, a charge upon the transmission of personal property from a deceased owner to legatees or distributees. It was not laid upon the entire personal estate, or upon all [112] that came into the hands of the executor or administrator, but upon "any legacies or distributive shares" in his charge "arising from" such estate, and passing to others by will or intestate laws.

It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. If the estate proves insolvent, nothing is to pass to them. So, in a practical sense, their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. But that this right was not intended to be taxed before there was an ascertained surplus or residue to which it could attach is inferable from the taxing act as a whole, and especially from the provision whereby the rate of tax was made to depend upon the value of the legacy or distributive share.

True, by that act, the executor or administrator was required, before surrendering a legacy or distributive share to whoever was entitled to it, to pay the tax assessed thereon and to deduct the amount from the particular legacy or distributive share, but this did not mean that the tax was to be assessed or paid in the absence of a right to immediate possession or enjoyment. On the contrary, as was held in Vanderbilt v. Eidman, 196 U. S. 499, 49

L. ed. 570, 25 Sup. Ct. Rep. 331, it imported the existence of "a practically contemporaneous right to receive the legacy or distributive share." In that [113] case it was said, after separately considering the several parts of the act (p. 495): "In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached."

The actual enforcement of the taxing act by the administrative officers was not uniform as respects contingent interests. At first the tax was regarded as not reaching them until they became absolute, but afterwards it came to be treated as imposing the tax at the time of the death.

The provisions of the repealing act of April 12, 1902, were such that the tax was to be discontinued on July 1 of that year, but without affecting its collection where the right to it became fixed before that time. Bearing in mind that this was the situation in which § 3 of the act of June 27, 1902, before quoted, was enacted, we think its meaning and purpose are plain. Briefly stated, it deals with legacies and distributive shares upon the same plane, treats both as "contingent" interests until they "become absolutely vested in possession or enjoyment," directs that the tax collected upon contingent interests not so vested prior to July 1, 1902, shall be refunded, and forbids any further enforcement of the tax as respects interests remaining contingent up to that date. In other words, it recognizes that the tax was being improperly collected upon legacies and distributive shares which were not absolutely vested in possession or enjoyment; and, for the purpose of avoiding the injustice that otherwise might result from this, it requires that the tax be refunded in all instances where the interests upon which it was collected had not become absolutely vested in the [114] sense indicated before July 1, 1902, that being the time when the tax was discontinued.

Applying this statute to the facts before stated, we see no escape from the conclusion that the tax in question must be refunded. It was collected upon distributive shares which neither were nor could have been absolutely vested in possession or enjoyment prior to July 1, 1902. The intestate's death had occurred only three days before, no administrator had been appointed, the debts and expenses had not been ascertained, what, if anything, would remain after their payment, was uncertain, and the time had not come when the daughters were entitled to a distribution.

The case of Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621, is cited as making for a different conclusion, but it is without real bearing here. The refunding statute was not there in question and was not mentioned in the opinion. The case came to this court upon a certificate from the circuit court of appeals for the seventh circuit, the question certified being: "Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902, relieve from taxation legacies otherwise taxable under §§ 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901 [31 Stat. at L. 938, chap. 806, Comp. Stat. 1913, § 6144]?" Thus it was expressly stated that the legacies were otherwise taxable, and the question propounded was merely whether they were relieved from taxation by the fact that the testator died within one year of July 1, 1902, when the repealing act took effect. The inquiry was prompted by the provision in the amendatory act of March 2, 1901 (31 Stat. at L. 938, 948, chap. 806, Comp. Stat. 1913, § 6144), that the tax should be due and payable one year after the death. The answer was in the negative, it being held that the time when the tax was made due and payable was not determinative of when it was imposed. The opinion contains some language which, separately considered, gives color to the present [115] contention of the government, but this must be read in the light of the question presented for decision and be taken as restrained accordingly. Besides, the opinion approvingly refers (p. 219) to Vanderbilt v. Eidman, supra, as having "conclusively decided" that the tax "does not attach to legacies or distributive shares until the right of succession becomes an absolute right of immediate possession or enjoyment." Here, as we have said, there was no right of immediate possession or enjoyment at the time designated in the refunding statute.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

EPHRAIM SIMON, Appt.,
v.
SOUTHERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 115–132.)

Federal courts — jurisdiction — enjoining enforcement of judgment of state court.

1. A Federal circuit court had jurisdiction, if the requisite diversity of citizenship existed, of a bill in equity to enjoin the enforcement of a judgment of a state court, obtained by fraud and without notice to the judgment debtor,—especially where, under the local law, the judgment debtor was not obliged to attack a void judgment in the court that rendered it, but might institute a new and independent proceeding in a court having jurisdiction of his person, to enjoin the judgment creditor from enforcing it.

[For other cases, see Courts, VI. f; Equity, I. d, 12, in Digest Sup. Ct. 1908.]

Federal courts — enjoining proceedings in state court.

2. A suit in a Federal circuit court to enjoin the enforcement by a judgment creditor of a judgment of a state court, obtained by fraud and without notice to the judgment debtor, is not forbidden by the provision of U. S. Rev. Stat. § 720, that, except in bankruptcy cases, a Federal court shall not "stay proceedings in any court of a state."

[For other cases, see Courts, VI. d, 2, in Digest Sup. Ct. 1908.]

Writ and process — service on foreign corporation — designated state officer — cause of action arising outside state.

3. Service of process on the state officer designated by La. Acts 1904, No. 54, for that purpose, is not effective to give a court of that state jurisdiction of a suit against a foreign corporation doing business within the state as to a cause of action arising in another state.

[For other cases, see Writ and Process, III. c, 2, b, in Digest Sup. Ct. 1908.]

[No. 34.]

Argued November 2 and 3, 1914. Decided January 25, 1915.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Louisiana, enjoining the enforcement by a judgment creditor of a judgment of a state court, obtained without notice to the judgment debtor. Affirmed.

See same case below, 115 C. C. A. 58, 195 Fed. 56.

Statement by Mr. Justice Lamar:

This appeal raises a question of the power of a United States court to enjoin the appellant, Ephraim Simon, from enforcing a judgment alleged to have been fraudulently obtained by him in a state court, in a suit against the Southern Railway. The company had no notice that the suit had been brought,—other than that arising from the service, which purported to have been made in pursuance of the Louisiana act No. 54, which provides (§ 1) that it shall [117] be the duty of every foreign corporation doing any business in this state to file a written declaration setting forth the places in the state where it is doing business, and the name of its "agents in this state upon whom process may be served."

"Section 2.—Whenever any such corporation shall do any business of any nature in the state without having complied with the requirements of § 1 of this act, it may be sued for any legal cause of action in any parish of the state where it may do business, and such service of process in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served."

Availing himself of the provisions of this statute, Ephraim Simon, on December 1, 1904, brought suit, in the civil district court for the parish of Orleans, against the Southern Railway Company, averring that the defendant was a Virginia corporation "doing business in the city of New Orleans." The petition alleged that Simon, a New Orleans merchant and manufacturer, purchased, on February 8, 1904, a ticket from Selma, Alabama, to Meridian, Mississippi, and while riding over its lines, through the negligence of defendant, a collision occurred in which were inflicted upon him great personal injuries and financial loss. The petitioner claimed as damages $5,000 for personal injury; $340 for medical expenses; $4,000 for loss of profit that he would have earned; $3,000 for deterioration in the stock while he was confined to his bed and unable to sell; and $1,000 for increased cost of manufacture, due to his absence from business.

There was a prayer that the company be cited to appear and answer, and "it having failed to comply with the provisions of § 1 of act No. 54 of the Session of 1904, that service of process in this suit be made upon Hon. John T. Michel, Secretary of State, said service, so made, to be a service upon

NOTE.—When judgment at law will be enjoined in equity—see note to Davis v. Tileston, 12 L. ed. U. S. 366.

As to service of process on state officer as service on foreign corporation—see note to Mutual Reserve Fund Life Asso. v. Phelps, 47 L. ed. U. S. 987.

the said Southern Railway [118] Company, as provided for in the act aforesaid." The plaintiff asked for judgment for $13,348.

The summons was directed to "the Southern Railway Company, through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans," and required the defendant to answer within ten days after service. The deputy sheriff on December 3, 1904, made return that he had served the citation and petition "on the within named Southern Railway Company in the parish of East Baton Rouge, state of Louisiana, by personal service on E. J. McGivney, Assistant Secretary of State, Jno. T. Michel, Secretary of State, being absent at the time of service." The assistant secretary of state, acting under the instructions of the attorney general, filed the citation and petition in his office.

No notice, however, was given to the Southern Railway of the service of the citation or of the fact that suit had been brought. It therefore made no appearance in the suit brought against it by Simon, and, on January 10, 1905, the court, on motion of the plaintiff, ordered that judgment by default be entered against the railway company. Under the Louisiana practice, the case was thereafter submitted to a "trial by jury on confirmation of default." The plaintiff himself testified and other witnesses were examined, and on January 16 the jury returned a verdict in favor of the plaintiff for $13,348,—being the exact amount claimed in the petition. On January 20 the court, considering "the verdict of the jury in the matter, and that the demand of the plaintiff was proved, the law and the evidence being in favor of said plaintiff," entered judgment on the verdict.

Thereafter the company learned of the existence of the judgment, and averring itself to be a citizen of Virginia, filed (February 6, 1905) in the United States circuit court for the district of Louisiana a bill against Simon, a citizen of Louisiana, asking that he be perpetually enjoined from enforcing the same.

[119] The bill attached, as an exhibit, a copy of the record in the state court, and alleged that, in the collision referred to, Simon had received injuries which a surgeon had reported were slight; that the company had offered him $350 in settlement. Simon refused to accept this sum, but considered and discussed the acceptance of $750, which, however, was not agreed to by the defendant; the matter was temporarily left in abeyance, it being understood that negotiations were still pending and would probably result in an agreement of settlement. It was alleged that thereafter the plaintiff surreptitiously and without the knowledge of the railway company entered suit for $13,348, "falsely and fraudulently pretending that he had been injured in that sum;" that Simon's personal injuries were slight, as shown by the report of the surgeon; that the claim for loss of profit on stock and the extra cost of manufacturing stock were claims that he well knew were fraudulent, fictitious, and utterly untrue; but by false testimony he secured a verdict therefor.

The bill further alleged that the Southern Railway was not doing business in the state of Louisiana; that the service upon the secretary or assistant secretary of state was not a citation upon the railway company, and was null and void for the purpose of bringing it under the jurisdiction of the civil district court; that any judgment rendered upon such attempted citation would be, if rendered without appearance of the defendant, a judgment without due process of law and in violation of the Constitution; that the railway company had never received the citation issued in the suit, nor was it advised, nor had it any knowledge, of the pendency of said proceedings until after the rendition of the judgment; that the verdict of the jury having been rendered upon false testimony and without notice, it would be against good conscience to allow the judgment thereon to be enforced against the railway company, which has [120] no remedy at law in the premises, and has a complete meritorious defense to the claim on which the judgment is based; that by fraud and accident, unmixed with its own negligence, the railway company has been prevented from making such defense.

As stated in Ex parte Simon, 208 U. S. 144, 52 L. ed. 429, 28 Sup. Ct. Rep. 238, on another branch of this case: "The bill further alleges that Simon will attempt to collect the fraudulent judgment by fieri facias, and prays as specific relief an injunction against his further proceeding under the same. A preliminary injunction was issued, after a hearing on affidavits, on June 30, 1905, and Simon appears to have obeyed the order for over two years. A demurrer to the bill was overruled in December, 1906, and a plea to the jurisdiction, filed in February, 1907, was overruled in the following May. Simon answered in August and issue was joined in the same month. Notwithstanding the injunction, Simon, in contempt therefor, obtained a writ of fieri facias and directed a levy and the service of garnishment process to collect the judgment. . . . The punishment was a small fine, and the imprisonment was ordered until the fine was paid."

In habeas corpus proceedings instituted

in this court he sought to be discharged from the sentence of imprisonment imposed in the contempt case, claiming that, under Revised Statutes, § 720, the circuit court was without jurisdiction to grant the injunction, and therefore the order in the contempt proceedings was absolutely void. The writ was denied.

After this court refused to grant the writ of habeas corpus the case, on the main bill, was referred to a master to hear evidence and to report his conclusions of law and facts. He found that the railway was not doing business in Louisiana in the sense of the statute; that the judgment was not fraudulent, but held it to be void because service upon the *assistant* secretary of state was not [121] the "service upon the secretary of state" required by the statute.

The circuit court did not consider the question of fraud, but held (184 Fed. 959) that the state judgment was void because the Louisiana statute providing for service on foreign corporations was unconstitutional. It thereupon entered a permanent injunction against Simon as prayed for in the bill. From that decree Simon appealed, making many assignments of error, attacking the jurisdiction of the court to entertain the bill, and especially denying its power to grant the relief prayed for in view of the provisions of § 720 of the Revised Statutes. The circuit court of appeals held (115 C. C. A. 58, 195 Fed. 56) that it had been authoritatively decided in Ex parte Simon, supra, that the circuit court had jurisdiction. It found that the railway company was doing business in New Orleans; but ruled that act 54 did not provide for service on the assistant secretary of state, and hence that the judgment by default in the state court was void for want of jurisdiction of the person of the defendant. The decree of the circuit court was affirmed, and thereupon Simon prosecuted the present appeal.

Mr. Henry L. Lazarus argued the cause, and, with Messrs. Herman Michel, Eldon S. Lazarus, David Sessler, and Girault Farrar, filed a brief for appellant:

The bill does not state any case of "deliberate fraud," for the intervention of a court of equity as a matter of equitable jurisdiction.

Kent v. Lake Superior Ship Canal R. & Iron Co. 144 U. S. 91, 36 L. ed. 358, 12 Sup. Ct. Rep. 650; Fogg v. Blair, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476; Massachusetts Ben. Life Asso. v. Lohmiller, 20 C. C. A. 274, 46 U. S. App. 103, 74 Fed. 23; Southern Bank & T. Co. v. Folsom, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 929; *United States* v. Throckmorton, 98 U. S. 61, 65, 68, 25 L. ed. 93, 95, 96; United States v. Flint, 4 Sawy. 42, Fed. Cas. No. 15,121; McMicken v. Millaudon, 2 La. 180.

All that can be fairly said to have been decided in Ex parte Simon, 208 U. S. 144, 52 L. ed. 429, 28 Sup. Ct. Rep. 238, is that a proceeding by habeas corpus was not the proper proceeding to test the jurisdiction of the circuit court in a case where a merely nominal fine had been imposed by the circuit court for failure to obey the preliminary order of the court.

When fairly and fully analyzed, neither Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407, nor Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524, was authority for the issuing of the injunction, which was the sole matter in contest in Ex parte Simon, as being without the jurisdiction of the circuit court, under U. S. Rev. Stat. § 720.

Nor was Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619, which was a creditors' bill; nor Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237, which was a bill brought by an infant to set aside a fraudulent sale of the infant's land, authority for the issuance of an injunction to stay proceedings in the state court, notwithstanding the prohibitory terms of U. S. Rev. Stat. § 720.

It may be doubted whether Marshall v. Holmes is now authority even on the question of the right of removal, since the decision of this court in the case of Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101, where the right of removal was denied by this court after two courts of the state of Kentucky had passed on the right of removal, and had decided the case on its merits, although the railroad company had actually removed the case to the Federal court, and although the Federal court had rendered a judgment upon the verdict of a jury therein, before the court of appeals of Kentucky had acted.

See also Morgan's L. & T. R. & S. S. Co. v. Street, 217 U. S. 599, 54 L. ed. 897, 30 Sup. Ct. Rep. 696; Bondurant v. Watson, 103 U. S. 281-287, 26 L. ed. 447-449.

The Federal statute, being a prohibitory statute, is a conclusive bar to Federal jurisdiction.

Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Randall v. Howard, 2 Black, 585, 17 L. ed. 269; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Riggs v. Johnson County, 6 Wall. 195, 18 L. ed. 776; Haines v. Carpenter, 91 U. S. 254, 23

L. ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Bondurant v. Watson, supra; Sargent v. Helton, 115 U. S. 348, 29 L. ed. 412, 6 Sup. Ct. Rep. 78; Lawrence v. Morgan's L. & T. R. & S. S. Co. 121 U. S. 634–636, 30 L. ed. 1018, 1019, 7 Sup. Ct. Rep. 1013; Moran v. Sturges, 154 U. S. 268, 38 L. ed. 985, 14 Sup. Ct. Rep. 1019; Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; Harkrader v. Wadley, 172 U. S. 170, 43 L. ed. 406, 19 Sup. Ct. Rep. 119; Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; Illinois C. R. Co. v. Sheegog, 217 U. S. 599, 54 L. ed. 897, 30 Sup. Ct. Rep. 696; Hull v. Burr, 234 U. S. 712, 58 L. ed. 1557, 34 Sup. Ct. Rep. 892; Ewing v. St. Louis, 5 Wall. 413, 18 L. ed. 657; Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026; Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470; Taylor v. Carryl, 20 How. 594, 15 L. ed. 1031; Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Payne v. Drew, 4 East, 523, 1 Smith, 170; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Evelyn v. Lewis, 3 Hare, 472; Noe v. Gibson, 7 Paige, 513; Russell v. East Anglian R. Co. 3 Macn. & G. 104, 20 L. J. Ch. N. S. 257, 14 Jur. 1033; Southern Bank & T. Co. v. Folsom, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 929; Phelps v. Mutual Reserve Fund Life Asso. 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 455; Oliver v. Parlin & O. Co. 45 C. C. A. 200, 105 Fed. 272; Missouri, K. & T. R. Co. v. Scott, 4 Woods, 386, 13 Fed. 793; Chicago Trust & Sav. Bank v. Bentz, 59 Fed. 645; Union P. R. Co. v. Flynn, 180 Fed. 565; Massachusetts Ben. Life Asso. v. Lohmiller, 20 C. C. A. 274, 46 U. S. App. 103, 74 Fed. 23; Coeur D'Alene R. & Nav. Co. v. Spalding, 35 C. C. A. 295, 93 Fed. 280; Rochester German Ins. Co. v. Schmidt, 99 C. C. A. 296, 175 Fed. 720.

The words of the statute, "staying proceedings," were used advisedly and cautiously. The broadness of the terms includes all proceedings in a state court, from the filing of the declaration or petition until the final result has been reached.

Riggs v. Johnson County, 6 Wall. 166, 18 L. ed. 768; Central Nat. Bank v. Stevens, 169 U. S. 464, 42 L. ed. 818, 18 Sup. Ct. Rep. 403.

A bill seeking the relief here prayed for is, by its nature and character, necessarily an ancillary bill.

Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Randall v. Howard, 2 Black, 585, 17 L. ed. 269; Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (Milwaukee & M. R. Co. v. Soutter) 2 Wall. 609–633, 17 L. ed. 886–895; Milwaukee & M. R. Co. v. Chamberlain, 6 Wall. 748, 18 L. ed. 859; Christmas v. Russell (Christmas v. Gaines) 14 Wall. 81, 20 L. ed. 763; Davis v. Gray, 16 Wall. 219, 21 L. ed. 452; First Nat. Bank v. Turnbull, 16 Wall. 195, 21 L. ed. 297; Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Dewey v. West Fairmont Gas Coal Co. 123 U. S. 333, 31 L. ed. 181, 8 Sup. Ct. Rep. 148; Johnson v. Christian, 125 U. S. 642, 646, 31 L. ed. 820, 821, 8 Sup. Ct. Rep. 989, 1135; Re Tyler, 149 U. S. 181, 37 L. ed. 694, 13 Sup. Ct. Rep. 785; Root v. Woolworth, 150 U. S. 401–413, 37 L. ed. 1123–1126, 14 Sup. Ct. Rep. 136; White v. Ewing, 159 U. S. 39, 40 L. ed. 68, 15 Sup. Ct. Rep. 1018; Carey v. Houston & T. C. R. Co. 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; Julian v. Central Trust Co. 193 U. S. 113, 48 L. ed. 639, 24 Sup. Ct. Rep. 399; 1 Bates, Fed. Eq. Proc. § 97, note; Goodrich v. Hunton, 29 La. Ann. 372; Dunlap v. Stetson, 4 Mason, 349, Fed. Cas. No. 4,164.

It cannot be possible that the authorities cited are of less weight than the *dicta* in Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62, to the effect that a bill to enjoin a judgment of a state court, brought in a Federal court, is properly cognizable in the Federal court as an original and independent bill, where the parties to the bill are the same parties as the parties in the suit at law in the state court, and where the state court has all of the power and processes to render full relief, and that such a bill is within the jurisdiction of the Federal court if there be the requisite diversity of citizenship. Such a view is not only irreconcilable with the mass of authorities cited, both in terms and on principle, but is in conflict with the positive doctrinal views of Mr. Justice Story, as expressed in his classic work on the Constitution, vol. 2, §§ 1751, 1753, and in his Equity Jurisprudence, § 900, where he lays down—as a fundamental exception to the general chancery doctrine—the principle that neither a state court will thus interfere with a Federal court, nor a Federal court with a state court, a principle which, he says, "proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein."

See also Chancellor Walworth in Mead v. Merritt, 2 Paige, 405; Bicknell v. Field, 8 Paige, 444; Chancellor Pitney in Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 71 Atl. 153.

It is apparent, as matter of law, upon the face of the bill, that the complainant

herein, upon making proper showing, had a plain, adequate, and complete remedy in the state court, both at law and in equity.

Ewing v. St. Louis, 5 Wall. 413, 18 L. ed. 657; Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026.

The courts of the state proceed on the same theory as the courts of the United States.

Chinn v. New Orleans, 1 Rob. (La.) 523; Paxton v. Cobb, 2 La. 139; Norris v. Fristoe, 3 La. Ann. 646; Blanck v. Speckman, 23 La. Ann. 146; Gayarre v. Millaudon, 23 La. Ann. 305; Perry v. Rue, 31 La. Ann. 287; Bryant v. Austin, 36 La. Ann. 808; Goodrich v. Hunton, 29 La. Ann. 372.

The Louisiana statute in question is nearly identical in terms with many other state statutes on the same subject-matter, that have been expressly upheld as due process of law under both state and Federal Constitutions.

Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 608, 37 L. ed. 301, 13 Sup. Ct. Rep. 444; Barrow S. S. Co. v. Kane, 170 U. S. 109, 42 L. ed. 967, 18 Sup. Ct. Rep. 526; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Pringle v. Woolworth, 90 N. Y. 509; Fisher v. Traders' Mut. L. Ins. Co. 136 N. C. 217, 48 S. E. 667; State v. St. Mary's Franco-American Petroleum Co. 58 W. Va. 108, 1 L.R.A.(N.S.) 558, 112 Am. St. Rep. 951, 51 S. E. 865, 6 Ann. Cas. 38, affirmed in 203 U. S. 183, 51 L. ed. 144, 27 Sup. Ct. Rep. 132; Wilson v. Seligman, 144 U. S. 45, 36 L. ed. 339, 12 Sup. Ct. Rep. 541; Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 1 Fed. 475; Knapp, S. & Co. v. National Mut. F. Ins. Co. 30 Fed. 607; Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co. 55 Fed. 27; Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 439; Merchants' Mfg. Co. v. Grand Trunk R. Co. 21 Blatchf. 109, 13 Fed. 358; Palmer v. Chicago Herald Co. 70 Fed. 886; Stewart v. Harmon, 98 Fed. 190; Fred Miller Brewing Co. v. Council Bluffs Ins. Co. 95 Iowa, 31, 63 N. W. 565; Youmans v. Minnesota Title Ins. & T. Co. 67 Fed. 282; Wilson v. Martin-Wilson Automatic Fire Alarm Co. 149 Mass. 24, 20 N. E. 318; Sparks v. National Masonic Acci. Asso. 100 Iowa, 458, 69 N. W. 678; Hinckley v. Kettle River R. Co. 70 Minn. 105, 72 N. W. 835; Keystone Driller Co. v. Superior Ct. 138 Cal. 738, 72 Pac. 398; Farrell v. Oregon Gold Co. 31 Or. 463, 49 Pac. 876; Com. v. Parlin & O. Co. 118 Ky. 168, 80 S. W. 791.

Mr. J. Blanc Monroe argued the cause, and, with Messrs. Monte M. Lemann and Alfred P. Thom, filed a brief for appellee:

When diversity of citizenship exists, and the amount involved exceeds $3,000, a Federal court can afford a litigant the same measure of protection that the state court offers. In aid of jurisdiction thus invoked, the Federal court may issue conservatory process of injunction, just as a state court may utilize that writ.

Terre Haute & I. R. Co. v. Peoria & P. U. R. Co. 82 Fed. 945.

When a default judgment, final and finished in the court which rendered it, has been rendered in a state court, which judgment is void for want of citation of defendant, or because obtained by fraud, or inequitably obtained because of some accident or mistake not attributable to his negligence, and defendant was prevented from properly defending it, equity will by injunction restrain the plaintiff personally from seeking to avail himself of his unfair advantage.

Hendrickson v. Hinckley, 17 How. 445, 15 L. ed. 124; Crim v. Handley, 94 U. S. 653, 24 L. ed. 216; Metcalf v. Williams, 104 U. S. 93, 26 L. ed. 665; Embry v. Palmer, 107 U. S. 11, 27 L. ed. 349, 2 Sup. Ct. Rep. 25; Knox County v. Harshman, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Marshall v. Holmes, 141 U. S. 596, 35 L. ed. 872, 12 Sup. Ct. Rep. 62; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362; Johnson v. Waters, 111 U. S. 667, 28 L. ed. 556, 4 Sup. Ct. Rep. 619; Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269.

In such case, if diverse citizenship exists, and $3,000 are in controversy, the Federal court, as well as the state court, may issue the process.

Marshall v. Holmes, 141 U. S. 596, 35 L. ed. 872, 12 Sup. Ct. Rep. 62; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Arrowsmith v. Gleason, 129 U. S. 98, 32 L. ed. 634, 9 Sup. Ct. Rep. 237; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 15, 51 L. ed. 348, 27 Sup. Ct. Rep. 236; National Surety Co. v. State Bank, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593.

Nor is there anything in U. S. Rev. Stat. § 720, to prevent it, since the proceeding is an independent proceeding, whether it be brought in the state or the Federal court; and, no state court having assumed jurisdiction of it, the Federal court interferes with no state court in taking it up.

National Surety Co. v. State Bank, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; Julian v. Central Trust Co. 193 U. S. 112, 48 L. ed. 639, 24 Sup. Ct. Rep. 399; Marshall v. Holmes, 141 U. S. 596, 35 L. ed. 872, 12 Sup. Ct. Rep. 62; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524.

The fact that the state statute confines certain actions to certain specified state courts will not prevent the proper Federal courts from entertaining the same, provided the other jurisdictional prerequisites exist; for a state statute cannot in any wise abridge or impair the scope of the jurisdiction of the Federal courts.

Hyde v. Stone, 20 How. 170, 175, 15 L. ed. 874, 875; Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The primary question whether the United States court had jurisdiction of the case must, of course, be determined by considering the allegations of the bill. It shows [122] diversity of citizenship, and charges that Simon was seeking to enforce by levy a judgment obtained by fraud and without notice to the railway company. If that be so, the United States courts, by virtue of their general equity powers, had jurisdiction to enjoin the plaintiff from enforcing a judgment thus doubly void. For even where there has been process and service, if the court "finds that the parties have been guilty of fraud in obtaining a judgment . . . it will deprive them of the benefit of it." McDaniel v. Traylor, 196 U. S. 415, 423, 49 L. ed. 533, 537, 25 Sup. Ct. Rep. 369. Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant "can no more be regarded as a party than any other member of the community." Such judgments are not erroneous and not voidable, but, upon principles of natural justice, and under the due process clause of the 14th Amendment, are absolutely void. They constitute no justification to a plaintiff who, if concerned in executing such judgments, is considered in law as a mere trespasser. Harris v. Hardeman, 14 How. 339, 14 L. ed. 446 (default judgment entered on improper service); Williamson v. Berry, 8 How. 541, 12 L. ed. 1189; Scott v. McNeal, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; Western Life Indemnity Co. v. Rupp, 235 U. S. 273, ante, 224, 35 Sup. Ct. Rep. 37.

On principle and authority, therefore, a judgment obtained in a suit of which the defendant had no notice was a nullity and the party against whom it was obtained was entitled to relief. It serves to illustrate the existence of appellee's right and the method of its enforcement to note that under the law of Louisiana the railway company was not obliged to attack a void judgment in the court that rendered it, but, in a court having jurisdiction of the plaintiff's person, could have instituted a new and independent proceeding to enjoin Simon from enforcing it. See Langridge v. 21st Judicial District Judge, 46 La. Ann. 29, 14 So. 427, where a suit was brought in the 21st district court to enjoin the enforcement of a void judgment obtained in the 17th district [123] court. See also Hibernia Nat. Bank v. Standard Guana Chemical & Mfg. Co. 1 La. Ann. 1321, 26 So. 274. Of course, the jurisdiction of the United States courts could not be lessened or increased by state statutes regulating venue or establishing rules of procedure. But, manifestly, if a new and independent suit could have been brought in a state court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal court, which was then bound to act within its jurisdiction and afford redress (Hyde v. Stone, 20 How. 175, 15 L. ed. 875; Reagan v. Farmers' Loan & T. Co. 154 U. S. 391, 38 L. ed. 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Payne v. Hook, 7 Wall. 429, 19 L. ed. 261). The United States courts could not stay original or supplementary proceedings in a state court (Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 159, 47 L. ed. 995, 23 Sup. Ct. Rep. 707), or revise its judgment. But by virtue of their general equity jurisdiction they could enjoin a party from enforcing a void judgment.

2. The appellant, Simon, however, contends that even if there was equity in the bill, and even if the railway company could have brought a new and independent suit in the state court to enjoin him from using the judgment, yet in the present case the Federal court was without power to afford the same relief, because § 720 of the Revised Statutes provides that, except in bankruptcy cases, a United States court shall not "stay proceedings in any court of a state."

In 1793, when that statute was adopted (1 Stat. at L. 334, chap. 22), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court,—in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses, and the like. It was also true that the courts of equity of one state or country could enjoin its own citizens from prosecut-

ing suits in another state or country. Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269. This, of course, often gave rise to irritating controversies between the courts themselves, [124] which could, and sometimes did, issue contradictory injunctions.

On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed. Diggs v. Wolcott, 4 Cranch, 179, 180, 2 L. ed. 587, 588 (1807), and Hull v. Burr, 234 U. S. 712, 58 L. ed. 1557, 34 Sup. Ct. Rep. 892 (1914), (the first and last cases in this court dealing with that question), furnish typical instances in which the statute has been applied. Those decisions, and the authorities therein cited, show that although the facts might have been such as to warrant an injunction against a suit then pending in a state court, yet § 720 prevented the Federal court from staying the proceedings in the state court.

3. But when the litigation has ended and a final judgment has been obtained, and when the plaintiff endeavors to use such judgment, a new state of facts, not within the language of the statute, may arise. In the nature of the case, however, there are few decisions dealing with such a question. For where the state court had jurisdiction of the person and subject-matter, the judgment rendered in the suit would be binding on the parties until reversed, and there would therefore usually be no equity in a bill in a Federal court seeking an injunction against the enforcement of a state judgment thus binding between the parties. See Marshall v. Holmes, 141 U. S. 600, 25 L. ed. 874, 12 Sup. Ct. Rep. 62, where Nougué v. Clapp, 101 U. S. 551, 25 L. ed. 1026, relied on by appellant, is discussed.

There have, however, been a few cases in which there was equity in the bill brought to enjoin the plaintiff from enforcing the state judgment, and where that equity was found to exist appropriate relief has been granted. For example, in Julian v. Central Trust Co. 193 U. S. 112, 48 L. ed. 639, 24 Sup. Ct. Rep. 399, a judgment was obtained in a state court, execution thereon was levied on property which, while not in possession of the Federal court, was in possession of a purchaser who held under the conditions of a Federal decree. It [125] was held that the existence of that equity authorized an injunction to prevent the plaintiff from improperly enforcing his judgment, even though it may have been perfectly valid in itself.

Other cases might be cited involving the same principle. But this is sufficient to show that if, in a proper case, the plaintiff holding a valid state judgment can be enjoined by the United States court from its inequitable use, by so much the more can the Federal courts enjoin him from using that which purports to be a judgment, but is, in fact, an absolute nullity. Marshall v. Holmes, 141 U. S. 597, 35 L. ed. 873, 12 Sup. Ct. Rep. 62; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Barrow v. Hunton, 99 U. S. 85, 25 L. ed. 408.

That the United States circuit court here could enjoin Simon from enforcing a void judgment against the Southern Railway Company has already been ruled in another branch of this very case. In habeas corpus proceedings (Ex parte Simon, 208 U. S. 144, 52 L. ed. 429, 28 Sup. Ct. Rep. 238) he sought relief from the punishment imposed because of his violation of the temporary injunction granted in this cause. He there claimed that the attachment for contempt was void because the court was without power to issue the injunction which he had violated. On that subject this court said:

"This is not a suit *coram non judice* and wholly void by reason of Rev. Stat. § 720, forbidding United States courts to stay by injunction proceedings in any state court. The circuit court had jurisdiction of the cause. That must be assumed at this stage, and finally unless we overrule the strong intimations in Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62, and the earlier cases cited in that case."

The appellant insists, however, that Marshall v. Holmes, referred to as conclusive unless overruled, does not support the jurisdiction of the circuit court because there no injunction was granted by the United States court.

In that case Mrs. Marshall brought a suit, in a Louisiana court, and obtained a temporary injunction restraining [126] Holmes, sheriff, from levying Mayer's judgments, alleged to be fraudulent. Her petition for removal to the United States court was denied and the case proceeded to final hearing in the state court, where the temporary injunction was dissolved. That decree was affirmed by the supreme court of Louisiana. The case was then brought here to review the order refusing to allow the case to be removed to the Federal court. In discussing that issue the appellee contended that "it was not competent for the circuit court of the United States, by any form of decree, to deprive Mayer of the benefit of his judgment at law, and that Mrs. Marshall could obtain the relief asked only in the court in which the judgment had been rendered." In considering that contention (which is substantially the same as that urged by the appellant Simon here), the court asked "whether, where the requisite diversity of

citizenship existed, the circuit court of the United States could not deprive a party of the benefit of a judgment fraudulently obtained by him in a state court." In answering this question the court pointed out the difference between enjoining a court and enjoining a party; and the difference between setting aside a judgment for irregularity and setting it aside for fraud. It was held that the case was removable, since, there being diversity of citizenship, the circuit court of the United States had jurisdiction to award Mrs. Marshall protection by preventing the plaintiff from enforcing his judgments if they were found to be fraudulent in fact, saying that the

"Authorities would seem to place beyond question the jurisdiction of the circuit court to take cognizance of the present suit, which is, none the less, an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgment in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall [127] not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud." And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service.

4. The appellant, Simon, further contends that Marshall v. Holmes is not applicable here because that was a removal case; and it is urged that even if a Federal court can grant an injunction in a case removed, it cannot award the same relief in a bill originally brought in the Federal court. But that is a clear case of distinction without a difference, and was not the basis of the decision.

Indeed (excluding ancillary bills, Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 245, 49 L. ed. 464, 25 Sup. Ct. Rep. 251), it seems always to have been assumed that the prohibition of § 720 applied to cases removed to the United States courts, as well as to those originally instituted therein. Such was true in Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587, the first reported case arising under the law. There a bill in chancery was filed in a Connecticut court to enjoin a suit then pending in a Connecticut court. The case was removed to the United States circuit court, and after removal the injunction was granted. On appeal the decree was reversed on the ground that a United States court could not [even on removal] "stay proceedings in a state court." In later decisions it has been pointed out that if there was a difference between cases brought and those removed, it would have been easy, as the law then stood, for the nonresident to bring a suit for injunction in a state court, remove it to the Federal court, secure therein the injunction sought, and thus evade [128] the statute. Bondurant v. Watson, 103 U. S. 288, 26 L. ed. 450; Lawrence v. Morgan's L. & T. R. & S. S. Co. 121 U. S. 636, 30 L. ed. 1019, 7 Sup. Ct. Rep. 1013.

The ground of the decision in the Marshall Case, in Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Barrow v. Hunton, 99 U. S. 85, 25 L. ed. 408; McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 337, cited in Julian v. Central Trust Co. 193 U. S. 112, 48 L. ed. 638, 24 Sup. Ct. Rep. 399; Dobbins v. Los Angeles, 195 U. S. 224, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Howard v. De Cordova, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 817, is that while § 720 prohibits United States courts from "staying proceedings in a state court," it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent the Federal courts from enjoining a party from using that which he calls a judgment, but which is, in fact and in law, a mere nullity. That conclusion is inevitable, or else the Federal court must hold that a judgment—void for want of service—is "a proceeding in a state court" even after the pretended litigation has ended and the void judgment has been obtained. Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the courts have universally held to be a nullity for all purposes.

(5) If, then, there was equity in the bill, and if the United States court had jurisdiction of a suit brought to enjoin the plaintiff from using a judgment alleged to be void because of fraud in its procurement and for want of service on the defendant, it becomes necessary to determine whether the railway company established the allegations of its bill.

The master found as a fact that the Southern Railway was doing business within the state of Louisiana; that there had been no fraud in the procurement of the judgment; but that the service on the *assistant* was not the service on the secre-

tary of state required by the statute. He therefore recommended that a decree be entered enjoining the plaintiff from using the judgment obtained in [129] the district court of the parish of Orleans. The circuit court made no finding on the question of fraud, but ruled (184 Fed. 959) that the service was void because act 54 was unconstitutional, in that it contained no provision requiring the secretary of state to give the foreign corporation notice that suit had been brought and citation served. In support of that construction is quoted at length a statement of the supreme court of Louisiana in Gouner v. Missouri Valley Bridge & Iron Co. 123 La. 964, 49 So. 657. In that case service was made on the secretary of state after the foreign corporation sued had left the state. As the court held that the statute did not apply to such absent corporation, it did not finally pass on the validity of act 54 under the state Constitution, though it did say:

"This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued, and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicil. When a petition cannot legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction."

On the other hand, the circuit court of appeals (115 C. C. A. 58, 195 Fed. 56), while referring to this case, held, citing Amy v. Watertown, 130 U. S. 317, 32 L. ed. 951, 9 Sup. Ct. Rep. 530, that though the Southern Railway was doing business in Louisiana, yet the default judgment was void because entered in a suit served on the *assistant* when the statute designated the secretary of state as the officer upon whom the citation should be served.

The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the court. We therefore purposely [130] refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the state of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute.

Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 22, 51 L. ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states.

In that case the Pennsylvania statute, as a condition of [131] their doing business in the state, required foreign corporations to file a written stipulation agreeing, "that any legal process affecting the company, served on the insurance commissioner . . . shall have the same effect as if served personally on the company within the state" (p. 18). The Old Wayne Life Association having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania (p. 20), was sued thereon in Pennsylvania. The declaration averred that the company "has been doing business in the state of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said county and state," and service was made on the commissioner of insurance. The association made no appearance, and a judgment by default was entered against it. Thereafter suit on the judgment was brought in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the

full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana court. There was no proof as to the company having done any business in the state of Pennsylvania, except the legal presumption arising from the statements in the declaration as to soliciting insurance in that state. This court said:

"But even if it be assumed that the . . . company was engaged in *some* business in Pennsylvania at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the insurance commission of that commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania [p. 21]. . . . Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it [132] in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. . . . As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association, and without its having appeared in person, or by attorney, or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the state within the meaning of the 14th Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the . . . judicial proceedings of the several states, and was void as wanting in due process of law."

From the principle announced in that case it follows that service under the Louisiana statute would not be effective to give the district court of Orleans jurisdiction over defendant as to a cause of action arising in the state of Alabama. The service on the Southern Railway, even if in compliance with the requirements of act 54, was not that kind of process, which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama. As the company made no appearance, the default judgment was void. Being void, the plaintiff acquired no rights thereby, and could be enjoined by a Federal court from attempting to enforce what is a judgment in name, but a nullity in fact. This conclusion makes it unnecessary to consider whether the Southern Railway was doing business in Louisiana. It also makes it unnecessary to consider the question of fact as to whether the judgment was void because of fraud in its procurement.

The decree of the Circuit Court of Appeals must be affirmed.

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[133] GRANT TIMBER & MANUFACTURING COMPANY, Plff. in Err.,
v.
GEORGE W. GRAY.

(See S. C. Reporter's ed. 133-135.)

Constitutional law — due process of law — right of defendant in possessory action to assert title.

The defendant in a possessory action for land, coupled with a demand for damages for timber taken by him from the premises, is not deprived of his property without due process of law, contrary to U. S. Const., 14th Amend., because, under La. Code of Practice, art. 55, he may not bring a petitory suit to establish his title to the land until after judgment shall have been rendered in the possessory action, and until, if he has been condemned, he shall have satisfied the judgment against him.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

[No. 136.]

Argued and submitted January 19 and 20, 1915. Decided February 1, 1915.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed, after striking out a stay of execution, a judgment of the District Court for the Fifth Judicial District, Winn Parish, in that state, for possession and money damages in a possessory action for land. Affirmed.

See same case below, 131 La. 922, 60 So. 617.

The facts are stated in the opinion.

NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On use of possessory title as a weapon of offense—see note to Freeman v. Funk, 46 L.R.A.(N.S.) 487.

Mr. Horace H. White argued the cause, and, with Messrs. Henry Moore, Jr., and J. R. Thornton, filed a brief for plaintiff in error:

The principle that no man shall be deprived of his liberty or property except by the "law of the land," or its synonym, "due process of law," is older than written constitutions,—older even than Runnymede,—and breathes so palpably of exact justice that it needs no formulation in the organic law. This principle is, however, in one form of expression or another, incorporated into the Federal Constitution, as well as into those of the several states.

Quimby v. Hazen, 54 Vt. 139.

Due process of law implies at least a conformity with the natural and inherent principles of justice.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

An opportunity of defense is an essential element in the conception of "due process of law."

Health Dept. v. Trinity Church, 17 N. Y. Supp. 512; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Doyle's Petition (Re Gannon) 16 R. I. 537, 5 L.R.A. 359, 27 Am. St. Rep. 759, 18 Atl. 159; Loeber v. Schroeder, 76 Md. 347, 25 Atl. 340.

Due process of law requires that the party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property.

People ex rel. Witherbee v. Essex County, 70 N. Y. 234; Brooks v. Tayntor, 17 Misc. 534, 40 N. Y. Supp. 445; Wright v. Cradlebaugh, 3 Nev. 349; State v. Cutshall, 110 N. C. 538, 16 L.R.A. 130, 15 S. E. 261.

Due process of law means as the "law of the land," and, as a general rule, involves an opportunity before a proper tribunal, under established procedure, to make contest in defending or enforcing a legal right.

Simmons v. Western U. Teleg. Co. 63 S. C. 425, 57 L.R.A. 607, 41 S. E. 521; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Pennoyer v. Neff, 95 U. S. 731, 24 L. ed. 572; Re Ogles, 93 Fed. 426.

If property can be taken without a forensic trial and judgment, there is no security for life or liberty. None of these things can be taken away by mere legislation.

Taylor v. Porter, 4 Hill, 146, 40 Am. Dec. 274; People ex rel. Griffing v. Brooklyn, 9 Barb. 552.

Mr. Patrick H. Loughran submitted the cause for defendant in error. Mr. John H. Mathews was on the brief:

What is due process of law in the states is *regulated* by the law of the state.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678.

Due process of law within the meaning of the 14th constitutional Amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 726.

Mr. Justice Holmes delivered the opinion of the court:

This is a possessory action for land, coupled with a demand for damages for timber taken by the defendant, the plaintiff in error, from the premises. After it was [134] begun, the defendant brought a petitory suit to establish its title to the land, and sought for a stay of proceedings in the present case until its title could be adjudicated, setting up that to allow the plaintiff to recover the value of the timber without proving ownership would be contrary to the 14th Amendment and a taking of the defendant's property without due process of law. The plaintiff recovered a judgment for possession and money damages, subject to a stay of execution, but the supreme court struck the stay of execution out. It seems also to have ordered the defendant's petitory suit to be dismissed. The ground for both orders was art. 55, Code of Practice. "He who is sued in a possessory action cannot bring a petitory action until after judgment shall have been rendered in the possessory action, and until, if he has been condemned, he shall have satisfied the judgment given against him." The only question is whether this act is valid. Some argument was attempted as to the scope and proper interpretation of the law, but we have nothing to do with that.

It would be a surprising extension of the 14th Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of the mediæval law. From the *exceptio spolii* of the Pseudo-Isidore, the Canon Law and Bracton to the assize of novel disseisin the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to; or at least that in a proceeding to right such disturbance a claim of title could not be set up; and from Kant to Ihering there has been much philosophizing as to the grounds. But it is unnecessary to follow the speculations, or to consider whether the principle is eternal or a no longer useful survival. The constitutionality of the law is independent of our views upon such points.

No doubt circumstances have changed. The proof of [135] title does not depend upon difficult evidence, technical procedure, or

the duel. Usually a few sheets of paper copied from the registry and costing but a trifle will establish the right, often with less trouble than it takes to prove possession. But these are not the only considerations. The state is within its constitutional power when it limits the sphere of self-help. It may protect an established possession against disturbance by anything except process of law. It may attach such consequences to the disturbance as it sees fit, short of cruel and unusual punishment. If it ordains a *restitutio in integrum*, or its equivalent in money, it not only is adopting a familiar remedy, but, with the conditions attached in Louisiana, does not go so far as it might. The law of Louisiana requires uninterrupted possession for a year for the possessory action. Civil Code, arts. 3454, 3455. If it had made a year the limitation for a petitory suit, and had provided that the title should be lost in that time, it would be hard to maintain that it had exceeded its constitutional power. Blinn v. Nelson, 222 U. S. 1, 7, 56 L. ed. 65, 68, 32 Sup. Ct. Rep. 1, Ann. Cas. 1913B, 555; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 156, 55 L. ed. 137, 155, 31 Sup. Ct. Rep. 171; Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38.

Judgment affirmed.

CELESTINA GALLARDO Y SEARY, Estefania Varonne, Celestina Gallardo y Varonne, and Eva Gallardo y Varonne, Appts.,

v.

JAMES R. NOBLE, William D. Noble, et al.

(See S. C. Reporter's ed. 135–140.)

Mortgage — property covered — crops or land.

1. The crops only, and not the land itself, are included in a mortgage given by a part owner and lessee in possession of a sugar plantation, notwithstanding the recital therein that his mortgage of future crops to secure his indebtedness is "besides the general obligation which he hereby makes of all his property" without the general hindering the special obligation, or the special hindering the general one, and despite the fact that, after referring to another indebtedness which must be paid, thereby canceling "that deed of refaccion," the mortgage obligates the mortgagor not to execute any other agreement or deed with damage "to this present one."

[For other cases, see Mortgage, I. d, in Digest Sup. Ct. 1908.]

Estoppel — by deed — registering title.

2. No estoppel to claim that a mortgage binds only the crops, and not the land itself, results from including such mortgage among the encumbrances set forth in an application for registry of a possessory title, where this is merely a statement of the condition of the record title, and does not in any way enlarge or purport to enlarge the scope of the original transaction.

[For other cases, see Estoppel, II., in Digest Sup. Ct. 1908.]

[No. 141.]

Argued January 20, 1915. Decided February 1, 1915.

APPEAL from the District Court of the United States for the District of Porto Rico to review a decree foreclosing a mortgage alleged to create a lien upon a sugar plantation. Reversed.

The facts are stated in the opinion.

Mr. Frederic R. Coudert argued the cause, and, with Mr. Howard Thayer Kingsbury, filed a brief for appellants.

Mr. N. B. K. Pettingill argued the cause, and, with Mr. Roberto H. Todd, filed a brief for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to foreclose a mortgage annexed to the bill, and alleged to create a lien upon the Cacique sugar plantation. It was brought against the appellants, who are the heirs of one Gallardo, a purchaser of the estate. A demurrer and a plea of prescription of thirty, twenty, fifteen, and five years were filed and overruled, subject to exception, and thereafter the bill was taken as confessed and a decree entered as prayed. The mortgage was made on December 22, 1865, and the plaintiffs agree that their claim depends upon its being construed to embrace the land. The construction of the instrument, therefore, is the main question to be dealt with. It is made more difficult by the fact that still, as when the case was here [138] before (223 U. S. 65, 56 L. ed. 353, 32 Sup. Ct. Rep. 194), there is only an obviously inartificial translation in the record, but enough can be gathered to make the result tolerably plain.

The mortgage, after reciting a debt due from the mortgagor, Don Ramon Ruiz, to the mortgagee, Mr. William Noble, "for the payment of the lease" on the Cacique estate, goes on to say that the mortgagor "binds himself to pay the above-mentioned sum to his creditor Noble, with the proceeds of the first crops which may be ground," etc. It then recites a debt of Ruiz to Goenaga that must be paid in October, 1866, "thereby

NOTE.—As to estoppel by recital in deed, will, or other instrument—see note to Carver v. Jackson, 7 L. ed. U. S. 761.

being canceled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one." "For the better security of the aforesaid, besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the Cacique plantation, . . . but also those which it may grind in the following crops, until the complete payment of the amount herein acknowledged." The appellee gives the original Spanish: "y sin que la obligación general que hace de todos sus bienes impide la especial ni por el contrario ésta à aquella, el compareciente don Ramón Ruiz hypoteca expresa y señaladamente no tan sólo los frutos que en la proxima cosecha elabore la Hacienda Casique . . . como ya queda precisado, sino tambien los que fabrique en los demás cosechas venideras hasta el completo pago de la cantidad que deja reconocida." We agree with the appellant that a negative is left out in the translation, and that the meaning is: without the general obligation of all the debtor's property hindering the special, or conversely this hindering that. So translated we think it is obvious that the general obligation of all the mortgagor's property is referred to not as the object [139] or effect of "this" special one, but as something presupposed. It is in fact the general obligation of all a debtor's property that is incident to the existence of a debt; an obligation which is recognized in some degree by every system of law, and shown in ours by the invalidity of conveyances in fraud of creditors, but which in the civil law is more emphasized and expressed. The object of the instrument, and the only object, is to pledge the crops, and to provide for the severance and application of them to the debt,—what is called an anticipatory mobilization. Williamson v. Richardson, 31 La. Ann. 685, 687. It could not well have gone further, seeing that, by the allegations of the bill, Ruiz owned only an undivided interest in the plantation, and was in possession under a lease.

The reference to the canceling of a deed of refaccion has no bearing upon the nature of the present instrument, although that point was argued. The obligation of Ruiz not to execute any other agreement to the damage of the present one is the well-known general pact *de non alienando*, intended to give an additional safeguard to the mortgagee against later alienees of the mortgaged property. Febrero, pt. 2, bk. 3, chap. 2, no. 85; Curia Filipica, pt. 2, § 11, no. 11; *Tercero Poseedor*. Nathan v. Lee, 2 Mart. N. S. 32. The language means any agreement other than the present—not any deed of refaccion other than the present, and so we need not consider the nature and effect of such deeds in creating, so to speak, a salvage lien. We turn, therefore, to a so-called acknowledgment that is relied upon as estopping the appellants from denying the operation of the mortgage upon the land. It seems from the bill that Ruiz became bankrupt, that a co-owner, Gallardo, obtained a possessory title, and that, on his applying for registry of the same, in 1882, he was required to set forth the encumbrances, and mentioned among them the mortgage to Noble. But even on the allegations of the bill, and still more plainly on looking at the instrument, [140] which is in the record and is referred to by both parties, this is merely a statement of the condition of the record title. It does not in any way enlarge or purport to enlarge the scope of the original transaction. The mortgage, of course, bound the land in a certain sense, because the crops were land until they were severed. Williamson v. Richardson, 31 La. Ann. 685. But that was the extent to which it bound it and the recital of it in the registry means no more. At a later date a registrar declined to recognize the mortgage as a lien upon the property, on the ground that it affected only the products to be manufactured in the plantation. He may have been wrong in his law for the reason that we have suggested, but he was plainly right in his construction of the document. There is no other recognition needing mention.

As our opinion is that the mortgage bound only the crops, it follows, without more, that the decree must be reversed.

Decree reversed.

UNITED STATES, Plff. in Err.,
v.
CLARA HOLTE.

(See S. C. Reporter's ed. 140-151.)

Conspiracy — against United States — white slave traffic — guilt of woman.

A woman may conspire "to commit an offense against the United States" within the meaning of the provision of the Crimin-

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NOTE.—On construction, applicability, and effect of congressional white slave act—see note to Johnson v. United States, L.R.A. 1915A, 862.

On indictment of woman transported in violation of the white slave traffic act for conspiracy to violate the laws of the United States—see note to this case as reported in L.R.A.1915D, 281.

al Code of March 4, 1909 (35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, § 10,201), § 37, although the object of the conspiracy is her own transportation in interstate commerce for purposes of prostitution, contrary to the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8812).

[For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

[No. 628.]

Argued January 8, 1915. Decided February 1, 1915.

IN ERROR to the District Court of the United States for the Eastern District of Wisconsin to review a judgment sustaining a demurrer to an indictment of a woman for conspiring to cause her own transportation in interstate commerce for purposes of prostitution. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause and filed a brief for plaintiff in error:

Where the substantive offense requires combination for its commission, the same combination cannot be also used as the basis of a conspiracy charge; *i. e.*, the prosecutor may not split the substantive offense into elements and frame an indictment on one element. But where the substantive offense may be consummated without a combination, the addition of that element furnishes the additional ingredient distinguishing conspiracy from the substantive offense, and makes it lawful to indict for either or both.

Chadwick v. United States, 72 C. C. A. 343, 141 Fed. 236; United States v. New York C. & H. R. R. Co. 146 Fed. 303; Ex parte Lyman, 202 Fed. 303; Reg. v. Whitchurch, L. R. 24 Q. B. Div. 420, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1; State v. Crofford, 133 Iowa, 478, 110 N. W. 921.

Guilty complicity on the part of the woman transported is not a necessary ingredient of the substantive offense.

Hoke v. United States, 227 U. S. 320, 57 L. ed. 526, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Bennett v. United States, 114 C. C. A. 402, 194 Fed. 630, affirmed in 227 U. S. 333, 57 L. ed. 531, 33 Sup. Ct. Rep. 288; United States v. Westman, 182 Fed. 1017.

If the act prohibited by each statute demands for its accomplishment the doing of the same things, then there is legal identity. If, however, any element is demanded by either that is not essential to the other, then they are separately punishable as different offenses, even though the elements of both may be furnished by the same single happening.

State v. Crofford, 133 Iowa, 480, 110 N. W. 921; Gavieres v. United States, 220 U. S. 342, 55 L. ed. 490, 31 Sup. Ct. Rep. 421.

The later consummation of the main offense by Laudenschleger could not swallow up, or give immunity to, the earlier completed crime of conspiracy.

Heike v. United States, 227 U. S. 131, 144, 57 L. ed. 450, 455, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128; Curley v. United States, 64 C. C. A. 369, 130 Fed. 1; United States v. Stamatopoulos, 164 Fed. 524; Solander v. People, 2 Colo. 48; State v. Crofford, 133 Iowa, 478, 110 N. W. 921.

Though the penalty provisions of the crime punished by § 2 were limited exclusively to procurers, no corresponding limitation is to be found in § 37, which, being aimed at every person, must apply to the defendant Holte.

United States v. Portale, 235 U. S. 27, ante, 111, 35 Sup. Ct. Rep. 1; United States v. Lewis, 235 U. S. 282, ante, 229, 35 Sup. Ct. Rep. 44.

It is not the policy of the law to suffer people to, with impunity, jointly plan the commission of crime.

Drew v. Thaw, 235 U. S. 432, ante, 302, 35 Sup. Ct. Rep. 137.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported from Illinois to Wisconsin for the purpose of prostitution, [144] contrary to the act of June 25, 1910, chap. 395, 36 Stat. at L. 825, Comp. Stat. 1913, § 8812. As the defendant is the woman, the district court sustained a demurrer on the ground that although the offense could not be committed without her, she was no party to it, but only the victim. The single question is whether that ruling is right. We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged.

The words of the Penal Code of March 4, 1909, chap. 321, § 37 [35 Stat. at L. 1096, Comp. Stat. 1913, § 10,201], are "conspire . . . to commit any offense against the United States;" and the argument is that they mean an offense that all the conspira-

tors could commit; and that the woman could not commit the offense alleged to be the object of the conspiracy. For although the statute of 1910 embraces matters to which she could be a party, if the words are taken literally, for instance, aiding in procuring any form of transportation for the purpose, the conspiracy alleged, as we have said, is a conspiracy that Laudenschleger should procure transportation and should cause the woman to be transported. Of course, the words of the Penal Code could be narrowed as we have suggested, but in that case they would not be as broad as the mischief; and we think it plain that they mean to adopt the common law as to conspiracy, and that "commit" means no more than bring about. For, as was observed in Drew v. Thaw (Dec. 21, 1914) [235 U. S. 432, ante, 302, 35 Sup. Ct. Rep. 137], a conspiracy to accomplish what an individual is free to do may be a crime (Reg. v. Mears, 4 Cox, C. C. 423, 2 Den. C C. 79, Temple & M. 414, 20 L. J. Mag. Cas. N. S. 59, 15 Jur. 66; Reg. v. Howell, 4 Fost & F. 160); and even more plainly a person may conspire for the commission of a crime by a third person. We will assume that there may be a degree of co-operation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor [145] was not a crime in the purchaser, although it was in the seller. Com. v. Willard, 22 Pick. 476. But a conspiracy with an officer or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section, now § 37, of the Penal Code. United States v. Martin, 4 Cliff. 156, 164, Fed. Cas. No. 15,728; United States v. Bayer, 4 Dill. 407, 410, Fed. Cas. No. 14,547; United States v. Stevens, 44 Fed. 132, 140; State ex rel. Durner v. Huegin, 110 Wis. 189, 246, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332. So a woman may conspire to procure an abortion upon herself when, under the law, she could not commit the substantive crime; and therefore, it has been held could not be an accomplice. Reg. v. Whitchurch, L. R. 24 Q. B. Div. 420, 422, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S. 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1; Solander v. People, 2 Colo. 48, 63; State v. Crofford, 133 Iowa, 478, 480, 110 N. W. 921.

So we think that it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York,—she would be within the letter of the act of 1910, and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime. The substantive offense might be committed without the woman's consent; for instance, if she were drugged or taken by force. Therefore the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply.

Judgment reversed.

[146] Mr. Justice McReynolds took no part in the consideration and decision of this case.

Mr. Justice Lamar, dissenting:

I dissent from the conclusion that a woman can be guilty of conspiring to have herself unlawfully transported in interstate commerce for purposes of prostitution.

Congress had no power to punish immorality, and certainly did not intend by this act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8812), to make fornication or adultery, which was a state misdemeanor, a Federal felony, punishable by $5,000 fine and five years' imprisonment. But when it appeared that there was a traffic in women to be used for purposes of prostitution, debauchery, and immoral purposes, Congress legislated so as to prohibit their interstate transportation in such vicious business. That there was such traffic in women and girls; that they were "literally slaves," "owned and held as property and chattels," and that their traffickers made large profits, is set out at length in the Reports of the House and Senate Committees (61st Congress, 2d Session), recommending the passage of the bill. So that an argument based on the use of the word "slave," "enslaved," "traffic in women," "business in women," "subject of transportation," and the like,—which might otherwise appear to be strained,— is amply justified by the amazing facts which those reports show as to the existence and extent of the business and the profits made by the traffickers in women. The argument based on the use of these words, and what they imply, is further justified by the fact that the statute itself declares (§ 8) that it

shall be known as the "white slave traffic act." In giving itself such a title the statute specifically indicates that, while of right, woman is not an object of merchandise or traffic, yet for gain she has by [147] some been wrongfully made such for purposes of prostitution; and that trade Congress intended to bar from interstate commerce.

The act either applies to women who are willingly transported, or it does not. If it does not apply to those who willingly go (47 H. R. 61st Cong. 2d Session, p. 10), then there was no offense by the man who transported her, or in the woman who voluntarily went,—and, in that event, there was, of course, no conspiracy against the laws of the United States in her agreeing to go. The indictment here, however, assumes that the act applies not only to those who are induced to go, but also to those who aid the panderer in securing their own transportation. On that assumption, every woman transported for the purposes of the business stands on the same footing, and cannot by her consent change her legal status. And if she cannot be directly punished for being transported, she cannot be indirectly punished by calling her assistance in the transportation a conspiracy to violate the laws of the United States. For if she is within the circle of the statute's protection, she cannot be taken out of that circle by the law of conspiracy, and thus be subjected to punishment because she agreed to go.

The statute does not deal with the offense of fornication and adultery, but treats the woman who is transported for use in the business of prostitution as a victim,—often a willing victim, but nevertheless a victim. It treats her as enslaved, and seeks to guard her against herself as well as against her slaver; against the wiles and threats, the compulsion and inducements, of those who treat her as though she was merchandise and a subject of interstate transportation. The woman, whether coerced or induced, whether willingly or unwillingly transported for purposes of prostitution, debauchery, and immorality, is regarded as the victim of the trafficker, and she cannot therefore be punished for being enslaved, nor for consenting and agreeing [148] to be transported by him for purposes of such business. To hold otherwise would make the law of conspiracy a sword with which to punish those whom the traffic act was intended to protect.

The fact that prostitutes and others have used this statute as a means by which to levy blackmail may furnish a reason why that should be made a Federal offense, so that she and they can be punished for blackmail or malicious prosecution. But those evils are not to be remedied by extending the law of conspiracy so as to treat the enslaved subject of transportation as a guilty actor in her own transportation; and then punish her because she agreed with her slaver to be shipped in interstate commerce for purposes of prostitution. Such a construction would make every willing victim indictable for conspiracy. Even that elastic offense cannot be extended to cover such a case.

There are no decisions dealing directly with the question as to whether a woman assisting in her own illegal transportation can be prosecuted for conspiracy. There are, however, a number of authorities dealing with somewhat analogous subjects. For example, in prosecutions for abortion, the woman "does not stand legally in the situation of an accomplice, for although she no doubt participated in the moral offense imputed to the defendant, she could not have been indicted for that offense. The law regards her as the victim rather than the perpetrator." Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319; Com. v. Wood, 11 Gray, 86; State v. Hyer, 39 N. J. L. 598; State v. Murphy, 27 N. J. L. 114; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471; State v. Owens, 22 Minn. 244; Watson v. State, 9 Tex. App. 238; Keller v. State, 102 Ga. 510, 31 S. E. 92 (seduction). *Contra* apparently in England and Colorado. Reg. v. Whitchurch, L. R. 24 Q. B. Div. 240, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S. 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1; Solander v. People, 2 Colo. 48. So, too, a person who knowingly purchases liquor from one [149] unauthorized to sell it is not guilty of a criminal offense and is not an accomplice. State v. Teahan, 50 Conn. 100; Com. v. Pillsbury, 12 Gray, 127; People v. Smith, 28 Hun, 626, affirmed on opinion below, 92 N. Y. 665; State v. Baden, 37 Minn. 212, 34 N. W. 24.

Where the purchaser of liquor sold in violation of law was prosecuted for inducing the seller to commit a crime, the court said:

"Every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act to all persons aiding, counseling, or encouraging the principal offender. There being no such provision in the statute, there is a strong implication that none such was

intended by the legislature." Com. v. Willard, 22 Pick. 479.

United States v. Dietrich, 126 Fed. 667, though not directly in point, sheds light on the subject. There two persons were indicted under Rev. Stat. § 5440, for conspiring to violate that law of the United States (Rev. Stat. § 1781) which makes it a criminal offense to agree to give or to receive a bribe. The court held that agreeing to give or receive a bribe was the substantive offense, and not a conspiracy. For when an offense, as bigamy or adultery, requires for its completion the concurrence of two persons, "the government cannot evade the limitations by indicting as for a conspiracy."

And in Reg. v. Tyrrell [1894] 1 Q. B. 711, 63 L. J. Mag. Cas. N. S. 58, 10 Reports, 82, 70 L. T. N. S. 41, 42 Week. Rep. 255, 17 Cox, C. C. 716, where a girl under fifteen years of age was prosecuted for inciting a man to commit adultery with her, one of the judges considered that she could not be found guilty because she was under the age of consent, and the other said that the statute did not apply because "there is no trace in the [150] statute of any intention to treat the women or girls as criminals."

Applying these cases, it appears that under the white slave traffic act there must be a woman who is transported and a person who compels or induces her to be transported, or who aids her in such transportation. "There is no trace in the statute of any intention to treat the women or girls as criminals" for being transported, nor for agreeing that they will be transported, nor for aiding in the transportation. And if, as said in Com. v. Willard, 22 Pick, 479, Congress had intended that they should be subject to indictment for conspiracy, "*it would have been declared . . . by extending the penal consequences of the prohibited act to all persons aiding, counseling, or encouraging the principal offender.* There being no such provision in the statute, there is a strong implication that none such was intended by the legislature."

To this may be added the practical consideration, that any construction making the woman liable for participation in the transportation will not only tend to prevent her from coming forward with her evidence, but in many instances she will be in position to claim her privilege and can refuse to testify on the ground that she might thereby subject herself to prosecution for conspiracy, in that she aided in the violation of the law, even though it was intended for the protection of her unfortunate class.

The woman, whether treated as the willing or an unwilling victim of such transportation for such business purpose, cannot be found guilty of the main offense, nor punished for the incidental act of conspiring to be enslaved and transported. Indeed, if she could be so punished for conspiring with her slaver, the fundamental idea that makes the act valid would be destroyed. She would cease to be an object of traffic; and instead of being the subject of illegal transportation would—not be transported by a slaver as an object of interstate commerce, [151] so as to be subject to regulative prohibitions under the commerce clause—but would be voluntarily traveling on her own account, and punishable by the laws of the state for prostitution practised after her arrival.

I am authorized to say that Mr. Justice Day concurs in this dissent.

WILMINGTON TRANSPORTATION COMPANY, Plff. in Err.,
v.
RAILROAD COMMISSION OF CALIFORNIA.

(See S. C. Reporter's ed. 151–157.)

Commerce — state regulation — rates for water transportation — course traversing high seas.

The absence of Federal regulation of rates for water transportation unconnected with transportation by railroad leaves a state free to prescribe reasonable rates for the transportation of passengers and goods wholly by water between two ports in the same state, over a course which traverses the high seas.

[For other cases, see Commerce, II.; III. m, in Digest Sup. Ct. 1908.]

[No. 369.]

Argued December 15 and 16, 1914. Decided February 1, 1915.

NOTE.—On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Co. v. Croxton, 33 L.R.A. 177.

As to whether a state may regulate the transportation between two points within the state over a route which passes outside the state—see note to Hanley v. Kansas City Southern R. Co. 47 L. ed. U. S. 333.

As to whether transportation between points in same state over a route part of which is in another state constitutes interstate commerce—see note to Missouri, K. & T. R. Co. v. Leibengood, 28 L.R.A. (N.S.) 985.

On jurisdiction over sea—see note to Humboldt Lumber Mfrs. Asso. v. Christopherson, 46 L.R.A. 264.

IN ERROR to the Supreme Court of the State of California to review a judgment which, on certiorari, sustained the authority of the State Railroad Commission to prescribe reasonable rates for carriage by water between two ports in the state over a course traversing the high seas. Affirmed.

See same case below, 166 Cal. 741, 137 Pac. 1153.

The facts are stated in the opinion.

Mr. Edward E. Bacon argued the cause, and, with Mr. James A. Gibson, filed a brief for plaintiff in error:

Transportation over high seas constitutes "commerce with foreign nations," and is therefore subject to regulation by Congress.

Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224; Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10; Hanley v. Kansas City Southern R. Co. 187 U. S. 619, 620, 47 L. ed. 335, 336, 23 Sup. Ct. Rep. 214; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 577, 22 L. ed. 654, 662; The Abby Dodge, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310.

Intercourse is commerce.

Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 431, 15 L. ed. 435, 437; Legal Tender Cases, 12 Wall. 457, 555, 20 L. ed. 287, 313; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; United States v. Arjona, 120 U. S. 479, 483, 30 L. ed. 728, 730, 7 Sup. Ct. Rep. 628; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Lottery Case (Champion v. Ames) 188 U. S. 321, 352, 47 L. ed. 492, 499, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; International Texbook Co. v. Pigg, 217 U. S. 91, 106, 54 L. ed. 678, 685, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905.

Transportation is commerce regardless of its purpose.

Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 619, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 470, 24 L. ed. 527, 529; Re Debs, 158 U. S. 564, 590, 39 L. ed. 1092, 1104, 15 Sup. Ct. Rep. 900; Union Bridge Co. v. United States, 204 U. S. 364, 385, 51 L. ed. 523, 533, 27 Sup. Ct. Rep. 367; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 46, 48, 56 L. ed. 327, 344, 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Philadelphia Co. v. Stimson, 223 U. S. 605, 634, 56 L. ed. 570, 582, 32 Sup. Ct. Rep. 340; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 336, 57 L. ed. 1501, 1506, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890.

Transit from one jurisdiction to another is the only essential.

Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 511, 58 L. ed. 332, 338, 34 Sup. Ct. Rep. 167; The Daniel Ball, 10 Wall. 557, 565, 19 L. ed. 999; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 38 L. ed. 962, 968, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Hoke v. United States, 227 U. S. 308, 320, 57 L. ed. 523, 526, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905.

The Federal government is charged with the exclusive responsibility as well as control of all "external affairs," including all foreign relations and intercourse.

Chy Lung v. Freeman, 92 U. S. 275, 279, 23 L. ed. 550, 551; Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L. ed. 23, 69; United States v. Arjona, 120 U. S. 479, 483, 30 L. ed. 728, 730, 7 Sup. Ct. Rep. 628; Chinese Exclusion Cases, 130 U. S. 581, 604, 32 L. ed. 1068, 1075, 9 Sup. Ct. Rep. 623; Nishimura Ekiu v. United States, 142 U. S. 651, 659, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336; Lem Moon Sing v. United States, 158 U. S. 538, 542, 39 L. ed. 1082, 1083, 15 Sup. Ct. Rep. 967.

Transportation from a state to a territory, held a species of "commerce among the states," is entirely analogous to the species of "commerce with foreign nations" here in question.

Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 619, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024.

Rights conferred by Federal license cannot be impaired by state action.

Gibbons v. Ogden, 9 Wheat. 1, 213, 6 L. ed. 23, 74; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Moran v. New Orleans, 112 U. S. 69, 75, 28 L. ed. 653, 655, 5 Sup. Ct. Rep. 38; Harman v. Chicago, 147 U. S. 396, 405, 411, 412, 37 L. ed. 216, 220, 222, 223, 13 Sup. Ct. Rep. 306.

State regulation of rates would impair rights under Federal license.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 570, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The failure of Congress to subject water carriers to regulation by the Interstate Commerce Commission does not imply that they were intended to be subject to regulation by the states, but rather that they were not to be regulated at all, except in the matters as to which Congress had already regulated them, and, in other matters, by the principles of the common law.

Regulation may be implied as well as express.

Hall v. DeCuir, 95 U. S. 485, 490, 24 L. ed. 547, 548; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 100, 45 L. ed. 765, 769, 21 Sup. Ct. Rep. 561; Gibbons v. Ogden, 9 Wheat. 1, 209, 6 L. ed. 23, 73; New York v. Miln, 11 Pet. 102, 158, 9 L. ed. 648, 670.

The doctrine requiring specific action of Congress is not applicable.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

Congress has prescribed all the regulations which are permissible, so far as that commerce is carried on in vessels. Those regulations, it is true, are principally designed to insure safety in the navigation of the vessels, and the protection and health of their officers and crews. Congress has not attempted to prescribe what charges may be made for the carriage of persons and merchandise in vessels; considering, perhaps, that they were more likely to be regulated upon just and equitable principles by competition than by legislation. Whatever the reason, Congress has not seen fit to act upon that subject.

Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 12.

The power to regulate interstate and foreign commerce is vested exclusively in Congress, and cannot be exercised by the states.

D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 58 L. ed. 857, 34 Sup. Ct. Rep. 564; International Harvester Co. v. Kentucky, 234 U. S. 579, 58 L. ed. 1479, 34 Sup. Ct. Rep. 944; Railroad Commission v. Worthington, 225 U. S. 101, 107, 56 L. ed. 1004, 1007, 32 Sup. Ct. Rep. 653.

There is no difference, as to Federal power, between interstate and foreign commerce.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 470, 24 L. ed. 527, 529; Hinson v. Lott, 8 Wall. 148, 151, 19 L. ed. 387, 388; Brown v. Houston, 114 U. S. 622, 630, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091; Leisy v. Hardin, 135 U. S. 100, 110, 111, 34 L. ed. 128, 132, 133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 58 L. ed. 1337, 52 L.R.A.(N.S.) 574, 34 Sup. Ct. Rep. 826.

Fixing transportation rates is regulation of commerce.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 619, 620, 47 L. ed. 333, 335, 336, 23 Sup. Ct. Rep. 214.

Termini of transportation route alone are not conclusive of "local" character.

Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 619, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214.

Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004.

Unity of control was the "uniform system or plan of regulation" which was declared to be desirable.

Gibbons v. Ogden, 9 Wheat. 1, 223, 6 L. ed. 23, 76.

Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable,

or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 48, 56 L. ed. 327, 345, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 507, 31 L. ed. 700, 714, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 470, 24 L. ed. 527, 529; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; Wabash St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 575, 30 L. ed. 244, 250, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 244, 30 L. ed. 888, 894, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 30 L. ed. 1200, 1201, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

The cases warrant and require the drawing of a sharp line of distinction between that state action which operates upon the act of commerce immediately, and that which operates upon it only mediately, being directed primarily against some instrument or agency, or some incident or consequence, of the act of commerce.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 572, 30 L. ed. 244, 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 206, 29 L. ed. 158, 163, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Hall v. DeCuir, 95 U. S. 485, 488, 24 L. ed. 547, 548.

Such immediate operation, clearly, is the character of the state action here involved, for it deals not with any instrumentality of commerce, such as the railroad cars involved in Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829, nor with any human agency of commerce, such as the locomotive engineers dealt with in Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, nor with any mere incident or consequence of commerce, constituting no necessary or integral part of the act of commerce, such as the liability for negligence of an interstate carrier, involved in Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, but with an act of commerce, —namely, transportation,—which is affirmed in so many decisions to be "commerce itself."

Valid state action must rest on some power other than regulating commerce.

Gibbons v. Ogden, 9 Wheat. 1, 204, 6 L. ed. 23, 72.

State action, although for a valid purpose, is void where it imposes unnecessary restraint upon Federal commerce.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 469, 472, 24 L. ed. 527, 529, 530; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 84, 34 L. ed. 862, 864, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Schollenberger v. Pennsylvania, 171 U. S. 1, 16, 43 L. ed. 49, 55, 18 Sup. Ct. Rep. 757; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 570, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

State action affecting Federal commerce is void where its object is to restrain or control such commerce.

Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 58 L. ed. 857, 34 Sup. Ct. Rep. 564; Central of Georgia R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; Railroad Commission v. Worthington, 225 U. S. 101, 111, 56 L. ed. 1004, 1009, 32 Sup. Ct. Rep. 653.

Police power respecting Federal commerce is vested in Congress, not in the states.

Crutcher v. Kentucky, 141 U. S. 47, 56, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851.

Stopping of interstate trains is a direct regulation of commerce, if local facilities are otherwise provided.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633.

Increasing common-law obligations as to

tracing lost freight, furnishing cars, etc., is regulation of commerce.

Central of Georgia R. Co. v. Murphey, 196 U. S. 194, 202, 203, 49 L. ed. 444, 447, 448, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 329–331, 50 L. ed. 772, 775, 776, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed 352, 29 Sup. Ct. Rep. 214; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491.

But states may, by appropriate means, enforce common-law obligations.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 619, 622, 53 L. ed. 352, 359, 360, 29 Sup. Ct. Rep. 214; Western U. Teleg. Co. v. James, 162 U. S. 650, 660, 40 L. ed. 1105, 1108, 16 Sup. Ct. Rep. 934.

Acts of commerce are governed by the common law in the absence of Federal regulation.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 101, 102, 45 L. ed. 765, 770, 771, 21 Sup. Ct. Rep. 561; Kansas v. Colorado, 206 U. S. 46, 96, 51 L. ed. 956, 974, 27 Sup. Ct. Rep. 655.

State action affecting Federal commerce beyond the bounds of a state is a void regulation thereof.

Hall v. DeCuir, 95 U. S. 485, 487, 24 L. ed. 547, 548; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 335, 29 L. ed. 636, 645, 6 Sup. Ct. Rep. 334, 388, 1191; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 577, 30 L. ed. 244, 251, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 358, 30 L. ed. 1187, 1189, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Western U. Teleg. Co. v. James, 162 U. S. 650, 662, 40 L. ed. 1105, 1109, 16 Sup. Ct. Rep. 934; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10.

Conflict of state action is not the only ground of the doctrine.

Railroad Commission v. Worthington and Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; Gibbons v. Ogden, 9 Wheat. 1, 222, 226, 6 L. ed. 23, 76, 77.

The Port Richmond Case deals solely with ferry transportation.

Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. Rep. 821.

Ferries cannot be operated from the shore of a state without its consent.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191.

The rule is not applicable to ferriage from opposite shore.

Conway v. Taylor, 1 Black, 634, 17 L. ed. 203.

Nor as to any other form of transportation than ferries.

Conway v. Taylor, 1 Black, 632, 17 L. ed. 202.

Territorial limitation on power of states is conceded by cases sustaining state action.

Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004; Sherlock v. Alling, 93 U. S. 99, 103, 104, 23 L. ed. 819–821; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 447, 30 L. ed. 976, 977, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 635, 42 L. ed. 878, 885, 18 Sup. Ct. Rep. 488; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 370, 55 L. ed. 498, 501, 31 Sup. Ct. Rep. 399; Adams Exp. Co. v. Croninger, 226 U. S. 491, 500, 57 L. ed. 314, 317, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 399, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

All other decisions deny the power of a state to regulate transportation, as to rates or otherwise, outside territorial limits.

Stare decisis requires adherence to the doctrine of Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. Rep. 167.

The general right to conduct commerce may not comprehend the special mode of ferries.

Brown v. Maryland, 12 Wheat. 419, 443, 6 L. ed. 678, 687; Emert v. Missouri, 156 U. S. 296, 313, 39 L. ed. 430, 434, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Schollenberger v. Pennsylvania, 171 U. S. 1, 23, 43 L. ed. 49, 57, 18 Sup. Ct. Rep. 757.

The right of regulation is impliedly, if not expressly, reserved in every grant of ferry rights.

Conway v. Taylor, supra; Baltimore &

O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 703, 40 L. ed. 849, 860, 16 Sup. Ct. Rep. 714.

The Federal power to regulate commerce, delegated by the Constitution, is, from its very nature, necessarily and wholly exclusive.

New York v. Miln, 11 Pet. 102, 158, 9 L. L. ed. 648, 670; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 211, 29 L. ed. 158, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Gibbons v. Ogden, 9 Wheat. 227, 6 L. ed. 77; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 620, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Upon whatever approved grounds the rule of exclusive Federal power over commerce is predicated, that rule clearly decides the case at bar against the defendant in error, the Railroad Commission of California.

Leisy v. Hardin, 135 U. S. 100, 109, 110, 34 L. ed. 128, 132, 133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The decision in Crandall v. Nevada, 6 Wall. 35, 44, 18 L. ed. 745, 747, has, in many subsequent cases, been treated as an interpretation of the commerce clause.

State Freight Tax Case, 15 Wall, 232, 281, 21 L. ed. 146, 163; Cook v. Pennsylvania, 97 U. S. 566, 571, 24 L. ed. 1015, 1017; Moran v. New Orleans, 112 U. S. 69, 73, 28 L. ed. 653, 655, 5 Sup. Ct. Rep. 38; Robbins v. Taxing Dist. 120 U. S. 489, 492, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 339, 30 L. ed. 1202, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 213, 38 L. ed. 962, 967, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

The absence of discrimination against nonresidents is immaterial.

State Freight Tax Case, 15 Wall. 279, 21 L. ed. 163; Robbins v. Taxing Dist. 120 U. S. 497, 30 L. ed. 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Bowman v. Chicago & N. W. R. Co. 125 U. S. 496, 31 L. ed. 711, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Minnesota v. Barber, 136 U. S. 326, 34 L. ed. 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Scott v. Donald, 165 U. S. 98, 41 L. ed. 644, 17 Sup. Ct. Rep. 265.

There would be intolerable confusion if nonresidents' rates were regulated by Congress, and residents' rates by the state.

Hall v. De Cuir, 95 U. S. 485, 489, 24 L. ed. 547, 548; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 572, 30 L. ed. 244, 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 620, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214.

Mr. Max Thelen argued the cause, and, with Messrs. Douglas Brookman and Allan P. Matthew, filed a brief for defendant in error:

Commerce between San Pedro and Avalon is local California commerce, and not commerce with foreign nations.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806.

A clear distinction must be drawn between admiralty and maritime jurisdiction on the one hand, and the so-called commerce clause on the other.

The Belfast, 7 Wall. 624, 640, 19 L. ed. 266, 270; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; Ex parte Boyer, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585; The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; The Commerce, 1 Black, 574, 17 L. ed. 107; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

Navigation on the high seas is not conclusive of Federal control.

Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; Norman v. Norman, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143.

The high seas cannot become the property of any one nation or of any set of nations.

Woolsey, International Law, § 59; Boyd, Wheaton's International Law, ¶ 106; 1 Oppenheim, International Law, p. 195.

The Federal government has failed to act in the matter of the rates of commerce wholly by water.

Re Water Carriers, 15 Inters. Com. Rep. 205; Mutual Transit Co. v. United States, 102 C. C. A. 164, 178 Fed. 664; Smith v. Maryland, 18 How. 71, 15 L. ed. 269.

In matters of local state interest, not necessitating a uniform rule, the state may act in the absence of Federal legislation.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

The test is not whether interstate com-

merce is burdened, but whether it is "lawfully" burdened.

Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377; Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 331, 58 L. ed. 1330, 1336, 34 Sup. Ct. Rep. 821; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 58 L. ed. 1337, 52 L.R.A.(N.S.) 574, 34 Sup. Ct. Rep. 826.

The basic principle in determining whether the states may act until the Federal Congress acts is that in those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive, but that in other matters admitting of diversity of treatment according to the special requirements of local conditions, the states may act until Congress sees fit to act.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 331, 58 L. ed. 1330, 1336, 34 Sup. Ct. Rep. 821; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; Mobile County v. Kimball, 102 U. S. 691, 698, 26 L. ed. 238, 240; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

In the absence of Federal legislation, the states may—

(a) Regulate pilotage.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; Anderson v. Pacific Coast S. S. Co. 225 U. S. 187, 56 L. ed. 1047, 32 Sup. Ct. Rep. 626.

(b) Protect their coasts, improve their harbors, bays, and streams, and construct dams and bridges across navigable rivers.

Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; Huse v. Glover, 119 U. S. 543, 547, 30 L. ed. 487, 489, 7 Sup. Ct. Rep. 313; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct Rep. 811; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127.

(c) Regulate wharfage charges and exact tolls for the use of artificial facilities provided under this authority (although payment is required from those engaged in interstate or foreign commerce).

Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113.

(d) Make quarantine regulations.

Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594; Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101.

(e) Make state inspection laws.

Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71; Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377.

(f) Safeguard life and property, even though engaged in interstate commerce.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New

York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829.

Cases in which this court has held that a state statute affecting interstate commerce was void may all be explained on the same fundamental test which this court has established.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Railroad Commission v. Worthington; 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118: Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 58 L. ed. 1337, 52 L.R.A.(N.S.) 574, 34 Sup. Ct. Rep. 826.

If the matter is of local concern, and the Federal government has not acted, the states may establish rates in certain cases of commerce among the states or with foreign nations. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. Rep. 821; Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 58 L. ed. 1337, 52 L.R.A.(N.S.) 574, 34 Sup. Ct. Rep. 826.

In the present case, because the matter is of local concern, California has jurisdiction to establish the rates between San Pedro and Avalon, even if this be considered commerce with foreign nations.

Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. Rep. 821.

Mr. Justice Hughes delivered the opinion of the court:

The Wilmington Transportation Company, a corporation organized under the laws of the state of California, is engaged as a common carrier of passengers and goods by sea, between San Pedro, on the mainland, and Avalon, on Santa Catalina island, both places being within the county of Los Angeles, in that state. Merchants at Avalon, insisting that the rates charged for this transportation were unreasonable, presented their complaint to the Railroad Commission of the state of California, and asked that reasonable rates be fixed under the public utilities act of 1911. Stat. (Cal.) 1911, Ex. Sess. p. 18. The Transportation Company challenged the authority of the Commission upon the ground that the business was subject exclusively to the regulating power of Congress. The Commission overruled the contention, and its authority to prescribe reasonable rates between these ports of the state was sustained on writ of review by the state court. 166 Cal. 741, 137 Pac. 1153. The case has been brought here on error.

The vessels of the plaintiff in error, in their direct passage between the ports named, must traverse the high seas for upwards of 20 miles. Adopting the statement of the Commission, the supreme court of the state puts the case thus: "They do not touch at any other port, [153] either of the United States or of any foreign country. They do not transfer their passengers or freight to any other vessel, or receive the same from any other vessel in their course. They do not on the voyage take on or put off any article of commerce. While a portion of the voyage is on the high seas, the navigation thereof is merely incidental to the real purpose of the voyage, which is to ply between two ports, both of which are located in the same county in this state."

Relying upon Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224, the plaintiff in error contends that transportation over the high seas is "commerce with foreign nations" in the constitutional sense. See Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 203, 36 L. ed. 672, 675, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; The Abby Dodge, 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310. But if it be assumed for the present purpose that the power of Congress extends to the subject of this controversy, the fact remains that the power has not been exercised. The provisions of the Federal statutes relating to vessels do not go so far,

and the Interstate Commerce Commission has not been authorized to prescribe rates for water transportation unconnected with transportation by railroad. 36 Stat. at L. 539, 545, chap. 309, Comp. Stat. 1913, § 8563. In this aspect, the question is whether the mere existence of the Federal power, that is, while it is dormant, precludes the exercise of state authority to prevent exorbitant charges with respect to this traffic which has its origin and destination within the limits of the state.

It is urged that the fixing of rates is a regulation of the commerce involved, and hence, of necessity, is repugnant to the Federal authority, although the latter be unexercised. This proposition, however, as has frequently been pointed out, is too broadly asserted if no regard be had to the differences in the subject which, by virtue of the commerce clause, are within the control of Congress. Thus, vessels engaged in foreign commerce have been compelled to submit to state requirements as to pilotage and quarantine since the foundation of the government, [154] although it could not be denied that these requirements were regulations which Congress could at any time displace. Cooley v. Port Wardens, 12 How. 299, 317, 319, 13 L. ed. 996, 1004; Ex parte McNiel, 13 Wall. 236, 240, 20 L. ed. 624, 625; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Anderson v. Pacific Coast S. S. Co. 225 U. S. 187, 195, 56 L. ed. 1047, 1051, 32 Sup. Ct. Rep. 626; Morgan, L. & T. R. S. S. Co. v. Board of Health, 118 U. S. 455, 465, 30 L. ed. 237, 242, 6 Sup. Ct. Rep. 1114; Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 387, 46 L. ed. 1209, 1213, 22 Sup. Ct. Rep. 811. In these cases, it was apparent that the subject was of a local nature, admitting of diversity of treatment according to local necessities, and it could not be supposed that it was the intention to deny to the states the exercise of their protective power, in the absence of Federal action. It is not necessarily determinative that the vessels in the course of the transportation in question pass beyond the boundary of the state. See The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 405, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133. In the case of ferries over boundary waters, it has always been recognized that ferriage from the shore of a state is peculiarly a matter of local concern, and, while undoubtedly Congress may regulate interstate transportation by ferry as well as other interstate commercial intercourse, still, because of the nature of the transportation and the local exigency, a state, in the absence of Federal regulation, *may prevent unreasonable charges for carriage by ferry from a point of departure* within its borders. Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 332, 58 L. ed. 1330, 1336, 34 Sup. Ct. Rep. 821; Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 342, 58 L. ed. 1337, 1341, 34 Sup. Ct. Rep. 826. The rule which the plaintiff in error invokes is not an arbitrary rule, with arbitrary exceptions, but is one that has its basis in a rational construction of the commerce clause. As repeatedly stated, it denies authority to the state in all cases where the subject is of such a nature as to demand that, if regulated at all, its regulation should be through a general or national system, and that it should be free from restraint or direct burdens save as it is constitutionally governed by Congress; and on the other hand, as to those matters which [155] are distinctively local in character, although embraced within the Federal authority, the rule recognizes the propriety of the reasonable exercise of the power of the states, in order to meet the needs of suitable local protection, until Congress intervenes. Cooley v. Port Wardens, 12 How. 299, 317, 319, 13 L. ed. 996, 1004; Ex parte McNiel, 13 Wall. 236, 240, 20 L. ed. 624, 625; Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 29 L. ed. 158, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 481, 31 L. ed. 700, 705, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 399-403, 57 L. ed. 1511, 1541-1543, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Port Richmond & B. P. Ferry Co. v. Hudson County, supra.

It was by the application of these principles that it was decided that a state could not prescribe rates for interstate railroad transportation, even with respect to that portion of the route which was within its own territory. As was said by Mr. Justice Miller, in delivering the opinion of the court upon this question (Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 577, 30 L. ed. 244, 251, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4), after recognizing the authority of the state to prescribe intrastate rates: "But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states cannot be over-

estimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said." And the same conclusion has been reached with respect to the fixing of rates for railroad transportation which, while beginning and ending in the same state, passes through the territory of another state. The regulation of such rates cannot be "split up" according to the jurisdiction of the respective states [156] over the track; there must be one rate fixed by one authority. Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 620, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214.

We are not here dealing with the case of property which is in course of continuous transportation to another state or to a foreign country. The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 124, 57 L. ed. 442, 447, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837. It must be assumed upon this record that the state claims the right to exercise its authority only as to transportation between the mainland and the island, and solely with respect to such shipments over this route as are local to the state, both as to the beginning and the end of the transportation. There is no passage through the territory of another state; the transportation, in its entire course, is subject to a single authority,—either that of Congress or that of the state,—and the latter would yield to the exercise of the former. The sovereignty of no other jurisdiction is encountered. It is plainly of importance to the people of the state that this local traffic should be carried upon reasonable terms; and if, in the case of a ferry, a state may protect its people from extortion although the ferriage is to the shore of another state, there is, in our judgment, no ground for saying that where the transportation is between two places in the same state, it is less a subject for local action, in the absence of Federal interposition, because the voyage is over a stretch of open sea. Congress has not attempted to intervene, and we find no basis for the conclusion that the subject is one which must be deemed to be wholly free from regulation unless Congress deals with it. On the contrary, it is precisely of that local character which permits it to be left appropriately to the care of the state.

A different conclusion was reached at circuit in Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10, [157] but, for the reasons stated, we are unable to agree with it. The judgment of the Supreme Court of California is affirmed.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,

v.

C. L. DE FUENTES, W. L. Foster, and Overton Cade, as Commissioners and Members of the Railroad Commission of Louisiana.

(See S. C. Reporter's ed. 157-164.)

Commerce — conflicting state and Federal regulation — interchange of railway traffic.

Congress has so far undertaken to regulate the subject as to invalidate, as an unlawful regulation of interstate commerce, an order of a state railroad commission under which a carrier may be required, upon demand of a carrier or shipper, and on terms fixed by the commission, to switch empty cars from any connection with a competing interstate railway to a designated side track within its own terminals in a city, for the purpose of being loaded there with goods intended for interstate commerce, and when so loaded, to move the same back to the competitor's line for continued transportation to another state, and also to accept from competing interstate lines at points within the city loaded cars brought from other states, and place them on its own side track, although such side track was the real destination contemplated at the time of the original shipment.

[For other cases, see Commerce, I. c; III., in Digest Sup. Ct. 1908.]

[No. 423.]

Argued January 8, 1915. Decided February 1, 1915.

APPEAL from the District Court of the United States for the Eastern District of Louisiana to review a decree dismissing the bill in a suit to enjoin the enforcement of an order of the Louisiana Railroad Commission, regulating the interchange of railway traffic. Reversed.

The facts are stated in the opinion.

NOTE.—On state regulation of interstate or foreign commerce, generally,—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On power to compel railroad to build, maintain, or connect with, side tracks for accommodation of shippers—see note to State ex rel. Mt. Hope Coal Co. v. White Oak R. Co. 28 L.R.A.(N.S.) 1013.

Mr. Blewett Lee argued the cause, and, with Messrs. Robert V. Fletcher, Hunter C. Leake, and Gustave Lemle, filed a brief for appellant:

A switching movement, whereby interstate freight is delivered or an interstate movement is originated, is itself a movement in interstate commerce.

McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Waverly Oil Works Co. v. Pennsylvania R. Co. 28 Inters. Com. Rep. 621; Re Detroit Switching Charges, 28 Inters. Com. Rep. 494; People's Fuel & Supply Co. v. Grand Trunk Western R. Co. 27 Inters. Com. Rep. 24; J. A. Adams & Sons Co. v. Vicksburg, S. & P. R. Co. 29 Inters. Com. Rep. 52; Lust & M. Digest of Decisions of Inters. Com. Com. pp. 787–796; Duluth-Superior Mill. Co. v. Northern P. R. Co. 152 Wis. 528, 140 N. W. 1105.

That which determines the character of commerce as being interstate or intrastate is the intention and purpose of the shipper as to destination when the freight begins its movement.

Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; United States v. Union Stock Yards & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83.

The order, since it deals with interstate commerce, is invalid as encroaching upon the exclusive authority of Congress.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

This order cannot be construed as applying only to intrastate commerce, and thereby saved from invalidity.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; United States v. JuToy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Mr. Wylie M. Barrow argued the cause, and, with Mr. Ruffin G. Pleasant, Attorney General of Louisiana, filed a brief for appellees:

There is no encroachment upon the Federal exercise of power by the order of the Railroad Commission of Louisiana, which prescribes a reasonable regulation in aid of commerce, and which prevents unjust discrimination in intracity switching.

Mobile County v. Kimball, 102 U. S. 697, 26 L. ed. 240; Louisville & N. R. Co. v. Higdon, 234 U. S. 592, 58 L. ed. 1484, 34 Sup. Ct. Rep. 948.

The order of the Louisiana Commission does not require the Illinois Central Railroad Company to give the use of its terminals to its connections.

Iowa v. Chicago, M. & St. P. R. Co. 4 Inters. Com. Rep. 425, 33 Fed. 391; St. Louis, S. & P. R. Co. v. Peoria & K. U. R. Co. 26 Inters. Com. Rep. 226; Merchants' & Mfrs. Asso. v. Pennsylvania R. Co. 23 Inters. Com. Rep. 474; Louisville & N. R. Co. v. Kentucky, 161 U. S. 699, 40 L. ed. 859, 16 Sup. Ct. Rep. 714.

The regulating power of the Railroad Commission of Louisiana extends over the carrier and all of its appurtenances.

Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214; Railroad Commission v. Kansas City Southern R. Co. 111 La. 33, 35 So. 487; Thompson v. Railroad Commission, 198 Fed. 691; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Merchants' & Mfrs. Asso. v. Pennsylvania R. Co. 23 Inters. Com. Rep. 474.

The order of the Railroad Commission of Louisiana, being in aid of commerce, does not come into conflict with the act to regulate commerce.

Merchants' & Mfrs. Asso. v. Pennsylvania R. Co. 23 Inters. Com. Rep. 474; Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 Sup. Ct. Rep. 263; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

The order is not in conflict with the doctrines laid down in Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246, or McNeill v. Southern R. Co. 202 U. S. 545, 50 L. ed. 1143, 26 Sup. Ct. Rep. 722.

Nor is it controlled by Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229.

This case is governed by the doctrines announced in Grand Trunk R. Co. v. Michigan

R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; and Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592. See also Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 27, 48 L. ed. 327, 24 Sup. Ct. Rep. 202; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

[161] Mr. Justice McReynolds delivered the opinion of the court:

After a full hearing and investigation the Railroad Commission of Louisiana, on August 8, 1903, promulgated the following, known as order No. 295:

"No railroad company operating in the state of Louisiana shall refuse or decline to switch cars for any other railroad with which it connects, or any shipper or consignee, at rates approved or established by the commission, whether such cars are to be loaded with freight to be shipped out of the state, or are loaded with freight shipped into the state. All tariffs for the 'service' of switching cars in the state of Louisiana shall be filed with the commission, within thirty days from the date of this order, and all the commission's rules and orders relative to rates and changes in rates will also apply to switching charges."

By a proceeding against the members of the commission, commenced in the United States circuit court, eastern district of Louisiana, February 10, 1904, the appellant, a common carrier of freight and passengers operating lines in Louisiana, attacked the validity of this order upon the ground that it is an unlawful attempt to regulate interstate commerce and for other reasons, and prayed that defendants be restrained from enforcing it. Shortly thereafter a temporary injunction was granted, to remain effective pending the cause or until otherwise directed; and on October 6, 1904, defendants answered, denying all the alleged equities. The record discloses no further action by either party until April, 1913, when a rather meager and unsatisfactory agreed statement of facts was filed. The trial court dismissed the bill without prejudice, —January, 1914,—saying that the questions involved had been indirectly decided by this court in Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152. [162] From this decree a direct appeal was taken and a supersedeas was allowed.

The extraordinary delay in bringing the cause to final hearing is not explained; and in the circumstances we deem it quite sufficient briefly to indicate and decide the controlling question.

With the consent of the proper local authorities appellant constructed and now operates at New Orleans extensive terminals, including switch and side tracks, warehouses and yards. These are essential to the proper conduct of its large interstate and foreign business; and when it brings freight there the cars are placed on its various switch tracks, to be unloaded by the consignees. At New Orleans physical connections exist between appellant's tracks and the lines of competitive railroads leading therefrom to many states; if order No. 295 is enforced, its switch tracks will be subjected to use by such railroads; more cars will pass over them; and its power to comply with obligations to patrons will be hindered. Together with the various railroads, appellant has published and now has in effect terminal tariffs covering switching; these include no rates for transporting freight to or from the city, "but simply cover the charges made for switching cars from the depot or yard of one railroad company to points on its terminals." Upon orders of the consignees certain switch movements are made entirely within the switching limits of the city, between points one or both of which may be located upon the terminals of the Illinois Central, and for these charges are made, varying according to distance, with an addition of $3 per car for rental. When a car loaded with interstate freight arrives at New Orleans, the consignee is first notified that the contents are ready for delivery at the carrier's depot or warehouse. After calling and paying the charges, he gives to the agent of the railroad transporting the shipment an order directing that the cars be switched and [163] placed on some terminal or industrial track for delivery. This order is then submitted to the Illinois Central Railroad, and in due course is executed by it.

From the foregoing summary of the facts stipulated it fairly appears that obedience to order No. 295 would require appellant, upon demand of a carrier or shipper, and

on terms fixed by the State Commission, to switch empty cars from any connection with a competing interstate railroad to a designated side track within its own terminals for the purpose of being loaded there with goods intended for interstate commerce, and when so loaded to move the same back to the competitor's line for continued transportation to another state. Likewise appellant would be required to accept from competing interstate lines at points within the city loaded cars brought from other states, and place them on its own side tracks, although such track was the real destination contemplated at the time of the original shipment. Switching movements of this kind (we do not now inquire as to others) constitute a part of interstate commerce the regulation of which Congress has undertaken, and consequently the order of the state commission transcends the limits of its powers.

When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement, and not the form of the bill of lading, determines the character of the commerce involved. And generally when this interstate character has been acquired it continues, at least, until the load reaches the point where the parties originally intended that the movement should finally end. McNeill v. Southern R. Co. 202 U. S. 543, 559, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 110, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 126, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 341, 57 L. ed. 1215, 1218, 33 Sup. Ct. Rep. 837.

[164] The contention for appellees that switching cars at junctions and terminals "is only interstate commerce when performed as a part of the interstate movement on a through rate or bill of lading under tariff authority" is contrary to the doctrine established by opinions of this court in the cases cited above. We cannot undertake, as suggested, to dissect the contested order, and point out whether any part of it constitutes "a workable scheme for the regulation of intrastate traffic." Problems relating alone to commerce wholly within the state must be left to the discretion of the State Commission, to be exercised upon a view of all existing, relevant facts and circumstances.

The present controversy is not controlled by *Grand Trunk* R. Co. v. Michigan R. Commission, supra. The issues in the two cases are essentially different. There the attack was upon an order of the state commission "suspensory only of the tariff of the appellants, not a final determination against it, or of the conditions which might or might not justify it;" and the question was "whether, under the statutes of the state of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic." The movement actually regulated was held to be intrastate commerce. It took place within Detroit, but between points sufficiently far apart to constitute genuine transportation; and, treating it as a local matter, the railway company had applied special tariffs thereto until withdrawn because of disagreement with shippers and Commission.

The original bill should have been sustained and a permanent injunction awarded. The decree below is accordingly reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

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[165] D. R. WILDER MANUFACTURING COMPANY, Plff. in Err.,
v.
CORN PRODUCTS REFINING COMPANY.

(See S. C. Reporter's ed. 165-178.)

Corporations — organization — collateral attack.

1. The legal existence of a corporate seller of goods cannot be collaterally attacked by raising the objection in a suit for the purchase price that the corporation was organized in violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), forbidding combinations in restraint of interstate commerce.

[For other cases, see Corporations, I. e. 1, in Digest Sup. Ct. 1908.]

Monopoly — right to recover on contract of sale.

2. The illegality of a corporation organized in violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), does not preclude such corporation from re-

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NOTE.—On enforcement by members of illegal combinations of agreements collateral to contracts forming such combinations—see notes to Freed v. American F. Ins. Co. 11 L.R.A.(N.S.) 368; International Harvester Co. v. Smith, 30 L.R.A.(N.S.) 580; Brent v. Gay, 41 L.R.A.(N.S.) 1034; and Straus v. American Publishers' Asso. 64 L.R.A. 712; Continental Wall Paper Co. v. Louis Voight & Sons Co. 53 L. ed. U. S. 486.

covering the purchase price of goods sold and delivered by it.

[For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.]

Monopoly — right to recover on contract of sale.

3. Recovery of the purchase price for goods sold and delivered by a corporation organized in violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647), Comp. Stat. 1913, § 8820), may not be denied because the goods were sold upon condition which made the payment to the purchaser of his percentage under a proposed profit-sharing scheme devised by the corporation depend upon the exclusive dealing of the purchaser with the corporation during the following year, or because, under the contract of sale, the goods could not be resold.

[For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.]

Contracts — offer and acceptance — performance of condition.

4. The purchaser of goods from a corporation organized in violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), is not entitled to his percentage in a proposed profit-sharing scheme devised by the corporation, where he did not comply with the condition upon which the offer of a right to a participation in the profits was rested, or the contract (if there was a contract to that effect) was based, *viz.*, that he would for the following year deal exclusively with such corporation.

[For other cases, see Contracts, I. d, 4; V. d, in Digest Sup. Ct. 1908.]

[No. 71.]

Argued November 9, 1914. Decided February 23, 1915.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Atlanta in favor of plaintiff in an action for the purchase price of goods sold by an alleged unlawful combination in restraint of trade. Affirmed.

See same case below, 11 Ga. App. 588, 75 S. E. 918.

The facts are stated in the opinion.

Mr. Marion Smith argued the cause and filed a brief for plaintiff in error:

The allegations of the answer show the defendant in error to be a combination in restraint of interstate trade, in violation of the Federal statute, it appearing that the combination merged into one corporation various firms and corporations which previously had been competitors, and that the combination was for the purpose and with the effect of restraining and monopolizing such interstate trade. The creation of a monopoly is sufficient to make the restraint unreasonable.

United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

The corporate organization of the defendant in error cannot be sued as a cloak to cover the fact that it constitutes an illegal combination.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; United States v. American Tobacco Co. and Standard Oil Co. v. United States, supra.

The general allegation that the defendant in error is an illegal combination is treated by the court of appeals of Georgia as sufficient under the Georgia practice, as against a motion in the nature of a general demurrer, although no express ruling on this point was considered necessary, as the court placed its decision on other grounds.

Wilder Mfg. Co. v. Corn Products Ref. Co. 11 Ga. App. 588, 75 S. E. 918.

A recovery cannot be had upon an account for goods sold and delivered by such illegal combination when the goods were sold with direct reference to and in execution of agreements which had for their object and which had directly as their effect the accomplishment of the illegal ends for which the combination was organized.

Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280.

It is not necessary to show that the contracts under which the goods were sold are expressly violative of the Federal statute. The illegal intent with which the contracts were made is sufficient to make illegal contracts which appear on their face as no more than ordinary acts of competition.

Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

A contract of purchase by an illegal combination, which, together with other similar contracts, tends to create a monopoly, is void and unenforceable even though the other party to the contract is ignorant of its purpose in this respect.

Brent v. Gay, 149 Ky. 615, 41 L.R.A. (N.S.) 1034, 149 S. W. 915.

A contract which, though apparently harmless in itself, is in reality a part of a general scheme to violate statutes against the restraint of trade, will be held to be illegal.

Continental Wall Paper Co. v. Louis

Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Cravens v. Carter-Crume Co. 34 C. C. A. 479, 92 Fed. 479; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; Finck v. Schneider Granite Co. 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; Detroit Salt Co. v. National Salt Co. 134 Mich. 120, 96 N. W. 1.

A contract is illegal where, though harmless on its face, it is one of many similar contracts which collectively have the direct effect of aiding an illegal purpose of restraining interstate trade.

United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D, 715.

The scheme must be treated as an entirety.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

Illegality may consist in the purpose to accomplish an illegal result though the methods used are not inherently unlawful.

Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439; Kohn v. Milcher, 10 L.R.A. 439, 43 Fed. 641; Mogul S. S. Co. v. McGregor [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; Clark, Contr. 478 et seq.

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect.

Coppell v. Hall, 7 Wall. 542, 19 L. ed. 244; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; Embrey v. Jemison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776.

One of the parties cannot maintain an action on the valid part of the contract, discarding or omitting to prove the portion that is illegal.

McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839.

The Continental Wall Paper Co. Case 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280, is authority for the proposition that when the sales are made under and with reference to an illegal agreement, and the plaintiff sues on the sales, the defendant may thereupon plead the illegal agreement of which the sales are a part.

See also:

Oceanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539.

The whole doctrine of mutuality in contracts is one of consideration.

Page, Contr. § 302; L'Amoreux v. Gould, 7 N. Y. 349, 57 Am. Dec. 524; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243.

When, under the offer made to the plaintiff in error, it commenced giving its 1909 trade to the defendant in error, it accepted the proposition and furnished a consideration for the contract. The contract was, of course, conditioned on its continuing to give its exclusive trade, and if it failed to do so the promise of the defendant in error never matured, but the contractual relation came into existence when the trading commenced, and from then on the defendant in error could not withdraw from its promise, except upon a breach of the condition which entered into the existing contract of the parties.

Storm v. United States, 94 U. S. 76, 24 L. ed. 42; Sheffield Furnace Co. v. Hull Coal & Coke Co. 101 Ala. 446, 14 So. 672; Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015; Cooper v. Lansing Wheel Co. 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 39; Attix v. Pelan, 5 Iowa, 336; Lapham v. Flint, 86 Minn. 376, 90 N. W. 780; Metcalf v. Kent, 104 Iowa, 487, 73 N. W. 1037; Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067; Hoskins v. Fogg, 60 N. H. 402; Goward v. Waters, 98 Mass. 596.

An ordinary invoice is not a contract passing title. Like any other paper, however, it may be the medium used to express the contract between the parties, in whole or in part.

9 Cyc. 260.

Messrs. James W. Austin and Preston Davie argued the cause, and, with Messrs. Morgan O'Brien, Albert B. Boardman, and Young B. Smith, filed a brief for defendant in error:

The answer filed by the plaintiff in error does not allege sufficient facts to support the conclusion of the pleader that the defendant in error is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade, in violation of the act of Congress of July 2, 1890, referred to as the Sherman anti-trust act.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46

L. ed. 679, 22 Sup. Ct. Rep. 431; Wilder Mfg. Co. v. Corn Products Ref. Co. 11 Ga. App. 588, 75 S. E. 918.

An objection to an answer that it states merely a conclusion of the pleader, and does not allege sufficient facts to support the conclusion, may be raised by general demurrer.

Morgan v. Cobb, 137 Ga. 545, 73 S. E. 844; Burnett v. W. A. Davis & Co. 124 Ga. 541, 52 S. E. 927; James v. Kelley, 107 Ga. 446, 73 Am. St. Rep. 135, 35 S. E. 425; Martin v. Bartow Iron Works, 35 Ga. 320.

A special demurrer is necessary only where the defect is one of form, and not of substance.

Georgia R. & Bkg. Co. v. Tice, 124 Ga. 459, 52 S. E. 916, 4 Ann. Cas. 200; Douglas, A. & G. R. Co. v. Swindle, 2 Ga. App. 550, 59 S. E. 600; Martin v. Bartow Iron Works, 35 Ga. 320.

Under the Georgia practice a motion to strike is the equivalent of a general demurrer.

Walden v. Walden, 124 Ga. 145, 52 S. E. 323; Minnesota Lumber Co. v. Hobbs, 122 Ga. 20, 49 S. E. 783.

The allegation in the answer that the defendant in error is a combination in restraint of interstate trade, in violation of the Federal statute, is not alone sufficient to defeat a recovery for the purchase price of goods sold and delivered by the defendant in error to the plaintiff in error under a collateral, independent contract.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

To bring the case within the decision of this court in Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280, it must appear that the plaintiff in error is a party to the unlawful combination, and that the purchase was made in the performance by it of its part of an unlawful contract previously made with the defendant in error, so that to uphold the sale would necessitate giving effect to the unlawful contract.

International Harvester Co. v. Oliver, 192 Fed. 59; United States Fire Escape Counterbalance Co. v. Joseph Halsted Co. 195 Fed. 295.

The allegation in the answer that defendant in error offered to give a rebate at the end of a specified time to all customers who purchased exclusively from it during said period does not state facts which constitute a contract binding the plaintiff in error to purchase exclusively from the defendant in error, but only states an offer contemplating a unilateral contract.

Georgia Cane Porducts Co. v. Corn Products Ref. Co. 141 Ga. 40, 80 S. E. 318.

The failure of the plaintiff in error to allege that it accepted the offer of the defendant in error, but, on the contrary, the admission in the answer that it did not accept the offer of the defendant in error, is fatal to the general allegation and argument that the sales in question were made with reference to, and in the execution of, an unlawful agreement.

Ibid.

The so-called "profit-sharing plant," and similar methods of merchandising, do not violate the provisions of the Sherman act.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Re Corning, 51 Fed. 205; Re Greene, 52 Fed. 105.

An invoice is not a bill of sale, nor is it evidence of a sale, nor does it constitute a "contract of purchase."

Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Miller v. Van Tassel, 24 Cal. 458.

The failure of the plaintiff in error to allege that it agreed to the clause against re-sale is fatal to its plea.

Georgia Cane Products Co. v. Corn Products Ref. Co. supra.

Even though it were true that a promise not to re-sell had been made, this fact alone would not bring the case within the decision of this court in Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280.

The construction placed by counsel for plaintiff in error upon the offer of the Corn Products Refining Company is erroneous.

Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982; Hoffman v. Maffioli, 104 Wis. 630, 47 L.R.A. 427, 80 N. W. 1032; Higbie v. Rust, 211 Ill. 337, 103 Am. St. Rep. 204, 71 N. E. 1010; Darr v. Mummert, 57 Neb. 378, 77 N. W. 767.

If the so-called "profit-sharing plan" is not inherently offensive to the Sherman law, it does not become so merely because employed by an organization which, for the purpose of this argument on demurrer, may be considered a combination or monopoly in violation of that law.

Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Re Corning, 51 Fed. 205; Re Greene, 52 Fed. 105; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

The legality of the clause against re-sale is not in issue in this suit.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 185, 50 L. ed. 428, 433, 26 Sup. Ct. Rep. 208.

Mr. Chief Justice White delivered the opinion of the court:

We refer to the parties, the one as the manufacturing, and the other as the refining company. Sued by the refining company in April, 1909, to recover the amount of the price of two lots of glucose or corn syrup which it had bought in January, 1909, and which it had consumed and not paid for, the manufacturing company asserted its nonliability on the following grounds, which we summarize:

(a) Because the refining company had no legal existence, as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products, in violation of the anti-trust act of Congress. That having illegally brought into one organization all the manufacturers of glucose or corn syrup, the corporation had unreasonably advanced the price of the products of its manufacture to the injury of the public. (b) That this end being accomplished, the corporation sought to perpetuate its monopoly by rendering it difficult or impossible for competitors to go into the business of producing glucose or corn syrup by devising a so-called profit-sharing scheme, by which it was proposed to give to all those who purchased from the combination a stipulated percentage upon the amount of the purchases made in one year, to be paid at the end of the following year, provided that during such time they dealt with no one else but the combination. While the sum of the percentage thus offered, it was alleged, varied from year to year, nevertheless it was charged that in substance the contract or offer remained the same. The tender to [170] the manufacturing company of a right to participate in the scheme, it was alleged, was first made in 1907 relative to the business done in 1906 in the form of a letter which is in the margin,[1] and this offer or asserted contract was continued from year to year. It was further alleged that the scheme proved successful in accomplishing its wrongful purpose since, although subsequently independent concerns engaged in the business of manufacturing glucose or corn syrup, and offered to sell their products at prices less than those charged by the combination, such concerns were virtually driven out of business because those who desired to purchase the products were deterred from buying from them for fear of losing the percentage which they would receive from the combination if all their purchases [171] continued to be made from it alone, and moreover because of the dread felt by purchasers that the independents would not be able to resist the overweening and controlling power of the combination. It was moreover alleged that all purchases made by the manufacturing company "contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption, and not for resale.'"

Charging that the condition which made the payment of the proposed profit-sharing percentage depend upon dealing alone with the combination was void and should be disregarded, the answer asked not only that the prayer for judgment for the purchase price be rejected, but that, treating the failure of the manufacturing company to comply with the condition on which the offer of profit sharing was made as immaterial, there should be a judgment for that company for the percentage of profits on the business for the year 1908.

On motion the answer was stricken out as stating no defense. There was a judgment in the absence of further pleading against the manufacturing company for the price of the goods, as sued for, and rejecting its claim for the percentage of profits. This judgment was affirmed by the court below (11 Ga. App. 588, 75 S. E. 918), and because of an assumed failure to give effect

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[1] 26 Broadway, New York, March 9, 1907.

The D. R. Wilder Mfg. Co., Atlanta, Ga.

Gentlemen:—

This company recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and co-operation of its patrons, has decided to adopt a liberal plan of profit sharing with you, in case you shall in the future continue to give us your exclusive patronage.

This company inaugurates such a policy of profit sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to 10 cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

This amount will be paid to you or your successors on December 31, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

With the assurance of steadfast co-operation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

Yours very truly,
Corn Products Refining Company.

to the anti-trust act of Congress this writ of error was prosecuted.

As the context of the answer clearly justified the inference that the sale of the glucose was an interstate transaction, the court below was right in assuming that to be the case, and therefore we put out of view as devoid of merit the contrary suggestion made by the refining company.

Having dealt with the refining company as an existing concern possessing the capacity to sell, speaking generally, the assertion that it had no legal existence, because it was an unlawful combination in violation of the anti-trust [172] act, was irrelevant to the question of the liability of the manufacturing company to pay for the goods, since such defense was a mere collateral attack on the organization of the corporation, which could not be lawfully made.[2] Besides, considered from the point of view of the alleged illegality of the corporation, the attack on its existence was absolutely immaterial because the right to enforce the sale did not involve the question of combination, since, conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result,—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, applying them to the identical general question here involved.

The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the [173] answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the refining company for the following year, and the clause to the effect that the goods were bought by the manufacturing company for its own use, and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions. In fact, it is not so contended in argument, since substantially the proposition which is relied upon is that, although such stipulations were intrinsically legal, they become illegal as the result of the duty to consider them from the point of view that one of the parties was an illegal combination, interested in inserting such conditions as an efficient means of sustaining its continued wrongdoing, and therefore giving power to accomplish the baneful and prohibited results of its illegal organization,—a duty which, it is urged, results from reason, is commanded by the anti-trust act and the obligation to enforce its provisions, and is required because of a previous decision of this court, enforcing that act (Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280), unless that decision is to be now qualified or overruled.

In the first place, the contention cannot be sustained consistently with reason. It overthrows the general law. It admits the want of power to assail the existence of a corporate combination as a means of avoiding the duty to pay for goods bought from it, and concedes at the same time the legality of the condition in the sale, and yet proposes, by bringing the two together, to produce a new and strange result, unsupported in any degree by the elements which are brought together to produce it, and conflicting with both.

In the second place, the proposition is repugnant to the anti-trust act. Beyond question, re-expressing what was ancient or existing, and embodying that which it was deemed wise to newly enact, the antitrust act was intended in the most comprehensive way to provide [174] against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632. In other words, founded upon

[2] Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383, 16 S. W. 863; Taylor v. Portsmouth, K. & Y. Street R. Co. 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; Smith v. Mayfield, 163 Ill. 447, 45 N. E. 157; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Mackall v. Chesapeake & O. Canal Co. 94 U. S. 308, 24 L. ed. 161; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the circuit court of the United States with "jurisdiction to prevent and restrain violations of this act," and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary, and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, chap. 647, 26 Stat. at L. 209, Comp. Stat. 1913, § 8820.

It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy [175] can be only that which the statute prescribes." Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 199; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Oates v. First Nat. Bank, 100 U. S. 239, 25 L. ed. 580; Stephens v. Monongahela Nat. Bank, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336; Tennessee Coal, I. & R. Co. v. George, 233 U. S. 354, 359, 58 L. ed. 997, 999, L.R.A.1915, —, 34 Sup. Ct. Rep. 587; Second, because of the destruction of the powers conferred by the statute, and the frustration of the remedies which it creates, which would obviously result from admitting the right of an individual, as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract, to assert that the corporation or combination suing had no legal existence in contemplation of the anti-trust act. This is apparent since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act, since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes, and thus protect the whole public,—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale, and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then, by a failure to provide against its future exertion of power, be recognized as virtually resurrected and in possession of authority to violate the law. And in a twofold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place, because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States,—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting [176] from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale, but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action, prompted, it may be, by purely selfish motives.

As, from these considerations, it results not only that there is no support afforded to the proposition that the anti-trust act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but, on the contrary, that the provisions of the act add cogency to the principles of general law on the subject, and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the Continental Wall Paper Case, supra.

It is to be observed in considering that contention that the general rule of law which we have stated is not apparently questioned in the argument, and the controlling influence of the ruling in the Connolly Case, supra, if here applicable, is not denied, but the contention is that the general law is not applicable, and the Connolly Case is inapposite because of an exception which was ingrafted upon the general law by the ruling in the Continental Wall Paper Case under which it is said this case comes. While it clearly appears that this is the contention, it is difficult to precisely fix the ground upon which it is rested. But as the rule of general law which, under ordinary circumstances, [177] does not permit the existence of a corporation to be indirectly attacked, is not assailed, and as it is not asserted that, irrespective of the illegal organization of the corporation, the contract of sale was inherently unlawful, it follows that the proposition is the one which we have already, in another aspect, disposed of; that is, that the sale and its conditions, although inherently legal, become illegal by considering the illegal corporation and the aid to be afforded to its wrongful purposes by the conditions which formed a part of the sale. But, in substance, this only assumes that it was held in the Continental Wall Paper Case that that which was inherently legal can be rendered illegal by considering in connection with it something which there is no right to consider at all. But it is apparent on the face of the opinion in the Continental Wall Paper Case that it affords no ground for the extreme and contradictory conclusion thus deduced from it, since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case, which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been, in and of itself, directly to sanction and give effect to a violation of the anti-trust act inhering in the sale. It is not necessary to analyze the facts and issues in the case for the purpose of pointing out how completely they are covered by the statement just made, because the opinion of the court and the reasons stated by the members of the court who dissented without more make that fact perfectly clear. Indeed, not only does this statement make clear the fact [178] that there is no conflict between the Connolly Case and the Continental Wall Paper Case, but it also establishes that both cases, the first directly, and the other by a negative pregnant, demonstrate the want of merit in the contentions here insisted upon.

It only remains to say that we think it requires nothing but statement to demonstrate that, in view of the facts which we have recited and the legal principles which we have applied to them, no error was committed by the court below in refusing to give to the defendant a judgment for its alleged share of the profits for the year 1908, when it was expressly admitted that the condition upon which the offer of a right to a participation in the profits was rested, or the contract (if there was a contract to that effect) was based, had not been complied with.

Affirmed.

PAUL HEYMAN and Jules Heyman, Partners, Doing Business under the Firm Name and Style of Paul Heyman, and the United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

W. P. HAYS, County Clerk of Hamilton County, Tennessee, J. Parks Worley, State Revenue Agent of the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee.

(See S. C. Reporter's ed. 178-188.)

Commerce — state taxation — mail order business — intoxicating liquors. The interstate character of the busi-

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NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On validity of state regulation of sales of intoxicating liquors—see note to Rhodes v. Iowa, 42 L. ed. U. S. 1089.

On power of state to prohibit the solicitation of orders for intoxicating liquors by mail, sent from another state—see note to R. M. Rose Co. v. State, 36 L.R.A.(N.S.) 443.

ness prevents a state from imposing a privilege tax upon the business of soliciting by mail orders for intoxicating liquors from persons in other states, and the delivery for interstate shipment to a carrier within the state in fulfilment of such orders of intoxicating liquors from an existing stock on hand in the state.

[For other cases, see Commerce, IV. b, 2, in Digest Sup. Ct. 1908.]

[No. 121.]

Argued January 14, 1915. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which, reversing a decree of the Chancery Court of Hamilton County, in that state, dismissed a suit to enjoin the enforcement of a privilege tax upon dealers in intoxicating liquors. Reversed.

The facts are stated in the opinion.

Messrs. Carlisle S. Littleton and James J. Lynch argued the cause, and, with Messrs. Jesse M. Littleton and George D. Lancaster, filed a brief for plaintiffs in error:

The sale of goods kept on hand in one state to residents of other states, and the interstate shipment and delivery of the same pursuant to such sale, is interstate commerce.

United States v. E. C. Knight Co. 156 U. S. 11, 39 L. ed. 328, 15 Sup. Ct. Rep. 249; Addyston Pipe & Steel Co. v. United States, 175 U. S. 239, 44 L. ed. 146, 20 Sup. Ct. Rep. 96, 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Vance v. W. A. Vandercook Co. 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564.

A state cannot tax interstate commerce.

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Stockard v. Morgan, 185 U. S. 30, 46 L. ed. 789, 22 Sup. Ct. Rep. 576; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Moran v. New Orleans, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Covington & C. Bridge Co. v. Kentucky, *154 U. S. 205, 38* L. ed. 963, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

Mr. Frank M. Thompson, Attorney General of Tennessee, argued the cause and filed a brief for defendants in error:

The following conditions exist in Tennessee with respect to the liquor traffic:

(1) Intoxicating liquors cannot be manufactured in this state;

(2) Intoxicating liquors cannot be sold within 4 miles of a schoolhouse, which covers the entire territory of Tennessee. There can be no legal sale of intoxicating liquors within the state of Tennessee and to her citizens except those made by druggists upon the prescription of a physician, and sales made for mechanical, medicinal, sacramental, chemical, and scientific purposes, or sales made to persons outside of the state upon mail orders, the acceptance of which is manifested by the delivery of the liquors to an interstate carrier for continuous transportation out of the state.

(3) In addition to the penalties prescribed by the 4-mile law and other laws, this state, as one of its police regulations, as well as for revenue purposes, passed chapter 479 of the Acts of 1909. The same has been maintained by the supreme court of the state in its application to intrastate liquor dealers who sell liquors which are, in point of fact, intoxicating. It also applies to interstate liquor dealers, such as plaintiff in error represents itself to be in this record, and in its application to such dealers the same is not violative of the commerce clause of the Federal Constitution.

Kelly v. Dwyer, 7 Lea, 180; State v. Schlier, 3 Heisk. 281; State v. Butler, 1 Shannon, Cas. 91; J. W. Kelly & Co. v. State, 123 Tenn. 550, 132 S. W. 193; Motlow v. State, 125 Tenn. 548, L.R.A.—, —, 145 S. W. 177; Austin v. Shelton, 122 Tenn. 637, 127 S. W. 446; Logan v. Brown, 125 Tenn. 209, 141 S. W. 751.

Mr. J. B. Sizer also argued the cause, and, with Mr. Frank M. Thompson, Attorney General of Tennessee, filed a brief in reply for defendants in error:

Ordinarily a delivery of goods by the seller to a common carrier, consigned to the purchaser, is a delivery to the purchaser, whose agent the carrier is held to be.

35 Cyc. 193, 194; United States v. Andrews, 207 U. S. 229, 240, 52 L. ed. 185, 190, 28 Sup. Ct. Rep. 100; State v. J. W. Kelly & Co. 123 Tenn. 562, 36 L.R.A.(N.S.) 171, 133 S. W. 1011.

If the tax affects interstate commerce at

all it is not directly, but only remotely and incidentally; and the fact that interstate commerce may be indirectly burdened or affected by a tax does not render the tax objectionable.

New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 430, 39 L. ed. 1043, 1045, 15 Sup. Ct. Rep. 896; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 82, 83, 58 L. ed. 127, 132, 133, L.R.A.—, —, 34 Sup. Ct. Rep. 15; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

Complainants' sales are not interstate transactions, and do not involve interstate commerce except in an indirect and incidental way.

Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

If the business carried on by the complainants involves the transaction of interstate commerce by them at all, the state may lawfully require them to pay a privilege tax for the business done in the state of Tennessee.

Nathan v. Louisiana, 8 How. 80, 12 L. ed. 995; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 368, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

Mr. Chief Justice White delivered the opinion of the court:

As a prelude we give a mere outline of the relevant laws of Tennessee. In 1909 the manufacture in the state of "intoxicating liquors for the purpose of sale" was prohibited. All liquors were included except alcohol of a stated degree of proof "for chemical, pharmaceutical, medical, and bacteriological purposes." The state court held this act constitutional. Motlow v. State, 125 Tenn. 548, L.R.A.—, —, 145 S. W. 177. In the same year (1909) the sale of liquors as a beverage was forbidden within 4 miles of any schoolhouse, public or private, whether school was in session or not. This law was held constitutional, and it is said in the argument that it was construed as excluding all sales of liquor throughout the state except sales by a druggist under a physician's prescription, and sales for mechanical, medicinal, sacramental, and other like purposes. State v. J. W. Kelly & Co. 123 Tenn. 556, 36 L.R.A. (N.S.) 171, 133 S. W. 1011.

In Tennessee the system of taxation embraces ad valorem property taxes, merchants' taxes by a percentage on their capital, and privilege taxes for the right to engage in business of a prescribed character. In 1909 a privilege tax was imposed upon wholesale and retail liquor dealers. The prohibitory liquor law (the 4 mile law) was held not to embrace a mail-order business, that is, orders by mail from other states and the shipment from Tennessee to such other states by carrier, because such business was interstate commerce not within state control. Ibid.

[183] In 1912 this suit was commenced to enjoin the collection of a county privilege tax for carrying on a wholesale liquor business in 1912, and to recover back the sum of a like tax for the same year which had been collected by the state over protest. It was in substance averred that having on hand in the state a stock of liquors, the complainant firm had found it unprofitable to seek to carry on the business of selling within the state, and therefore had, prior to that time, abstained from all attempts to carry on business in the state by selling any liquor directly or indirectly therein, and had confined its activities to a mail-order business; that is, the soliciting of orders from persons in other states by mail, the receipt of such orders, and the filling of the same by delivering the liquor to a carrier for through transportation out of the state. Averring that such business was purely interstate commerce which the state or county had no right to directly burden, it was alleged that the attempt of the state and county to impose the privilege taxes in question was an unlawful interference with, and a direct burden upon, interstate commerce, and therefore void. The bill was demurred to as stating no case. The demurrer was overruled, and the defendants electing to plead no further, a decree went in favor of the complainants for the repayment of the one tax, and enjoining the enforcement of the other. The supreme court reversed this judgment, and because of the asserted repugnancy of the tax whose validity was thus sustained to the Constitution of the United States, this writ of error was prosecuted.

In American Exp. Co. v. Iowa, 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182, referring to previous rulings concerning the operation of the commerce clause, it was said:

"Those cases rested upon the broad prin-

ciple of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the [184] citizen of a state to contract to send merchandise into other states."

And again, in West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564, where the law of a state prohibiting the piping out from the state of natural gas was held to be repugnant to the commerce clause, it was observed, page 260:

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce."

Indeed, in the opinion of the court below there was not the slightest intimation of doubt concerning this elementary doctrine, nor any suggestion that if the complainant firm did no business in the state, and confined its activities exclusively to transactions of interstate commerce, there was any power to impose the privilege taxes in controversy. And no doubt was expressed concerning the fact that abstractly and inherently the selling of liquor under a strictly mail-order business, and the delivery in Tennessee of liquor to a carrier for through shipment to other states to fill such orders, was interstate commerce beyond the control of the state, which the court had previously pointed out in State v. J. W. Kelly & Co., supra. But the decision was based upon what was deemed to be the legal result of distinctions arising from the mode in which the complainant carried on its business, which the court pointed out as follows:

"But it appears, also, from the bill, not in express terms, but by clear inference from other matters stated, that the complainant has a regularly organized business,—a business house and employees, etc., —and that he is conducting the business within the state of Tennessee, although he sells all his goods beyond the state.

"We are of the opinion that the case falls directly within Logan v. Brown, decided by this court last year, [185] and reported in 125 Tenn. 209, 141 S. W. 751, and the Federal cases therein referred to and relied on, and that there is no substantial distinction between that case and the present one."

We must look, then, to Logan v. Brown to ascertain the implied conditions which were found to constitute a local business done in Tennessee which made the privilege taxes valid, although, as admitted, no liquor was sold in Tennessee, but all of it was exclusively sold under mail orders from other states. Without intimating that if here present it would be material, there existed in Logan v. Brown an element not found in this case; that is, that the stock of liquor which was held in Tennessee, and which was exclusively sold under the mail-order system, was constantly replenished by the receipt of liquor from other states, likewise shipped in as the result of mail orders, and in Logan v. Brown the receipt of such goods, the breaking of their bulk, and the commingling with the existing stock, was found to be a business done in Tennessee, independent of the shipping of goods to other states under the mail orders. With such considerations removed from view, carefully analyzing the opinion in Logan v. Brown we find that the only grounds held in that case to establish a business done in the state independent of the sale and shipment of the goods out of the state under the mail-order system were the following: (1) The existence of the goods in the state, held in a warehouse as stock susceptible of being sold in the state if there was a desire to do so, and ready to be shipped in the channels of interstate commerce; (2) the care and attention for the purpose of packing or otherwise which must be given to the goods situated in the state, to enable the interstate commerce shipment to be made; (3) the receipt in the state from other states of the orders; (4) the clerical force or assistance which was required in the state to keep an account of the shipments as made to other states, and the supervision [186] in Tennessee which was required to conduct the exclusive business of shipping into other states and of receiving the price resulting from such shipments.

But we are of opinion that although it be conceded that such facts were clearly to be implied from the allegations of the complaint that no sales were directly or indirectly made in the state, and that the business was exclusively confined to soliciting mail orders from other states, and the delivery to a carrier in fulfilment of such orders, such assumed facts afford no ground for taking the business out of the protection of the interstate commerce clause, and thus conferring upon the state authority to impose a tax on the privilege of carrying it on. We reach this conclusion because we are of opinion that, giving the fullest effect to the conditions stated, they were but the performance of acts accessory to and inhering in the right to make the interstate commerce shipments, and therefore to admit the power, because of their

existence, to burden the right to ship in interstate commerce, would necessarily be to recognize the authority to directly burden such right. In the nature of things the protection against the imposition of direct burdens upon the right to do interstate commerce, as often pointed out by this court, is not a mere abstraction, affording no real protection, but is practical and substantial, and embraces those acts which are necessary to the complete enjoyment of the right protected.

In addition to the foregoing considerations upon which, as we have seen, the conclusion in Logan v. Brown that local business was done in the state was based, it is now urged in argument by the state that the correctness of such conclusion is in addition demonstrated by the fact that the goods embraced by the orders received from other states were delivered to a carrier in Tennessee, and as such carrier was the agent of the buyer, therefore the sales were completed in Tennessee. But this merely denies the interstate commerce character of the mail-order business. [187] It directly conflicts with the ruling of the state court in State v. J. W. Kelly & Co. 123 Tenn. 556, 36 L.R.A.(N.S.) 171, 133 S. W. 1011, and therefore comes to this: That under the law of the state, such business is interstate commerce for the purpose of allowing it to be done, but when done, a privilege tax may be exacted for doing it because it is not such commerce. It is no answer to suggest that the Kelly Case, while treating the mail-order business as not within the prohibition law, because it was interstate commerce, really was but an expression of a broad rule of interpretation giving effect to the spirit and intent of the prohibition law, since delivery in the state of liquor to be transported to another state could not be said to be a sale or delivery as a beverage. But if this rule of interpretation were to be here applied, it would destroy the distinction which it is advanced to sustain, for it would lead to the conclusion that the act of delivery for the sole purpose of through shipment to another state, in fulfilment of a previous order, was in no practical sense the doing of business within the state. But this is immaterial since it is not open to controversy that substance, and not form, controls in determining whether a particular transaction is one of interstate commerce, and hence that the mere method of delivery is a negligible circumstance if, in substantial effect, the transaction under the facts of a given case is interstate commerce. American Exp. Co. v. Iowa, 196 U. S. 133, 144, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182; Savage v. Jones, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715.

Some cases[1] are pressed in argument as upholding the privilege tax in question under the circumstances here disclosed, but they are inapposite. We do not stop to review them in order to sustain this appreciation of the cases relied on, since, in our opinion, in the nature of things its [188] accuracy is demonstrated by a mere statement of the proposition to which all the contentions here urged are in their essence reducible, which is as follows: Although the shipment of merchandise from one state to another is interstate commerce, which the states cannot directly burden, nevertheless the states may directly burden such shipments in every case where there is any merchandise kept in the state to be the subject of interstate commerce shipment, or when any of those steps which are essentially prerequisite to the initiation of an interstate commerce shipment are taken by the owner of the merchandise.

Reversed.

SOUTHERN OPERATING COMPANY, Paul Heyman, and H. W. Steiner, Plffs. in Err.,

v.

W. P. HAYS, County Clerk of Hamilton County, Tennessee, and J. Parks Worley, State Revenue Agent of the State of Tennessee.

(See S. C. Reporter's ed. 188, 189.)

This case is governed by the decision in Heyman v. Hays, ante, 527.

[No. 122.]

Argued January 14, 1915. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which, reversing a decree of the Chancery Court of Hamilton County, in that state, dismissed a suit to enjoin the enforcement of a privilege tax upon dealers in intoxicating liquors. Reversed.

The facts are stated in the opinion.

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[1] Nathan v. Louisiana, 8 How. 80, 12 L. ed. 995; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 368, 27 L. ed. 420, 2 Sup. Ct. Rep. 257; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

Messrs. Carlisle S. Littleton, and James J. Lynch argued the cause, and, with Messrs. Jesse M. Littleton and George D. Lancaster, filed a brief for plaintiffs in error.

For contentions of counsel, see their brief as reported in Heyman v. Hays, ante, 527.

Mr. Frank M. Thompson, Attorney General of Tennessee, argued the cause and filed a brief for defendants in error:

The statute in question in its application to interstate liquor dealers does not impose an unlawful burden on interstate commerce.

Logan v. Brown, 125 Tenn. 217, 141 S. W. 751; Delamater v. South Dakota, 205 U. S. 97, 51 L. ed. 728, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; Phillips v. Mobile, 208 U. S. 479, 480, 52 L. ed. 581, 28 Sup. Ct. Rep. 370; Nathan v. Louisiana, 8 How. 80, 12 L. ed. 995; State v. Applegarth, 81 Md. 293, 28 L.R.A. 813, 31 Atl. 961.

The tax imposed by this statute is not imposed upon or directed at any sale or sales to any person or persons in either Tennessee or any other state or states; it is not assessed or levied because of such sale or sales, but it is imposed upon the business or occupation of a wholesale liquor dealer carried on and conducted by the plaintiff in error; that is, it is imposed upon the general business of the plaintiff in error in which he holds himself out to the public as a wholesale liquor dealer. The act is not directed to any particular class of dealers, or to any dealer who sells alone to the citizens of Tennessee, or sells exclusively to nonresidents of Tennessee. The act is directed to the business conducted by any and everybody of selling intoxicating liquors at wholesale within the state of Tennessee.

Logan v. Brown, 125 Tenn. 211, 141 S. W. 751; Ledbetter v. United States, 170 U. S. 609, 42 L. ed. 1163, 18 Sup. Ct. Rep. 774.

This business or occupation of the plaintiff in error, mentioned, designated, and provided for in this act assailed, is located at Chattanooga; its liquors are stored there; its office is kept there; from this place orders for liquors to be shipped into and delivered are issued or sent; the orders for the sale of the goods or liquors are received there; at this place the goods are unpacked, the original packages are broken, and the goods thus become commingled with the balance of the property of the state; at this place the liquors are repacked and prepared for shipment; from this place they are carried by drays or other vehicles to the depots of the various railroads and there delivered to a common carrier. Up to the time of the actual delivery of the liquors to the carrier and receipt of them by the carrier for the consignee they are not articles of interstate commerce. The liquors themselves do not become a part of interstate commerce until actual delivery to the carrier. The abovementioned things necessary to be done before this delivery to the carrier are not in any sense a part of interstate commerce transactions; that is, they are not interstate transactions. The difference between the things necessary to be done as conditions precedent to placing any commodity under the control or protection of the interstate commerce clause of the Constitution and interstate commerce itself is clearly pointed out by this court in the following cases:

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202.

The fact that these liquors when purchased, delivered, and stored are intended by plaintiff in error to be sold only in interstate commerce cannot avail to take from the state this right and authority to either prohibit the sale within its borders *in toto*, to regulate, or to tax the business of selling it as a means of regulation.

Kidd v. Pearson, 128 U. S. 24, 25, 32 L. ed. 351, 352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

Mr. J. B. Sizer also argued the cause for defendants in error.

[189] Mr. Chief Justice White delivered the opinion of the court:

This case was brought to enjoin the collection of a state and county privilege tax upon the same facts as those which were involved in the case just decided [236 U. S. 178, ante, 527, 35 Sup. Ct. Rep. 403]. The two cases in both the trial and the court below were heard together, and they were here argued at the same time. The court below, in disposing of this case, with one exception placed its conclusion upon the same grounds upon which it decided the previous case. The one exception referred to was a declaration that the trial court erred in granting the injunction so far as the state tax was concerned because there was no authority to enjoin the collection of such a tax, and the only right was to pay under protest and sue to recover. Whatever difference between the two cases would otherwise result from that point of view need not be considered, since the attorney general of the state in the argument at bar in express terms states that that question is not insisted upon. It being thus removed from consideration, a complete identity between the two cases results, and for the reasons given in the previous case

the judgment in this case must also be reversed.

Reversed.

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[190] WASHINGTON, ALEXANDRIA, & MT. VERNON RAILWAY COMPANY, Plff. in Err.,

v.

EDWARD A. DOWNEY.

(See S. C. Reporter's ed. 190-194.)

Error to District of Columbia court of appeals — construction of Federal law.

1. The original Federal employers' liability act of June 11, 1906 (34 Stat. at L. 232, chap. 3073), though in form a statute of general operation throughout the United States, having been held unconstitutional so far as it embodied anything but the exertion of the local power of Congress over the District of Columbia and the territories, can no longer be regarded as a "law of the United States" within the meaning of the provision of the Judicial Code, § 250, for the appellate review in the Federal Supreme Court of judgments and decrees of the court of appeals of the District of Columbia in cases in which the "construction of any law of the United States is drawn in question by the defendant."

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

Error to District of Columbia court of appeals — construction of Federal law.

2. The nature of the statute itself, and not the character of the act to which it applies, is the test to determine whether a statute is general or local, within the meaning of the rule that laws only general in their operation throughout the United States are meant by the provision of the Judicial Code, § 250, for the appellate review in the Federal Supreme Court of judgments and decrees of the court of appeals of the District of Columbia in cases in which the "construction of any law of the United States is drawn in question by the defendant."

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

Error to District of Columbia court of appeals — construction of Federal law.

3. Whether a statute is general or local, within the meaning of the rule that laws only general in their operation throughout the United States are meant by the provision of the Judicial Code, § 250, for the appellate review in the Federal Supreme Court of judgments and decrees of the court of appeals of the District of Columbia in cases in which the "construction of any law of the United States is drawn in question by the defendant," depends not upon the particular question to which the statute may be exceptionally applied in a given case, but upon the exertion of legislative power which the statute manifests and its general operation.

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

[No. 144.]

Argued January 21 and 22, 1915. Decided February 23, 1915.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action brought under the employers' liability act. Dismissed for want of jurisdiction.

See same case below, 40 App. D. C. 147.

The facts are stated in the opinion.

Messrs. **John S. Barbour** and **John C. Gittings** argued the cause, and, with Messrs. Basil D. Boteler and Douglass S. Mackall, filed a brief for plaintiff in error.

Mr. **Edmund Burke** argued the cause, and, with Mr. Leo P. Harlow, filed a brief for defendant in error.

Mr. Chief Justice **White** delivered the opinion of the court:

The plaintiff in error, a Virginia corporation whom we shall speak of as the company, operates a trolley line from Washington to Mt. Vernon, in Virginia. The defendant in error, Downey, was employed by the company as a trolley man, and on the 29th of November, 1907, was working on a train of two cars, a motor car and a trailer car, moving from Mt. Vernon to Washington. Downey was on the rear platform of the motor car, and his duty was to hold the rope connecting with the overhead trolley wheel to keep it from getting off the wire, and thus breaking the electrical connection. While in the District of Columbia, on the bridge crossing the Potomac, Downey was thrown from the platform and injured, and the company prosecutes this writ of error to a judgment of the court below (40 App. D. C. 147), affirming one of the supreme court of the District, rendered on a verdict against it and in favor of Downey, upon the finding that his injury was caused by the actionable negligence of the company or of its servants.

NOTE.—On appellate jurisdiction of Federal Supreme Court over District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Various errors are assigned relating to the operation and meaning of the act of Congress (employers' liability act) of June 11, 1906 (34 Stat. at L. 232, chap. 3073), by which the case is governed and the rulings of the trial court admitting [192] or excluding testimony and instructions given or refused. But before we consider them, whether we have jurisdiction to do so arises, and therefore we primarily consider that question. It depends upon the sixth clause of § 250 of the Judicial Code [36 Stat at L. 1159, chap. 231, Comp. Stat. 1913, § 1227], and it is not open to controversy that the "law of the United States" therein referred to "embraced only laws of the United States of general operation," and does not therefore include "laws of the United States local in their application to the District of Columbia." McGowan v. Parish, 228 U. S. 312, 317, 57 L. ed. 849, 851, 33 Sup. Ct. Rep. 462; American Secur. & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553; District of Columbia v. Philadelphia, B. & W. R. Co. 232 U. S. 716, 58 L. ed. 812, 34 Sup. Ct. Rep. 331.

The law here involved, as we have said, is the employers' liability act of 1906. Undoubtedly that law as enacted was in form one of general application, but it was held to be unconstitutional as such a law in Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. Notwithstanding that ruling, however, the provisions of the statute, so far as they apply to the District of Columbia, have been decided to be within the power of Congress to enact because of its plenary authority as the local legislature of the District, and because the intention to make the provisions of the law applicable to the District locally was manifest and separable from the purpose to enact a statute which would be applicable generally throughout the United States. El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 97, 98, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 610, 56 L. ed. 911, 915, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892; Santa Fe C. R. Co. v. Friday, 232 U. S. 694, 698, 58 L. ed. 802, 34 Sup. Ct. Rep. 468; and see Butts v. Merchants & M. Transp. Co. 230 U. S. 126, 137, 57 L. ed. 1422, 1426, 33 Sup. Ct. Rep. 964. Under this condition there is no ground to maintain the proposition that the statute, as applicable to the District of Columbia, was adopted as one of a general character, and that therefore we have power to review the questions involved.

But it is said, the trolley cars were in *transit* from the state of Virginia to the District, and therefore were engaged [193] in a movement from state to territory not purely local in its character, and hence there is jurisdiction. But this rests upon the mistaken assumption that the test of jurisdiction is the character of the act to which the statute applies, and not the nature of the statute itself; that is, whether it is general or local to the District. And this difficulty is not answered by the argument that because the statute was made controlling concerning acts not purely local, therefore, as the effect cannot be greater than the cause, the statute must itself be said to be, for the purposes of jurisdiction, not of a local character. But again the proposition rests upon an erroneous assumption. The test of whether the statute is general or local depends not upon the particular question to which it may be exceptionally applied in a given case, but upon the exertion of legislative power which the statute manifests and its general operation; that is to say, whether it was enacted as a statute of general application under the general legislative power, or whether it took being as the result of the exercise of the purely local power of Congress to govern the District of Columbia, and was, as a general rule, intended to be so applicable. The error of the argument could not be better illustrated than by saying that if the proposition were admitted, it would necessitate deciding that a statute which has been held to be beyond the constitutional power of Congress to enact so far as it embodied anything but the exertion of local power may yet be enforced and applied as a general statute. The want of foundation for the contention is besides made plainer by looking at the subject from another point of view. While the transit in which the train was engaged was not purely local, the accident complained of occurred within the confines of the District of Columbia, and the statute became applicable concerning it because, as a local statute, it governed in the absence of legislation by Congress of a general [194] character governing the subject. Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87. To take jurisdiction, therefore, we would be compelled to decide that a purely local statute which would be void if it were general in character was yet operative in such aspect, and that because a local law was applicable to a given situation solely for the reason that there was no general

law to control, the local law was a general one.

Dismissed for want of jurisdiction.

UNITED STATES, Appt.,
v.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al. (No. 452.)

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al.
v.
UNITED STATES. (No. 572.)

RE EVENS & HOWARD FIRE BRICK COMPANY and Union Sand & Material Company. (No. —, Original.)

(See S. C. Reporter's ed. 194–210.)

Appeal — who may be heard — intervenors not parties below.

1. Persons not parties to the suit are entitled to be heard originally in the Federal Supreme Court concerning the settlement, so far as it may operate prejudicially to their rights, of a decree below entered pursuant to a mandate from the Supreme Court, directing the entry of a decree for the reorganization of a combination of railway terminal facilities found to violate the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), so as to escape the condemnation of that statute.

[For other cases, see Appeal and Error, VIII. b, in Digest Sup. Ct. 1908.]

Appeal — dismissal — consolidation.

2. An appeal by the defendants from a refusal to modify a final decree entered pursuant to a mandate from the Federal Supreme Court directing the entry of a decree for the reorganization of a combination of railway terminal facilities found to violate the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), so as to escape the condemnation of that statute, will not be dismissed because the United States had appealed from such decree before the petitions for modification were filed, since the dismissal of such appeal would in no way limit the power or duty of the Supreme Court to examine, either originally, if essential, or as the result of an appeal by one of the parties, or by way of assertions of right made by the other party as an appellee, even in the absence of a cross appeal, every controversy between the parties concerning the discharge by the court below of its duty to execute the mandate, and the better practice is to consolidate the two appeals, and treat the cases as one for the purpose of settling the questions raised by both parties.

[For other cases, see Appeal and Error, VII. 1, in Digest Sup. Ct. 1908.]

Appeal — judgment — compliance with mandate.

3. The parties to the unlawful combination, and not the parties to the suit, were meant by the word "parties" in a mandate from the Supreme Court of the United States which remanded a suit brought by the United States to enforce the provisions of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), against a combination of railway terminal facilities, with directions to enter a decree requiring the parties to submit a plan for the reorganization of the combination so as to escape the condemnation of the statute, with a further direction that if the parties shall fail to come to an agreement which is in substantial accord with the Supreme Court's opinion and decree, the court below shall, after hearing, dissolve the combination.

[For other cases, see Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

Appeal — judgment — compliance with mandate.

4. The right of a combination of railway terminal facilities, found to violate the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), to carry on, in connection with its strictly terminal business, such transportation business as exclusively originates, moves, and terminates on its own lines, must be recognized by a Federal district court when attempting to give effect to the mandate of the Supreme Court, which remanded the cause for the entry of a decree under which the combination shall be reorganized so as to escape the condemnation of the statute.

[For other cases, see Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

Appeal — judgment — compliance with mandate.

5. A Federal district court, when attempting to give effect to the mandate of the Supreme Court, which remanded the cause for the entry of a decree for the reorganization of a combination of railway terminal facilities so as to escape the condemnation of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), by directing, *inter alia*, in the language of the mandate, the "abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area," need not and should not insert in such decree an express provision absolutely controlling or regulating for the future the charges which the terminal company may make, since this would cause the decree to be repugnant to the interstate commerce act, and contrary to the exercise by the state authorities of

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NOTE.—On parties to appellate proceedings in Federal Supreme Court—see note to Amadeo v. Northern Assur. Co. 50 L. ed. U. S. 723.

their power over charges of the terminal company, in so far as the jurisdiction of such authorities may extend.

[For other cases, see Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

[Nos. 452, 572, and —, Original.]

Argued October 20, 1914. Decided February 23, 1915.

APPEAL by the United States from the District Court of the United States for the Eastern District of Missouri to review a decree entered pursuant to a mandate from the Federal Supreme Court, which remanded a suit by the United States to enforce the provisions of the Sherman anti-trust act against a combination of railway terminal facilities for the entry of a decree for the reorganization of the combination so as to escape the condemnation of the statute; Also an

APPEAL by the defendants in such suit to review a further decree of the same court, refusing to modify the original decree. Modified by permitting the terminal company to carry on, as ancillary to its terminal business, a transportation business originating, moving, and terminating on its lines, and, as modified, affirmed. Also a

MOTION by persons not parties to the above suit to be allowed to intervene in the Federal Supreme Court concerning the settlement of the decree. Granted.

The facts are stated in the opinion.

Mr. Edward C. Crow, Special Assistant to the Attorney General, argued the cause and filed a brief for the United States.

Messrs. H. S. Priest and T. M. Pierce argued the cause and filed a brief for the Terminal Railroad Association et al.

Mr. George M. Block argued the cause, and, with Mr. John F. Lee, filed a brief for the Evens & Howard Fire Brick Company, Interveners.

Mr. Chief Justice White delivered the opinion of the court:

This case was decided April 22d, 1912 (224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507), and the question now is, Was due effect given to the mandate of this court? A clearer understanding will come by the merest outline of some of the legal proceedings preceding and following that decision. The decree which was reversed was entered by a circuit court composed of four judges in accordance with the expedition act. The circuit [196] courts having been abolished when the decision of this court was rendered, the mandate was directed to the appropriate district court. There the United States filed the mandate and asked an interlocutory decree giving the time fixed by this court to take the steps which were decided to be necessary to make the organization of the defendants a legal one under the anti-trust act. The defendants presented a statement of what was proposed by them to be done in compliance with the decree of this court to accomplish the result stated, and over some objection on the part of the United States, an interlocutory decree was entered which in many respects accepted as sufficient what was proposed to be done by the defendants. On the taking of those steps and after a full hearing of the parties the court announced its purpose to enter a final decree, not following in some respects a proposed form of final decree suggested by the United States. Thereupon the United States, by petition for prohibition, filed in this court, asserted the entire want of jurisdiction in the court as constituted to entertain the enforcement of the mandate, as that could only be done by a court composed like the one which had rendered the judgment; that is, one composed under the expedition act. The prohibition was granted (226 U. S. 420, 57 L. ed. 281, 33 Sup. Ct. Rep. 170), and jurisdiction to enforce the mandate was assumed by a court of three circuit judges sitting in the district court in pursuance of the expedition act. In that court, after a hearing as to a proposed interlocutory decree, and as the result of steps taken by the defendants to comply with the decision of this court which were deemed sufficient for that purpose, a final decree was entered on March 2, 1914. This decree was objected to by the United States because of the insufficiency, at least in form, of the steps taken by the defendants for the purpose of complying with the decree of this court, and of the failure by the court below to insert in the decree various clauses suggested by the United [197] States, and which it was insisted were necessary to give effect to the mandate of this court. For these reasons the United States on March 27, 1914, appealed, and such appeal is now before us and constitutes No. 452, referred to in the caption.

The day after this appeal (March 28) the defendants moved to modify the decree by striking out the first paragraph on two grounds: First, because it referred to the terminal company as illegally organized, in violation of the anti-trust act, although under the supervision and approval of the court such steps had been taken as were directed by this court to remove all objection to the organization of the company. Second, because the restrictions imposed on the business which the terminal company might lawfully do were susceptible of being

construed as forbidding the company to carry on, as ancillary to its strictly terminal work, a transportation business originating upon one part of its line, and destined exclusively to other points on such line. And the necessity of not prohibiting the company from doing such work, the petition to modify asserted, was shown by the fact that "on account of the necessary extent of its tracks, covering an area of 75 to 100 square miles, it is frequently called upon to take traffic from one point on its line to another point on its line, completing the entire movement on its own tracks." In addition the petition to modify alleged as follows:

"As an illustration: The terminal association operates in the early morning and late in the afternoon some trains to transport laborers engaged in industrial factories from Granite City, Illinois, to the different stations on its line in St. Louis, Missouri. This it is prohibited from doing under the decree.

"Another illustration: Many factories are located upon the terminal association's tracks on both sides of the Mississippi river. Under this order the defendant, terminal [198] association, would be restrained from accepting either raw material or finished products shipped from one such factory to another, although it could, with great convenience to the public, render such service."

At about the same date petitions to be allowed to intervene were filed on behalf of the Evens & Howard Fire Brick Company, Union Sand & Material Company, and fifty-three others, all based upon the ground that the petitioners would suffer great injury by the serious loss occasioned to their business or the destruction thereof which would arise from forbidding the terminal company to engage in transportation moving exclusively from one point on its line to another point on its line. Some of these petitions alleged that the raw material was prepared at one point and the manufactured product made by using the raw material at another, and that consequently an impossibility of continuing business would result from the inability to transport from one place to another. All these petitions prayed a modification of the order, so as to make it clear that it did not forbid the terminal company, as an incident to its purely terminal business, to carry on the business in question. On the 20th of June the petition of the terminal company to modify and the petitions of the various parties to be allowed to intervene, and praying a modification, came on for hearing, the United States opposing the allowance of all. In support of its petition affidavits were filed by the terminal company showing the movement of many thousands of cars annually in the business referred to, and giving the names of very many of those concerned in the movement. The prayer of the terminal company for a modification was refused without passing on its merits, the court expressly holding that it had no jurisdiction to do so, as the previous appeal taken by the United States from the final decree had transferred the case to this court. The petitions of intervention of the other parties over the objection of the United States [199] were permitted to be filed, but, after filing, the prayer to modify was also in each of said cases denied on the ground that the court was without jurisdiction because of the appeal taken by the United States. From this decree all the defendants to the original suit appealed, and the record referred to in the caption as No. 572 is the one embracing such appeal.

In this court the Evens & Howard Fire Brick Company and the Union Sand & Material Company have filed a petition praying leave to be allowed here to intervene to ask a modification of the decree so as to make it clear that it does not forbid the terminal company from engaging, as an incident to its terminal business, in transportation movements beginning and terminating exclusively on its own lines, the prayer being supported by statements concerning the situation and the alleged injury which would be suffered by prohibiting such business, as set out in the petitions to intervene and modify, filed in the court below.

The challenge by the United States of the right to hear the intervening petitioners is without merit, since even, although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights.

A motion made by the United States to dismiss the appeal taken by the defendants in No. 572 is also without merit. The duty of the court below was but to execute the mandate of this court, and every controversy between the parties concerning the discharge by the court below of its duty was open for this court to examine either originally, if essential, or as the result of an appeal by one of the parties, or by way of assertions of right made by the other party as an appellee even in the absence of a cross appeal,—a result inevitably arising from the fact that both parties, so far as the settlement of the decree [200] of this court was concerned, were in this court and endowed with the capacity to invoke its action for the proper shaping and execution of the decree, either by original proceeding or in any other appropriate form. Perkins v. Fourniquet, 14 How. 328, 14 L. ed. 441; Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L.

ed. 414, 16 Sup. Ct. Rep. 291; Re Potts, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520. As under these conditions the dismissal of the appeal would in no way limit the power and duty to pass upon the questions raised on the appeal, we think the motion to dismiss ought not to prevail, and that the better practice is to consolidate the appeal of the defendants in No. 572 with the appeal taken by the United States in No. 452, and treat the cases as one for the purposes of settling the questions raised by both parties. In doing this we shall also dispose of the contentions arising on the petition of intervention, since the right to modify the decree which the interveners assert is precisely coterminous with the claim made by the defendants to modify. In saying this we do not overlook a contention of the defendants with which the interveners are not concerned as to error committed in qualifying the defendants as an illegal combination, although, by complying with the requirements exacted by the decision of this court, they were no longer subject to be so qualified. But we treat that subject as not in controversy because we are of the opinion that the contention concerning it rests upon a wholly unwarranted criticism of a mere form of expression in the decree, —unwarranted because on its face the decree unmistakably demonstrates the contention to be absolutely devoid of all merit.

The errors of which the United States complains are stated in ten propositions: but if consideration of the subject embraced in the ninth be postponed to be disposed of in connection with the complaint of the defendants as to the right to a modification of the first paragraph of the decree because of the influence which the reasoning applicable to the one will have on the other, we think every [201] possible contention embraced in the assignments may be briefly disposed of by a few general considerations common to them all.

To afford an opportunity for the making of the necessary agreements and contracts curing the vices which the decisions of this court found to exist in the organization of the terminal company, and to the end that when so made clean the company might continue its existence and operations subject to the safeguards provided in the opinion of this court, it was commanded by the mandate that the case be "remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the terminal company, which we have pointed out as bringing the combination within the inhibition of the statute;" this being followed by a statement of what was required, embraced under seven general headings which are in the margin,[1] followed by the direction that "upon [202] failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties, . . ." dissolve the combination. The contention of the United States which is fundamental in the sense that it is involved in or at least gives color to all the propositions insisted upon,

[1] "First. By providing for the admission of any existing or feature railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

"Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

"Third. By eliminating from the present agreement between the terminal company and the proprietary companies any provision which restricts any such company to the use of the facilities of the terminal company.

"Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

"Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

"Sixth. By providing that any disagreement between any company applying to become a joint owner or user as herein provided for and the terminal or proprietary companies which shall arise after a final decree in this cause may be submitted to the district court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

"Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission."

is that the court below should have directly proceeded to apply the sanction stated in the mandate in disregard of all its other directions because the combination had so failed to comply with such other requirements as not to be entitled to the benefits which would have arisen from complying with them, and therefore had subjected itself to immediate dissolution as an illegal combination. The premise is that the word "parties" in the mandate embraced not solely the parties to the combination, but the parties to the suit, and therefore included the United States. From this the argument proceeds that as below, neither for the purposes of the interlocutory decree, nor in any other step, was the United States invited to become [203] one of the parties entering into contracts or agreements for the purpose of curing the defects, therefore there was a disregard of the condition precedent to the right to remove the defects, and the duty to apply the penalty of dissolution automatically arose. But this argument, even upon the assumption of ambiguity in the text, assumes that this court recognized that there was a right to cure the defects, but deprived of all power to do so by subjecting the exercise of the right to a condition wholly beyond the will of the parties to the combination. There is, however, not the slightest ambiguity in the mandate giving support to the consequences deduced from it, as the parties referred to plainly embrace only the parties to the agreement from which the combination resulted, and directed them to become parties to the new agreement required to make the combination legal by removing the illegal clauses. That this was the purpose of the decision so plainly results from the opinion and mandate as to leave no room for dispute to the contrary. But if there were any opening for controversy, the meaning of the mandate has been previously so explicitly pointed out in this case as to conclude the question. Thus, in passing upon the application for prohibition made by the United States to restrain the conduct of the proceedings to enforce the mandate in a district court presided over by a district judge, the nature of the duty involved in enforcing the mandate arose for decision, and it was said:

"While it is true that the mandate of this court gave certain specific directions as to the scope and character of the decree to be entered, it afforded an opportunity to the defendants to submit a plan in order to carry out the decree, and gave to the United States an opportunity to be heard in opposition to that plan, and left to the court a serious and important duty to be discharged in any event, and especially in case of controversy on the subject." (226 U. S. p. 425, supra.)

[204] The want of foundation for the proposition relied upon disposes of all the assigned errors except the one the consideration of which we previously postponed because they all, in a greater or less degree, depend upon such proposition, and to the extent that they do not, they are devoid of all merit for the following reasons: (a) Because the interlocutory decree was in strict compliance with the mandate; (b) because the contracts and agreements executed by the parties to remove the causes of illegality, and which were approved by the court, were adequate for that purpose; (c) because when the conception that the government was a party upon whom rested the responsibility of agreeing to contracts modifying the terms of the combination is put out of view, we are of opinion there is no merit in the contention that certain forms of proposed contracts submitted for approval by the government should have been sanctioned by the court, as such contracts were wholly unnecessary in view of the sufficiency of those executed by the parties, and which were approved; (d) because after a careful scrutiny of the record we are of the opinion that in every material step taken by the court below concerning both the interlocutory and final decree ample opportunity was afforded to all the parties to be heard, careful consideration was evidently given to the matters to be decided, and a full compliance, both in form and substance, with the mandate, resulted from the final decree unless error inheres in the two propositions urged, one by the defendants and the other by the United States, which we now come to dispose of.

It may not be disputed that the clause of the first paragraph of the decree which is in the margin,[2] pointing [205] out the character of the business which the terminal company, as reorganized, was authorized to pursue, is susceptible of the construction that the right was excluded to do anything but a terminal business in the narrow sense, and therefore did not permit the company to carry on as ancillary to its terminal business a transportation business, even although originating and terminating on its

[2] "1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for

lines. This being true, we are of opinion, despite the contentions of the United States to the contrary, that the provision in the decree on that subject did not give proper effect to the mandate of this court, and should be qualified so as to recognize the right to do, in connection with the terminal business proper, such transportation business as originates and terminates on the lines of the terminal company for the following reasons: Because not to so decide would lead inevitably to the conclusion that the decision of this court contemplated safeguarding one public interest by destroying another, and in effect proposed making the movement of transportation freer in some channels by absolutely obstructing all possibility of its flow in others; and moreover, because it assumes that the decision proposed to cure the defects in the organization of the combination which caused it to be in conflict with [206] the anti-trust act by commanding the abstention from the prosecution of business which otherwise under the law there would have been a duty to carry on, thus virtually seeking to remove one cause of illegality in a combination by substituting another. The contention that the terminal company and the combination which it embodied was not dissolved, and was permitted to continue in business solely because, if allowed to continue, it would be obliged to confine itself to terminal business in the strict sense, and therefore should not be permitted to now do other than purely terminal work, rests upon a misapprehension of the conditions. The suit to dissolve was largely defended upon the ground that the combination was formed for terminal purposes, and that to combine for the purpose of obtaining facilities of that character was not in conflict with the anti-trust act. In disposing of the case, the correctness of this contention in the abstract was conceded, but, as it was found that the geographical situation, the area over which the terminal company operated and the business which it carried on, in other words, its general environment, took it out of the conceded abstract general rule, it was decided that the combination, if it wished to continue in business, must execute certain agreements for the benefit of the public, modifying the terms under which it was organized. The proposition, therefore, now is that although the duty to execute agreements arose and its performance was compelled because the terminal company was not to be dealt with in the light, abstractly speaking, of a strictly terminal organization, nevertheless upon the execution of the agreements its rights are to be measured upon the contrary assumption. As these considerations in our opinion demonstrate that the decree should be modified by permitting the carrying on by the company, as incidental to its terminal business, of a transportation business originating exclusively on its own line, moving thereon and terminating [207] thereon, a direction to modify the decree in that respect must necessarily follow.

The subject of the ninth assignment of errors, upon which the United States most relies, relates to the fifth clause in the mandate containing a direction for the "abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area."

As the court below on this subject did nothing more than embody in its decree the provision of the mandate, the contention is that error was committed because the decree failed to expound the language of the mandate. Indeed, in the argument it was insisted that to properly give effect to the mandate there should have been inserted in the decree an express provision absolutely controlling or regulating for the future charges which the terminal company might make. But to have given effect to this view would have caused the decree to be plainly repugnant to the provisions of the act to regulate commerce, and contrary to the exercise by the state authorities of their power over charges of the terminal company in so far as the jurisdiction of such authorities may have extended. The flagrant repugnancy to the act to regulate commerce which would have resulted if the decree as asked had been granted will become more manifest when it is considered that the in-

railroad transportation, and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads, and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage, and the like, and modfying its contracts as herein specified.

"An election having been made to continue *the combination* for terminal purposes, the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies, and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered."

sistence was, as pointed out by the court below in its opinion, that there should have been a provision in substance so fixing and perpetuating for the future rates on traffic coming into East St. Louis from the zone mentioned in the mandate as to compel the commodities transported to East St. Louis to be carried from there across the river to their point of destination in St. Louis without any transportation charge whatever,—a direction which it is apparent would have [208] involved, if given, a disregard not only of all the regulations concerning rates established under the act to regulate commerce, but also, it may be, the prohibitions of that act concerning preference and discrimination. This condition is not escaped by the suggestion that such limitations, if imposed, would not have been in substance repugnant to the act to regulate commerce, since, as the rate from which the repugnancy would arise would only apply to business done by the combination, and as the combination would have to be dissolved because of the repugnancy, therefore the repugnancy would cease to exist from the very fact that it arose. But this argument only restates the contention concerning another aspect of the case which we have previously disposed of, and serves to emphasize the view that it is impossible to conceive that the decision of this court recognized the right of the terminal company to continue to exist provided certain features in its organization which were in conflict with the anti-trust act were removed, and yet at the same time provided that when such features were removed, the right to continue should be lost by the fact of its exercise. The particular expression of disapproval of the form of rate stated in the clause relied upon could only have been based upon one of two conceptions: First, the intention if such a charge was attempted to be exacted under the future operation of the company which was permitted, to lay down a rule forbidding such a charge in the future by the terminal company, and thereby expressing an opinion upon and controlling a subject plainly beyond the primary sphere of the judicial power, and exclusively within the original cognizance of the Interstate Commerce Commission under the terms of the act to regulate commerce; or second, as there was contention in the record as to whether such a form of rate was charged, and if it was, as to its legality, the expressions on that subject were used only to exclude all inference that the [209] judicial recognition of the right of the terminal company to continue in business on compliance with exactions which were required carried with it an implication of approval also to continue to exact the rate in question if it was being exacted, thus excluding all room for the contention that the provisions of the act to regulate commerce were in any way interfered with. That the expressions relied upon did not have the first meaning, and therefore solely had the second, so clearly results from the context of the mandate, that is, from its seventh paragraph, as to need no further consideration of the subject. The clause is as follows:

"Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission."

Comprehensively considering and once again weighing all the contentions pressed upon us by the United States, we are of the opinion they all, in last analysis, rest upon the following contradictory assumptions: (a) that the decision of this court destroyed one set of public rights upon the theory of protecting another set; (b) that it proposed to correct an abuse of one statute by conferring authority to violate another; (c) that while exerting the authority of enforcing one statute, the power was assumed of setting aside the provisions of another statute. On the contrary, when the confusion upon which these views rest is disregarded, we are of the opinion that the decision involved none of these contrarieties or conflicts, since in the public interest, and to open wide the avenues of commerce and make them free to the enjoyment of all, it commanded the correction of conditions impeding that result and [210] which were in conflict with the anti-trust act, thus bringing the assailed combination under the law of the land, and leaving it to be controlled by such law.

It follows from what we have said that the decree below, giving effect to the mandate of this court, will be modified so as to recognize the right of the terminal company, as an accessory to its strictly terminal business, to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same, and in other respects the decree will be affirmed.

Modified and affirmed.

Mr. Justice Holmes and Mr. Justice McReynolds took no part in the decision of this case.

VENS & HOWARD FIRE BRICK COMPANY and Union Sand & Material Company, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 210, 211.)

Appeal — further proceedings pending appeal — intervention.

A Federal district court cannot permit persons not parties to the record to intervene after a final decree, attempting to carry out the mandate of the Supreme Court, remanding the case for entry of a decree reorganizing a combination found to offend against the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), so as to escape the condemnation of that statute, has been entered and an appeal from such decree has been taken.

[For other cases, see Appeal and Error, IV. g, in Digest Sup. Ct. 1908.]

[No. 567.]

Argued October 20, 1914. Decided February 23, 1915.

APPEAL from the District Court of the United States for the Eastern District of Missouri to review a decree refusing to permit persons not parties to the record to intervene after final decree and an appeal therefrom taken. Affirmed.

Mr. George M. Block argued the cause, and, with Mr. John F. Lee, filed a brief for appellants.

Mr. Edward C. Crow, Special Assistant to the Attorney General, argued the cause and filed a brief for appellee.

Mr. Chief Justice White delivered the opinion of the court:

This appeal was taken from the order of the court refusing to allow an intervention on the ground that there was no jurisdiction to do so because, as the result of a previous final decree and an appeal taken therefrom by the United States, the authority of the court over the subject-matter was ended. In effect the relief which was sought to be accomplished by the intervention below has been obtained as the result of an original petition for intervention here and our action this day taken thereon. As those applying to intervene were not parties to the record, we are of opinion that the court below had no power to allow them to intervene under the circumstances which existed, and its judgment refusing their application was therefore right, and is affirmed.

NOTE.—On further proceedings pending error or appeal to Federal Supreme Court—see note to Wedding v. Meyler, 66 L.R.A.

OLYMPIA MINING & MILLING COMPANY, Limited, Plff. in Err.,

v.

ABNER G. KERNS.

(See S. C. Reporter's ed. 211-216.)

Error to state court — Federal question not raised below — opportunity.

Assuming that the failure to raise in the state courts the Federal questions, if any, presented by rulings that certain state statutes of limitations barred all right to the relief sought, would not defeat the appellate jurisdiction of the Federal Supreme Court if there was no opportunity to urge or suggest such questions in the courts below, such cannot be said to be the case where the statutes of limitations were in express terms stated in the demurrer to the bill, which was sustained by the trial court.

[For other cases, see Appeal and Error, 1311-1318, in Digest Sup. Ct. 1908.]

[No. 495.]

Submitted January 25, 1915. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Idaho to review a decree which affirmed a decree of the District Court of the First Judicial District in and for the County of Shoshone, in that state, sustaining a demurrer to a bill in a suit to enforce a trust agreement, on the ground that the relief sought was barred by the applicable state statutes of limitation. Dismissed for want of jurisdiction.

See same case below, 24 Idaho, 481, 135 Pac. 255.

The facts are stated in the opinion.

Mr. Charles E. Miller submitted the cause for plaintiff in error:

Where, upon a writ of error to a state

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

court, a Federal question is raised in the Supreme Court, and it is possible that its decision was necessarily involved in the judgment below, a motion to dismiss will not be sustained, although it may not appear affirmatively on the face of the record that such question was raised below.

Eureka Lake & Y. Canal Co. v. Superior Ct. 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 269, 35 L. ed. 1009, 12 Sup. Ct. Rep. 173.

Where the defendant contended in the state court that the operation of a state irrigation statute deprived him of property without due process of law, contrary to the Federal Constitution, and the supreme court of the state decided against such contention, a Federal question was presented.

Tregea v. Modesto Irrig. Dist. 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

If a statute is so construed as to deprive one of his property without due process of law, it violates the constitutional provision and presents a Federal question.

Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

Where there is an abuse of law, amounting to confiscation of property or a deprivation of personal rights, the Federal courts will interfere.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

A refusal to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives the Supreme Court jurisdiction to review.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

The objection to a tax that it is taking property without due process of law and denies to the taxpayers the equal protection of the laws raises a question under the Constitution of the United States; and where the question was necessarily involved in the final decision of the case, the writ of error cannot be dismissed.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

The court will not grant the motion to dismiss if consideration of the merits is required.

Hecker v. Fowler, 1 Black, 95, 17 L. ed. 45; Sparrow v. Strong, 3 Wall. 97, 18 L. ed. 49, 2 Mor. Min. Rep. 320; Minor v. Tillotson, 1 How. 288, 11 L. ed. 134; Semple v. Hagar, 4 Wall. 431, 18 L. ed. 402; Day v. Washburn, 23 How. 309, 16 L. ed 551; Lynch v. De Bernal, 131 U. S. XCIV, appx. and 19 L. ed. 395; Bohanan v. Nebraska, 118 U. S. 231, 30 L. ed. 71, 6 Sup. Ct. Rep. 1049; Hill v. Chicago & E. R. Co. 129 U. S. 170, 32 L. ed. 651, 9 Sup. Ct. Rep. 269; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681.

Mr. James H. Forney submitted the cause for defendant in error:

It is essential to the jurisdiction of the Supreme Court to review a decision of a state court that a Federal question should be actually raised in the latter court, and no jurisdiction exists where it was not raised until after final judgment, and in the petition for the writ of error, or in a petition for rehearing in the highest state court.

McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270; Forbes v. State Counsel, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295; Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.

The proper time to raise a Federal question is in the trial court and before its judgment is made final, if that be required by the state procedure.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270; 11 Cyc. 935–937; Sayward v. Denny, 158 U. S. 180, 39 L. ed 941, 15 Sup. Ct. Rep. 777; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Commercial Bank v Buckingham, 5 How. 317, 12 L. ed. 169; Loveland, App. Jur. Fed. Courts, § 320, p. 679; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Brown v. Massachusetts, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

It is the practice in the state of Idaho that the supreme court will not revise the judgment of the trial court on questions not raised therein.

Medbury v. Maloney, 12 Idaho, 634, 88 Pac. 81; Big Lost Irrig. Co. v. Davidson, 21 Idaho, 160, 121 Pac. 88; Marysville Mercantile Co. v. Home F. Ins. Co. 21 Idaho, 377, 121 Pac. 1026; Steve v. Bonners Ferry Lumber Co. 13 Idaho, 393, 92 Pac 363.

To give jurisdiction of a writ of error to

a state court it must appear affirmatively not only that a Federal question was presented to that court for decision, but also that the decision of the question was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution; or that the judgment as rendered could not have been given without such decision.

Snell v. Chicago, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489; Montgomery, Fed. Proc. §§ 336, 337.

Mr. Chief Justice White delivered the opinion of the court:

Concerned now only with a motion to dismiss, we limit our statement to that which is essential to decide such issue. In 1912 the Olympia Mining & Milling Company, Limited, the plaintiff in error, brought this suit to enforce a trust agreement between Kerns, the defendant in error, and one Cunningham, by which it was alleged Kerns had obliged himself in 1901 to transfer to Cunningham certain property then owned or to be acquired by him, for a designated consideration, Cunningham to put the title to the property when transferred in the name of a corporation to be by him organized, of which Kerns was to have a stated proportion of the stock. The bill was generally demurred to and state statutes creating terms of limitation of three, four, and five years were expressly set out in the demurrer as barring all right to the relief sought. In reviewing the action of the trial court in sustaining the demurrer the court below held that the statutes of limitations were decisive. 24 Idaho, 481, 135 Pac. 255. From the averments of the bill and facts disclosed in its previous records concerning the controversy, the time when the term of the statutes commenced to run was determined by the court to be August, 1904, because on that date Kerns made a sale of a portion of the property embraced by the trust agreement and at the same time had bound himself to sell it all,—obligations which were held to be a repudiation by him of the trust agreement, and in fact constituted a disclaimer of all obligation under it. It was held that by a suit brought in 1905, by which Cunningham was bound, it was judicially admitted that at that time there was a [215] default in carrying out the trust agreement on the part of Cunningham or those holding with or under him, and a knowledge on their part of the disclaimer of all obligation by Kerns,—conclusions which caused the statutes to be operative, since, from the date of the starting point, 1904, to the date of the bringing of the present suit, in 1912, more than the statutory periods had elapsed.

Briefly stated, two propositions are relied upon: First, that causing the term of the statutes to commence to run from the year 1904 was a violation of the due process clause of the 14th Amendment because at that date the corporation was not in existence, and hence was without capacity to take and hold the property embraced by the trust agreement. Second, as the state statutes of limitations, generally speaking, did not run against minors or incapacitated persons, to cause the term to commence to run against the corporation before it came into existence and had capacity to take the property was a denial of the equal protection of the laws under the 14th Amendment. But without in the remotest degree admitting that these propositions afford the slightest ground for converting such a purely state question as the operation of statutes of limitations upon real property situated in a state into Federal questions giving rise to jurisdiction of this court to review, there is obviously in any event no jurisdiction, because in no manner and at no time were the alleged Federal questions, be they real or imaginary, presented or even remotely suggested to the court below. Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699. In the argument this is admitted, but it is said the propositions ought now to be treated as adequate to confer jurisdiction, because there was no opportunity to urge or suggest them in the courts below. Again, without conceding the merit of the suggestion if founded in fact, it is here plainly not so founded, since the statutes of limitations which were upheld by the court below were in express terms stated in the [216] demurrer filed in the trial court, and yet the record is silent as to any suggestion of assumed Federal right until after the decision below, when the assignments of error were made for the purpose of a review by this court.

Dismissed for want of jurisdiction.

J. J. BROLAN, Joseph McKenna, G. B. Balk, et al., Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 216-222.)

Error to district court — frivolousness of Federal question.

The contention that Congress could not constitutionally punish, as it did by the act of February 9, 1909 (35 Stat. at L. 614, chap. 100, Comp. Stat. 1913. § 8801),

§ 2, the knowing receipt, concealment, or facilitation of transportation of opium which had been successfully imported from a foreign country in violation of the prohibitions of that section against such importation, is too unsubstantial and frivolous to serve as the foundation for a writ of error from the Federal Supreme Court to a district court.

[For other cases, see Appeal and Error, 938–939, in Digest Sup. Ct. 1908.]

[No. 645.]

Submitted January 5, 1915. Decided February 23, 1915.

IN ERROR to the District Court of the United States for the Northern District of California to review a conviction of knowingly concealing or moving opium which had been wrongfully imported into the United States. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Edward M. Cleary and John L. McNab submitted the cause for plaintiffs in error. Messrs. P. S. Ehrlich, Bert Schlesinger, and S. C. Wright were on the brief:

If this act be constitutional, there is no limitation to the power of the Federal government in its interference with the police power in respect to the morals, the public health, and welfare of the citizens of each and every individual state. Yet, it has been axiomatic and fundamental in our theory of government that the police power, in respect to the public health, morals, and social welfare of the citizens of each and every individual state, is solely and exclusively for that particular state.

Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; United States v. Krsteff, 185 Fed. 203; Hoke v. United States, 227 U. S. 322, 57 L. ed. 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; United States v. Gould, Fed. Cas. No. 15,239; License Cases (Thurlow v. Massachusetts) 5 How. 504, 12 L. ed. 256; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Recognizing that the commerce power of Congress is limited to its particular sphere of interstate and foreign commerce, and that the acts declared constitutional have been held so only in so far as they affected foreign or interstate commerce, in every particular instance where the power of Congress has been exercised so as to indiscriminately affect intra- as well as interstate commerce the acts have been held unconstitutional.

Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Butts v. Merchants' & M. Transp. Co. 230 U. S. 126, 57 L. ed. 1422, 33 Sup. Ct Rep. 964; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; The Abby Dodge, 223 U. S. 174, 56 L. ed. 393, 32 Sup. Ct. Rep. 310; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Vance v. W. A. Vandercook Co. 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 674.

There is no decision, although *dicta* are found in the pure food and drug decisions, which extends the power of Congress beyond the original-package doctrine.

Hipolite Egg Co. v. United States, 220 U. S. 49, 55 L. ed. 365, 31 Sup. Ct. Rep. 364; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Shawnee Mill. Co. v. Temple, 179 Fed. 522; Philadelphia Pickling Co. v. United States, 120 C. C. A. 429, 202 Fed. 152.

Assistant Attorney General Warren submitted the cause for defendant in error:

For one hundred years the power of Congress to compel persons who knowingly receive, conceal, etc., goods liable to seizure, —*i. e.*, unlawfully imported,—to forfeit and pay double their value, has been enforced by the courts; and for fifty years the power of Congress to constitute it a crime for a person to receive, conceal, etc., goods unlawfully imported, having knowledge of such unlawful importation, has been enforced by the courts.

United States v. Thomas, 4 Ben. 370, Fed.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

Cas. No. 16,473; United States v. 53 Boxes of Havana Sugar, 2 Bond, 354, Fed. Cas. No. 15,098; Re Landsberg, Fed. Cas. No. 8,041; United States v. Claflin, 13 Blatchf. 178, Fed. Cas. No. 14,798; United States v. Kee Ho, 33 Fed. 333; United States v. Sauer, 73 Fed. 671; Dunbar v. United States, 156 U. S. 185, 198, 39 L. ed. 390, 395, 15 Sup. Ct. Rep. 325; Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; Amado v. United States, 195 U. S. 172, 49 L. ed. 145, 25 Sup. Ct. Rep. 13; United States v. 95 Boxes, Fed. Cas. No. 15,891; United States v. A Lot of Jewelry, 59 Fed. 684; United States v. A Lot of Precious Stones, 68 C. C. A. 1, 134 Fed. 61; United States v. Merriam, Fed. Cas. No. 15,759; Keck v. United States, 172 U. S. 434, 43 L. ed. 505, 19 Sup. Ct. Rep. 254; United States v. Chesbrough, 176 Fed. 778; Rogers v. United States, 31 L.R.A.(N.S.) 264, 103 C. C. A. 408, 180 Fed. 54; United States v. Ah Fook, 105 C. C. A. 325, 183 Fed. 33; The Ariel, 1 Haskell. 65. Fed. Cas. No. 527; Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491; United States v. Jordan, 2 Low. Dec. 537, Fed. Cas. No. 15,498; United States v. 90 Demijohns of Rum, 8 Fed. 485; United States v. Lot of Jewelry, 13 Blatchf. 65. Fed. Cas. No. 15,626; United States v. Claflin, 97 U. S. 546, 24 L. ed. 1082; Von Cotzhausen v. Nazro, 11 Biss. 44, 15 Fed. 891, affirmed in 107 U. S. 215, 27 L. ed. 540, 2 Sup. Ct. Rep. 503; Friedenstein v. United States, 125 U. S. 224, 233, 31 L. ed. 736, 740, 8 Sup. Ct. Rep. 838; United States v. One Pearl Necklace, 105 Fed. 357, 56 L.R.A. 130, 49 C. C. A. 287, 111 Fed. 164; United States v. 5 Packages of Tapestry, 114 Fed. 496; Dodge v. United States, 65 C. C. A. 603. 131 Fed. 849; One Pearl Chain v. United States, 59 C. C. A. 499, 123 Fed. 371, 139 Fed. 510, 71 C. C. A. 500, 139 Fed. 513; United States v. 50 Waltham Watch Movements, 139 Fed. 291; United States v. 646 Half Boxes of Figs, 164 Fed. 778; United States v. Farnsworth, 1 Mason, 1, Fed. Cas. No. 15,072; Clark v. Protection Ins. Co. 1 Story, 109, Fed. Cas. No. 2,832; Ex parte Hoyt, 13 Pet. 279, 10 L. ed. 161; Walsh v. United States, 3 Woodb. & M. 341, Fed. Cas. No. 17,116; Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491.

The power to regulate commerce with foreign nations includes the power to prohibit the importation into the United States of any article or articles which Congress may see fit to exclude.

The Abby Dodge, 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310; United States v. Marigold, 9 How. 560, 566, 13 L. ed. 257, 260; Buttfield v. Stranahan, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Lottery Case (Champion v. Ames) 188 U. S. 321, 341-343, 47 L. ed. 492, 496, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; United States v. The William, Fed. Cas. No. 16,700.

The primary purpose of the act was to prevent the importation of opium and its derivatives into this country. Everything else in the act is incidental to and in pursuance of this main purpose.

United States v. Caminata, 194 Fed. 903.

Knowledge of the illegal importation is made an essential element of the crime.

United States v. Sauer, 73 Fed. 671.

Congress has ample power to authorize the destruction of articles which it has prohibited as articles of commerce, and such destruction is an appropriate means for enforcing the prohibition.

Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; Buttfield v. Stranahan, 192 U. S. 470, 497, 48 L. ed. 525, 536, 24 Sup. Ct. Rep. 349; Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 705, 41 L. ed. 1169, 1172, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 315, 53 L. ed. 195, 199, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276, Lawton v. Steele, 152 U. S. 133, 88 L. ed. 385, 14 Sup. Ct. Rep. 499; 29 Ops. Atty. Gen. 603.

And it is not essential that such article, when destroyed, should be in the original package.

McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39.

The power existing to forbid the importation of opium, the right to exercise that power carries with it the authority to do those things which are incidental to the power itself, or which are plainly necessary to make effective the principal authority when exerted, or which have reasonable relation to this end.

Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 619, 55 L. ed. 883, 31 Sup. Ct. Rep. 621; Lewis Pub. Co. v. Morgan, 229 U. S. 314, 57 L. ed. 1202, 33 Sup. Ct. Rep. 867; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. ed. 678, 688; United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004.

Hence, Congress could make criminal any act having a direct or reasonably closely related tendency to interfere with the government's right to seize and destroy such opium. Clearly, the selling or concealing or facilitating the transport of the forbidden article, with knowledge of its illegal importation, had such tendency to place obstacles in the way of the government's right to seize and to make more remote the

chances of successful detection by the government of the presence of the forbidden article. Stockwell v. United States, 13 Wall. 531, 546, 547, 20 L. ed. 491, 494, 495.

Clearly, the relation between the object sought to be attained by Congress and the means which it provided to effectuate its object in the opium act was not within the objection raised by the court in United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593.

This court will not hold that the relation of the means provided by the act to the purpose of the act was so remote and uncertain as to make the act unconstitutional, except in the clearest possible case, where no other decision would be within reason.

Nicol v. Ames, 173 U. S. 509, 514, 515, 43 L. ed. 786, 791, 792, 19 Sup. Ct. Rep. 522; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553.

The power of Congress to declare that the receipt, purchase, concealment, or sale of goods unlawfully imported, knowing that they have been brought in contrary to law, shall constitute an offense against the United States, is closely connected with the offense of unlawfully importing. In this respect the analogy of statutes making the receiver of stolen goods an accessory after the facts is sufficient to indicate that the act of receiving, etc., unlawfully imported goods with knowledge of the illegal importation, is not so far removed and remote from the illegal importation itself as to be beyond the power of Congress to punish.

United States v. Claflin, 13 Blatchf. 182, Fed. Cas. No. 14,798; Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491.

It is no objection to the act that it seeks to punish actions which might be prohibited by state law, or that it partakes of the nature of a police regulation.

Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905.

There have been frequent cases in the past where the same act might be punished under either a state or a Federal law.

Fox v. Ohio, 5 How. 410, 12 L. ed. 213; United States v. Marigold, 9 How. 560, 13 L. ed. 257; Moore v. Illinois, 14 How. 13, 14 L. ed. 306; Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118; Grafton v. United States, 206 U. S. 333, 354, 51 L. ed. 1084, 1091, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640.

Mr. Chief Justice White delivered the opinion of the court:

The indictment against the plaintiffs in error contained two counts: The first charged a conspiracy to wrongfully import opium into the United States in violation of the first portion of § 2 of the act of February 9, 1909 (chap. 100, 35 Stat. at L. 614, Comp. Stat. 1913, § 8801). The second charged a conspiracy to unlawfully receive, conceal, and facilitate the transportation of opium which had been wrongfully imported into the United States with knowledge of such previous, illegal importation, in violation of the latter part of the section referred to. The first count was quashed on the ground that the overt acts alleged occurred after the illegal importation or smuggling which was counted on. On the second count there was a conviction and sentence, and this direct writ of error to the trial court is prosecuted to reverse the same. The right to a reversal rests upon two propositions: the one, that the clause of the section upon which the second count was based is repugnant to the Constitution of the United States because beyond the legislative power of Congress to enact, and because, moreover, its provisions intrinsically constitute a usurpation of the powers reserved to the states by the Constitution; and the other, the insistence that various material errors were committed by the trial court during the progress of the case aside from the constitutionality of the statute.

Our jurisdiction to directly review depends upon the constitutional question, since the other matters relied upon are, as a general rule, within the exclusive jurisdiction of the circuit court of appeals of the ninth circuit, although, if power to review attaches to the case because of the constitutional question, that authority gives rise to the [218] duty to determine all the questions involved. Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; Williamson v. United States, 207 U. S. 425, 432, 52 L. ed. 278, 284, 28 Sup. Ct. Rep. 163; Billings v. United States, 232 U. S. 261, 276, 58 L. ed. 596, 603, 34 Sup. Ct. Rep. 42. Under these circumstances, to prevent a disregard of the distribution of appellate power made by the Judicial Code, and to see to it that there is something on which our jurisdiction to review can rest, it behooves us in this as in all other cases to see whether the question upon which our power depends is really presented, and if not, because, although in form arising, it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Hendricks v. United States, 223 U. S. 178, 56 L. ed. 394, 32 Sup. Ct. Rep. 313.

Coming to that subject, the entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based upon such contention. In Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, in stating the previously settled doctrine on the subject, it was said, p. 492:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. Lottery Case (Champion v. Ames) 188 U. S. 321, 353-356, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, [219] but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States, and excluding such as did not equal the standards adopted. 9 Stat. at L. 237, chap. 70, Rev. Stat. § 2933, Comp. Stat. 1913, § 5622." And see Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 334, 335, 53 L. ed. 1013, 1020, 29 Sup. Ct. Rep. 671; The Abby Dodge, 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310.

Nor is there any ground upon which to rest the contention that although, under this settled doctrine, it is frivolous to question the power of Congress to prohibit importations and punish a violation of such prohibition, it is open to controversy, and therefore not frivolous, to contend that there is a want of power to prohibit and punish the act of knowingly concealing or *moving merchandise* which has been successfully imported from a foreign country in violation of the prohibitions against such importations. This conclusion is inevitable since it is obvious that to concede that the wrongful and successful evasion of the prohibition against bringing in imported merchandise, or of knowingly, in violation of a further prohibition, dealing with such merchandise, was beyond the scope of the complete power to prohibit importation, would be in substance to deny any power whatever. Indeed, it is evident that a power to prohibit which is operative and effective only as long as its prohibitions are not disobeyed is not an absolute power, but is scarcely worthy of being denominated a relative one. But the authority being absolute, it follows that the right to assert it must endure and reach beyond the mere capacity of persons to evade its commands [220] to the control of those things which are essential to make the power existing and operative,—a conclusion the truth of which cannot be escaped in the light of the doctrine on that subject, so luminously stated in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, and which has been the guide by which the Constitution has been successfully interpreted and applied from that day to this.

While these considerations demonstrate that the attempted distinction is but a denial of the existence of a power which it is conceded it would be frivolous to deny, we briefly refer to the legislative history from the beginning for the purpose of showing that the authority which it is now insisted was not included in the right to prohibit importation has at all times been considered to be and treated as within the scope of such authority. Thus, in 1799 the customs act of that year (§ 69, chap. 22, 1 Stat. at L. 678, Comp. Stat. 1913, § 5785) contained a provision for a seizure and forfeiture of merchandise imported in violation of its terms, and imposed penalties upon any person who should "conceal or buy any goods, wares, or merchandise, knowing them to be liable to seizure by this act." And by the act of March 3, 1823 (chap. 58, 3 Stat. at L. 781), amending the act of March 2, 1821 (chap. 14, 3 Stat. at L. 616, Comp. Stat. 1913, § 5811), a like authority was asserted and penalties and forfeitures were imposed for violations. Again, in 1866, in an act to prevent smuggling (§ 4, act of July 18, chap. 201, 14 Stat. at L. 179, Comp. Stat. 1913, § 5785), the identical provisions found in the section here in question were made applicable generally to all importations, and were sanctioned by making violations thereof criminal. And these provisions passed into the Revised Statutes

(§ 3082, Comp. Stat. 1913, § 5785), and are in force to-day, the particular provision here involved concerning opium being part of the act of 1909, prohibiting the importation of that article. In the face of this unbroken legislative interpretation of the extent of the power to prohibit, covering a period of more than one hundred and [221] fifteen years, of the constant exertion of administrative authority under such legislation, and of the assumption that such power undoubtedly obtained, manifested by a multitude of judicial decisions too numerous to refer to, although many of them are cited in the argument of the government, we can discover no possible ground upon which the contention to the contrary here relied upon can rest, and therefore the conclusion that it is wholly unsubstantial and frivolous cannot possibly be escaped.

In the argument it is, however, suggested that some support for the view relied upon results from the ruling in Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066, wherein a provision of the act known as the white slave act (chap. 1134, 34 Stat. at L. 898, Comp. Stat. 1913, § 4242) was held to be beyond the power of Congress to enact. In fact, the provisions of that statute are printed in a parallel column with the statute here assailed, and the conclusion is drawn that the identity between them is perfect, and therefore, despite the considerations involved in the review which we have made, it has come to pass not only that the assertion of the want of power in Congress here relied upon is not frivolous, but that it is well founded and must be upheld if the Keller Case is not to be overruled. But the contention is itself frivolous, since it is based upon a mere failure to observe the broad line which separates the ruling in the Keller Case from the question here involved. Nothing can make this plainer than the mere statement that while in the Keller Case it is true there was a prohibition against the importation for immoral purposes of the persons whom the statute enumerated, the act punished not the harboring of persons for immoral purposes who had been brought into the United States in violation of the prohibition against importation, but its provisions also embraced the harboring of persons for immoral purposes if they were aliens, even although they had come into the United States lawfully. The basis upon which the Keller Case proceeded [222] was so manifest that Congress amended the act by making the penal clause which was held unconstitutional, applicable only to those immoral aliens who had come into the United States in violation of the prohibitions of the act (§ 2, chap. 128, 36 Stat. at L. 264, Comp. Stat. 1913, § 4247). In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests in the broad distinction which exists between the two powers, and therefore the cases cited and many more which might be cited, announcing the principles which they uphold, have obviously no relation to the question in hand. In fact it is true to say of the citation of these cases as well as of the reference to the Keller Case that a proposition which is so wholly devoid of merit as to be frivolous is not given a substantial character by an attempt to support it by contentions which are themselves wholly devoid of all merit and frivolous.

There being no possible ground upon which to attribute even semblance of foundation for the constitutional question relied upon, it folllows that it affords no basis for our jurisdiction to directly review, and the writ of error is dismissed for want of jurisdiction.

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[223] A. A. TRUSKETT and W. O. Truskett, Appts.,
v.
FRED D. CLOSSER.

(See S. Ç. Reporter's ed. 223-229.)

Indians — allotments — lease by minor.

The conferring of the rights of majority, conformably to a state statute, upon a minor Indian allottee so as to qualify him to make a lease, must be deemed to be beyond the power of an Oklahoma district court, notwithstanding the removal of restrictions on alienation by Indian allottees, made by the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), §§ 1 and 4, in view of the provisions of §§ 2 and 6 of that act defining "minors," and specifically providing for the leasing of their allotments by their guardians under the order of the state probate courts, which are given, subject to the provisions of that act, jurisdiction of the persons and property of minor allottees, "except as otherwise specifically provided by law,"—especially since a contrary view would conflict with the rulings of the highest state court, which have become a rule of property.

[For other cases, see Indians, VIII.; Courts, VII., in Digest Sup. Ct. 1908.]

[No. 160.]

Argued January 28, 1915. Decided February 23, 1915.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Oklahoma, quieting title under a lease by the guardian of a minor Indian allottee. Affirmed.

See same case below, 117 C. C. A. 477, 198 Fed. 835.

The facts are stated in the opinion.

Mr. James A. Veasey argued the cause, and, with Mr. Lloyd A. Rowland, filed a brief for appellants.

Messrs. G. T. Stanford and Eugene Mackey argued the cause, and, with Messrs. John H. Brennan and T. H. Stanford, filed a brief for appellee.

Mr. Justice McKenna delivered the opinion of the court:

Conflict of oil and gas mining leases derived from the same lessor, one Robert F. Goodman, a member of the Cherokee Tribe of Indians.

Appellee brought suit in the district court for the eastern district of Oklahoma to quiet title to his lease against that of appellants covering the same premises. The bill set up the full title of appellee and the full title of appellants, to which appellants demurred. The demurrer was overruled, and, appellants declining to plead further, a decree was entered quieting the title of appellee, [225] and decreeing the cancelation of the lease of appellants. The decree was affirmed by the circuit court of appeals, 117 C. C. A. 477, 198 Fed. 835.

The lands in controversy were part of the common domain of the Cherokee Tribe of Indians, and on the 31st day of March, 1909, were conveyed to Goodman, a member of the tribe, by patent of the Cherokee Nation, duly approved by the Secretary of the Interior as his, Goodman's, allotment, 50 acres being his so-called "surplus" allotment, and the remaining 30 acres being his homestead allotment.

Goodman was one-eighth Indian blood and seven-eighths white blood, and did not attain the full age of twenty-one years until September 25, 1910. Before that date, to wit, on the 12th of October, 1909, in a proceeding brought by his next friend, the district court of Washington county, Oklahoma, by a decree duly entered, removed from Goodman the disability of minority, and conferred upon him the rights of majority concerning contracts, and "authorized and empowered him to transact business in general with the same effect as if such business were transacted by a person over the age of twenty-one years." In pursuance of this decree Goodman granted to one Overfield a lease for oil and gas mining purposes covering his entire allotment for the term of fifteen years from its date, and as long thereafter as oil or gas should be found in paying quantities. The lease passed to appellants by assignment, and constitutes the basis of their title.

On September 14, 1910, that is, subsequent to the decree conferring majority rights upon Goodman, and subsequent to the lease under which appellants hold, the legal guardian of Goodman granted a lease in behalf of Goodman to appellee, covering the same lands. This lease was both authorized and confirmed by the order of the county court for Nowata county, Oklahoma, that court then having probate jurisdiction of the person and estate [226] of Goodman, and Goodman at that time being a minor. This lease is the ground of title of appellee.

The question in the case then is, Of the two leases, which constitutes the better title? And a decision of this question, appellants contend, depends upon the construction of the act of Congress of May 27, 1908, 35 Stat. at L. 312, chap. 199. Special stress being put upon §§ 1 and 4. These sections are as follows: Section 1. "That from and after sixty days from the date of this act, the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restriction. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood, shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

"Section 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five

Civilized Tribes: Provided, That allotted lands shall not be subjected or [227] held liable to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

At the time this act was passed, Goodman was a minor of one-eighth Indian blood, and it is hence contended that Goodman having less than one-half Indian blood, his entire allotment was free from all restrictions and was therefore subject to the laws of Oklahoma. And this notwithstanding §§ 2 and 6 of the act, which read respectively as follows: "Section 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by an allottee if an adult, or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years without the privilege of renewal: Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, that the jurisdiction of the probate courts of the state of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term 'minor' or 'minors' as used in this act shall include all males under the age of twenty-one years and all females under the age of eighteen years."

"Section 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma. . . ."

These sections are circumstantial and contain the elements of decision. Section 2 defines minors, male and [228] female, and provides for the disposition of their property under, as stated, rules and regulations provided by the Secretary of the Interior, and declares that the jurisdiction of the probate courts of the state shall be subject to its provisions. And § 6 declares to what courts the property of minors so defined shall be subject. Explicitly such property is made "subject to the jurisdiction of the probate courts of the state of Oklahoma." The qualification "except as otherwise specifically provided by law" means, as said by the circuit court of appeals, "Federal law, not state law."

Counsel, however, resist that conclusion, and contend that the jurisdiction which was made subject to the provisions of the section is yet to be regarded independently of them, and subject to the provisions of the local statutes. The reasoning by which this is attempted to be supported is somewhat involved and is difficult to represent succinctly. It is that the enabling act of the state, exccept as modified, and the Constitution of the state, continued the laws in force in the territory at the time of its admission into the Union until they expired or were altered or repealed, and that by those laws minors were defined (Wilson's Stat. § 733), and other laws gave power to confer upon them the rights of majority (Wilson's Stat. chap. 59, art. 5, §§ 73–75). But this did not preclude the exercise of the power of Congress as exhibited in the act of May 27, 1908. Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. And the courts, both state and Federal, have found no difficulty in determining its meaning or its dominance over the provisions of the state law. Priddy v. Thompson, 123 C. C. A. 277, 204 Fed. 955; Jefferson v. Winkler, 26 Okla. 653, 110 Pac. 755. And we think it is clear that §§ 1 and 4 are not to be construed independently of the other sections of the act.

In Jefferson v. Winkler an Indian girl married when she was under eighteen, and while under that age conveyed [229] her allotment. It was held that under the general law of Oklahoma the marriage emancipated her, but that, notwithstanding, her conveyance was void, the act of May 27, 1908, prevailing over the state law. The reasoning of the court is directly antagonistic to that of appellants in the case at bar, the same contentions being urged in that case as in this. In other words, it was contended that § 1 of that act was absolute, and was not modified by § 2, and the court, considering all of the provisions of the act, was of opinion that the legislative intention was to provide that the allotted lands of freedmen and mixed-blood Indians of less than half Indian blood, under the age of eighteen if a female, and under the age of twenty-one if a male, might be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise. The court, therefore, decided, upon a consideration of the act of May 27, 1908, and of the laws of the state, that the latter, removing the disability of minority, do not extend to Indian minors as defined by the act of Congress.

The decision has been followed in Tirey v. Darneal, 37 Okla. 606, 133 Pac. 614. Also Tirey v. Darneal, 37 Okla. 611, 132 Pac. 1087.

The construction has become a rule of property in the state, and we should be dis-

posed to accept it as such, even if we had doubts of the construction of the act of May 27, 1908. Reynolds v. Fewell, 236 U. S. 58, ante, 465, 35 Sup. Ct. Rep. 230.

The other contentions of appellants which have been argued are but phases of those we have reviewed, or are determined by the same considerations.

Decree affirmed.

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[230] MUTUAL FILM CORPORATION, Appt.,
v.
INDUSTRIAL COMMISSION OF OHIO et al.

(See S. C. Reporter's ed. 230-247.)

Commerce — state regulation — censorship of motion picture films.

1. The censorship by a state board of censors, conformably to 103 Ohio Laws, 399, of motion picture films which are "to be publicly exhibited and displayed in the state of Ohio," is not an unlawful burden on interstate commerce, even as applied to films which are brought in from another state, but which are in the hands of film exchanges, ready for rental to exhibitors, or have passed into the possession of the latter.

[For other cases, see Commerce, IV.; VI. c, in Digest Sup. Ct. 1908.]

Constitutional law — freedom of speech and press — censorship of motion picture films.

2. The freedom of speech and publication guaranteed by Ohio Const. art. 1, § 11, with responsibility only for abuse, is not violated by the provisions of 103 Ohio Laws, 399, for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition, motion picture films which are to be publicly exhibited and displayed in the state, and is to pass and approve only such films as are, in its judgment, of a moral, educational, or amusing and harmless character.

[For other cases, see Constitutional Law, IV. d, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of legislative power — censorship of motion picture films.

3. Legislative power is not unlawfully delegated by the provisions of 103 Ohio Laws, 399, for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition, motion picture films which are to be publicly exhibited and displayed in the state, and is to pass and approve only such films as are, in its judgment, of a moral, educational, or amusing and harmless character.

[For other cases, see Constitutional Law, III. b, 3, in Digest Sup. Ct. 1908.]

[No. 456.]

Argued January 6 and 7, 1915. Decided February 23, 1915.

APPEAL from the District Court of the United States for the Northern District of Ohio to review a decree refusing to restrain the enforcement of a state statute for the censorship of motion picture films. Affirmed.

See same case below, 215 Fed. 138.

Statement by Mr. Justice McKenna:

Appeal from an order denying appellant, herein designated complainant, an interlocutory injunction sought to restrain the enforcement of an act of the general assembly of Ohio, passed April 16, 1913 (103 Ohio Laws, 399), creating under the authority and superintendence of the Industrial Commission of the state a board of censors of motion picture films. The motion was presented to three judges upon the bill, supporting affidavits, and some oral testimony.

The bill is quite voluminous. It makes the following attacks upon the Ohio statute: (1) The statute is in violation of §§ 5, 16, and 19 of article 1 of the Constitution of the state in that deprives complainant of a remedy by due process of law by placing it in the power of the board of censors to determine from standards fixed by itself what films conform to the statute, and thereby deprives complainant of a judicial determination of a violation of the law. (2) The statute is in violation of articles 1 and 14 of the Amendments to the Constitution of the United States, and of § 11 of article 1 of the Constitution of Ohio, in that it restrains complainant and other persons from freely writing and publishing their sentiments. (3) It attempts to give the board of censors legislative power, [232] which is vested only in the general assembly of the state, subject to a referendum vote of the people, in that it gives to the board the power to determine the application of the statute without fixing any standard by which the board shall be guided in its determination, and places it in the power of the board, acting with similar boards in other states, to reject, upon any whim or caprice, any film which may be presented, and power to determine the legal status of the foreign board or boards, in conjunction with which it is empowered to act.

The business of the complainant and the description, use, object, and effect of motion pictures and other films contained in the

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NOTE.—On regulations affecting moving pictures—see note to State ex rel. Ebert v. Loden, 40 L.R.A.(N.S.) 193.

On constitutional freedom of speech and of the press—see note to Cowan v. Fairbrother, 32 L.R.A. 829.

bill, stated narratively, are as follows: Complainant is engaged in the business of purchasing, selling, and leasing films, the films being produced in other states than Ohio, and in European and other foreign countries. The film consists of a series of instantaneous photographs or positive prints of action upon the stage or in the open. By being projected upon a screen with great rapidity there appears to the eye an illusion of motion. They depict dramatizations of standard novels, exhibiting many subjects of scientific interest, the properties of matter, the growth of the various forms of animal and plant life, and explorations and travels; also events of historical and current interest,—the same events which are described in words and by photographs in newspapers, weekly periodicals, magazines, and other publications, of which photographs are promptly secured a few days after the events which they depict happen; thus regularly furnishing and publishing news through the medium of motion pictures under the name of "Mutual Weekly." Nothing is depicted of a harmful or immoral character.

The complainant is selling and has sold during the past year for exhibition in Ohio an average of fifty-six positive prints of films per week to film exchanges doing business in that state, the average value thereof being the sum of $100, [233] aggregating $6,000 per week, or $300,000 per annum.

In addition to selling films in Ohio, complainant has a film exchange in Detroit, Michigan, from which it rents or leases large quantities to exhibitors in the latter state and in Ohio. The business of that exchange and those in Ohio is to purchase films from complainant and other manufacturers of films and rent them to exhibitors for short periods at stated weekly rentals. The amount of rentals depends upon the number of reels rented, the frequency of the changes of subject, and the age or novelty of the reels rented. The frequency of exhibition is described. It is the custom of the business, observed by all manufacturers, that a subject shall be released or published in all theaters on the same day, which is known as release day, and the age or novelty of the film depends upon the proximity of the day of exhibition to such release day. Films so shown have never been shown in public, and the public to whom they appeal is therefore unlimited. Such public becomes more and more limited by each additional exhibition of the reel.

The amount of business in renting or leasing from the Detroit exchange for exhibition in Ohio aggregates the sum of $1,000 per week.

Complainant has on hand at its Detroit exchange at least 2,500 reels of films which it intends to and will exhibit in Ohio, and which it will be impossible to exhibit unless the same shall have been approved by the board of censors. Other exchanges have films, duplicate prints of a large part of complainant's films, for the purpose of selling and leasing to parties residing in Ohio, and the statute of the state will require their examination and the payment of a fee therefor. The amounts of complainant's purchases are stated, and that complainant will be compelled to bear the expense of having them censored because its customers will not purchase or hire uncensored films.

The business of selling and leasing films from its offices [234] outside of the state of Ohio to purchasers and exhibitors within the state is interstate commerce, which will be seriously burdened by the exaction of the fee for censorship, which is not properly an inspection tax, and the proceeds of which will be largely in excess of the cost of enforcing the statute, and will in no event be paid to the Treasury of the United States.

The board has demanded of complainant that it submit its films to censorship, and threatens, unless complainant complies with the demand, to arrest any and all persons who seek to place on exhibition any film not so censored or approved by the censor congress on and after November 4, 1913, the date to which the act was extended. It is physically impossible to comply with such demand and physically impossible for the board to censor the films with such rapidity as to enable complainant to proceed with its business, and the delay consequent upon such examination would cause great and irreparable injury to such business, and would involve a multiplicity of suits.

There were affidavits filed in support of the bill and some testimony taken orally. One of the affidavits showed the manner of shipping and distributing the films, and was as follows:

"The films are shipped by the manufacturers to the film exchanges inclosed in circular metal boxes, each of which metal boxes is in turn inclosed in a fiber or wooden container. The film is in most cases wrapped around a spool or core in a circle within the metal case. Sometimes the film is received by the film exchange wound on a reel, which consists of a cylindrical core with circular flanges to prevent the film from slipping off the core, and when so wound on the reel is also received in metal boxes, as above described. When the film is not received on a reel, it is, upon receipt, taken from the metal box, wound on a reel, and then replaced in the metal box. So wound and so inclosed in metal boxes, the

films are shipped by the film [235] exchanges to their customers. The customers take the film as it is wound on the reel from the metal box, and exhibit the pictures in their projecting machines, which are so arranged as to permit of the unwinding of the film from the reel on which it is shipped. During exhibition, the reel of film is unwound from one reel and rewound in reverse order on a second reel. After exhibition, it must be again unwound from the second reel from its reverse position and replaced on the original reel in its proper position. After the exhibitions for the day are over, the film is replaced in the metal box and returned to the film exchange, and this process is followed from day to day during the life of the film.

"All shipments of films from manufacturers to film exchanges, from film exchanges to exhibitors, and from exhibitors back to film exchanges, are made in accordance with regulations of the Interstate Commerce Commission, one of which provides as follows:

" 'Moving picture films must be placed in metal cases, packed in strong and tight wooden boxes or fiber pails.' "

Another of the affidavits divided the business as follows:

"The motion picture business is conducted in three branches; that is to say, by manufacturers, distributers, and exhibitors, the distributers being known as film exchanges. . . . Film is manufactured and produced in lengths of about 1,000 feet, which are placed on reels, and the market price per reel of film of a thousand feet in length is at the rate of 10 cents per foot, or $100. Manufacturers do not sell their film direct to exhibitors, but sell to film exchanges, and the film exchanges do not resell the film to exhibitors, but rent it out to them."

After stating the popularity of motion pictures, and the demand of the public for new ones, and the great expense their purchase would be to exhibitors, the affidavit proceeds as follows:

[236] "For that reason film exchanges came into existence, and film exchanges such as the Mutual Film Corporation are like clearing houses or circulating libraries, in that they purchase the film and rent it out to different exhibitors. One reel of film being made to-day serves in many theaters from day to day until it is worn out. The film exchange, in renting out the films, supervises their circulation."

An affidavit was filed, made by the "general secretary of the national board of censorship of motion pictures, whose office is at No. 50 Madison Avenue, New York city." The "national board," it is averred, "is an organization maintained by voluntary contributions, whose object is to improve the moral quality of motion pictures." Attached to the affidavit was a list of subjects submitted to the board which are "classified according to the nature of said subjects into scenic, geographic, historical, classical, and educational and propagandistic."

Messrs. William B. Sanders and Walter N. Seligsberg argued the cause, and, with Mr. Harold T. Clark, filed a brief for appellant:

Appellant is entitled to invoke the protection of the constitutional guaranty of freedom of publication as fully as any person with whom it does business could do.

Savage v. Jones, 225 U. S. 501, 519, 521, 56 L. ed. 1182, 1189, 1190, 32 Sup. Ct. Rep. 715; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Crenshaw v. Arkanas, 227 U. S. 389, 397, 57 L. ed. 565, 568, 33 Sup. Ct. Rep. 294.

Motion pictures are publications.

Standard Dict. 12th ed. p. 1443, "Publish"; United States v. Williams, 3 Fed. 484; 2 Bouvier's Law Dict. p. 392, "Publication"; United States v. Loftis, 8 Sawy. 194, 12 Fed. 671; Pierce & B. Mfg. Co. v. Werckmeister, 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54; Le Roy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271; United States v. Comerford, 25 Fed. 902; 32 Cyc. 750; Kalem Co. v. Harper Bros. 222 U. S. 55–62, 56 L. ed. 92–95, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285; Dailey v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458.

Motion pictures constitute part of "the press" of Ohio within the comprehensive meaning of that word.

New Standard Dict. Press, p. 1961.

The Ohio motion picture censorship law is in direct contravention of the guaranty of freedom of publication contained in § 11 of article 1 of the Constitution of Ohio.

Dopp v. Doll, 9 Ohio Dec. Reprint, 423; Judson v. Zurhorst, 10 Ohio C. C. N. S. 289, 30 Ohio C. C. 9, 78 Ohio St. 446, 85 N. E. 1127; Cooley, Const. Law, 3d ed. chap. 14, § 5, p. 309; 2 Story, Const. 5th ed. p. 636, § 1882; Black, Const. Law, 3d ed. § 247, p. 658; Paterson, Liberty of Press, Speech & Public Worship (1880) p. 10.

The question is not whether or not the framers of our state and Federal Constitution had in mind this particular method of publication by motion pictures at the time when the Constitution was adopted. Obviously they did not, but this fact does not in any way remove this form of publication

from the protection of the constitutional guaranty if it is within the spirit thereof.

Hurtado v. California, 110 U. S. 516, 530, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; Holden v. Hardy, 169 U. S. 366, 385, 42 L. ed. 780, 788, 18 Sup. Ct. Rep. 383; Re Debs, 158 U. S. 564, 591, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900.

Neither the legislative nor the judicial branches of the government can, through censorship or injunction or by any other means, constitutionally impose a previous restraint upon publications, whether these publications be made through the medium of speech, writing, acting on the stage, motion pictures, or through any other mode of expression now known or which may hereafter be discovered or invented.

2 Cooley's Bl. Com. 4th ed. p. 1326; Patterson v. Colorado, 205 U. S. 454, 462, 51 L. ed. 879, 881, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; Dailey v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458; Ex parte Neill, 32 Tex. Crim. Rep. 275, 40 Am. St. Rep. 776, 22 S. W. 923; Cowan v. Fairbrother, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep. 733, 24 S. E. 212; Ulster Square Dealer v. Fowler, 58 Misc. 325, 111 N. Y. Supp. 16; Life Asso. of America v. Boogher, 3 Mo. App. 173; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; Atchison, T. & S. F. R. Co. v. Brown, 80 Kan. 312, 23 L.R.A.(N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346; Rawle, Const. 2d ed. pp. 123, 124.

However far-reaching the police power vested in the legislature of Ohio may be, it is always subject to the limitation that the legislature may not pass an act which is in direct conflict with any provision of the Constitution of the United States or of the state of Ohio.

State Bd. of Health v. Greenville, 86 Ohio St. 21, 98 N. E. 1019, Ann. Cas. 1913D, 52; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A.(N.S.) 1123, 144 N. W. 795.

The Ohio censorship law violates the provisions of art. 2, § 1, of the Constitution of Ohio, in that it attempts to delegate legislative power.

Harmon v. State, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; Toledo v. Winters, 21 Ohio S. & C. P. Dec. 171, 10 Ohio N. P. N. S. 661; Ex parte Lewis, 14 Ohio N. P. N. S. 609; Noel v. People, 187 Ill. 591, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; United States ex rel. Kerr v. Ross, 5 App. D. C. 241; State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785.

A constitutional guaranty need not embody a specific prohibition in order to be entitled to protection against violation by legislative act.

Gibbs v. Girard, 88 Ohio St. 34, 102 N. E. 299; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391.

Even as to theaters, the legislature of Ohio could not demand the surrender of rights guaranteed by the Constitution as a condition precedent to the issuing of a license. The conducting of a theater or other place of public amusement is a perfectly lawful business, and can only be subjected to such regulations as may other legitimate businesses.

People v. Steele, 231 Ill. 344, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; District of Columbia v. Saville, 1 MacArth. 581, 29 Am. Rep. 616; Chicago v. Weber, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 2 Ann. Cas. 359; Indianapolis v. Miller, 168 Ind. 285; 8 L.R.A.(N.S.) 822, 80 N. E. 626; William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 N. Y. Supp. 594; Ex parte Quarg, 149 Cal. 79, 5 L.R.A. (N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; People ex rel. Empire City Trotting Club v. State Racing Commission, 190 N. Y. 31, 82 N. E. 723.

Under the law of Ohio, just as elsewhere, a corporation has the right to avail itself of these constitutional guaranties.

Kahn v. Cincinnati Times-Star, 10 Ohio S. & C. P. Dec. 599, affirmed in 52 Ohio St. 662, 44 N. E. 1132; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Mr. Robert M. Morgan argued the cause, and, with Mr. Timothy S. Hogan, Attorney General of Ohio, and Messrs. Clarence D. Laylin and James I. Boulger, filed a brief for appellees:

As to the scope of police power of the general assembly of Ohio, see State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52. See also Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 280, 53 L. ed. 176, 185, 29 Sup. Ct. Rep. 50; State v. Nelson, 52 Ohio St. 89, 26 L.R.A. 317, 39 N. E. 22.

It always has been customary at common

law and in all jurisdictions under the common law and constitutions the same as that of Ohio to prohibit or regulate by license or otherwise control theaters, shows, etc.

People ex rel. Schwab v. Grant, 126 N. Y. 481, 27 N. E. 964; Re Flaherty, 105 Cal. 562, 27 L.R.A. 529, 38 Pac. 981; Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; Wandell, Theatres, pp. 8, 10; Brackett, Theatres, p. 37; 38 Cyc. 258, 262; Baker v. Cincinnati, 11 Ohio St. 534.

The constitutional provision in question (Ohio Const. art. 1, § 11) must be construed in the light of what the people of Ohio probably conceived the language of said section to mean at the time of its adoption.

Hill v. Higdon, 5 Ohio St. 247, 67 Am. Dec. 289; Platt v. Craig, 66 Ohio St. 77, 63 N. E. 594.

Such constitutional provision should be read in the light of established contemporaneous common-law principles.

State v. Wing, 66 Ohio St. 407, 64 N. E. 514, 15 Am. Crim. Rep. 634.

So far as speech was concerned, the right to freely express one's sentiments defined the limits of the right; as to the press a similar right to express in print sentiments on all questions, even to the criticism of government, defined the right; but that either of these liberties included the right to offend against all laws of morality by a display of obscenity or the like, having no legitimate connection with criticism of men or government, without previous restraint, is, we think, beyond any recognized scope of the liberties in question.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

The courts must decide private rights according to law. The prohibition in question, setting a limit to the power of the general assembly of Ohio, and the similar provisions in Constitutions of the United States and other states, must have had the effect upon their adoption of expressly or impliedly repealing any law in conflict therewith. Therefore, the power of the courts in the use of the injunctive process could have had no law to support it if it was exercised to place anticipatory restraints upon the liberties of speech or press, but we find the writ to have been held properly used to restrain publications where such would interfere with private rights.

Vulcan Detinning Co. v. American Can Co. 72 N. J. Eq. 387, 12 L.R.A.(N.S.) 102, 67 Atl. 339.

Also to protect property in copyrights.

Kalem Co. v. Harper Bros. 222 U. S. 60, 56 L. ed. 95, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285.

And to protect against the effect of a boycott or other conspiracy.

Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492.

There is another line of cases equally helpful showing that such restraint has been exercised by legislation to protect the public interest. We refer to the legislation upheld as valid, and not in conflict with the free-speech constitutional provisions, in the cases holding that permits for public speaking or assemblage on public streets or in public places may be given or withheld by administrative officers having control thereof.

Love v. Recorder's Ct. Judge (Love v. Phalen) 128 Mich. 545, 55 L.R.A. 618, 87 N. W. 785; Com. v. Davis, 140 Mass. 485, 4 N. E. 577.

Then there are the cases upholding legislation by Congress prohibiting the admission of objectionable matter to the mails.

Re Rapier, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374; Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877.

Corporations have no liberty of speech or liberty of the press. They are incapable of having sentiments, the publication of which was designed to be protected by these constitutional guaranties.

Western Turf Asso. v. Greenberg, 204 U. S. 359, 363, 51 L. ed. 520, 522, 27 Sup. Ct. Rep. 384. See also Brayton v. Cleveland Special Police Co. 63 Ohio St. 83, 52 L.R.A. 525, 57 N. E. 1085; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

The right to censor moving picture exhibitions to the point of absolute prohibition has been recognized.

People ex rel. Moses v. Gaynor, 77 Misc. 576, 137 N. Y. Supp. 196; Dreyfus v. Montgomery, 4 Ala. App. 270, 58 So. 730; Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; Higgins v. Lacroix, 119 Minn. 145, 41 L.R.A.(N.S.) 737, 137 N. W. 417; Com. v. McGann, 213 Mass. 213, 100 N. E. 355.

There is no invalid delegation of power in the act here concerned.

State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52; Fairview v. Giffee, 73 Ohio St. 183, 76 N. E. 865; Theobald v. State, 30 Ohio C. C. 326; Rose v. Baxter, 18 Ohio S. & C. P. Dec. 658, 7 Ohio N. P. N. S. 132, affirmed in 81 Ohio St. 522, 91 N. E. 1138; Board of Education v. Sawyer, 7 Ohio N. P. N. S. 401, 19 Ohio S. & C. P. Dec. 1; Baltimore & O. R. Co. v. Railroad Commision, 21 Ohio S. & C. P. Dec. 468, 10 Ohio N. P. N. S. 665; State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; Cincinnati, W. & Z. R. Co. v.

Clinton County, 1 Ohio St. 77; Bronson v. Oberlin, 41 Ohio St. 482, 52 Am. Rep. 90; Gordon v. State, 46 Ohio St. 633, 6 L.R.A. 749, 23 N. E. 63; Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; Com. v. McGann, 213 Mass. 213, 100 N. E. 355.

It is well settled that a distinction can be and is made between the arbitrary exercise of administrative discretion in the case of a "useful trade" as in Harmon v. State, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117, and where it is sought to regulate the business of those engaged "in giving amusement to the public." In the case of the former the legislature could not, under the Constitution, prohibit, but merely regulate; when the latter is concerned, where any possibility of danger to the public is apparent to a court, the legislative will, in prohibiting, will not be interfered with, and a large measure of, if not full, administrative discretion to licensing officers is recognized as not being within the rule prohibiting a delegation of legislative power.

Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153. 32 Sup. Ct. Rep. 697; State v. Sherow, 87 Kan. 235, 123 Pac. 866, Ann. Cas. 1913D, 1050; Dill. Mun. Corp. 5th ed. § 661.

It is, of course, clear that under the holdings of this court there is no delegation of legislative power.

Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349.

Messrs. Waldo G. Morse and Jacob Schechter filed a brief as *amici curiæ:*

Censorship does not exist in the United States and may be regarded as prohibited by the spirit of the Constitution.

Freund, Pol. Power, ¶ 251; Black, Const. Law, p. 659.

The theatrical business is a private business, and subject to just so much and no more regulation by the state as is every other private business.

Horney v. Nixon, 213 Pa. 20, 1 L.R.A. (N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496; Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; People v. Steele, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; People ex rel. Burnham v. Flynn, 114 App. Div. 578, 100 N. Y. Supp. 31; Collister v. Hayman, 183 N. Y. 250, 1 L.R.A.(N.S.) 1188, 111 Am. St. Rep. 740, 76 N. E. 20, 20 Ann. Cas. 344; Ex parte Quarg, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747.

Undoubtedly, under the police power, the state may regulate the location of a theater building, as to its proximity to a church or school, or otherwise; the construction of such building as to its fireproof qualities, the number of exits, and other particulars; and unless such regulations are complied with, refuse a license to operate the said theater. Undoubtedly also, under the taxing power, the state may exact a fee to cover the expenses of the regulations just outlined, or other expenses which the authorities may incur, because of the peculiar nature of the theatrical business, refusing a license until the fee is paid. And such, with one exception, are the decisions cited below.

Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Baker v. Cincinnati, 11 Ohio St. 534; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; State v. Loden, 117 Md. 373, 40 L.R.A.(N.S.) 193, 83 Atl. 564, Ann. Cas. 1913E, 1300; Higgins v. Lacroix, 119 Minn. 145, 41 L.R.A.(N.S.) 737, 137 N. W. 417; Dreyfus v. Montgomery, 4 Ala. App. 270, 58 So. 730; State v. Morris, 1 Boyce (Del.) 330, 76 Atl. 479; People ex rel. Moses v. Gaynor, 77 Misc. 576, 137 N. Y. Supp. 196; Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011.

The physical thing used as a carrier to render possible the presentation of the ideas of the author or producer of a motion photoplay to his readers and "observers" has been distinctly and emphatically found to be entirely separate and apart from the intellectual idea which is thus to be transmitted.

Universal Film Mfg. Co. v. Copperman, 218 Fed. 577.

So far as the intangible side of the theatrical business is concerned, in so far as matters of taste or judgment, matters historically subject to "censorship," as opposed to regulation, are concerned, no authority has been found in the adjudicated cases for any regulation of the same previous to exhibition. Hence, it would seem, even accepting the court's refusal to find that the plaintiff's business partook of the nature of a press enterprise, and accordingly did not come within the letter of the constitutional provision as to the freedom of the press, that no justification in reason or in precedent can be found for sustaining the statute in question as an exercise of the power to license theatrical exhibitions.

Norfolk v. Norfolk Landmark Pub. Co. 95 Va. 564, 28 S. E. 959; Ex parte Neill, 32

Tex. Crim. Rep. 275, 40 Am. St. Rep. 776, 22 S. W. 923.

The statute here involved unquestionably goes far beyond any interpretation which has ever been put upon the word "inspection." And of course, unless the law sought to be sustained can be brought within the proper scope of an inspection law, it is within the prohibition of the section of the Constitution here under discussion.

New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 62, 27 L. ed. 383, 384, 2 Sup. Ct. Rep. 87.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

Complainant directs its argument to three propositions: (1) The statute in controversy imposes an unlawful burden on interstate commerce; (2) it violates the freedom of speech and publication guaranteed by § 11, article 1, of the Constitution of the state of Ohio;[1] and (3) it attempts to delegate legislative power to censors and to other boards to determine whether the statute offends in the particulars designated.

It is necessary to consider only §§ 3, 4, and 5. Section 3 makes it the duty of the board to examine and censor motion picture films to be publicly exhibited and displayed [240] in the state of Ohio. The films are required to be exhibited to the board before they are delivered to the exhibitor for exhibition, for which a fee is charged.

Section 4. "Only such films as are, in the judgment and discretion of the board of censors, of a moral, educational, or amusing and harmless character shall be passed and approved by such board." The films are required to be stamped or designated in a proper manner.

Section 5. The board may work in conjunction with censor boards of other states as a censor congress, and the action of such congress in approving or rejecting films shall be considered as the action of the state board, and all films passed, approved, stamped, and numbered by such congress, when the fees therefor are paid, shall be considered approved by the board.

By § 7 a penalty is imposed for each exhibition of films without the approval of the board, and by § 8 any person dissatisfied with the order of the board is given the same rights and remedies for hearing and reviewing, amendment or vacation of the order "as is provided in the case of persons dissatisfied with the orders of the Industrial Commission."

The censorship, therefore, is only of films intended for exhibition in Ohio, and we can immediately put to one side the contention that it imposes a burden on interstate commerce. It is true that, according to the allegations of the bill, some of the films of complainant are shipped from Detroit, Michigan, but they are distributed to exhibitors, purchasers, renters, and lessors in Ohio, for exhibition in Ohio, and this determines the application of the statute. In other words, it is only films which are "to be publicly exhibited and displayed in the state of Ohio" which are required to be examined and censored. It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for [241] renting for the purpose of exhibition within the state, could not be disclosed to the state officers. If this be so, whatever the power of the state to prevent the exhibition of films not approved,—and for the purpose of this contention we must assume the power is otherwise plenary,—films brought from another state, and only because so brought, would be exempt from the power, and films made in the state would be subject to it. There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges, ready to be rented to exhibitors, or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state.

It is true that the statute requires them to be submitted to the board before they are delivered to the exhibitor, but we have seen that the films are shipped to "exchanges" and by them rented to exhibitors, and the "exchanges" are described as "nothing more or less than circulating libraries or clearing houses." And one film "serves in many theaters from day to day until it is worn out."

The next contention is that the statute violates the freedom of speech and publication guaranteed by the Ohio Constitution. In its discussion counsel have gone into a very elaborate description of moving picture exhibitions and their many useful purposes as graphic expressions of opinion and sentiments, as exponents of policies, as teachers of science and history, as useful, interesting,

[1] "Section 11. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted."

amusing, educational, and moral. And a list of the "campaigns," as counsel call them, which may be carried on, is given. We may concede the praise. It is not questioned by the Ohio statute, and under its comprehensive description, "campaigns" of an infinite variety may be conducted. Films of a "moral, educational, or amusing and harmless character shall be passed and approved," are the words of the statute. No exhibition, therefore, or "campaign" [242] of complainant will be prevented if its pictures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statute. But they may be used for evil, and against that possibility the statute was enacted. Their power of amusement, and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences. And not only the state of Ohio, but other states, have considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty.

We do not understand that a possibility of an evil employment of films is denied, but a freedom from the censorship of the law and a precedent right of exhibition are asserted, subsequent responsibility only, it is contended, being incurred for abuse. In other words, as we have seen, the Constitution of Ohio is invoked, and an exhibition of films is assimilated to the freedom of speech, writing, and publication assured by that instrument, and for the abuse of which only is there responsibility, and, it is insisted, that as no law may be passed "to restrain the liberty of speech or of the press," no law may be passed to subject moving pictures to censorship before their exhibition.

[243] We need not pause to dilate upon the freedom of opinion and its expression, and whether by speech, writing, or printing. They are too certain to need discussion—of such conceded value as to need no supporting praise. Nor can there be any doubt of their breadth, nor that their underlying safeguard is, to use the words of another, "that opinion is free, and that conduct alone is amenable to the law."

Are moving pictures within the principle, as it is contended they are? They, indeed, may be mediums of thought, but so are many things. So is the theater, the circus, and all other shows and spectacles, and their performances may be thus brought by the like reasoning under the same immunity from repression or supervision as the public press,—made the same agencies of civil liberty.

Counsel have not shrunk from this extension of their contention, and cite a case in this court where the title of drama was accorded to pantomime;[2] and such and other spectacles are said by counsel to be publications of ideas, satisfying the definition of the dictionaries,—that is, and we quote counsel, a means of making or announcing publicly something that otherwise might have remained private or unknown,—and this being peculiarly the purpose and effect of moving pictures, they come directly, it is contended, under the protection of the Ohio constitution.

The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns, and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to [244] bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

The judicial sense supporting the common sense of the country is against the contention. As pointed out by the district court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation. The court cited the following cases: Marmet v. State, 45 Ohio St. 63, 72, 73, 12 N. E. 463; Baker v. Cincinnati, 11 Ohio St. 534; Com. v. McGann, 213 Mass. 213, 215, 100 N. E. 355; People v. Steele, 231 Ill. 340, 344, 345, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236.

The exercise of the power upon moving picture exhibitions has been sustained. Greenberg v. Western Turf. Asso. 148 Cal. 126, 113 Am. St. Rep. 216, 82 Pac. 684, 19 Am. Neg. Rep. 72; Laurelle v. Bush,

[2] Kalem Co. v. Harper Bros. 222 U. S. 55, 56 L. ed. 92, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285.

17 Cal. App. 409, 119 Pac. 953; State v. Loden, 117 Md. 373, 40 L.R.A.(N.S.) 193, 83 Atl. 564, Ann. Cas. 1913E, 1300; Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; Higgins v. Lacroix, 119 Minn. 145, 41 L.R.A.(N.S.) 737, 137 N. W. 417. See also State v. Morris, 1 Boyce (Del.) 330, 76 Atl. 479; People ex rel. Moses v. Gaynor, 77 Misc. 576, 137 N. Y. Supp. 196, 199; McKenzie v. McClellan, 62 Misc. 342, 116 N. Y. Supp. 645, 646.

It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal [245] Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government.

It does not militate against the strength of these considerations that motion pictures may be used to amuse and instruct in other places than theaters,—in churches, for instance, and in Sunday schools and public schools. Nor are we called upon to say on this record whether such exceptions would be within the provisions of the statute, nor to anticipate that it will be so declared by the state courts, or so enforced by the state officers.

The next contention of complainant is that the Ohio statute is a delegation of legislative power, and void for that if not for the other reasons charged against it, which we have discussed. While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions *to which the policy* and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other [246] general terms, get precision from the sense and experience of men, and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349. See also Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220. If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility, and government in some of its most important exercises become impossible.

To sustain the attack upon the statute as a delegation of legislative power, complainant cites Harmon v. State, 66 Ohio St. 249, 53 L.R.A. 618, 64 N. E. 117. In that case a statute of the state committing to a certain officer the duty of issuing a license to one desiring to act as an engineer if "found trustworthy and competent" was declared invalid because, as the court said, no standard was furnished by the general assembly as to qualification, and no specification as to wherein the applicant should be truthworthy and competent, but all was "left to the opinion, finding, and caprice of the examiner." The case can be distinguished. Besides, later cases have recognized the difficulty of exact separation of the powers of government, and announced the principle that legislative power is completely exercised where the law "is perfect, final, and decisive in all of its parts, and

the discretion given only relates to its execution." Cases are cited in illustration. And the principle finds further illustration in the decisions of the courts of lesser authority, but which exhibit the juridical sense of the state as to the delegation of powers.

Section 5 of the statute, which provides for a censor [247] congress of the censor board and the boards of other states, is referred to in emphasis of complainant's objection that the statute delegates legislative power. But, as complainant says, such congress is "at present nonexistent and nebulous;" and we are, therefore, not called upon to anticipate its action, or pass upon the validity of § 5.

We may close this topic with a quotation of the very apt comment of the district court upon the statute. After remarking that the language of the statute "might have been extended by description and illustrative words," but doubting that it would have been the more intelligible, and that probably by being more restrictive might be more easily thwarted, the court said: "In view of the range of subjects which complainants claim to have already compassed, not to speak of the natural development that will ensue, it would be next to impossible to devise language that would be at once comprehensive and automatic." [215 Fed. 147.]

In conclusion we may observe that the Ohio statute gives a review by the courts of the state of the decision of the board of censors.

Decree affirmed.

MUTUAL FILM COMPANY, Appt.,
v.
INDUSTRIAL COMMISSION OF OHIO et al.

(See S. C. Reporter's ed. 247, 248.)

This case is governed by the decision in Mutual Film Corporation v. Industrial Commission, ante, 552.

[No. 457.]

Argued January 6 and 7, 1915. Decided February 23, 1915.

APPEAL from the District Court of the United States for the Northern District of Ohio to review a decree refusing to restrain the enforcement of a state statute for the censorship of motion picture films. Affirmed.

See same case below, 215 Fed. 138.

The facts are stated in the opinion.

Messrs. **William B. Sanders** and **Walter N. Seligsberg** argued the cause, and, with Mr. Harold T. Clark, filed a brief for appellant.

Mr. **Robert M. Morgan** argued the cause, and, with Mr. Timothy S. Hogan, Attorney General of Ohio, and Messrs. Clarence D. Laylin and James I. Boulger, filed a brief for appellees.

Messrs. Waldo G. Morse and Jacob Schechter filed a brief as *amici curiæ*.

For contentions of counsel, see their briefs as reported in Mutual Film Corp. v. Industrial Commission, ante, 552.

Mr. Justice **McKenna** delivered the opinion of the court:

This case was submitted with No. 456 [236 U. S. 230, ante, 552, 35 Sup. Ct. Rep. 387], just decided. In the latter case the complainant in the court below, and appellant here, was a corporation of Virginia. The appellant in the pending case is a corporation of Ohio, and counsel say, "although there are some differences in the way in which their business is conducted, yet the questions involved are the same, the records in both cases are nearly identical, and the court below treated them together, rendering the one opinion to cover both." And counsel have submitted them on the same argument.

On the authority, therefore, of the opinion in No. 456, the decree is affirmed.

MUTUAL FILM CORPORATION OF MISSOURI, Appt.,
v.
GEORGE H. HODGES, Governor; Charles H. Sessions, Secretary of State; John S. Dawson, Attorney General; and W. D. Ross, State Superintendent of Public Instruction of the State of Kansas.

(See S. C. Reporter's ed. 248-258.)

Commerce — state regulation — censorship of motion picture films.

1. Interstate commerce in the renting, leasing, selling, and delivery of motion picture films is not unlawfully burdened by the provisions of Kan. Laws 1913, p. 294, making it unlawful to exhibit or to permit the exhibition within the state of motion picture films which have not first been examined by the superintendent of public instruction and approved as moral and in-

NOTE.—On regulations affecting moving pictures—see note to State ex rel. Ebert v. Loden, 40 L.R.A.(N.S.) 193.

On constitutional freedom of speech and of the press—see note to Cowan v. Fairbrother, 32 L.R.A. 829.

structive, and not tending to debase or corrupt morals.

[For other cases, see Commerce, IV.; VI. c, in Digest Sup. Ct. 1908.]

Constitutional law — freedom of speech and press — censoring motion picture films.

2. The constitutional freedom of speech and opinion is not violated by Kan. Laws 1913, chap. 294, under which motion picture films may not be exhibited within the state unless they have first been examined by the superintendent of public instruction and approved as moral and instructive, and not tending to debase or corrupt the morals.

[For other cases, see Constitutional Law, IV. d, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of legislative power — censorship of moving picture films.

3. Administrative officers are not unlawfully given legislative power by Kan. Laws 1913, chap. 294, under which motion picture films may not be exhibited within the state unless they have first been examined by the superintendent of public instruction and approved as moral and instructive, and not tending to debase or corrupt the morals, his disapproval being reviewable by a commission consisting of the governor, attorney general, and secretary of state.

[For other cases, see Constitutional Law, III. b, 3, in Digest Sup. Ct. 1908.]

[No. 597.]

Argued and submitted January 6 and 7, 1915. Decided February 23, 1915.

APPEAL from the District Court of the United States for the District of Kansas to review a decree refusing to enjoin the enforcement of a state law censoring motion picture films. Affirmed.

Statement by Mr. Justice McKenna:

Appellant, which we shall call complainant, it being such in the court below, is a Delaware corporation and the defendants are officers of the state of Kansas.

The bill attacks the validity of a law of Kansas censoring moving picture films, and prays an injunction against its enforcement. The relief was denied and the bill dismissed. This appeal was then allowed.

The bill alleges that complainant is engaged in local and interstate commerce in the renting, leasing, selling, and delivery of "'films'" in the state of Kansas and other states, which films have been and now are being used in the motion picture show business in Kansas, as well as elsewhere.

It is alleged that a film "may be a scenario of an original story or theatrical production, conceived by a writer or author. This is a sketch of a plot, or chief incidents of a libretto or play, a drama, a prose or poetical composition, depicting human life and conduct on a stage. It may be also a reproduction of animated objects, scenery, picturesque views or animals, and is descriptive, educational, instructive, as well as amusing."

The manner of the production of a film is stated, and that there are in the state about five hundred moving [250] picture theaters using the films, and each theater uses an average of three films a day.

That a revenue in the shape of a tax of $2 is attempted to be imposed upon each film censored, which means a tax of $6 per day on the films sold, rented, or used in each show, approximating $3,000 per day on the picture show business in the state, and making a total revenue of $40,000 for the first three months from the beginning of the enforcement of the act, and thereafter a revenue of thousands of dollars to be imposed as a tax upon films printed and produced in Kansas.

That the act places a tax of about $300 a week on the films rented, hired, and shipped into the state for the period of three months, and about $6,000 for the first year, and means thereafter a tax on the interstate commerce business of complainant, a similar tax to be imposed on all films produced and printed and sent into Kansas.

That upon the films brought into the state the duty of censorship is imposed upon the state superintendent of public instruction, thereby attempting to place in him the exclusive power of censorship of all films sent into the state for use in the state, and the power to review and stamp with his approval the films used, shipped, or rented or sent into the state; and the act provides that no film shall be exempt until a fee of $2 be paid, and that all fees shall be paid into the state treasury and credited to the general fund of the state. That on account of the way the business is conducted, complainant and other film exchanges must necessarily bear the expense of censorship, otherwise the amount of the charges therefor would be necessarily doubled or trebled.

The bill attacks the law for various reasons, having foundation, it is alleged, in the provisions of the Federal and state Constitutions, which may be summarized as follows: The prohibition upon the state to lay an import or export duty; or to abridge the privileges and immunities [251] of citizens of the United States, the statute of the state offending in this as it places an embargo and prohibition upon citizens of other states in transacting a lawful business in Kansas. The statute violates the Bill of Rights of the United States and of the state of Kansas, as it deprives of life, liberty, and property without due process of law, and par-

ticularly of the freedom to say, write, or publish whatever one will on any subject, "being only responsible for all abuse of that liberty," and that there can be no abuse until it is judicially determined.

It is alleged that the attorney general of the state threatens to enforce the act, although it seems to be charged that he is without the means to do so, and arrests have been made on information filed in one of the courts of the state.

The answer of defendants asserts in elaborate allegations the necessity of the act and of the censorship of films; that it is not primarily a revenue measure, but is an exercise in good faith of the police power of the state for the protection of the public morals, and that "the legislature, in its unimpeachable wisdom, believed that uncensored pictures were detrimental to the morals and perversive of true education." In denial of any grievance of complainant under the act the answer alleges the following: "Answering still further, defendants allege that this complainant has no interest in the act of the Kansas legislature complained of, nor does the complainant exhibit pictures to the people of Kansas in moving picture shows, or elsewhere, nor does the complainant come directly under the provisions of said act, nor can the complainant, as a Delaware corporation licensed to do business in the state of Missouri, transact interstate business within the state of Kansas either with or without the payment of an inspection fee under the act complained of, nor is the complainant liable to any criminal prosecution under the act complained of, but only the persons, [252] firms, partnerships, companies, and corporations which actually do exhibit pictures uncensored within the state of Kansas in violation of the act. The defendants further allege that upon its own showing this complainant has brought only mere moot questions into this honorable court."

A hearing upon an interlocutory or temporary injunction was waived and the case heard upon its merits, one judge only sitting, the parties agreeing thereto.

Affidavits in support of the bill were filed. One of them was by an exhibitor of films within the state, and showed the number of theaters owned by him, the number of films received by him and the price paid therefor, and that they were manufactured elsewhere than in Kansas. It affirmed that he never exhibited nor has he ever seen exhibited indecent, immoral, obscene, or sacrilegious pictures or films; that among the films exhibited by him is a film known as the "Mutual Weekly," which consists of photographs of events of current interest throughout the world. A list of the subjects represented is given.

An affidavit of one of the managers of the complainant was also filed, giving an account of the production of the films and their distribution. After a detail of this by complainant and by other "film exchanges" renting out films in the state, and which operate independently of complainant, it is said:

"In my opinion the only possible method of continuing the rental of film in the state of Kansas, if the proposed censorship law were to go into effect, would be for the film exchanges to procure the approval required by statute. There are a large number of motion picture exhibitors in the state of Kansas,—about five hundred (500). I do not believe it would be in any wise practicable for the exhibitors themselves to procure the approval of the different films. In the first place, the same subjects are rented from different film exchanges and are shown in [253] different theaters concurrently. No exhibitor would be in a position to know whether the subject had been approved or not, without submitting the same to the superintendent of public instruction. The result would be that in almost every case each reel of film received by an exhibitor on rental for exhibit would have to be sent to Topeka for approval, because the exhibitor would not, at his peril, exhibit the same.

"The film exchange, on the other hand, could, with less difficulty than the exhibitor, ascertain whether a film had been approved or not, because the film exchange itself handles large quantities of films, and at least as to its own produce could keep track of the approval or nonapproval thereof, therefore making it absolutely necessary for this complainant, or the other film exchanges, to submit before renting out their films to their patrons in Kansas the films for approval.

"In the second place, in my opinion, no exhibitor would consent to pay the censoring charge on any particular reel or reels of film, because he would insist that the film be rented out to some other exhibitor in Kansas before him, so that someone else should pay the tax."

Mr. Walter N. Seligsberg argued the cause, and, with Messrs. Eugene Batavia, Jackson H. Ralston, Harold T. Clark, and William B. Sanders, field a brief for appellant:

Appellant is entitled to invoke the protection of the constitutional guaranty of freedom of publication as fully as any person with whom it does business could do.

Savage v. Jones, 225 U. S. 501, 519-521,

56 L. ed. 1182, 1189, 1190, 32 Sup. Ct. Rep. 715; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Crenshaw v. Arkansas, 227 U. S. 389, 397, 57 L. ed. 565, 568, 33 Sup. Ct. Rep. 294.

Motion pictures are publications.

Standard Dict. 12th ed. 1443; 2 Bouvier's Law Dict. 793; United States v. Williams, 3 Fed. 486; United States v. Loftis, 8 Sawy. 194, 12 Fed. 671; Pierce & B. Mfg. Co. v. Werckmeister, 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54; Leroy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271; United States v. Comerford, 25 Fed. 902; 22 Cyc. 750; Kalem Co. v. Harper Bros. 222 U. S. 55, 56 L. ed. 92, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285; Dailey v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458.

Motion pictures constitute part of "the press" within the comprehensive meaning of that word.

New Standard Dict. 1961.

The motion picture censorship law is in direct contravention of the guaranty of freedom of publication.

Dopp v. Doll, 9 Ohio Dec. Reprint, 428; Judson v. Zurhorst, 10 Ohio C. C. N. S. 289, 78 Ohio St. 446, 85 N. E. 1127; Cooley, Const. Law, 3d ed. chap. 14, § 5, p. 309; 2 Story, Const. 5th ed. p. 636, § 1882; Black, Const. Law, 3d ed. § 247, p. 658; Paterson, Liberty of the Press, Speech & Public Worship, 1880, pp. 10, 41.

The question is not whether or not the framers of our state and Federal Constitution had in mind this particular method of publication by motion pictures at the time when the Constitution was adopted. Obviously they did not, but this fact does not in any way remove this form of publication from the protection of the constitutional guaranty if it is within the spirit thereof.

Hurtado v. California, 110 U. S. 516, 530, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Holden v. Hardy, 169 U. S. 366, 385, 42 L. ed. 780, 788, 18 Sup. Ct. Rep. 383; Re Debs, 158 U. S. 564, 591, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900.

Neither the legislative nor the judical branches of the government can, through censorship or injunction, or by any other means, constitutionally impose a previous restraint upon publications, whether these publications be made through the medium of speech, writing, acting on the stage, motion pictures, or through any other mode of expression now known or which may hereafter be discovered or invented.

2 Cooley, Bl. Com. 4th ed. p. 1326; Dailey v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458; Ex parte Neill, 32 Tex. Crim. Rep. 275, 40 Am. St. Rep. 776, 22 S. W. 923; Cowan v. Fairbrother, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep. 733, 24 S. E. 212; Ulster Square Dealer v. Fowler, 58 Misc. 325, 111 N. Y. Supp. 16; Patterson v. Colorado, 205 U. S. 454, 462, 51 L. ed. 879, 881, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; Life Asso. of America v. Boogher, 3 Mo. App. 173; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; Atchison, T. & S. F. R. Co. v. Brown, 80 Kan. 312, 23 L.R.A. (N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346; Rawle, Const. 2d ed. pp. 123, 124.

However far-reaching the police power vested in the legislature may be, it is always subject to the limitation that the legislature may not pass an act which is in direct conflict with any provision of the Constitution of the United States or of the state.

State Bd. of Health v. Greenville, 86 Ohio St. 21, 98 N. E. 1019, Ann. Cas. 1913D, 52; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A. (N.S.) 1123, 144 N. W. 795.

The censorship law attempts to delegate legislative power.

Harmon v. State, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; Toledo v. Winters, 21 Ohio Dec. 171, 10 Ohio N. P. N. S. 661; Ex parte Lewis, 12 Ohio N. P. N. S. 609; Noel v. People, 187 Ill. 591, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; United State ex rel. Kerr v. Ross, 5 App. D. C. 241; State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785.

Appellant's interstate business would be seriously damaged by the enforcement of the statute, and it has established facts warranting the exercise of jurisdiction upon several grounds.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 9, 24 L. ed. 708, 710; International Text-book Co. v. Pigg, 217 U. S. 91, 106, 54 L. ed. 678, 685, 30 Sup. Ct. Rep. 481; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The police power, though broad in scope

is not an unlimited power, but is strictly limited by the written Constitution, and the statute in question, in so far as it violates the Constitution, is in excess of the police power.

Crenshaw v. Arkansas, 227 U. S. 389, 399, 57 L. ed. 565, 568, 33 Sup. Ct. Rep. 294; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 79, 58 L. ed. 857, 859, 34 Sup. Ct. Rep. 564; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Freund, Pol. Power, § 18.

Mr. John S. Dawson, Attorney General of Kansas, and Mr. Frank P. Lindsay, submitted the cause for appellees:

Is the act in question in violation of the Constitution of the United States and of the Constitution of the state of Kansas?

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 Sup. Ct. Rep. 610; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 280, 53 L. ed. 176, 185, 29 Sup. Ct. Rep. 50; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Lawton v. Steele, 152 U. S. 135, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lindsay v. East Bay Street Comrs. 2 Bay, 61; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; State ex rel. Chapman v. State Medical Examiners, 34 Minn. 387, 26 N. W. 123; State v. Nelson, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

The inspection fee provided for in chapter 294 of the Session Laws of Kansas of 1913 lays no impost or duty on picture films and reels imported into Kansas for exhibition purposes.

American Steele & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Dooley v. United States, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

The fee provided for in said act is not an unreasonable censorship or inspection charge against such picture films or reels.

Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70, 57 L. ed. 734, 33 Sup. Ct. Rep. 437; Com. v. Herr, 229 Pa. 132, 78 Atl. 68, Ann. Cas. 1912A, 422.

The picture films or reels are proper subjects of censorship or inspection by a state before they can be exhibited to the public in such state.

Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; Chicago v. Brownell, 146 Ill. 64, 34 N. E. 595; Chicago v. Bowman Dairy Co. 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700; Peoria v. Calhoun, 29 Ill. 317; Com. v. McGann, 213 Mass. 213, 100 N. E. 357; Gundling v. Chicago, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44; Hawthorn v. People, 109 Ill. 303, 50 Am. Rep. 610; Harrison v. People, 222 Ill. 150, 78 N. E. 52; Knopf v. People, 185 Ill. 20, 57 N. E. 22; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; People ex rel. Morrison v. Cregier, 138 Ill. 401, 28 N. E. 812; People ex rel. Miller v. Cooper, 83 Ill. 585; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718; State ex rel. Chapman v. State Medical Examiners, 34 Minn. 387, 26 N. W. 123; State ex rel. Burroughs v. Webster, 150 Ill. 607, 41 L.R.A. 212, 50 N. E. 750; State v. Hathaway, 115 Mo. 36, 21 S. W. 1081; State Bd. of Health v. Roy, 22 R.

I. 538, 48 Atl. 802; Wilkins v. State, 113 Ind. 514, 16 N. E. 192.

The act in question is not a revenue measure for the general fund of the state, and is therefore not a tax on interstate commerce.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Austin v. Tennessee, 179 U. S. 351, 45 L. ed. 229, 21 Sup. Ct. Rep. 132; May v. New Orleans, 178 U. S. 502, 44 L. ed. 1167, 20 Sup. Ct. Rep. 976; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The act in question does not deprive appellant of its property without due process of law, by imposing a fee of $2 per film or reel inspected under the provisions of said act.

Metropolitan Bd. of Health v. Heister, 37 N. Y. 661; Cincinnati v. Steinkamp, 54 Ohio St. 284, 43 N. E. 490; Ex parte White, 67 Cal. 102, 7 Pac. 186; Fire Dept. v. Chapman, 10 Daly, 377; Fire Dept. v. Wendell, 13 Daly, 427; Grant v. Slater Mill & Power Co. 14 R. I. 380; Hennessy v. St. Paul, 37 Fed. 565; State, Hubbard, Prosecutor, v. Paterson, 45 N. J. L. 310, 46 Am. Rep. 772; Re Rahrer, 140 U. S. 546, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Parker & W. Public Health & Safety, § 15; Philadelphia v. Coulston, 13 Phila. 182; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 39 L.R.A. (N.S.)694, 97 N. E. 602; State v. Moore, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; St. Paul v. Dow, 37 Minn. 20, 5 Am. St. Rep. 811, 32 N. W. 860; Inwood v. State, 42 Ohio St. 186; Woodruff v. New York & N. E. R. Co. 59 Conn. 63, 20 Atl. 17.

The act in question is not in violation of § 1 of the 14th Amendment to the Constitution of the United States in the matter of *free speech* and free press, or § 11 of the Bill of Rights of the Constitution of the state of Kansas.

Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 Sup. Ct. Rep. 610; Bartemeyer v. Iowa, 18 Wall. 133, 21 L. ed. 930; Conery v. New Orleans Waterworks Co. 142 U. S. 88, 35 L. ed. 946, 12 Sup. Ct. Rep. 142; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Re Rapier, 143 U. S. 132, 36 L. ed. 102, 12 Sup. Ct. Rep. 374; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; Re Banks, 56 Kan. 242, 42 Pac. 693; Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A. (N.S.) 153, 32 Sup. Ct. Rep. 697; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 557, 50 L. ed. 308, 26 Sup. Ct. Rep. 144; Orient Ins. Co. v. Daggs, 172 U. S. 561, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69; Tylor v. Judges of Ct. of Registration, 179 U. S. 410, 45 L. ed. 254, 21 Sup. Ct. Rep. 206.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

Necessarily the first factor to be considered is the law of the state. It is entitled, "An Act Regulating the Exhibiting or Using of Moving Picture Films or Reels; Providing and Regulating the Examination and Approval of Moving Picture Films and Reels, and Fixing Penalties for the Violation of This Act, and Making an Appropriation for Clerical Help to Carry This Act into Effect." [Laws 1913, chap. 294, p. 504.]

The following are its provisions: On and after the 1st of April, 1913, it shall be unlawful to exhibit or use any moving picture film or reel unless the same shall have been examined [257] and approved by the superintendent of public instruction. Films used in institutions of learning are exempt from the provisions of the act. It is made the duty of such officer to examine the films or reels intended for exhibition, and approve such as he shall find to be moral and instructive, and to withhold his approval from such as tend to debase or corrupt the morals. His approval is to be stamped in writing upon the films or reels approved. He is to keep a record of examinations made by him, noting those approved and those not approved, stating the reasons for the latter. A charge of $2 is to be made for each examination. He is given the power

and authority to supervise and regulate the display of all moving picture films or reels in all places of amusement or elsewhere within the state, to inquire and investigate, and to have displayed for his benefit to aid him in his investigation, those which are intended to be displayed, and shall approve such as shall be moral and proper, and disapprove such as are sacrilegious, obscene, indecent, or immoral, or such as tend to corrupt the morals. His disapproval of any film or reel may be reviewed by a commission consisting of the governor, attorney general, and secretary of state, and if they, or a majority of them, find the film or reel fit for exhibition, it shall be approved. It is the duty of every person exhibiting or permitting to be exhibited any film or reel within the state to furnish the superintendent of instruction, if he require it, a description of such film or reel and a description of its scenes and purposes, and to exhibit and display it for his examination and approval. Any person exhibiting or permitting to be exhibited any unapproved film or reel shall be guilty of a misdemeanor, and each liable to suit and separate fines.

It will be observed that the law makes only exhibitors or those permitting exhibitions of unapproved films liable to the penalties of the act, and, as we have seen, it is alleged by the defendants that as complainant is in neither [258] class, it has no standing to attack the statute. To this complainant replies that its sales are interfered with, and invokes, as sustaining its right to complain, Savage v. Jones, 224 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715. This may be; but complainant, by asserting such right, cannot enlarge the character of the statute, or give to it an operation which it does not have,—cannot, for instance, make the importation of films into the state an offense under it, and not their exhibition, which only it punishes,—cannot, therefore, make the act an interference with interstate commerce instead of what it is,—an exercise of the police power of the state upon things within the state. Nor can it make any difference that the "exchanges" can more conveniently submit the films for approval than exhibitors can.

The opinion in No. 456 [236 U. S. 230, ante, 552, 35 Sup. Ct. Rep. 387] becomes applicable here. Indeed, this case was argued conjointly with that, and submitted on the same briefs. It is here contended that the Kansas statute has the same invalidity and for the same reasons as it was contended there that the statute of Ohio had. We need not, therefore, repeat the reasoning. It establishes that both statutes are valid exercises of the police power of the states, and are not amenable to the objections urged against them,—that is, do not interfere with interstate commerce nor abridge the liberty of opinion; nor are they delegations of legislative power to administrative officers.

Decree affirmed.

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[259] UNITED STATES, Appt.,
v.
ERIE RAILROAD COMPANY.

(See S. C. Reporter's ed. 259-272.)

Carriers — discrimination — free transportation — interchange of passes.

The right of a carrier which is subject to the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8564), to issue passes to the officers, agents, and employees of carriers not subject to that act, such as trans-Atlantic steamship companies and foreign railway companies, is recognized in the proviso in § 1 of that act, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), that the prohibition against free transportation "shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families."

[For other cases, see Carriers, II. b, 5, in Digest Sup. Ct. 1913 Supp.]

[Nos. 493 and 494.]

Argued January 11 and 12, 1915. Decided February 23, 1915.

TWO APPEALS from the District Court of the United States for the Southern District of New York to review decrees dismissing bills filed by the United States to enjoin a railway company from issuing passes to employees of common carriers not subject to the interstate commerce act. Affirmed.

See same case below, 213 Fed. 391.

The facts are stated in the opinion.

Mr. G. Carroll Todd, Assistant to the Attorney General, argued the cause, and, with Mr. Thurlow M. Gordon, Special Assistant to the Attorney General, filed a brief for the United States:

The construction of the disputed exception in the anti-pass provision of § 1 of the act to regulate commerce for which the government contends is the construction which has been adopted by the Interstate Commerce Commission, the administrative body charged with the enforcement of that act.

Re Exchange of Free Transportation, 12 Inters. Com. Rep. 44.

The construction of a statute by the ad-

ministrative body charged with its enforcement is always entitled to great weight.

United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; United States v. Hammers, 221 U. S. 220, 228, 229, 55 L. ed. 710, 715, 31 Sup. Ct. Rep. 593; Illinois Surety Co. v. United States, 131 C. C. A. 476, 215 Fed. 338; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 118, 58 L. ed. 868, 878, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526; Jacobs v. Prichard, 223 U. S. 200, 214, 56 L. ed. 405, 409, 32 Sup. Ct. Rep. 289; Schell v. Fauche, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376; Greenwald v. Weir, 130 App. Div. 701, 115 N. Y. Supp. 311; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 5 Inters. Com. Rep. 131, 64 Fed. 982.

And when, as here, Congress has re-enacted the statute without altering the part construed, the administrative construction, unless plainly erroneous, must be taken as impliedly ratified by Congress, and therefore as binding upon the courts.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272; United States v. Falk, 204 U. S. 143, 150, 152, 51 L. ed. 411, 414, 415, 27 Sup. Ct. Rep. 191; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 338, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; Valk v. United States, 28 Ct. Cl. 241; United States v. Baruch, 223 U. S. 191, 199, 56 L. ed. 399, 404, 32 Sup. Ct. Rep. 306; Latimer v. United States, 223 U. S. 501, 504, 56 L. ed. 526, 527, 32 Sup. Ct. Rep. 242; Komada v. United States, 215 U. S. 392, 397, 54 L. ed. 249, 252, 30 Sup. Ct. Rep. 136; Edwards v. Darby, 12 Wheat. 207, 210, 6 L. ed. 603, 604; Jacobs v. Prichard, 223 U. S. 200, 214, 56 L. ed. 405, 409, 32 Sup. Ct. Rep. 289.

Not only is the Commission's construction not plainly erroneous, but, on the contrary, it accords (1) with the sense in which the disputed words are generally used in the statute, (2) with the context of the particular provision, and (3) with the purpose and spirit of the legislation.

United States v. Chavez, 228 U. S. 525, 57 L. ed. 950, 33 Sup. Ct. Rep. 595; Church of the Holy Trinity v. United States, 143 U. S. 457, 459, 36 L. ed. 226, 228, 12 Sup. Ct. Rep. 511; Brewer v. Blougher, 14 Pet. 178, 198, 10 L. ed. 408, 417; McKee v. United States, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 21 L. ed. 841; Brown v. Duchesne, 19 How. 183, 194, 15 L. ed. 595, 599; Pollard v. Bailey, 20 Wall. 520, 525, 526, 22 L. ed. 376–378; Alexander v. Alexandria, 5 Cranch, 1, 7, 3 L. ed. 19, 20; United States v. Freeman, 3 How. 556, 564, 565, 11 L. ed. 724, 727, 728; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co. 235 U. S. 383, ante, 282, 35 Sup. Ct. Rep. 132; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; American Exp. Co. v. United States, 212 U. S. 522, 532, 533, 53 L. ed. 635, 640, 29 Sup. Ct. Rep. 315; Interstate Commerce Commission v Baltimore & O. R. Co. 145 U. S. 263, 278, 36 L. ed. 699, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Re Montana Pass Situation, 29 Inters. Com. Rep. 411; Re Financial Relations of Louisville & N. R. Co. 31 Inters. Com. Rep. 261; Davies v. Boston, 190 Mass. 194, 76 N. E. 663, 20 Am. Neg. Rep. 108; Townsend v. Boston, 187 Mass. 283, 72 N. E. 991, 17 Am. Neg. Rep. 555; Re Colorado Free Pass Investigation, 26 Inters. Com. Rep. 491; Re Tap Line Case, 23 Inters. Com. Rep. 277; Re Five Per Cent Case, 31 Inters. Com. Rep. 351; Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 578, 58 L. ed. 1476, 1479, 34 Sup. Ct. Rep. 964; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; American Exp. Co. v. United States, 212 U. S. 522, 524, 532, 53 L. ed. 635, 640, 29 Sup. Ct. Rep. 315.

The exception contained in § 22 can have no broader operation than the exception contained in the anti-pass provision of § 1.

United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154; Murdock v. Memphis, 20 Wall. 590, 617, 22 L. ed. 429, 437; District of Columbia v. Hutton, 143 U. S. 18, 26, 36 L. ed. 60, 62, 12 Sup. Ct. Rep. 369; Tracy v. Tuffly, 134 U. S. 206, 223, 33 L. ed. 879, 884, 10 Sup. Ct. Rep. 527; Cook County Nat. Bank v. United States, 107 U. S. 445, 451, 27 L. ed. 537, 539, 2 Sup. Ct. Rep. 561; King v. Cornell, 106 U. S. 395, 396, 27 L. ed. 60, 1 Sup. Ct. Rep. 313; Alexander v. Alexandria, 5 Cranch, 1, 7, 3 L. ed. 19, 20.

The rule that where the text of a statute is unambiguous the courts may not read words in or out under the guise of construction does not mean that words which have a certain meaning when considered apart from any application to a particular object, that is, when considered in the abstract, must be given that same meaning when considered not apart from, but in connection with, a particular object, and in association with other words.

Atkins v. Fibre Disintegrating Co. 18 Wall.

272, 301, 302, 21 L. ed. 841, 844; United States v. Chavez, 228 U. S. 525, 530, 57 L. ed. 950, 951, 33 Sup. Ct. Rep. 595.

The true basis of the rule according weight to an administrative construction of a statute is not acquiescence in the construction by the parties affected, but the respect due the administrative authority,—the respect commanded by experts "appointed by law and informed by experience."

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Bates & G. Co. v. Payne, 194 U. S. 106, 109, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595.

The rule is particularly applicable where the administrative body in question, like the Interstate Commerce Commission, has received express authority to enforce the law by orders, regulations, and rulings.

Jacobs v. Prichard, 223 U. S. 200, 214, 56 L. ed. 405, 409, 32 Sup. Ct. Rep. 289; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 402, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272.

Mr. Joseph W. Folk filed a brief for the Interstate Commerce Commission:

The United States district court has jurisdiction to restrain by injunction the unlawful issuance of passes.

United States v. Union Stockyards & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; American Exp. Co. v. United States, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315.

The issuance of free passes except to persons authorized by law to receive them is a discrimination forbidden by law under §§ 2 and 3 of the act to regulate commerce.

Re Charge to Grand Jury, 66 Fed. 146; Ex parte Koehler, 1 Inters. Com. Rep. 28, 30 Fed. 867; Re Carriage of Persons Free, 3 Inters. Com. Rep. 717; Slater v. Northern P. R. Co. 2 Inters. Com. Rep. 243; Harvey v. Louisville & N. R. Co. 3 Inters. Com. Rep. 793; Milk Producers' Protective Asso. v. Delaware L. & W. R. Co. 7 Inters. Com. Rep. 92.

The proviso in § 1 of the act to regulate commerce did not bring a new class of common carriers under discussion, but carved out certain exceptions to which the main clause should not apply.

Re Webb, 24 How. Pr. 249.

One of the main purposes of the act to regulate commerce was to put an end to passes and discrimination which had grown up in the practice of interstate carriers, and the issuance of passes, except to certain recognized persons other than the employees of the issuing carrier, has long been recognized as a grave evil and an unjust burden upon the transportation-tax paying public.

Louisville & N. R. Co. v. Mottley, 219 U. S. 468, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

The Interstate Commerce Commission has uniformly held that the proviso in question applies only to carriers subject to the act.

Re Exchange of Free Transportation, 12 Inters. Com. Rep. 39, 47; Conference Rulings, June 30, 1908, 95-g. 196-216; Cary v. Eureka Springs R. Co. 7 Inters. Com. Rep. 311; Wylie v. Northern P. R. Co. 11 Inters. Com. Rep. 154.

This contemporaneous construction by those having in charge the enforcement of the act should have great weight.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272; United States v. Cerecedo Hermanos y Compania, 209 U. S. 338, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; Southern R. Co. v. Tift, 79 C. C. A. 536, 158 Fed. 1021; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 5 Inters. Com. Rep. 131, 64 Fed. 981; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; United States v. Moore, 95 U. S. 760, 24 L. ed. 588.

The free-pass provision should be construed in harmony with the purpose of its enactment.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. Joint Traffic Asso. 171 U. S. 550, 171 L. ed. 261, 19 Sup. Ct. Rep. 25.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and such construction as to avoid unjust or absurd conclusions.

Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. Joint Traffic Asso. 171 U. S. 550, 567, 171 L. ed. 261, 286, 19 Sup. Ct. Rep. 25.

The provisions of § 22, permitting the issuance of passes to the employees of other railroad companies, are included in the language of § 1, as amended in 1906. The provision of § 22, allowing issuance of passes, was modified or repealed by § 1, as amended in 1906.

Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. Rep. 527; United States v. Cerecedo Hermanos y Compania, 209 U. S.

338, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154; Murdock v. Memphis, 20 Wall. 590, 617, 22 L. ed. 429, 437.

The Erie Railroad Company is a common carrier subject to the act and bound by it, and the court may issue an injunction broad enough to cover any future issuance of interstate passes to the agents or employees of common carriers not subject to the jurisdiction of the Interstate Commerce Commission under the act to regulate commerce.

American Exp. Co. v. United States, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693.

Mr. George F. Brownell argued the cause, and, with Mr. M. B. Pierce, filed a brief for the Erie Railroad Company:

The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*.

Gardner v. Collins, 2 Pet. 93, 7 L. ed. 359; United States v. Fisher, 109 U. S. 143, 27 L. ed. 885, 3 Sup. Ct. Rep. 154; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; American Exp. Co. v. United States, 212 U. S. 522, 535, 53 L. ed. 635, 641, 29 Sup. Ct. Rep. 315.

While it is true that, technically, the office of a proviso is restrictive, yet it is a general practice on the part of legislative bodies to add new matter in a proviso.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; Interstate Commerce Commission v. Baird, 194 U. S. 25, 36, 37, 48 L. ed. 860, 865, 866, 24 Sup. Ct. Rep. 563; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 242, 46 L. ed. 1144, 1146, 22 Sup. Ct. Rep. 881; Baggaley v. Pittsburg & L. S. Iron Co. 33 C. C. A. 202, 62 U. S. App. 683, 90 Fed. 638; American Exp. Co. v. United States, 212 U. S. 522, 534, 53 L. ed. 635, 640, 29 Sup. Ct. Rep. 315.

The phrase "common carriers" as used in this proviso is unambiguous; its meaning is clear. It is to be assumed that words and phrases are used in their ordinary meaning.

Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511.

When language is clear it needs no construction.

Yerke v. United States, 173 U. S. 439, 43 L. ed. 760, 19 Sup. Ct. Rep. 441; Thornley v. United States, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; Alexander v. Worthington, 5 Md. 485; Kohlsaat v. Murphy, 96 U. S. 153, 24 L. ed. 844.

In the absence of legislative definition of these phrases, the words are to be construed in their popular sense.

Maillard v. Lawrence, 16 How. 256, 14 L. ed. 928.

To give the construction contended for by the government the court would have to interpolate the words "subject to the provisions of this act" in the provisos of §§ 1 and 22 under consideration. This would be legislation, and not construction, and is not permissible.

Prairie Oil & Gas Co. v. United States, 204 Fed. 798, affirmed in 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; 36 Cyc. 1127; Day v. Ogdensburgh & L. C. R. Co. 107 N. Y. 129, 13 N. E. 765; American Exp. Co. v. United States, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Johnson v. Barham, 99 Va. 310, 38 S. E. 136; Denn ex dem. Scott v. Reid, 10 Pet. 524, 9 L. ed. 519; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; Hilburn v. St. Paul, M. & M. R. Co. 23 Mont. 229, 58 Pac. 551, 811; Beley v. Naphtaly, 169 U. S. 353, 42 L. ed. 775, 18 Sup. Ct. Rep. 354; Lewis's Sutherland, Stat. Constr. 350; Andrews v. United States, 2 Story, 202, Fed. Cas. No. 381; Ex parte Brown, 21 S. D. 515, 114 N. W. 303; Ashby v. State, 124 Tenn. 684, 139 S. W. 872; Kohlsaat v. Murphy, 96 U. S. 160, 24 L. ed. 846.

In enacting the act to regulate commerce Congress had two main objects: First, to provide that rates of the railroad companies of this country should not be unjust or unreasonable; second, to do away with various forms of undue discrimination and preference which existed throughout this country at the time of the enactment of the act.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37.

The regulation of carriers subject to the act was limited to the control of their relations with the general public; *i. e.*, in their functions as common carriers; and they were left free to deal with their employees and with other carriers, where the public interest was not affected, as they had before the passage of the act.

Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964; Northern P. R. Co. v. Adams, 192

U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385.

The provisions of § 22 as construed by the Supreme Court are illustrative rather than exclusive, and under its provisions railroad companies subject to the act to regulate commerce lawfully could and did interchange passes with other common carriers not subject to the act, including trans-Atlantic steamship companies.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 278, 36 L. ed. 699, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Statutes are to be construed as they were intended to be understood when they were passed.

Schuyler County v. Thomas, 98 U. S. 169, 25 L. ed. 88; Jones v. New York Guaranty & I. Co. 101 U. S. 622, 25 L. ed. 1030.

Should the court be of the opinion that the portions of the act here under consideration are not so clear and unambiguous that the intent of Congress is found in the language of the act, to ascertain that intent it may properly examine the views expressed by individual members of Congress in debate, and gather therefrom the history of the times, and of the evil which the legislation was intended to remedy (American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; Tap Line Cases [United States v. Louisiana & P. R. Co.] 234 U. S. 27, 58 L. ed. 1195, 34 Sup. Ct. Rep. 741); it may avail itself of all light afforded by the history of the steps taken in the enactment of the law as disclosed by the legislative record (United States v. Burr, 159 U. S. 85, 40 L. ed. 84, 15 Sup. Ct. Rep. 1002); it may refer to opinions expressed in the reports of committees (Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 200, 201, 55 L. ed. 180, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164).

A guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511.

The interchange of transportation between common carriers obtains for their respective employees privileges which make their employment more desirable.

The New World v. King, 16 How. 469, 473, 14 L. ed. 1019, 1021.

There is no distinction between an interchange of passes for the employees of common carriers subject to the act to regulate commerce, and an interchange between such carriers on the one hand and foreign railroad companies, trans-Atlantic steamship companies, and railroad companies operating within the confines of a state, and not under a common arrangement or control for the through handling of business, which railroad companies were not made subject to the act to regulate commerce (United States ex rel. Interstate Commerce Commission v. Chicago, K. & S. R. Co. 81 Fed. 783; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; United States v. Geddes, 65 C. C. A. 320, 131 Fed. 452; Interstate Commerce Commission v. Bellaire, Z. & C. R. Co. 77 Fed. 942), on the other. It is all a matter of reciprocity.

This court ought not to impute an intent to Congress, not clearly expressed in the legislative enactment, which is in direct hostility to the traditions and policy in regard to the interchange of these passes which have existed for so many years (Chamberlain v. Chamberlain, 43 N. Y. 424), and especially since prohibiting the continuance of this custom of issuance and interchange is not necessary to carry out any purpose of the statute.

To so hold requires the reading into the statute of something not found therein and something not essential to the carrying out of the general scheme and plan of the legislation.

Re Frontier & W. R. Co. 155 App. Div. 62, 139 N. Y. Supp. 627.

The government's contention that the construction given by the Commission to provisions of the act to regulate commerce in *ex parte* administrative rulings must be taken as impliedly ratified by Congress and as binding upon the courts is not supported by either reason or authority.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 331, 332, 57 L. ed. 1501, 1504, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890; United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. Rep. 5; Interstate Commerce Commission v. Delaware L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415.

Mr. Justice McKenna delivered the opinion of the court:

These are direct appeals from decrees dismissing two bills filed by the United States to enjoin the railroad company from issuing passes to employees of common carriers not subject to the act to regulate commerce.

The action of the railroad company is

alleged to be in violation of §§ 2 and 3 of that act (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, §§ 8564, 8565), and of §§ 1 and 6 as amended June 29, 1906 (34 Stat. at L. 584, 586, chap. 3591, Comp. Stat. 1913, §§ 8563, 8569), prohibiting rebates and preferences.

[268] The bills were filed in pursuance of § 3 of the act to further regulate commerce (32 Stat. at L. 847, 848, chap. 708, Comp. Stat. 1913, §§ 8597, 8599), which authorizes proceedings in equity to prevent common carriers from departing from their published rates, or from committing any discrimination forbidden by law, and the basic contention of the United States is that the giving of passes for free transportation constituted a departure from the carrier's published rates, and a discrimination against other passengers. To this the railroad replies that the passes issued by it, and which constitute the ground of suit, were authorized by the so-called anti-pass provision of § 1 of the act to regulate commerce. The question, therefore, is very direct and is, What does the act authorize or prohibit?

The charge in No. 493 is that the railroad company, which is a common carrier subject to the act, in pursuance of a standing practice, issues passes to certain of the officers, agents, and employees of various trans-Atlantic steamship lines, such lines not being carriers subject to the act, while other passengers who are transported between the same points are required to pay the published fares, and that the railroad company will continue the practice.

The railroad company admits the charges and avers that it solicits transportation over its lines of freight brought to this country by the steamship lines; that the latter in turn solicit from shippers on the line of the railroad company the transportation of their freight abroad; that large amounts of traffic moving by the steamship lines are transported by the railroad company after arrival in or before departing from the United States, as the case may be, some of it under through bills of lading; that the interchange of passes between the officers and employees of the railroad and such steamship lines to the limited extent alleged is one which, as a matter of common knowledge, has existed and been openly followed by the railroad [269] company and other carriers generally for years; that its existence was commonly known long before the passage of the interstate commerce act, by the terms of which its continuance is permitted; that it rests upon the same consideration, including considerations of business policy, which have always been recognized as justifying the interchange of passes, and is recognized and permitted by the proviso in § 1 of the act as amended and approved June 29, 1906. The provision is as follows:

"No common carrier subject to the provisions of this act shall after January 1, 1907, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, . . . provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employees of common carriers and their families, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation."

The material facts in No. 494 are the same as in No. 493, with the exception that the passes there in controversy were issued by the railroad company to an employee of the Great Eastern Railway of England, and a defense of the passes is made not only under the proviso of § 1, above quoted, but under § 22 of the act as originally enacted, which reads as follows:

"Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

In support of its contention the United States adduces certain rulings of the Interstate Commerce Commission, and argues that Congress, having re-enacted the statute, adopted the Commission's construction as the proper [270] one. Counsel invoke a line of cases which decide, it is contended, that a contemporaneous construction of a statute by the officers upon whom is imposed the duty of administering it is entitled to weight, and, unless clearly wrong, to determining weight. The cases are familiar, the doctrine they announce a useful one, and we are brought to the inquiry, Does it apply in the case at bar?

The first of the rulings referred to was made upon petition of Frank Parmelee & Company. That company, which is a transfer company transferring passengers and packages from the railroads to the hotels in Chicago, and the reverse, asked for a ruling as to whether, under the exception contained in the proviso of § 1, it had a right to interchange passes with the railroads. The Commission decided that the Parmelee Company was not a carrier subject to the act, and that, therefore, an interchange of passes between it and the railroads was not permissible. In subsequent Conference Rulings the Commission

decided that the right to issue passes coexisted with the obligation to file tariffs, and when the latter did not exist the former could not be exercised. These rulings received emphasis from the fact that "ocean carriers to nonadjacent foreign countries" were said to be among the carriers not subject to the act, and, under the principle announced, not entitled to receive passes.

But these rulings were never enforced and the custom of carriers was uniformly the other way. Against a mere verbal construction, therefore, permitted to languish in inactivity, we have the unopposed practice of the companies. The Commission's action, therefore, cannot have the absolute effect that the Attorney General ascribes to it; but, keeping it in mind, let us proceed to a consideration of the statute.

It is not denied that the words "carriers," "common carriers," "railroads," and "railroad companies" are used in the act with and without the qualification, "subject to the [271] provisions of the act," and the number of times they are so used is compared. It will do no good to set forth the instances. The act was passed to regulate the conduct and affairs of the carriers of the country, and necessarily they are brought under its provisions and subject to them. It controls their relations, but the carriers subject to the act may have relation with other carriers, and special provisions would naturally be made to govern that relation. And certainly the reasoning is not impressive which justifies an interchange of passes between carriers subject to the act, and denies it to those not so subject, the same business reasons existing in both cases.

Counsel for the United States sounds an alarm at such extension, and lets imagination loose in portrayal of its consequences, and sees included "tap lines and other industrial railroads, street car lines, local traction companies, omnibus transfer companies and herdic lines, hackmen, boatmen, ferrymen, truckmen, lumber flumes, bucket lines for ore, parcel deliveries, district messenger services, carriers of all descriptions, both in this country and abroad,"—a formidable enumeration, it must be admitted. And there must be included, too, all their officers, all their employees and their families. There is, however, an opposing picture. It is conceded that carriers subject to the act may interchange passes, the officers and employees of each carrier receiving free transportation, and giving it to every other carrier subject to the act, making an army of the privileged with the same discrimination and the same burden on the passenger service of the railroads as in the illustration of the government. There is no argument, therefore, in a comparison of the possibilities under one construction rather than the other. At best it is but a comparison of the excesses which may be but are not likely to be practised. Counsel seem to think that the railroads have an eager desire to distribute passes and burden their transportation service with a crowd of [272] free passengers. Congress certainly had no such view, and gave power to exchange passes, considering that the best safeguard against its abuse was the interest of the carriers. The cases at bar are a typical instance of its exercise. It has its justification in a strictly business policy, and instead of being a burden upon the resources of the companies it is an aid to them. With these examples before us, and in view of the other reasons which we have adduced, we see no reason to disregard the literal terms of the statute. And this view is strengthened, not weakened, by the proviso inserted on June 18, 1910, which is as follows:

"And provided further, that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for . . . employees . . . of such telegraph, telephone, and cable lines, and the . . . employees . . . of other common carriers subject to the provisions of this act." [36 Stat. at L. 546, chap. 309, Comp. Stat. 1913, § 8563.]

In such case the statute makes a special limitation, as will be observed; in other words, restricts the privilege of exchanging telegraph and telephone franks for employees, etc., of such lines and of other common carriers subject to the act,—that is, there are words of explicit limitation.

Decree affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of the case.

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[273] JAY FOX, Plff. in Err.,
v.
STATE OF WASHINGTON.

(See S. C. Reporter's ed. 273-278.)

Constitutional law — due process of law — liberty — indefiniteness of criminal statute.

A statute which, like Rem. & Bal. (Wash.) Code, § 2564, makes criminal the editing of printed matter tending to encourage and advocate disrespect for law, cannot be said to violate U. S. Const., 14th

NOTE.—On constitutional freedom of speech and of the press—see note to Cowan v. Fairbrother, 32 L.R.A. 829.

Amend., as being an unjustifiable restriction of liberty, and too indefinite for a criminal statute, where the highest state court, by implication at least, reads the statute as confined to encouraging an actual breach of the law, and in the case at bar has merely construed it as embracing an article encouraging and inciting a persistence in what would be a breach of the state laws against indecent exposure.

[For other cases, see Constitutional Law, 779–830, in Digest Sup. Ct. 1908.]

[No. 134.]

Submitted January 19, 1915. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a conviction in the Superior Court of Pierce County, in that state, of editing printed matter tending to encourage and advocate disrespect for law. Affirmed.

See same case below, 71 Wash. 185, 127 Pac. 1111.

The facts are stated in the opinion.

Mr. Gilbert E. Roe submitted the cause for plaintiff in error:

The constitutional question here presented was sufficiently raised in the state court.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Tyler v. Judges of Ct. of Registration, 179 U. S. 405, 411, 45 L. ed. 252, 255, 21 Sup. Ct. Rep. 206; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 244, 52 L. ed. 466, 471, 28 Sup. Ct. Rep. 294; Loeb v. Columbia Twp. 179 U. S. 472, 483, 45 L. ed. 280, 287, 21 Sup. Ct. Rep. 174; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281.

The statute in question violates the 14th Amendment to the Constitution of the United States because it deprives the accused of liberty and property without due process of law.

Black's Law Dict. p. 1181; Hodgson v. Vermont, 168 U. S. 262, 272, 42 L. ed. 461, 464, 18 Sup. Ct. Rep. 80; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 108–111, 53 L. ed. 417, 429, 430, 29 Sup. Ct. Rep. 220; Ex parte Jackson, 45 Ark. 158; Czarra v. Medical Supers. 25 App. D. C. 443; United States v. Capital Traction Co. 34 App. D. C. 592, 19 *Ann. Cas. 68;* Hewitt v. State Medical Examiners, 148 Cal. 590, 3 L.R.A.(N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750; Louisville & N. R. Co. v. Com. 99 Ky. 663, 37 S. W. 79; Com. v. Louisville & N. R. Co. 20 Ky. L. Rep. 491, 46 S. W. 700; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785; Hagerstown v. Baltimore & O. R. Co. 107 Md. 178, 126 Am. St. Rep. 382, 68 Atl. 490; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Dobbins v. Los Angeles, 195 U. S. 223, 240, 49 L. ed. 169, 176, 25 Sup. Ct. Rep. 18; Patterson v. Colorado, 205 U. S. 454, 461, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; West v. Louisiana, 194 U. S. 258, 263, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650.

Mr. W. V. Tanner, Attorney General of Washington, submitted the cause for defendant in error. Mr. Fred G. Remann was on the brief:

The act in question is not void for uncertainty.

State v. Stuth, 11 Wash. 423, 39 Pac. 665; Foster v. Territory, 1 Wash. 411, 25 Pac. 459; State v. Dvoracek, 140 Iowa, 266, 118 N. W. 399; Louisville & N. R. Co. v. Com. 103 Ky. 605, 45 S. W. 880, 46 S. W. 697; Louisville & N. R. Co. v. Com. 97 Ky. 207, 30 S. W. 616; Missouri, K. & T. R. Co. v. State, — Tex. Civ. App. —, 97 S. W. 720; Gustavel v. State, 153 Ind. 613, 54 N. E. 123; State v. Hirsch, 125 Ind. 207, 9 L.R.A. 170, 24 N. E. 1062; State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 595; 36 Cyc. 968, 969; 12 Cyc. 141, 142; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86–112, 53 L. ed. 417–430, 29 Sup. Ct. Rep. 220.

The word "encourage" has a well-defined meaning (3 Words & Phrases, 2385), as has also the word "advocate." In the case of State v. Stuth, 11 Wash. 423, 39 Pac. 665, the word "disturb" was held to have a well-known legal significance. Certainly the words "encourage" and "advocate" are no more difficult of comprehension than the word "disturb." Can the words "disrespect for law" be held to be vague, indefinite, and uncertain? Is it difficult to ascertain what the legislature meant by the use of these words?

The punishment of those who publish articles which tend to corrupt morals, induce crime, or destroy organized society is essential to the security of freedom and the stability of the state. While all the agencies of government—executive, legislative, and judicial—cannot abridge the freedom of the press, the legislature may control, and the

courts may punish, the licentiousness of the press.

People v. Most, 171 N. Y. 423, 58 L.R.A. 509, 64 N. E. 175. See also 8 Cyc. 892; Cooper v. People, 13 Colo. 337, 6 L.R.A. 430, 22 Pac. 790; Re Banks, 56 Kan. 242, 42 Pac. 693; Hart v. People, 26 Hun, 396; State v. Sykes, 28 Conn. 225.

Mr. Justice Holmes delivered the opinion of the court:

This is an information for editing printed matter tending to encourage and advocate disrespect for law, contrary to a statute of Washington. The statute is as follows: "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross [276] misdemeanor;" Rem. & Bal. Code, § 2564. The defendant demurred on the ground that the act was unconstitutional. The demurrer was overruled and the defendant was tried and convicted. 71 Wash. 185, 127 Pac. 1111. With regard to the jurisdiction of this court, it should be observed that the supreme court of the state, while affirming that the Constitution of the United States guarantees freedom of speech, held not only that the act was valid in that respect, but also that it was not bad for uncertainty, citing Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220, so that we gather that the Constitution of the United States, and especially the 14th Amendment, was relied upon, apart from the certificate of the chief justice to that effect.

The printed matter in question is an article entitled, "The Nude and the Prudes," reciting in its earlier part that "Home is a community of free spirits, who came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society;" that "one of the liberties enjoyed by the Homeites was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose;" but that "eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom," and that they had four persons arrested on the charge of indecent exposure, followed in two cases, it seems, by sentences to imprisonment. "And the perpetrators of this vile action wonder why they are being boycotted." It goes on: "The well-merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy." It then predicts and encourages the boycott of those who thus interfere with the freedom of Home, concluding: "The boycott will be pushed until these invaders will come to see the [277] brutal mistake of their action and so inform the people." Thus by indirection, but unmistakably, the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury so found.

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed (United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527); and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it,—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853. It lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less [278] selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wis-

dom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States.

Judgment affirmed.

GEORGE N. PIERCE COMPANY,
Petitioner,
v.
WELLS FARGO & COMPANY.

(See S. C. Reporter's ed. 278–287.)

Carriers — limiting liability — agreed value — Carmack amendment.

1. Gross disproportion between the value of an interstate express shipment and the arbitrary value fixed in the express company's receipt does not prevent the application of the rule that the carrier may, under the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 20, limit its liability to an agreed value made to secure the lower of two or more published rates based upon value.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

Carriers — limiting liability — agreed value — Carmack amendment.

2. Fifty dollars is the limit of recovery from an express company in case of its breach of the duty imposed upon it by the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 20, as the initial carrier of an interstate shipment of four uncrated automobiles, together with an extra automobile body and other automobile parts, where the shipper deliberately and purposely, without imposition or fraud, accepted the express company's receipt limiting the amount of recovery to $50, which is the sum named in the filed tariffs as the amount of recovery in the absence of a declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate, and having the liability extended to the full value of the goods.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 14.]

Argued December 8, 1913. Ordered to be restored to docket for reargument October 26, 1914. Reargued January 7, 1915. Decided February 23, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of New York, restricting the liability of an express company because of the loss of a shipment to the valuation declared in the express company's receipt. Affirmed.

See same case below, 110 C. C. A. 645, 189 Fed. 561.

The facts are stated in the opinion.

Mr. **Alfred L. Becker** argued the cause, and, with Messrs. William B. Hoyt, George E. Hamilton, John W. Yerkes, and John J. Hamilton, filed a brief for petitioner on original argument:

The limitation of liability to $50 is void as against public policy and as a (partial) exemption from liability prohibited by the act to regulate commerce.

Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 650, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391.

The so-called "valuation" of the articles shipped at $50 for the lot is "subject to impeachment as upon its face arbitrary and unreasonable." Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 669, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397. Such a valuation is arbitrary, and has no reasonable relation to the actual value. Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 656, 57 L. ed. 683, 689, 33 Sup. Ct. Rep. 391. The actual intent of the parties, apparent on the face of the contract, was not to liquidate the damages, but to exempt from liability. This method of limiting liability has been regard-

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NOTE.—As to the validity of agreement to restrict carrier's liability, generally,—see notes to Deming v. Merchants' Cotton Press & Storage Co. 13 L.R.A. 518; Missouri P. R. Co. v. Ivey, 1 L.R.A. 500; Hartwell v. Northern P. Exp. Co. 3 L.R.A. 342; Richmond & D. R. Co. v. Payne, 6 L.R.A. 849; Adams Exp. Co. v. Harris, 7 L.R.A. 214; Duntley v. Boston & M. R. Co. 9 L.R.A. 452; Gulf, C. & S. F. R. Co. v. Gatewood, 10 L.R.A. 419; Pacific Exp. Co. v. Foley, 12 L.R.A. 799; Ballou v. Earle, 14 L.R.A. 433; Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527; Everett v. Norfolk & S. R. Co. 1 L.R.A. (N.S.) 985; New Jersey Steam Nav. Co. v. Merchants' Bank, 12 L. ed. U. S. 465; and Chicago, M. & St. P. R. Co. v. Solan, 42 L. ed. U. S. 688.

On the validity of stipulation limiting carrier's liability to agreed valuation, as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

On the Carmack amendment as affecting state regulation as to stipulations limiting liability of common carrier for loss or damage to goods—see notes to Adams Exp. Co. v. Croninger, 44 L.R.A.(N.S.) 257, and Louisville & N. R. Co. v. Miller, 50 L.R.A. (N.S.) 819.

ed by the Interstate Commerce Commission as both "arbitrary" and "unreasonable."

Ibid.; Re Released Rates, 13 Inters. Com. Rep. 550.

Cases deciding whether a penalty or liquidated damages were meant by a clause in a written contract relating to damages for its nonfulfilment are in point and furnish the rule of decision.

United States v. Bethlehem Steel Co. 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. Rep. 450; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; Bignall v. Gould, 119 U. S. 495, 30 L. ed. 491, 7 Sup. Ct. Rep. 294; Little v. Banks, 85 N. Y. 258; Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256.

These cases establish the following principles:

(1) A contract for a penalty in gross is unenforceable in equity; or, under the statute 8 and 9 Wm. III. chap. 11, at law. (In close analogy to a carrier's contract for an exemption from liability for negligence; though the latter rule is one of public policy, and has now been made the statute law of the land.)

(2) Where the parties intend in good faith to liquidate their damages, their agreement will be upheld by the courts. Where they intend to agree upon a penalty, the agreement is unenforceable.

(3) In determining the intent of the parties, the language they use in characterizing the agreement as one for liquidated damages or for a penalty is not necessarily controlling.

United States v. Bethlehem Steel Co. 205 U. S. 120, 51 L. ed. 737, 27 Sup. Ct. Rep. 450.

(4) In construing the contract, where doubt exists as to its meaning, recourse may be had to the facts surrounding the agreement and to the prior negotiations, for the purpose of determining the correct construction of the language of the contract.

United States v. Bethlehem Steel Co. 205 U. S. 118, 51 L. ed. 736, 27 Sup. Ct. Rep. 450.

(5) Where there is an extraordinary disproportion between the agreed damages and the probable loss resulting from a breach,—at least where such disproportion is apparent on the face of the contract,—a stipulation as to damages will be deemed to contemplate a penalty.

A fictitious valuation is an exemption.

The New England, 110 Fed. 415, 10 Am. Neg. Rep. 388; La Bourgogne, 75 C. C. A. 647, 144 Fed. 781, affirmed without passing on the point in 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664; Southern Exp. Co. v. Hanaw, 134 Ga. 445, 137 Am. St. Rep. 227, 67 S. E. 944; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Abrams v. Milwaukee, L. S. & W. R. Co. 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; Murphy v. Wells, F. & Co. Exp. 99 Minn. 231, 108 N. W. 1070, 20 Am. Neg. Rep. 613; Re Released Rates, 13 Inters. Com. Rep. 550; Union P. R. Co. v. Stupeck, 50 Colo. 151, 114 Pac. 646; Schwarzschild v. National S. S. Co. 74 Fed. 257.

Properly construed, the bill of lading purports to exempt the carrier from all liability for "ordinary negligence," even though a higher rate be paid. The only liability assumed under any circumstances whatever is for fraud or gross negligence. The alternative being unreasonable, the limitation is void. This court has held that the alternative must be offered of full, unrestricted common-law liability.

The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102.

The most that the shipper could secure by paying for valuation was an agreement by the carrier to be liable for gross negligence or fraud, which must be proved. In no event, even the payment for valuation, did the carrier agree to be liable for ordinary negligence, such as can be inferred from the nondelivery of the shipment.

Canfield v. Baltimore & O. R. Co. 93 N. Y. 538, 45 Am. Rep. 268; Wheeler v. Oceanic Steam Nav. Co. 125 N. Y. 155, 21 Am. St. Rep. 729, 26 N. E. 248.

That no more favorable alternative was proposed is clear from a reading of the bill of lading. It contains several independent clauses set off by semicolons, all governed by the principal or general clause at the beginning, ending with the words "but only upon the following condition," followed by a colon "(:)." No one of these clauses can be read into any other, for they are all separate, dependent clauses, governed by the principal clause, but each is independent of the others.

Tyrrell v. New York, 159 N. Y. 239, 53 N. E. 1111.

The limitation of liability in the bill of lading was prohibited by the interstate commerce act, as a concession to the shipper, or variation from the posted and filed schedules of rates and charges of the defendant. The declaration of a false valuation is a violation of § 10 of the act.

Conference Rulings of the Commission, p. 14.

Even if the offense had been consummated, it would not bar a recovery.

Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 388,

38 L. ed. 195, 205, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367.

The inadvertent statement of the agent of the shipper that the goods were insured does not create an estoppel.

Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

Bills of lading are to be construed against the carrier which prepares them.

Texas & P. R. Co. v. Reiss, 183 U. S. 621, 46 L. ed. 358, 22 Sup. Ct. Rep. 252; Texas & P. R. Co. v. Callender, 183 U. S. 632, 46 L. ed. 362, 22 Sup. Ct. Rep. 257; London Assur. Co. v. Companhia de Moagens, 167 U. S. 149, 159, 42 L. ed. 113, 120, 17 Sup. Ct. Rep. 785; Compania de Navigacion v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537; The Queen of the Pacific, 180 U. S. 49, 52, 45 L. ed. 419, 420, 21 Sup. Ct. Rep. 278.

If the carrier had intended to limit its liability for conversion, or breach of the contract to deliver, not caused by the loss or destruction of the shipment, to $50, it should have so provided in distinct terms.

Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297; Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176.

Inasmuch as the jury could find that there was a wilful and intentional failure to deliver the salvage, greater than mere negligence, the limitations of the bill of lading do not apply; and the carrier must respond for the full value of the shipment, as it is not within the power of the shipper to prove the value of the undestroyed portion.

Shelton v. Canadian Northern R. Co. 189 Fed. 153; Hutchinson, Carr. § 432; Rosenthal v. Weir, 170 N. Y. 148, 57 L.R.A. 527, 63 N. E. 65; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Savannah, F. & W. R. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219; Georgia Southern R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807.

No demand was necessary, because an express carrier, unlike a freight carrier, agrees to make personal delivery.

Hutchinson, Carr. § 716.

Mr. Alfred L. Becker also argued the cause, and, with Messrs. William B. Hoyt and Maurice C. Spratt, filed a brief for petitioner on reargument:

The defendant so renounced its contract of carriage when only half performed by failing to continue and complete the transportation of the salvage after the railroad wreck and fire, and intentionally converting the salvage, as to be debarred from taking advantage of the contract to limit its liability.

Sleat v. Fagg, 5 Barn. & Ald. 342, 24 Revised Rep. 407; Balian v. Joly, 6 Times L. R. 345; Thorley v. Orchis S. S. Co. [1907] 1 K. B. 660, 2 B. R. C. 565, 76 L. J. K. B. N. S. 595, 96 L. T. N. S. 488, 23 Times L. R. 338, 12 Com. Cas. 251, 7 Ann. Cas. 281; McKahan v. American Exp. Co. 209 Mass. 270, 35 L.R.A.(N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612; Johnson v. New York C. R. Co. 33 N. Y. 610, 88 Am. Dec. 416; Maghee v. Camden & A. R. Transp. Co. 45 N. Y. 514, 6 Am. Rep. 124; Isaacson v. New York C. & H. R. R. Co. 94 N. Y. 278, 46 Am. Rep. 142.

The so-called valuation was void as a contract exempting the carrier from the liability for its negligence imposed by the Carmack amendment.

Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Lewis v. Rucker, 2 Burr. 1167, 14 Eng. Rul. Cas. 215; Wilson v. Day, 2 Burr. 827.

The defendant's tariffs and classifications were not offered in evidence; but it must be presumed that they contained lawful provisions, and it must therefore be presumed that they did not provide for the exemption of the carrier from liability for negligence by means of the practice of undervaluation.

Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 650, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391.

This court may take judicial notice of the actual tariffs and classifications.

New York Indians v. United States, 170 U. S. 1, 614, 42 L. ed. 927, 1165, 18 Sup. Ct. Rep. 531, 735; Underhill v. Hernandez, 168 U. S. 250, 253, 42 L. ed. 456, 457, 18 Sup. Ct. Rep. 83; The Habana, 175 U. S. 677, 696, 44 L. ed. 320, 327, 20 Sup. Ct. Rep. 290; Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; Jenkins v. Collard, 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868; Heath v. Wallace, 138 U. S. 573, 34 L. ed. 1063, 11 Sup. Ct. Rep. 380; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Coffee v. Groover, 123 U. S. 1, 31 L. ed. 51, 8 Sup. Ct. Rep. 1; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 204 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.

It being established that the tariffs must be presumed to have required, and did require, the carrier to charge for the actual apparent value of the shipment, the car-

rier, in the absence of an estoppel, is bound to respond in damages equal to the actual value.

Kansas City Southern R. Co. v. Carl, supra; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397.

If it be assumed that the tariffs and classifications purported to authorize such an undervaluation contract as was made: (a) they would be not only unreasonable, but unlawful, as in conflict with the Carmack amendment and the common law; (b) such contracts and tariffs have been condemned by the Interstate Commerce Commission. For these two reasons recourse to the Commission for revision of the tariffs and classifications was unnecessary.

Illinois C. R. Co. v Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 100, 57 L. ed. 742, 746, 33 Sup. Ct. Rep. 443; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 482, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Procter & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761; Re Released Rates, 13 Inters. Com. Rep. 550.

If it be assumed that the undervaluation contract was illegal, as an attempt to procure a rate made unlawful by the tariffs or by the Carmack amendment and common law, or by all three, such illegality would not bar a recovery.

Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Deming v. Merchants' Cotton-press & Storage Co. 90 Tenn. 311, 13 L.R.A. 518, 17 S. W. 89.

It is a well-recognized exception to the rule *ex dolo malo non oritur actio* that where the plaintiff does not need the aid of an illegal contract incidentally connected with a transaction, he may recover. But there must be an independent ground of recovery in tort or contract.

9 Cyc. 556; McMullen v. Hoffman, 174 U. S. 639, 654, 655, 43 L. ed. 1117, 1123, 1124, 19 Sup. Ct. Rep. 839; National Bank & L. Co. v. Petrie, 189 U. S. 423, 47 L. ed. 879, 23 Sup. Ct. Rep. 512; Gray v. Hook, 4 N. Y. 449; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Hoyt v. Cross, 108 N. Y. 76, 14 N. E. 801; Dennehy v. McNulta, 41 L.R.A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825; Minnesota Lumber Co. v. Whitebreast Coal Co. 56 Ill. App. 248; Washington Irrig. Co. v. Krutz, 56 C. C. A. 1, 119 Fed. 279; National Distilling Co. v. Cream City Importing Co. 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864.

It was unnecessary for the plaintiff to prove the contract, or the smallest part of it, to recover in this case as for negligence.

Murgoo v. Cogswell, 1 E. D. Smith, 359; Dougherty v. Posegate, 3 Iowa, 88, 1 Am. Neg. Cas. 894; Doorman v. Jenkins, 2 Ad. & El. 256, 4 Nev. & M. 170, 4 L. J. K. B. N. S. 29; National Bank & L. Co. v. Petrie, 189 U. S. 423, 47 L. ed. 879, 23 Sup. Ct. Rep. 512; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The defendant cannot at once claim that the contract was illegal and void, and use it as an affirmative defense to the plaintiff's action in tort for negligence not based on the contract.

Kinsman v. Parkhurst, 18 How. 289, 15 L. ed. 385; Pullman's Palace Car Co. v. Central Transp. Co. 139 U. S. 62, 35 L. ed. 69, 11 Sup. Ct. Rep. 489; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450.

Contracts exempting carriers from negligent liability have always been regarded as against public policy. Yet the shipper, however freely he made the contract, has been allowed to recover. This has been because the policy is *publici juris*. The public have an interest in seeing that those who occupy public employments should not put off the full measure of duty which they owe to the public. The courts have been careful to say that this principle depends upon the public character of the carrier's employment. When the carrier engages in other activities than as common carrier the principle does not apply.

Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. 228 U. S. 177, 194, 57 L. ed. 787, 795, 33 Sup. Ct. Rep. 474.

Mr. Charles W. Pierson argued the cause, and, with Messrs. William W. Green and L. A. Doherty, filed a brief for respondent on original argument:

In applying the rule enunciated in Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, it is immaterial whether or not the carrier knew that the agreed valuation was less than the actual value, provided the valuation was made fairly and in good faith for the purpose of applying to the shipment the lower of two rates, and was not adopted as a device for evading the rule of law forbidding a common carrier to stipulate for exemption from responsibility for its own negligence.

Blackwell v. Southern P. Co. 184 Fed.

489; Donlon Bros. v. Southern P. Co. 151 Cal. 763, 11 L.R.A(N.S.) 811, 91 Pac. 603.

If it be claimed that the transactions in suit involved a violation of the interstate commerce acts, in that case the parties are *in pari delicto* and the court will leave them where it finds them.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397; Ellison v. Adams Exp. Co. 245 Ill. 410, L.R.A.1915A, 502, 92 N. E. 277.

Mr. Charles W. Pierson also argued the cause, and, with Messrs. Charles W. Stockton and William W. Green, filed a brief for respondent on reargument:

The cases of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and Wells, Fargo & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267, argued and decided in this court since the writ of certiorari was granted herein, have settled in favor of defendant all questions as to the validity of the $50 limitation, save the effect of actual knowledge on the part of the carrier that the goods were worth more than the valuation adopted for the purpose of fixing the rate.

The doctrine of these cases has repeatedly been reaffirmed.

See Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556.

The rights of the parties in respect of the $50 limitation depend upon contract, not estoppel.

Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526.

The tests of the validity of such a contract are: (a) that it shall be fair as between the parties; (b) that it shall not contravene the rule of public policy forbidding a common carrier to stipulate for exemption from responsibility for its own negligence; (c) that it shall not offend against the interstate commerce law. The contract in suit meets these tests.

Hart v. Pennsylvania R. Co. 112 U. S. 331, *28 L. ed. 717, 5* Sup. Ct. Rep. 151; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Hinton v. Dibbin, 2 Q. B. 646, 2 Gale & D. 36, 6 Jur. 601; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

The real question presented by a valuation of $50 as applied to a carload of automobiles is a question of the reasonableness of the tariff and regulations under which the shipment was made. Under the interstate commerce act that question is devolved upon the Interstate Commerce Commission, and the courts are without jurisdiction.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380; Boston & M. R. Co. v. Hooker, supra.

This court in Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267, has sustained the validity of a receipt identical in phraseology.

Mr. Justice Day delivered the opinion of the court:

This action was begun in the circuit court of the United States for the western district of New York, to recover $20,000 **[280]** for the loss of certain automobiles, shipped for the petitioner, hereinafter called the automobile company, by the respondent, hereinafter called the express company. The automobiles were shipped under circumstances to be detailed later, and the recovery of their value was sought for a breach of the contract to carry safely; failure to deliver according to the contract; for negligence; and for breach of the duty imposed upon the initial carrier by § 20 of the act to regulate commerce [24 Stat. at L. 379, chap. 104], the Carmack amendment (act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, Comp. Stat. 1913, § 8592). The automobiles were shipped and receipt was issued in the form usually used by the express companies, and containing the clause, "Nor in any event shall said company be held

liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated." The receipt is in the form of the one shown in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and is identical in form with the one involved in the case of Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267.

At the trial, the tariff book of the express company was marked for identification, but does not appear to have been embodied in the record. Counsel for the petitioner has, since the argument, filed a memorandum in explanation of the tariffs of the express company, and giving extracts therefrom, from which it appears that the rate for uncrated automobiles is double the merchandise rate, and that a through rate could be made by combination of rates from the point of shipment to the basing point, thence to destination. The rates filed, according to the memorandum, show merchandise rate from Chicago, a a basing point, to Buffalo, whence the goods were shipped, and shows merchandise rate, California section, page 20, from Chicago to San Francisco, and double the merchandise rate from Chicago to Buffalo, Chicago to San Francisco, would be $26.50 per hundred pounds, or, using [281] Kansas City as a basing point, taking the rates from Kansas City to Buffalo, Kansas City to San Francisco, the doubled rate would be the same amount per hundred pounds; also a valuation tariff, showing an additional charge for value in excess of $50, on rate of $8 per hundred pounds or over, 20 cents per hundred pounds, and, as the memorandum shows, if the value of the shipment may be taken to be $15,487.06, the rate for that sum in excess of $50 would be $31.

The automobile company was engaged in Buffalo in the manufacture, sale, and shipment of automobiles. It had frequently made use of the services of the express company, knew its course of business, had a copy of its tariffs and a book of its express receipts, and was familiar with the same; that is, it knew of the filed rate based upon weight or volume and the primary statement of value and consequent limitation upon the right to recover, as well as of the existence of a right to declare additional value, and secure, in case of loss, an additional amount of recovery. Indeed, the automobile company had frequently resorted to the method of making a declaration of increased value in order to secure an increased amount of recovery under the tariff.

In May, 1907, the automobile company requested the express company to furnish an express car for the shipment of a carload of automobiles to San Francisco. Negotiations followed between the officers of the two companies and an understanding was reached. An express car was furnished and put, as requested by the automobile company, upon a side track, where it could be by that company conveniently loaded. Four automobiles were then moved by their own power to the place of loading, and, together with an extra automobile body and other automobile parts, were loaded in the car by the shipper. When the car was loaded, triplicate receipts on the form usually used by the express company were made out and handed [282] to the agent of the automobile company, who read them, observed the absence of declaration of value and the limitation of $50, and said they were satisfactory Before the shipment moved, the agent of the express company again called the attention of the agent of the shipper to the absence of declared valuation, inquired whether such declaration had been intentionally omitted and whether the property was insured, and was told that the omission was intentional and that the property was insured. Indeed, it was shown beyond dispute that the failure to declare an additional value was the result of a change in the method of shipping its goods which had been shortly before put in practice by the automobile company, and that in this particular case the additional value was not declared because the shipment had been ordered from San Francisco, and the primary rate, that is, the one shown by the tariff on weight or volume, based upon the primary value, had been designated from San Francisco as the rate under which the goods should be carried. The car moved toward its destination, but never reached there because, while in transit on the rails of the Santa Fe Railway in the state of Missouri, it was destroyed by fire.

This suit was then brought by the automobile company against the express company and the Santa Fe Railway to recover $20,000, the alleged value of the automobiles. The suit as to the Santa Fe Railway was dismissed for want of service, and the case was tried only against the express company. As the case went to the jury, there was no denial of some liability on the part of the express company, the issue being whether its responsibility was limited to the sum of $50, the value of the automobiles as stated in the shipping receipt, which was in accordance with the published and filed tariff, or embraced the actual value of the things shipped. The trial court sustained the limitation in the receipt and directed a verdict for the $50 only, and after the affirmance by the circuit court [283] of ap-

peals of the second circuit of the judgment of the trial court, entered on such instructed verdict (110 C. C. A. 645, 189 Fed. 561), the writ of certiorari which brings the case before us was granted.

The case as made therefore presents the question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to $50, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled in case of loss to recover the full value of the property.

That contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence (New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624), was settled by this court in what is known as the Hart Case, 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151. In that case a recovery limited to $1,200 for 6 horses, one shown to be worth $15,000 and the others from $3,000 to $3,500 each, was sustained upon the principle that the contract did not relieve against the carrier's negligence, but limited the amount that might be recovered for such negligence, and it was there held that such contracts, when fairly made, did not contravene public policy. That case has been frequently followed since, and its doctrine applied in construing limited-liability contracts in connection with the Carmack amendment to the interstate commerce act. in a series of cases beginning with the Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148. See, in this connection, Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; [284] Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526; Atchison T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556.

The facts detailed show that there was nothing unfair in the contract. It was made between competent parties, dealing at arm's length, and for the purpose, so far as the shipper was concerned, of securing the *lower rate*, it deliberately took upon itself the risk of lessened recovery in case of loss for the sake of the lower rate.

Since the act to regulate commerce and its amendments have gone into effect, cases of this character must be decided in view of the provisions of the commerce act and its requirement that the carrier shall file its tariffs and rates, which shall be open to inspection, and shall prescribe rates applicable to all shippers alike, thus to effect one of the main purposes of the law often declared by this court, to require like treatment of all shippers and the charging of uniform rates equally applicable to all under like circumstances. As this court said in one of the earlier cases, considering the limited-liability contracts in connection with the provisions of the interstate commerce act (Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391):

"The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss or damage a greater sum. . . . To permit such a declared valuation to be overthrown by evidence *aliunde* the contract for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of [285] the rate applicable, and actual want of knowledge is no excuse."

But it is said, and this fact was the basis of the dissenting opinion in the circuit court of appeals, that there was no valuation at all in this case, and that the disproportion between the actual value of the automobiles shipped—about $15,000—and $50 demonstrates this fact, and it is insisted that what was done was merely an arbitrary and unreasonable limitation in the guise of valuation. This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property. None such was attempted in the Marcus-Neiman Case, the Croninger Case, or the Hooker Case. But the contract embodied in the receipt was sustained in the express company cases, because of the acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby.

In each of those cases the filed tariff showed an opportunity to the shipper to have a recovery in a greater value than was declared, thus making it optional with the shipper to ship at the lower rate, and not to avail himself of the right to greater recovery upon paying the higher rate named in the tariff. As the cases cited have held, so long as the tariff rate remains operative, the alternative rates based on value are deemed to be in force and controlling of the rights of the parties. Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 121, 58 L. ed. 868, 879, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526.

If the rates were unreasonable it is for the Commission to correct them upon proper proceedings. If this were not so, the interstate commerce act would fail to make effectual one of its prime objects, the prevention of discrimination among shippers. So long as the tariffs are adhered to, shippers under the same circumstances are treated alike.

Since the cause of action in this case arose, the Interstate [286]Commerce Commission has dealt with this subject (Re Express Rates, 28 Inters. Com. Rep. 131), and the fifty-dollar limitation and the classification based upon the valuation not exceeding $50 have been made applicable only to shipments weighing not more than 100 pounds. 28 Inters. Com. Rep. 137, 138. Under that weight the recovery is still limited to the sum of $50 unless a greater value is declared at the time of shipment, and the declared value in excess of the value specified paid for, or agreed to be paid for, under the schedule of charges for excess value. The limitation in the tariffs of $50 was made in view of the great mass of merchandise of moderate value in shipments received by the company, and for that reason has been permitted in modified form to remain in the published tariffs by the action of the Interstate Commerce Commission in the matter to which we have referred.

In the O'Connor Case, 232 U. S. 508, and the Robinson Case, 233 U. S. 173, above cited, the doctrine of the conclusiveness of the filed rates was said to have no application to attempted fraudulent acts or false billing. We do not perceive how this doctrine can be applicable to the present case. As the statement of facts shows, the transaction was open and above board, the character of the goods was plainly disclosed and known to both parties, and the rate paid was not attempted to be fixed upon actual value alone, but upon a value which the shipper was competent to agree to, in consideration of the lower rate. Indeed, if a recovery for full value was to be permitted in this case, the shipper itself would obtain an undue advantage in recovering such value, when it had purposely and intentionally taken the risk of less responsibility from the carrier, for a lower rate. Such result would bring about the very favoritism which it is the purpose of the commerce act to avoid.

The suggestion that there is a wrong to other shippers, who value their goods at their real worth, is answered by [287] the fact that this tariff was open to all under the same circumstances, and while it remained in force, any shipper who wished to take the risk of a recovery for very much less than the value of his goods might have the benefit of the shipment at the reduced rate. The contention that the carrier should have been held to account for the value of what was left of the automobiles after the wreck and fire does not seem to be presented by the pleadings, and was not involved in the disposition of the case ultimately made upon the contract of shipment. We find no error in the court's withholding that issue from the jury in the condition of the record

Finding no error in the judgment of the Circuit Court of Appeals, it is affirmed.

Mr. Justice Pitney dissenting.

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[288] GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY, Appt.,

v.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt. (No. 99.)

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, Appt.,

v.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt. (No. 100.)

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, Appt.,

v.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt. (No. 101.)

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, et al., Petitioners,

v.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY, et al., Respondents. (No. 292.)

(See S. C. Reporter's ed. 288-305.)

Appeal — from circuit court of appeals — controversy arising in bankruptcy proceedings.

1. A contest in a bankruptcy court

over the distribution of a fund in the hands of a trustee in bankruptcy, derived from the sale under an order of a state court of certain property which that court held had been conveyed by the bankrupt in fraud of antecedent creditors, is a controversy arising in bankruptcy proceedings, the decree in which is appealable as in other cases in equity under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), to the circuit court of appeals, and thence to the Supreme Court.

[For other cases, see Appeal and Error, 804, 805, 738, in Digest Sup. Ct. 1908.]

Bankruptcy — avoiding or preserving existing liens.

2. The existence long prior to the bankruptcy proceedings of the right of antecedent creditors, under Ky. Stat. § 1907, to set aside conveyances made by the bankrupt without consideration, does not prevent the application of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9651), § 67f, for avoiding or preserving for the benefit of the bankrupt estate liens obtained by legal proceedings within four months of the bankruptcy proceedings, where the suits to enforce such right were not begun nor the attachments therein issued until within the four months' period.

[For other cases, see Bankruptcy, 130–139a, 296–304, in Digest Sup. Ct. 1908.]

Bankruptcy — preservation of existing liens — distribution.

3. The preservation for the benefit of the estate by the bankruptcy court under the bankruptcy act of July 1, 1898 (30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9651), § 67f, of the existing lien of attachments issued in suits in a state court by antecedent creditors to set aside a conveyance by the bankrupt, made without consideration, entitles all the creditors of the bankrupt estate to participate in the distribution of the proceeds in the hands of the trustee in bankruptcy, derived from the sale of the property under an order of the state court, although that court, while avoiding the conveyance as to antecedent creditors, held that, under Ky. Stat. § 1907, it was valid as to subsequent creditors.

[For other cases, see Bankruptcy, VII.; X. c, in Digest Sup. Ct. 1908.]

Bankruptcy — distribution — parties.

4. The right of antecedent creditors under Ky. Stat. § 1907, to set aside, where made without consideration, a conveyance by their debtor which is valid as against subsequent creditors or purchasers, is not a debt given priority by a state law, within the meaning of the bankruptcy act of July 1, 1898 (30 Stat. at L. 563, chap. 541, Comp. Stat. 1913, § 9648), § 64b, subsec. 5, which provides that the debts of a bankrupt to have priority, except as therein provided, and to be paid in full out of bankrupt estates, are, among others, "debts owing to any person who, by the laws of the states or the United States, is entitled to priority."

[For other cases, see Bankruptcy, X. c, 3, in Digest Sup. Ct. 1908.]

Bankruptcy — jurisdiction — distribution.

5. The right of the bankruptcy court itself to distribute the proceeds in the hands of the trustee in bankruptcy, derived from the sale of property which the state courts, in a suit in which the trustee had intervened, held had been conveyed by the bankrupt in constructive fraud of antecedent creditors, cannot be deemed to have been excluded by anything in the proceedings of the state courts, where the highest state court distinctly affirmed the judgment of the lower court, directing the proceeds to be disposed of in the bankruptcy proceedings, although it further stated that only those creditors whose debts were created previous to the delivery and acceptance of the conveyance were entitled to participate in the proceeds realized from the sale of the property.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[Nos. 99, 100, 101, and 292.]

Argued December 4 and 7, 1914. Decided February 23, 1915.

THREE APPEALS from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which, reversing a decree of the District Court for the Western District of Kentucky, ordered the distribution of a fund in the hands of the trustee in bankruptcy among all the creditors of the bankrupt estate. Affirmed. Also a

PETITION for a Writ of Certiorari to review the same decree. Denied.

See same case below, on first appeal, 113 C. C. A. 627, 193 Fed. 841; on second appeal, 119 C. C. A. 363, 201 Fed. 31.

The facts are stated in the opinion.

Mr. D. H. Hughes argued the cause, and, with Messrs. J. G. Wheeler, C. K. Wheeler, and Alexander Gilchrist, filed a brief for appellants:

The circuit court of appeals erred in refusing to dismiss the appeal and petition for review.

Re Mueller, 68 C. C. A. 349, 135 Fed. 711; Re Loving, 224 U. S. 183, 56 L. ed. 725, 32 Sup. Ct. Rep. 446; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

The circuit court of appeals erred in holding that the recovery of property under Kentucky statutes § 1907 (Carroll's Stat. 1909 ed.), is for the benefit of creditors

NOTE.—Appellate jurisdiction of Federal Supreme Court over circuit courts of appeals —see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On appellate jurisdiction of Federal Supreme Court in bankruptcy cases, see note [illegible] *Stone*, 57 L. ed. U. S. 573.

whose debts were created after voluntary conveyance, as well as those whose debts were created before such conveyance, although no actual fraud was shown.

Atkins v. Globe Bank & T. Co. — Ky. —, 124 S. W. 879; Re Bennett, 82 C. C. A. 531, 153 Fed. 673; Re Allen, 96 Fed. 512; Merchants Nat. Bank v. Sexton, 228 U. S. 634, 57 L. ed. 998, 33 Sup. Ct. Rep. 725; Re Laird, 48 C. C. A. 538, 109 Fed. 550; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580; Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176.

Messrs. W. F. Bradshaw, Jr., and **J. D. Mocquot** argued the cause and filed a brief for appellee in Nos. 99, 100, and 101, and for petitioners in No. 292:

Sections 1906 and 1907, Kentucky Statutes, providing for the recovery of property conveyed in fraud of creditors, afford the creditor no lien upon the property except such as is acquired by and arises at the time of the institution of the creditor's action. The statute merely affords a cause of action. The creditor first attaching in such an action acquires a first lien on the property.

Stamper v. Hibbs, 94 Ky. 358, 22 S. W. 607.

Sections 2487 and 2488, Kentucky Statutes, provide for an inchoate lien which exists before the institution of the action. An action brought under those statutes is for the purpose of enforcing a pre-existing lien.

Re Bennett, 82 C. C. A. 531, 153 Fed. 673; Hall v. Guthrie, 31 Ky. L. Rep. 801, 103 S. W. 721; Winters v. Howell, 109 Ky. 163, 58 S. W. 591.

An action for the recovery of property fraudulently conveyed by a bankrupt vests exclusively in the trustee under the provisions of § 70a (4) and § 70e of the bankruptcy act of 1898.

Anderson v. Anderson, 80 Ky. 638; Annis v. Butterfield, 99 Me. 181, 58 Atl. 898; Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381; Bush v. Export Storage Co. 136 Fed. 918; Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363; Re Downing, 119 C. C. A. 431, 201 Fed. 93; Glenny v. Langdon, 98 U. S. 20, 25 L. ed. 43; Re Gray, 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. Supp. 618; Hunt v. Doyal, 128 Ga. 416, 57 S. E. 489; Moyer v. Dewey, 103 U. S. 301, 26 L. ed. 394; Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 10 L.R.A.(N.S.) 305, 56 S. E. 898, 11 Ann. Cas. 929; Trimble v. Woodhead, 102 U. S. 647, 26 L. ed. 290; Williamson v. Selden, 53 Minn. 73, 54 N. W. 1055.

Although, in the absence of bankruptcy, only certain creditors could, under the state law, recover the property fraudulently conveyed, when bankruptcy intervenes the property fraudulently conveyed passes as an asset of the estate, recoverable by the trustee for the benefit of the creditors generally.

Annis v. Butterfield, 99 Me. 181, 58 Atl. 898; Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363; Re Downing, 119 C. C. A. 431, 201 Fed. 93; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580.

A controversy between the trustee representing general creditors, on one hand, and a class of creditors claiming exclusive right to the fund realized from the recovery of property fraudulently conveyed, on the other hand, the property being at the time of the bankruptcy in the adverse possession of the fraudulent vendee, constitutes a controversy arising in a bankruptcy proceeding appealable under § 24a of the bankruptcy act.

Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Re Loving, 224 U. S. 183, 56 L. ed. 725, 32 Sup. Ct. Rep. 446; Re Mueller, 68 C. C. A. 349, 135 Fed. 711; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Thomas v. Sugarman, 218 U. S. 129, 54 L. ed. 967, 29 L.R.A.(N.S.) 250, 30 Sup. Ct. Rep. 650; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

If this controversy is to be regarded as involving only an order of distribution under the claim of the appellants to a lien upon the fund, it may then be held a bankruptcy proceeding reviewable in a revisory proceeding in the circuit court of appeals under § 24b, and reviewable by this court on writ of certiorari. But even in such event, inasmuch as the appeal involves both questions of law and of fact, and a writ of certiorari only a question of law, this court may retain jurisdiction upon either proceeding and determine the question of law.

Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Duryea Power Co. v. Sternbergh, 218 U. S. 299, 54 L. ed. 1047, 31 Sup. Ct. Rep. 25; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

By whatever means the fund representing property conveyed in fraud of creditors may be recovered and brought into the bankruptcy court, the disposition of the fund in bankruptcy is determined by the rule of distribution prevailing in the Federal jurisdiction and is not affected by any rule of distribu-

tion prevailing in the state court in the absence of bankruptcy.

Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 307, 56 L. ed. 213, 32 Sup. Ct. Rep. 96: First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580; Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176.

In the Supreme Court neither party will be permitted to abandon the issues made by them and considered by the inferior courts, and in this court take the position that their rights really rested upon other grounds not at issue.

Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118, 32 Sup. Ct. Rep. 67.

Messrs. W. F. Bradshaw, Jr., and J. D. Mocquot also filed a separate brief for appellee in Nos. 99, 100, and 101:

The lien acquired by the appellants in this matter was one acquired by operation of law, obtained in or pursuant to a suit or proceeding in equity.

25 Cyc. 662; Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 580; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Society of Shakers v. Watson, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 730; Enders v. Williams, 1 Met. (Ky.) 346; Trimble v. Ratcliff, 9 B. Mon. 514; Lyne v. Bank of Kentucky, 5 J. J. Marsh. 553.

Mr. Justice Day delivered the opinion of the court:

These are appeals from a decree of the United States circuit court of appeals for the sixth circuit, involving the distribution of a fund in the hands of a trustee in bankruptcy. The cases are reported in the circuit court of appeals in 113 C. C. A. 627, 193 Fed. 841 and 119 C. C. A. 363, 201 Fed. 31.

One Thomas J. Atkins, upon a petition in involuntary bankruptcy, was, on the 28th day of December, 1908, in the United States district court for the western district of Kentucky, duly adjudicated a bankrupt. On the 3d day of December, 1906, the bankrupt conveyed certain parcels of real estate to his son, Edward L. Atkins, and to the children of said Edward L. Atkins. At the time of the conveyance, the bankrupt was indebted to the Globe Bank & Trust Company of Paducah, Kentucky, the First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Indiana. He also became indebted, subsequently to the delivery of said deed, to certain other creditors in considerable sums. On August 25th, 1908, the Globe Bank & Trust Company instituted a suit in the [293] McCracken circuit court of Kentucky, against Atkins and the vendees of said deed, asking a judgment for the amount of the debt, and seeking to set aside the deed of conveyance as fraudulent and void, causing at the same time a writ of attachment to issue, which writ of attachment was levied upon the real estate described in the deed. Similar actions were begun by the First National Bank of Paducah, and the Old State National Bank of Evansville, asking the same relief, and in each of said actions attachments were issued and levied upon the same property. These suits were begun and the attachments issued within four months of the filing of the petition in bankruptcy. Arthur Y. Martin was duly elected trustee in bankruptcy. On January 9th, 1909, the Globe Bank & Trust Company filed its petition contesting the jurisdiction of the bankruptcy court, and its right to interfere with the proceedings in the state court for the recovery of the property as aforesaid. On January 20th, 1909, the Globe Bank & Trust Company filed a second petition, praying that the attachment lien be preserved under § 67f of the bankruptcy act [30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9651], and that it be permitted to make the trustee, A. Y. Martin, a defendant in said state court proceeding. On February 18th, 1909, the bankruptcy court entered an order, directing that the attachment lien be preserved for the benefit of the bankrupt estate, as provided in § 67f, and the referee, under authority from the court, made an order authorizing the trustee to institute an action for the recovery of the property and to intervene in the state court. Thereafter the trustee in bankruptcy instituted an action in the McCracken circuit court, praying that said conveyance be set aside as fraudulent and void as against creditors both before and after the execution and delivery of the deed, and setting up his right as trustee in bankruptcy to be substituted as the real party in interest in the suits then pending in the state court, and further praying that all rights of action and recoveries resulting [294] therefrom should be decreed to pass to the trustee as assets of the bankrupt estate.

The trustee's action was consolidated with the actions then pending in the McCracken circuit court, brought by the creditors, and thereafter judgment was rendered, adjudging that enough of the property be sold to realize the amount of the creditors' debts existing at the time of the conveyance, and adjudging that the conveyance was not actually fraudulent, and therefore not voidable as to creditors whose debts were created after the delivery of the deed, and that court appointed the trustee in bankruptcy a special commissioner to sell the property and hold all the proceeds subject to the further order of the court in the further and

final distribution of such proceeds, or subject to orders of the district court of the United States for the western district of Kentucky in its final distribution of the entire assets of the estate of such bankrupt, and the final adjustment and settlement of its affairs before such court in such proceedings now pending in bankruptcy, "and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt estate are hereby reserved and not determined, but left open for final adjudication among them in such proceedings in bankruptcy."

The trustee, as well as other parties, appealed to the Kentucky court of appeals, and that court rendered a judgment which we shall have occasion to consider more at length hereafter.

Subsequently, after the case had gone back to the McCracken circuit court from the court of appeals, the trustee filed his report of the sale of the property, and asked the court to direct him in the distribution of the proceeds of the sale in his hands. The Globe Bank & Trust Company, the First National Bank, and the Old State National Bank of Evansville, Indiana, claimed the whole of the fund recovered, and afterwards, upon the hearing, the [295] referee in bankruptcy entered an order, adjudging the three banks named, whose debts were created antecedent to the execution and delivery of the deed, entitled to the entire proceeds of the property, being the sum of $16,146.58,—a sum less than the total amount of their debts, leaving nothing for distribution among general creditors.

The district court affirmed the action of the referee, and an appeal was taken to the circuit court of appeals for the sixth circuit. A petition for review was filed at the same time.

It further appears that the Globe Bank & Trust Company, the First National Bank, and the Old State National Bank of Evansville, Indiana, had originally filed proofs of debts, setting up their claims in bankruptcy. Afterwards the banks filed amended and supplemental petitions and proofs of claims, setting up their alleged priority, to which pleadings the trustee filed a response, and the order appealed from was entered. The circuit court of appeals, treating the case as before it upon appeal (119 C. C. A. 363, 201 Fed. 31), entered a decree from which the present appeal is taken, reversing the order and decree of the district court, and finding that the trustee held the fund for distribution among all the creditors of the estate, and not for the exclusive benefit of the banks named as prior creditors.

It is first contended that this court has no jurisdiction because the case, if not properly before the circuit court of appeals by petition for review, should have been taken to that court under § 25 of the bankruptcy act, which section limits the time of appeal and requires special findings of fact in bankruptcy proceedings upon claims. We are of opinion, however, that the circuit court of appeals rightly decided (119 C. C. A. 363, 201 Fed. 31), that the contest over the distribution of this fund in the hands of the trustee was a controversy arising in the bankruptcy proceedings, and hence appealable as other cases in equity [296] under the circuit court of appeals act, and the appeals to the circuit court of appeals and this court were properly taken. Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Re Loving, 224 U. S. 183, 56 L. ed. 725, 32 Sup. Ct. Rep. 446; Re Mueller, 68 C. C. A. 349, 135 Fed. 711. This view of the jurisdiction of the court results in the denial of the petition for writ of certiorari in No. 292, submitted at the same time with the other cases now under consideration.

We come, then, to the cases upon their merits. Section 67f of the bankruptcy act provides:

"That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Under § 70a of the bankruptcy act, the trustee of the estate is vested with the title of the bankrupt, including all property transferred by him in fraud of creditors,

and [297] property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

Under § 70e, of the same act, the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and he is given authority to recover the property in the hands of anyone not a bona fide holder for value. The authority of the trustee to prosecute such actions does not seem to be questioned, and is ample for the purpose involved in the present suit. Security Warehousing Co. v. Hand, 206 U. S. 415, 425, 426, 51 L. ed. 1117, 1123, 1124, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789.

In the cases in the McCracken circuit court the property was charged to have been conveyed in fraud of creditors, and also involved a consideration of § 1907 of the Laws of Kentucky, which provides that:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefore, shall be void as to all his then-existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

It is the contention of the appellants that, as the conveyances were held in the Kentucky courts to be void under that section as to creditors whose debts and demands then existed, and because of the lack of actual fraud were held not to be void as to subsequent creditors or purchasers, they are entitled to priority because of the Kentucky statute and the judicial determinations of the state court.

The argument of the appellants does not depend upon the attachments alone, but is based upon their right to [298] subject the property, which right they contend existed long prior to the four months before the institution of the bankruptcy proceedings. But this argument must be considered in the light of the provisions of § 67f. That section distinctly provides that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, within four months of the filing of the petition in bankruptcy, shall be deemed null and void, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, as was done in this case, order that the right under the levy, judgment, attachment, or other lien be preserved for the benefit of the estate, in which event the same shall pass to and be preserved by the trustee for the benefit of the estate. Except for the attachments, the appellant banks had no specific lien upon the estate.

The attachments were doubtless sued out because, under the Kentucky statute, the parties were entitled thereby to gain a preference over other intervening creditors. Stamper v. Hibbs, 94 Ky. 358, 22 S. W. 607. The creditors had a right, it is true, to bring an action to set aside the conveyance as against existing creditors, but that right was not supported by any pre-existing lien. The suit was instituted to assert the creditors' rights against the property, and thus to subject it to the payment of their claims. The banks had a right of action for this purpose, but the property was not subjected to attachment, nor was there any action seeking to enforce rights in the property until the suits were begun, and that was within four months of the filing of the bankruptcy petition.

With attachments and liens thus acquired under state laws, the bankruptcy act dealt in provisions which were superior to all state laws upon the subject, in virtue of the [299] constitutional authority of Congress to enact a uniform system of bankruptcy. Re Watts, 190 U. S. 1, 27, 47 L. ed. 933, 941, 23 Sup. Ct. Rep. 718, 14 Am. Crim. Rep. 48; First Nat. Bank v. Staake, 202 U. S. 141, 148, 50 L. ed. 967, 970, 26 Sup. Ct. Rep. 580.

The difference, having the provisions of the act in view, between the beginning of a proceeding to assert liens that existed more than four months before the filing of the petition in bankruptcy, and the attempt to create them by attachment and other proceedings within four months, has been recognized in decisions of this court. In Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67, a proceeding to give effect to a prior lien existing more than four months before the filing of the bankruptcy petition was held not within the meaning of § 67f of the bankruptcy act. In Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363, Metcalf Bros. v. Barker was distinguished, and it was held that where a judgment in the state court had gone so far that an execution had been realized by sale of the debtor's property, and the money was yet in the hands of the sheriff, who held it under a restraining order issued in a suit by another creditor, and the time for the return of the execution had not yet elapsed, and a bank-

ruptcy petition was filed, the money did not belong to the judgment creditor, but passed under § 67f to the trustee in bankruptcy.

Section 67f came again under consideration in First Nat. Bank v. Staake, supra, in which property of the bankrupt had been seized by attachment within four months of the filing of the petition, and § 67, particularly subdivision f, was given full consideration, and it was held that where the benefit of the attachment was claimed by the trustee in bankruptcy, and the court had ordered the same to be preserved for the benefit of the estate, so much of the value of the property attached as was represented by the attachment passed to the trustee for the benefit of the entire body of creditors; that the statute recognized the lien of the attachment, but *distributed the lien* among the whole body of creditors. In that case it was contended [300] that § 67f referred only to liens upon property which, if such liens were annulled, would pass to the trustee in bankruptcy; but this court answered that argument by saying:

"This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken, doubtless this property would have been sold for the benefit of the attaching creditors." And in the *Staake* Case it was held that it made no difference that the diligent creditor was thereby deprived of a preference which would have been entirely legal under the state law. It was also held that the rule that the trustee stands in the shoes of the bankrupt has no application to § 67f, where the trustee is permitted to assert a superior right for the benefit of general creditors.

The section (67f) was again before this court in Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176. In that case, First Nat. Bank v. Staake, supra, was quoted with approval, and it was held that the right to preserve liens under subdivision f of § 67 extended to causes of action arising under state law, and that while the state court had the right to entertain suits to avoid conveyances under the law of the state, under § 67f the right to the lien of preference arising from the suit might, by authority of the court, be preserved for the benefit of the bankrupt estate. In that case it was further held that the proceeding and judgment in the state court did not prejudice the right of the bankruptcy court to determine among what creditors the property should be distributed, and that such questions were exclusively cognizable in the bankruptcy court. See also Rock Island Plow Co. v. Reardon, 222 U. S. 354, 56 L. ed. 231, 32 Sup. Ct. Rep. 164.

It is contended, however, by the appellants, that if we [301] assume that under § 67f of the bankrupty act, the property or its proceeds must come to the trustee, to be distributed by him under the orders of the bankruptcy court for the benefit of the estate, that inasmuch as, under the statute of Kentucky, creditors existing prior to the making of the deed in question were entitled to be preferred in the distribution of the proceeds, that right is protected by subsection 5 of § 64b of the bankruptcy act, which provides that the debts to have priority, except as therein provided, and to be paid in full out of bankrupt estates, are, among others, "debts owing to any person who, by the laws of the states or the United States, is entitled to priority;" and it is contended that this subsection, as considered by the circuit court of appeals of the sixth circuit in an opinion written by the late Justice Lurton, Re Bennett, 82 C. C. A. 531, 153 Fed. 673, maintains that position. But an examination of that case shows that it dealt with a statutory lien created under § 2487 of the Kentucky statutes, giving preferences to persons furnishing materials or supplies to manufacturing companies, and creating a lien upon the property in cases of such companies in case of an assignment for the benefit of creditors, or where the property is distributed among creditors by operation of law or by act of the company. It was held that such statutory lien gave a substantial right in or inchoate lien upon the property from the date of furnishing the material, within the spirit and meaning of § 64b, subsection 5, of the bankruptcy act. That case, and such cases as Re Laird, 48 C. C. A. 538, 109 Fed. 550, which dealt with labor claims, recognize the purpose of Congress in passing § 64b, to maintain statutory liens and preferences in such cases in the distribution of the bankrupt estate.

We are unable to see that the case has any bearing upon the construction of § 67f and the cases now under consideration. Under our system of bankruptcy, and in the [302] administration of assignments under state laws, there are certain persons, such as those furnishing material or labor, that, in certain specified ways, are given preference in the distribution of insolvent estates. It is a statutory lien of that kind with which the court dealt in Re Bennett.

Nor are we able to discover anything excluding the right of the bankruptcy court to itself distribute the property in the proceedings had in the Kentucky courts where

the trustee intervened on the order of the judge. In his petition filed in the McCracken circuit court, Martin, the trustee, alleged that the conveyances made by Atkins were fraudulent and should be set aside and the property adjudged to belong to the trustee of the bankrupt for the benefit of his creditors. He also set up the order which had been made under § 67f in the bankruptcy court. In that case, the McCracken circuit court held that the conveyances were not actually fraudulent, but were constructively so as to antecedent creditors. The property was ordered to be sold and the trustee in bankruptcy appointed special commissioner, and directed to hold the proceeds of the sale, subject to the order of final distribution of the bankruptcy court, as appears in that part of the judgment which we have already quoted. From that judgment the trustee and the grantees under the deed appealed. Upon the trustee's appeal the court, in its opinion (— Ky. —, 124 S. W. 879), held that the trustee had not been prejudiced by the failure of the court below to allow the action to be prosecuted in his name, nor had the judgment prejudiced his substantial right as trustee for the benefit of all the creditors. The court cited § 70 of the bankruptcy act, recognizing the right of the trustee, vested with the title of the bankrupt, to bring proceedings in the bankruptcy court or the state court for its recovery, and his right to be substituted by the court as plaintiff in any suits brought by creditors for the purpose of recovering [303] property fraudulently conveyed by the bankrupt, and in its opinion the court said (p. 881):

"It is true the trustee asked that the conveyance be declared fraudulent as to all creditors, both subsequent and antecedent, while the court only adjudged that the conveyance was fraudulent as to antecedent creditors, but we do not understand that the trustee in bankruptcy is complaining of the judgment in so far as it refused to adjudge the conveyance actually fraudulent. The judgment does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination, and we do not doubt that, when the court comes to make an order concerning the disposition of the proceeds in the hands of the trustee as special commissioner, it will direct that the proceeds be paid over to the trustee in bankruptcy, to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the court will do, we may with propriety in this opinion direct that it make such orders. If the court in the judgment *had undertaken* to divest the trustee of the control of this fund, we would upon this point reverse the judgment, with directions to proceed as indicated; but, as the court did not make such an order, we are of the opinion that, on the appeal of the trustee, the judgment of the lower court should be affirmed."

Therefore it appears that the judgment of the lower court, directing the proceeds to be disposed of in the bankruptcy proceedings, was distinctly affirmed, and the court declared that a contrary holding would have been reversed.

After dealing with the questions brought up by the grantees in the deed, it was held that the court below was wrong in fixing the date of the delivery and acceptance of the deed as of April 20th, 1907, instead of December 4th, 1906, and the court said (page 882):

"To what extent this will affect the judgment creditors [304] we are not advised; but only those creditors whose debts were created previous to December 4, 1906, are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed."

But we do not think in this part of the opinion the court of appeals of Kentucky intended in anywise to depart from its affirmation of the judgment of the circuit court upon the trustee's appeal and its explicit recognition of the authority of the bankruptcy court to control the disposition of the proceeds of the sale. The court did not consider § 67f in its opinion, nor did it give, as it had no authority so to do, any specific direction as to the distribution of the fund in the bankruptcy court. The McCracken circuit court, after the mandate came down, repeated its order as to the distribution in the bankruptcy court by reference to its former judgment, and the trustee applied for an order in that court, which was made and subsequently appealed from in the present case.

Under the bankruptcy act, when the conveyance was set aside, the lien or attachment being within four months of the bankruptcy proceeding, the bankrupt being then insolvent, of which fact no question is made, and the bankruptcy court having ordered that the lien be preserved for the benefit of creditors, it became good under the provisions of the bankruptcy act for the benefit of all the creditors of the estate. Under this order the bankruptcy court had acquired jurisdiction,—the state court had no possession of the property except such as the attachment gave,—and after the conveyance was set aside in the state court, for which purpose the state court is given con-

current jurisdiction by § 70 of the bankruptcy act, it had the right to determine for itself the disposition of the fund arising from the property sold. Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176.

[305] We find no error in the decree of the Circuit Court of Appeals, directing the distribution of the proceeds of the sale for the benefit of all the creditors of the estate. The decree is accordingly affirmed.

Mr. Justice Pitney and Mr. Justice McReynolds dissenting.

IOWA CENTRAL RAILWAY COMPANY, Plff. in Err.,
v.
L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased.

(See S. C. Reporter's ed. 305–311.)

Removal of causes — further proceedings in state court — suit not removable.

A state court did not lose jurisdiction of an action for death because the Federal circuit court to which a removal was sought made several orders continuing the case from term to term after the filing of the transcript in that court, and finally dismissed the suit for want of prosecution, where, upon the face of the record, the suit was not a removable one, as the prayer for recovery was for but $1,990, which amount the state court decided was the limit of recovery, notwithstanding an allegation in the petition that the decedent's estate was damaged in the sum of $10,000.

[For other cases, see Removal of Causes, X.: Judgment, 178–192, in Digest Sup. Ct. 1908.]

[No. 130.]

Submitted January 19, 1915. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the District Court of Mahaska County, in that state, in favor of plaintiff in an action for death. Affirmed.

See same case below, 157 Iowa, 493, 137 N. W. 1011.

The facts are stated in the opinion.

Messrs. William H. Bremner and F. M. Miner submitted the cause for plaintiff in error:

Under statutes similar to those of Iowa, it has been held that after an answer has been filed the prayer for relief becomes immaterial, and that the court may give judgment for such an amount as is consistent with the issues made and the proof.

Marquat v. Marquat, 12 N. Y. 336; 1 Bates, Pl. 315; Erck v. Omaha Nat. Bank, 43 Neb. 613, 62 N. W. 67.

The prayer for relief forms no part of the petition, and the sufficiency and character thereof, as well as the amount involved, must be determined from the facts stated, and not from the prayer for relief.

Henry v. McKittrick, 42 Kan. 485, 22 Pac. 576; Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157, 43 N. E. 279.

The supreme court of Iowa had, prior to the decision in this case, in various opinions, held that the plaintiff was not limited to the relief asked by his petition.

Wilson v. Miller, 16 Iowa, 111; Marder v. Wright, 70 Iowa, 42, 29 N. W. 799; Johnson v. Rider, 84 Iowa, 50, 50 N. W. 36.

The fact that no order directing the removal of the case was entered by the state court is immaterial, as such an order or the failure to make such an order does not affect the question of removal.

Brigham v. C. C. Thompson Lumber Co. 55 Fed. 881; South Carolina ex rel. Tillman v. Coosaw Minn. Co. 45 Fed. 804; La Page v. Day, 74 Fed. 977; Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Eisenmann v. Delemar's Nevada Gold Min. Co. 87 Fed. 248; Loop v. Winters, 115 Fed. 362; Van Horn v. Litchfield, 70 Iowa, 11, 29 N. W. 783; Byson v. McPherson, 71 Iowa, 437, 32 N. W. 418; Ohle v. Chicago & N. W. R. Co. 64 Iowa, 599, 21 N. W. 101; Chambers v. Illinois C. R. Co. 104 Iowa, 238, 73 N. W. 593; Turner v. Farmers' Loan & T. Co. 106 U. S. 552, 27 L. ed. 273, 1 Sup. Ct. Rep. 519; Marshall v. Holmes, 141 U. S. 589–595, 35 L. ed. 870–872, 12 Sup. Ct. Rep. 62; Myers v. Chicago & N. W. R. Co. 118 Iowa, 318, 91 N. W. 1076.

The case was actually removed, whether rightfully or not, and the state court lost jurisdiction by such removal, and could only recover jurisdiction by remand from the Federal court, or the commencement of a new action.

South Carolina ex rel. Tillman v. Coosaw Min. Co. 45 Fed. 804; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430.

If the Federal court was without jurisdiction because the case was not removable, the remedy of the plaintiff was by moving to remand in the Federal court.

Turner v. Farmers' Loan & T. Co. 106 U. S. 552, 555, 27 L. ed. 273, 274, 1 Sup. Ct. Rep. 519; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 218, 53 L. ed. 765, 770, 29 Sup. Ct. Rep. 430; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 559, 31 L. ed. 202, 205, 8 Sup. Ct. Rep.

217; Judge v. Arlen, 71 Iowa, 186, 32 N. W. 326

There being a petition for removal sufficient in all respects and in proper form, and a good and sufficient bond being filed, the case was removed, and thereafter only the Federal court could determine whether or not it had jurisdiction.

Van Horn v. Litchfield, 70 Iowa, 11, 29 N. W. 783; Byson v. McPherson, 71 Iowa, 437, 32 N. W. 418; Turner v. Farmers' Loan & T. Co. 106 U. S. 552, 27 L. ed. 273, 1 Sup. Ct. Rep. 519; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 27 Sup. Ct. Rep. 430; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552-559, 31 L. ed. 202-205, 8 Sup. Ct. Rep. 217; Ohle v. Chicago & N. W. R. Co. 64 Iowa, 599, 21 N. W. 101; Myers v. Chicago & N. W. R. Co. 118 Iowa, 312, 91 N. W. 1076; Carson v. Hyatt, 118 U. S. 279-287, 30 L. ed. 167-169, 6 Sup. Ct. Rep. 1050; Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; South Carolina ex rel. Tillman v. Coosaw Min. Co. 45 Fed. 804; Eisenmann v. Delemar's Nevada Gold Min. Co. 87 Fed. 248; Starr v. Chicago, R. I. & P. R. Co. 110 Fed. 3.

Even though no question as to the jurisdiction of the Federal court was raised in that court by any party to the litigation, it must be presumed that the court determined for itself that it had jurisdiction before proceeding with the case, and even though jurisdiction was improperly assumed, nevertheless, the judgment of the United States court is binding until reversed.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

Mr. E. Elmer Mitchell submitted the cause for defendant in error. Messrs. L. T. Shangle, D. C. Waggoner, and J. N. McCoy were on the brief:

The amount in controversy is the sum for which judgment is prayed, notwithstanding the allegation of the petition that the plaintiff therein has been damaged more than that sum. The statute requires the petition to contain a demand for the relief to which the plaintiff considers himself entitled, and, if for money, the amount thereof.

Bottorff v. Lewis, 121 Iowa, 27, 95 N. W. 262; Browne v. Kiel, 117 Iowa, 316, 90 N. W. 624; Marder v. Wright, 70 Iowa, 42, 29 N. W. 799; Tice v. Derby, 59 Iowa, 312, 13 N. W. 301; Lafever v. Stone, 55 Iowa, 49, 7 N. W. 400; Stark v. Port Blakely Mill. Co. 44 Wash. 309, 87 Pac. 339; Smith v. Northern P. R. Co. 3 N. D. 17, 53 N. W. 173; Lake Erie & W. R. Co. v. Juday, 19 Ind. App. 436, 49 N. E. 843; Lesh v. Bailey, 49 Ind. App. 254, 95 N. E. 341.

The amount in controversy must be determined from the pleadings, and the case cannot be removed from a state court to the United States circuit court unless it appears from the plaintiff's statement of his own case that the case is removable; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

Minnesota v. Northern Securities Co. 194 U. S. 64, 48 L. ed. 878, 24 Sup. Ct. Rep. 598; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 208, 39 L. ed. 672, 675, 15 Sup. Ct. Rep. 563; Tennessee v. Union & Planters' Bank, 152 U. S. 454-461, 38 L. ed. 511-514, 14 Sup. Ct. Rep. 654; Chappell v. Waterworth, 155 U. S. 102-107, 39 L. ed. 85, 87, 15 Sup. Ct. Rep. 34.

If it does not appear at the outset that the suit is one of which the Federal court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed.

Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 460, 43 L. ed. 766, 767, 19 Sup. Ct. Rep. 451; Minnesota v. Northern Securities Co. 194 U. S. 64, 48 L. ed. 878, 24 Sup. Ct. Rep. 598.

Consent of parties or the assumption thereof cannot confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the circuit court, the supreme court must, on its own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute.

Minnesota v. Northern Securities Co. supra; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Continental Nat. Bank v. Buford, 191 U. S. 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54.

The state court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner can remove the case to the Federal court as a matter of right.

Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; Pennsylvania Co. v. Bender, 148 U. S. 255, 37 L. ed. 441, 13 Sup. Ct. Rep. 591; Meyer v. Delaware R. Constr. Co. 100 U. S. 457, 25 L. ed. 593; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Gregory v. Hartley, 113 U. S. 745, 28 L. ed. 1150, 5 Sup. Ct. Rep. 743.

Mr. Justice Day delivered the opinion of the court:

The defendant in error, as administrator of Martin W. Lockhart, deceased, brought

an action on the 22d of September, 1905, in the district court of Iowa in and for the county of Mahaska, to recover damages for the alleged wrongful killing of his intestate. In the petition it was alleged that the estate had been damaged in the sum of $10,000, but judgment was asked only for the sum of $1,990. On September 30th, 1905, the railway company filed its answer, and on the 2d of October, 1905, within the time required by law, filed a petition for removal of the cause to the United States circuit court in and for the southern district of Iowa, on the ground of diversity of citizenship, alleging that the amount in controversy exceeded, with interest and costs, the sum of $2,000. The petition was accompanied by a bond.

The district court of Mahaska county did not enter any order directing the removal of the case, but, on the 29th of March, 1906, there was filed in the office of the clerk of the United States circuit court for the southern district of Iowa a transcript of the proceedings in the case. After the filing of the transcript in the Federal court, the case was continued from term to term, until, on the 5th day of December, 1908, an order to notice said case for trial at the next term, or show cause why it should not be dismissed, was entered, and the clerk was directed to mail and serve a copy of said order on the parties. On May 11, 1909, the circuit court of the United States entered an order dismissing the cause [309] for want of prosecution, at the plaintiff's costs, and the defendant was given judgment for its costs.

Afterwards, on the 19th of September, 1910, the plaintiff filed in the office of the district court of Mahaska county an amended and substituted petition. On the 6th of October, 1910, the district court entered an order, denying the application of the defendant for a removal of the cause to the United States court on the ground that the amount in controversy, exclusive of interest and costs, was less than $2,000. The application for removal was the one filed on October 2, 1905. On February 28, 1911, the railway company filed a motion to dismiss the case and to strike from the files all pleadings filed subsequent to the 1st of September, 1905, on the ground that the case had been removed to the United States circuit court. Attached to the motion was a certified copy of the record in the United States court. This motion was denied, and afterwards the case went to trial in the state court, and upon verdict of the jury a judgment was rendered against the railway company. The case was taken to the supreme court of Iowa, and that court affirmed the judgment of the lower court. 157 Iowa, 493, 137 N. W. 1011. The case was brought here, and the Federal question presented is whether the state court had lost its jurisdiction by the attempted removal to the United States circuit court.

It was, of course, essential to the removal of the case that the amount in controversy should have been sufficient to give the Federal court jurisdiction; that is to say, $2,000, exclusive of interest and costs. The state court had authority to determine the effect of the prayer to the petition, and it decided that, under the petition, no more than the amount prayed for could be recovered in the action, notwithstanding the statement that the estate had suffered damage in the sum $10,000. It is contended that, nevertheless, the proceedings in this case show that the case was removed to the United States circuit court, and inasmuch [310] as the state court lost jurisdiction, its subsequent proceedings are null and void.

In Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251, this court said, citing many previous cases, that certain principles relating to the removal of causes had been settled by the former adjudications of the court. One is that if the suit be one in which the circuit court could rightfully take jurisdiction, then upon the filing of the petition for removal in due time, with sufficient bond, the case is in law removed, and the state court loses jurisdiction to proceed further, and all subsequent proceedings therein are void. Furthermore, that if, upon the face of the record, including the petition for removal, the suit does not appear to be removable, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. See also the previous cases in this court cited in the Madisonville Traction Co.'s Case, at pages 244 and 245.

Applying these principles, it is apparent that the case now under consideration was not, upon the face of the record, a removable one. The prayer for recovery was for $1,990, and consequently the amount required to give jurisdiction to the Federal court was not involved. The filing of the petition and bond did not, therefore, effect a removal of the case.

But it is contended that this case is governed by Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430, because the United States court had determined, as it had authority to, that the case was a removable one, and that so long as that judgment stood, the state court had lost its jurisdiction, and had no power to proceed further in the

case. In the McCabe Case, where the state court refused to order the removal of the case upon a transcript being filed, the Federal court held that it had jurisdiction in the case, and proceeded to render a judgment therein; and when this adjudication was brought to the attention of the state [311] court, it refused to give it force, and proceeded to adjudge the case upon its own view of jurisdiction. This court held that the state court was bound to give weight to the judgment of the Federal court deciding that it had jurisdiction, and that the judgment, until reversed, was conclusive upon the state court as to the jurisdiction of the Federal court.

But no such case is presented here. The Federal court, it is true, more than once made an order continuing the case, and finally dismissed it for want of prosecution. The question of its authority to take jurisdiction was never presented or decided in the Federal court, and there is nothing in the orders made conclusive of that question in such sense that the state court was bound to respect it.

As the record upon its face made no case for removal, the state court was right in retaining its jurisdiction, and proceeding to determine and adjudge the case. The judgment is affirmed.

AMERICAN CAR & FOUNDRY COMPANY, Plff. in Err.,
v.
AGNES KETTELHAKE.

(See S. C. Reporter's ed. 311-317.)

Removal of causes — separable controversy — involuntary nonsuit as to some defendants.

An action against a nonresident corporation in which two individual citizens of the same state as plaintiff have properly been joined as defendants is not converted into a separable controversy for the purpose of removal to a Federal court because, after the state court has sustained demurrers to the evidence interposed by the individual defendants, the plaintiff takes an involuntary nonsuit as to such defendants, with leave to move to set aside the same, conformably to the local practice, which gives the right to an appeal from an order overruling such a motion.

[For other cases, see Removal of Causes, IV. c, in Digest Sup. Ct. 1908.]

[No. 138.]

Argued January 20, 1915. Decided February 23, 1915.

IN ERROR to the St. Louis Court of Appeals of the State of Missouri to review a judgment holding that an action for death, brought in the Circuit Court of the City of St. Louis, was not removable to a Federal court. Affirmed.

See same case below, 171 Mo. App. 528, 153 S. W. 552.

The facts are stated in the opinion.

Mr. William R. Gentry argued the cause, and, with Messrs. M. F. Watts and Edwin W. Lee, filed a brief for plaintiff in error:

A servant whose misfeasance causes injury to another servant is jointly liable with his master for such misfeasance, though not for nonfeasance.

Jewell v. Kansas City Bolt & Nut Co. 231 Mo. 206, 140 Am. St. Rep. 515, 132 S. W. 703; McGinnis v. Chicago, R. I. & P. R. Co. 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Harriman v. Stowe, 57 Mo. 93; Edge v. Southwest Missouri Electric R. Co. 206 Mo. 471, 104 S. W. 90; Lanning v. Chicago G. W. R. Co. 196 Mo. 647, 94 S. W. 491; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250.

Whether the petition states a joint cause of action is a question of state law.

Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250; Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 57 L. ed. 1090, 33 Sup. Ct. Rep. 684.

Up to the time when plaintiff took a nonsuit as to the individual defendants, Martin and Eilers, there was never a moment, from the time of the institution of the suit, when the right of removal existed. Hence, plaintiff in error was in no way guilty of neglect nor out of time in making its application for removal, nor had the right of removal been waived or lost by reason of not having been exercised earlier.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 53 L. ed. 551, 29 Sup. Ct. Rep. 366.

When plaintiff took her nonsuit as to the two individual defendants, Martin and Eilers, it had the very same effect, so far as the stage of the proceedings was then concerned, as if she had entered a voluntary dismissal as to the defendants named.

NOTE.—As to removal of causes in separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Sloane v. Anderson, 29 L. ed. U. S. 899; Butler v. National Home, 36 L. ed. U. S. 346; Torrence v. Shedd, 36 L. ed. U. S. 528; and Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195.

Wiethaupt v. St. Louis, 158 Mo. 655, 59 S. W. 960; 6 Enc. Pl. & Pr. 978; Mason v. Kansas City Belt R. Co. 226 Mo. 212, 26 L.R.A.(N.S.) 914, 125 S. W. 1128; Wetmore v. Crouch, 188 Mo. 653, 87 S. W. 954, 3 Ann. Cas. 94; National Waterworks Co. v. School Dist. 23 Mo. App. 235; West v. McMullen, 112 Mo. 409, 20 S. W. 628; Hudson-Kimberly Pub. Co. v. Young, 90 Mo. App. 513; Meddis v. Wilson, 175 Mo. 126, 74 S. W. 984; Wing v. Union L. Ins. Co. 167 Mo. App. 18, 150 S. W. 1121; Haldeman v. United States, 91 U. S. 585, 23 L. ed. 455.

Suppose plaintiff had voluntarily dismissed as to defendants Eilers and Martin at any time before the case was submitted to the jury. There can be no doubt that the defendant American Car & Foundry Company would then immediately have become entitled to the right to remove the cause to the Federal court.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

It has always been the law in Missouri that a trial court has no power to force plaintiff to a nonsuit. The most the court can do is to direct a verdict against plaintiff. If plaintiff wants to keep the defendant in he can do so, or he can let a defendant out by nonsuit; but the court can never require him to take a nonsuit.

Wells v. Gaty, 8 Mo. 685; Clark v. The Mound City, 9 Mo. 146; Clark v. The Mound City, 9 Mo. 148; Welles v. Biddle, 9 Mo. 160; Clark v. Hannibal & St. J. R. Co. 36 Mo. 215.

The right of removal must be determined in this case by the situation as it existed at the moment when the application for removal and the removal bond were filed.

Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 415, 426, 55 L. ed. 521, 526, 31 Sup. Ct. Rep. 460; Wilson v. Oswego Twp. 151 U. S. 67, 38 L. ed. 75, 14 Sup. Ct. Rep. 259; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514.

Mr. **George Safford** argued the cause and filed a brief for defendant in error:

What constitutes an involuntary nonsuit and what constitutes a termination of the suit as to Martin are questions of state law concerning which the decisions of the Missouri court are binding upon this court.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147.

An involuntary nonsuit is one prompted by an adverse ruling which strikes at the root of the case and precludes recovery.

Nivert v. Wabash R. Co. 232 Mo. 626, 135 S. W. 33; Lewis v. Center Creek Min. Co. 199 Mo. 463, 97 S. W. 938; Sachse v. Clingingsmith, 97 Mo. 406, 11 S. W. 69; Chouteau v. Rowse, 90 Mo. 191, 2 S. W. 209.

The court's action constituted a final ruling upon Martin's demurrer, struck at the root of plaintiff's case, precluded recovery against Martin, and, plaintiff's exception having been taken and allowed, rendered plaintiff's nonsuit involuntary. Plaintiff then had an opportunity to secure judgment against the American Car & Foundry Company and in favor of defendant Martin, from which, as to Martin, she could appeal, holding the judgment as to the American Car & Foundry Company, if favorable, in abeyance, until final judgment as to Martin, or she could proceed to judgment against the American Car & Foundry Company, and as to Martin take an involuntary nonsuit, with leave to move to set the same aside and reinstate the cause upon the docket, and if unable, on motion, to secure a reversal of the adverse ruling of the lower court, appeal to the court of last resort for redress.

Lewis v. Center Creek Min. Co. 199 Mo. 463, 97 S. W. 938; Williams v. Finks, 156 Mo. 597, 57 S. W. 732; Sachse v. Clingingsmith, 97 Mo. 406, 11 S. W. 69; Chouteau v. Rowse, 90 Mo. 191, 2 S. W. 209; Overall v. Ellis, 32 Mo. 322; Dowd v. Winters, 20 Mo. 361; Hart v. Rector, 7 Mo. 532.

The suit as to defendant Martin is not yet determined. The nonsuit as to Martin was involuntary, and taken "with leave." Plaintiff appealed from the decision of the trial court. Until the appeal is determined the controversy is partly between plaintiff and Martin, and not wholly between citizens of different states.

Wetmore v. Crouch, 188 Mo. 647, 87 S. W. 954, 3 Ann. Cas. 94; Hewitt v. Steele, 136 Mo. 327, 38 S. W. 82; West v. McMullen, 112 Mo. 405, 20 S. W. 628; Chouteau v. Rowse, 90 Mo. 191, 2 S. W. 209; State v. Kessler, 15 Mo. App. 590; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478. See also Lewis v. Center Creek Min. Co. 199 Mo. 463, 97 S. W. 938; Williams v. Finks, 156 Mo. 597, 57 S. W. 732; Sachse v. Clingingsmith, 97 Mo. 406, 11 S. W. 69; Overall v. Ellis, 32 Mo. 322; Dowd v. Winters, 20 Mo. 361; Hart v. Rector, 7 Mo. 532.

The case comes clearly within the rule laid down in—

Lathrop, S. & H. Co. v. Interior Constr. & Improv. Co. 215 U. S. 247, 54 L. ed. 177, 30 Sup. Ct. Rep. 76; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Kansas City Suburban Belt R. Co. v. Herman, 187 U. S. 63, 47 L. ed. 76, 23 Sup. Ct. Rep. 24; Knott v. McGilvray, 124 Cal. 128, 56 Pac. 789, 6 Am. Neg. Rep. 7, 179 U. S. 680, 45 L. ed. 383, 21 Sup. Ct. Rep. 917; Bank of Maysville v. Claypool, 120 U. S. 268, 30 L. ed. 632, 7 Sup. Ct. Rep. 545; Gregory v. Hartley,

defendants as to leave a removable controversy wholly between the plaintiff and a nonresident corporation.

The element upon which the decision in the Powers Case depended—the voluntary dismissal and consequent conclusion of the suit in the state court as to the resident defendants—is not present in this case.

We think the Court of Appeals of the City of St. Louis correctly ruled that the case is not a removable one, and its judgment is affirmed.

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[318] UNITED STATES OF AMERICA, by James C. McReynolds, Attorney General, Plff. in Err., Appt.,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(See S. C. Reporter's ed. 318–338.)

Appeal — mode of review — mandamus.

1. Writ of error, not appeal, is the proper mode of reviewing a judgment of a Federal district court refusing a writ of mandamus which the United States undertook to obtain under the authority of the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8592), requiring carriers to permit inspection and examination of their accounts, reports, and memoranda by special agents of the Interstate Commerce Commission.

[For other cases, see Appeal and Error, 689, 690, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — inspection of carrier's papers.

2. The right of special agents or examiners for the Interstate Commerce Commission to inspect carriers' accounts, records, and memoranda was not conferred by the act of February 4, 1887 (24 Stat. at L. 383, chap. 104), § 12, which deals with the production of evidence in certain cases.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — inspection of carrier's papers — correspondence.

3. The compulsory inspection of the correspondence of an interstate railway carrier, relative to its business, was not contemplated by the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8592), giving the Interstate Commerce Commission power to prescribe the forms of accounts, records, and memoranda which such carriers shall keep, to which the Commission shall have access at all times, with authority to employ special agents or examiners to inspect and examine any and all accounts, records, and memoranda kept by such carriers; nor is there anything in the use of the word "documents" in the further amendment to that section by the act of February 25, 1909 (35 Stat. at L. 649, chap. 193, Comp. Stat. 1913, § 8592), indicating an intention to make such section broad enough to include correspondence.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — inspection of carrier's papers — retrospective effect of statute.

4. The right to inspect and examine the accounts, records, and memoranda of interstate railway carriers, given to the Interstate Commerce Commission by the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8592), was not intended to be limited to such accounts, records, and memoranda only as were made after the passage of the act, but it was intended that an examination be permitted of all such accounts, records, and memoranda for the purpose of carrying out the provisions of the act.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission; Retrospective statutes, see Statutes, II. v. in Digest Sup. Ct. 1908.]

Appeal — judgment — reversal to permit grant of partial relief.

5. An order of a Federal district court, properly refusing to grant in the broad terms prayed for in the petition and the motion for the writ, a writ of mandamus sought by the United States under the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8592), requiring carriers to permit the inspection and examination of accounts, reports, and memoranda, by special agents of the Interstate Commerce Commission, should not be reversed by the Federal Supreme Court so as to permit a grant of relief within the limits which the statute permits, where the petition was dismissed by the court below without prejudice, so that a new proceeding may be started, asking for such inspection as the law allows.

[For other cases, see Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

[No. 499.]

Argued January 5 and 6, 1915. Decided February 23, 1915.

IN ERROR to and APPEAL from the United States District Court for the Western District of Kentucky to review an order refusing mandamus to compel carriers to permit the inspection of their accounts, records, memoranda, and correspondence by special agents of the Interstate Commerce

NOTE.—On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

Commission. Appeal dismissed. Judgment affirmed on writ of error.

See same case below, 212 Fed. 486.

The facts are stated in the opinion.

Solicitor General Davis argued the cause, and, with Mr. Theodor Megaarden, filed a brief for the United States:

Information of the relations existing between carriers is indispensable and necessary for the performance by the Commission of its proper duties.

(a) The preservation of competition is one of the purposes of the act, and its existence or nonexistence bears directly upon the questions of discrimination, reasonableness of rates, and similar matters.

Gerke Brewing Co. v. Louisville & N. R. Co. 5 I. C. C. Rep. 596; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 276, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

The question is also important in ascertaining whether charges fixed by a carrier are just and reasonable within § 1 of the act.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493.

The matter of competition is also to be considered in applying the provisions of §§ 3, 4 of the act with reference to undue or unreasonable preference to persons, etc., and the long and short haul clause.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 164, 42 L. ed. 414, 422, 18 Sup. Ct. Rep. 45.

The subject is likewise material in connection with § 5 (pooling section) of the act.

Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 505; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 39 C. C. A. 413, 99 Fed. 52.

(b) Whether a carrier is subject to the act at all frequently depends upon the relation between it and other carriers.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

(c) The inquiry of the Commission is proper as a basis for legislative recommendations, for legal prosecutions, and for many other purposes.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 474, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 208, 56 L. ed. 729, 735, 32 Sup. Ct. Rep. 436.

The plenary power of the Commission has been repeatedly recognized and upheld.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 474, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 208, 56 L. ed. 729, 735, 32 Sup. Ct. Rep. 436; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 438, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

Even if the investigation should divulge violations of the anti-trust act rather than of the act to regulate commerce, that would not end the Commissioner's power.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 93, 57 L. ed. 431, 434, 33 Sup. Ct. Rep. 185.

No right of privacy attaches to corporate records as against the visitatorial power of the state or of the national government where the corporate activities are in the domain subject to the powers of Congress.

Grant v. United States, 227 U. S. 74, 57 L. ed. 423, 33 Sup. Ct. Rep. 190; Wheeler v. United States, 226 U. S. 478, 57 L. ed. 309, 33 Sup. Ct. Rep. 158; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558.

A corporation is not entitled to plead the immunity of the 5th Amendment.

Hale v. Henkel, 201 U. S. 43, 74, 75, 50 L. ed. 652, 665, 666, 26 Sup. Ct. Rep. 370.

And it is doubtful whether it can plead the immunity of the 4th Amendment.

Ibid.; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

A corporation cannot restrict the production of its books and papers on the ground of self-crimination.

Wilson v. United States, 221 U. S. 361, 382, 55 L. ed. 771, 780, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558.

Having the power to regulate, Congress must also be held to have the power to determine what means are appropriate for carrying into effect its control.

Flint v. Stone Tracy Co. 220 U. S. 107, 176, 55 L. ed. 389, 423, 31 Sup. Ct. Rep. 342.

The act is not retrospective in a legal sense simply because it affords access to pre-existing documents.

Society for Propagation of Gospel v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156; Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.

There are no constitutional restrictions upon Congress in the matter of retrospective legislation as there are in some of the states.

Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Sinking-Fund Cases, 99 U. S. 700, 25 L. ed. 496.

Reason dictates and practice has now

established that the court shall conform the remedy to the facts alleged and proved.

West Virginia Northern R. Co. v. United States, 67 C. C. A. 220, 134 Fed. 198.

Mr. **Joseph W. Folk** argued the cause and filed a brief for the Interstate Commerce Commission:

The ordinary rules of evidence are not concerned in this proceeding. Whatever privilege there may be under such rules cannot apply against the visitatorial power of the government.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 211, 56 L. ed. 736, 32 Sup. Ct. Rep. 436; Wilson v. United States, 221 U. S. 384, 55 L. ed. 780, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. 673, 21 L. ed. 380; Olcott v. Fond du Lac County, 16 Wall. 678, 695, 21 L. ed. 382, 388; Louisville & N. R. Co. v. Kentucky, 161 U. S. 696, 40 L. ed. 857, 16 Sup. Ct. Rep. 714; Smyth v. Ames, 169 U. S. 544, 42 L. ed. 848, 18 Sup. Ct. Rep. 418; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 296, 45 L. ed. 199, 21 Sup. Ct. Rep. 115; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 588, 50 L. ed. 607, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The Federal government has the same power of visitation over carriers engaged in interstate commerce as a state has with respect to the franchises granted by the state.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 211, 56 L. ed. 736, 32 Sup. Ct. Rep. 436; Wilson v. United States, 221 U. S. 384, 55 L. ed. 789, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558: Hale v. Henkel, 201 U. S. 75, 50 L. ed. 665, 26 Sup. Ct. Rep. 370.

This power of visitation by the government to the public carriers has been delegated to the Interstate Commerce Commission by the act to regulate commerce.

This carries with it authority to examine the records of such carriers.

Hale v. Henkel, 201 U. S. 74, 50 L. ed. 665, 26 Sup. Ct. Rep. 370.

The correspondence of a common carrier is a part of its records.

Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558.

It is the correspondence of the railroad the Commission seeks to examine, not the personal correspondence of its officers, agents, or attorneys. The fact that some of the correspondence may be between the railroad and its officers, agents, and attorneys does not exempt it from scrutiny. No individual constitutional rights are involved.

Interstate Commerce Commission v. Baird, 194 U. S. 45, 48 L. ed. 869, 24 Sup. Ct. Rep. 563; Adams v. New York, 192 U. S. 598, 48 L. ed. 580, 24 Sup. Ct. Rep. 372; Consolidated Rendering Co. v. Vermont, 207 U. S. 553, 52 L. ed. 335, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; Hammond Packing Co. v. Arkansas, 212 U. S. 347, 53 L. ed. 543, 29 Sup. Ct. Rep. 370; Wilson v United States, 221 U. S. 380, 55 L. ed. 779, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; Grant v. United States, 227 U. S. 74, 57 L. ed. 423, 33 Sup. Ct. Rep. 190; Wheeler v. United States, 226 U. S. 478, 57 L. ed. 309, 33 Sup. Ct. Rep. 158; Interstate Commerce Commission v. Brimson, 154 U. S. 489, 38 L. ed. 1061, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

That some of the business covered by the correspondence may not be within the regulatory powers of the Commission is immaterial.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436.

The prayer of the petition specifies clearly and definitely the exact relief desired; that is, in the language of the statute, access to the accounts, records, and memoranda of the defendant. This is a sufficient description in a petition for mandamus to enforce the visitatorial power of the Commission under the act to regulate commerce.

Consolidated Rendering Co. v. Vermont, 207 U. S. 553, 52 L. ed. 335, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658.

Mr. **Helm Bruce** argued the cause, and, with Messrs. Henry L. Stone, William A. Colston, and Edward S. Jouett, filed a brief for the Louisville & Nashville Railroad Company:

The Commission had no authority to make the examination it sought to make.

Traders' & T. Union v. Philadelphia & R. R. Co. 1 Inters. Com. Rep. 374; New York Produce Exch. v. Baltimore & O. R. Co. 7 Inters. Com. Rep. 658; Sprigg v. Baltimore & O. R. Co. 8 Inters. Com. Rep. 456; Haines v. Chicago, R. I. & P. R. Co. 13 Inters. Com. Rep. 214; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 216, 221, 40 L. ed. 946, 948, 5 Inters. Com. Rep. 405,

16 Sup. Ct. Rep. 666; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443; Harriman v. Interstate Commerce Commission, 211 U. S. 418, 53 L. ed. 262, 29 Sup. Ct. Rep. 115.

There is a difference in the purposes of the act to regulate commerce and the anti-trust act.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Northern Securities Co. v. United States, 193 U. S. 331, 48 L. ed. 697, 24 Sup. Ct. Rep. 436; United States v. Trans-Missouri Freight Asso. 166 U. S. 315, 41 L. ed. 1018, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 565, 43 L. ed. 286, 19 Sup. Ct. Rep. 25.

The Commission's inquisitorial powers are not without limit.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 476, 479, 38 L. ed. 1047, 1057, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Section 20 of the act to regulate commerce as amended by the Hepburn act of 1906 does not give the Commission access to the correspondence of the carrier.

Harriman v. Interstate Commerce Commission, 211 U. S. 407, 418, 419, 53 L. ed. 253, 262, 263, 29 Sup. Ct. Rep. 115.

It is unbelievable that, by an act which merely provides that the Commission shall "have access to all accounts, records, and memoranda kept by carriers subject to this act," and which act was introduced into Congress accompanied by a report from the Interstate Commerce Commission that "an efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe the form in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants," Congress could possibly have intended to make public correspondence between the railways and their legal counsel, and thus by these terms, or by any terms short of express unequivocal declaration, to abolish as to this class of persons, a privilege so universally understood, so ancient, so important, and so firmly "imbedded in our jurisprudence."

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 459, 24 L. ed. 253; Blackburn v. Crawford, 3 Wall. 175, 18 L. ed. 186; 4 Wigmore, Ev. § 2290, p. 3193.

The familiar rule of construction ordinarily referred to briefly as *noscitur a sociis* throws light upon the construction of the expression "accounts, records, and memoranda," as used in the act under consideration.

2 Lewis's Sutherland, Stat. Constr. 2d ed. § 414; Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728.

Penal statutes are strictly construed.

United States v. Wiltberger, 5 Wheat. 96, 5 L. ed. 42.

Statutes are construed, if possible, to avoid reasonable doubts as to constitutionality.

Harriman v. Interstate Commerce Commission, 211 U. S. 422, 53 L. ed. 264, 29 Sup. Ct. Rep. 115.

The search of defendant's papers sought by the Commission's examiners would, if permitted, be an unreasonable search, contrary to the Federal Constitution, to the protection of which corporations are entitled.

Hale v. Henkel, 201 U. S. 43, 75, 76, 50 L. ed. 652, 665, 666, 26 Sup. Ct. Rep. 370; Re Pacific R. Commission, 32 Fed. 241.

Not much advance is made toward a clear understanding of the nature and extent of the power which Congress or the Commission, under authority of Congress, has in the matter of the examination of such papers by calling the power "visitatorial." This is a common-law term applied to the power which a "visitor" of a corporation exercised, and as we understand the nature of the power of a visitor, or the visitatorial power, it was a judicial power, the power to determine controversies over the appointment or removal of officers, or charges of mismanagement, or of departure from the purposes fixed by the charter of the corporation, or the rules laid down for its government, and matters of similar nature.

Philips v. Bury, 2 T. R. 346; Tudor, Charities & Mortmain, p. 68; Atty. Gen. v. Talbot, 3 Atk. 662, 1 Ves. Jr. 78; Bishop of Ely v. Bentley, 2 Bro. P. C. 220; Ex parte Berkhampstead Free School, 2 Ves. & B. 134. 13 Revised Rep. 43; 1 Bl. Com. p. 481; 2 Bacon, Abr. (Bouvier's ed.) p. 477; MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 3 L.R.A.(N.S.) 227, 61 Atl. 1027; Guthrie v. Harkness, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4, 4 Ann. Cas. 433; Rex v. Bishop of Ely, 2 T. R. 290.

Furthermore, the jurisdiction of the visitor of a corporation was confined to the internal affairs of the corporation, such as the election or removal of officers, or questions of violation of or departure from the purposes of the corporation. No charge of violation by the corporation of the general law of the land could ever be tried by any visitor, or in the exercise of any visitatorial power. Such matters could only be tried in the court of King's bench, exercising other than visitatorial powers.

2 Bacon, Abr. 480; Rex v. St. John's College, 4 Mod. 233.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from and writ of error to the district court of the United States for the western district of Kentucky, refusing a writ of mandamus which the United States undertook to obtain under authority of § 20 of the act to regulate commerce [24 Stat. at L. 386, chap. 104], as amended, 34 Stat. at L. 584, 594, 595, chap. 3591, Comp. Stat. 1913, §§ 8563, 8592. In view of the character of an action in mandamus, we are of opinion that the review is by writ of error. Columbian Ins. Co. v. Wheelright, 7 Wheat. 534, 5 L. ed. 516; Kentucky v. Dennison, 24 How. 66, 97, 16 L. ed. 717, 725; [324] High, Extr. Leg. Rem. §§ 6, 557. The appeal is therefore dismissed.

The petition sets forth the authority conferred upon the Commission by § 20 of the act, and also § 12, and embodies a copy of a resolution passed by the Senate of the United States, which is given in the margin.[1] It further [325] states that for the purpose of enabling the Commission to perform its duties, it appointed two special agents and duly authorized them to inspect and examine the accounts, records, and memoranda of the defendant railway company; that on February 4, 1914, one of said agents demanded of the vice president of the defendant, the officer [326] in charge and control of the accounts, records, and memoranda of the company, and to and of other officers, access to and opportunity to examine the accounts, records, and memoranda kept by the defendant prior to August 28, 1906 [the Hepburn act took effect August 29, 1906], and that the same was refused by the officers of the company; that on February 4, 1914, a demand was made for an opportunity to examine the accounts, records, and memoranda of the defendant on and subsequent to August 28th, 1906, which was refused; and a writ of mandamus was asked against the company, requiring it to give access to its accounts, records, and memoranda, and its correspondence and copies of correspondence, and indexes thereto, and to afford opportunity to examine the same to the commission and its agents and examiners, and to give such access to and opportunity to examine the said accounts, records, and memoranda made and kept by and for said [327] defendant both before, on, and subsequent to August 28, 1906, including correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda.

To this petition the defendant answered, setting out that it did, prior to the beginning of the suit, give the examiners

1 "Resolution.

"Resolved, That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—

"First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga & St. Louis Railway is owned or controlled by the Louisville & Nashville Railroad;

"Second. What other railroad or railroads in the territory served by the Louisville & Nashville Railroad and the Nashville Chattanooga & St. Louis Railway have been purchased, leased, controlled, or arrangements entered into with for the purpose of controlling by either the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway;

"Third. Whether the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

"Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

"Fifth. The terms of the lease of the Nashville & Decatur Railroad by the Louis- & Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville & Decatur Railroad, and of the Lewisburg & Northern Railroad are owned by the Louisville & Nashville Railroad, or any of its subsidiaries or holding companies;

"Sixth. Whether the Nashville & Decatur Railroad, the Lewisburg & Northern Railroad, and the Louisville & Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

"Seventh. Any other fact or facts showing or tending to show the further relations between the Louisville & Nashville Railroad, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

"Eighth. Any fact or facts showing or tending to show (a) the relations between the Louisville & Nashville Railroad, the Nashville, Chattanooga, & St. Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah, & Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of

access to the correspondence other than privileged communications, and that after this suit it did refuse and does now refuse to give to said commission or to said agent access to or opportunity to examine correspondence received by it before, on, or subsequent to August 28, 1906, or copies of correspondence sent out by defendant before, on, or subsequent to that date, or the indexes kept with respect to said outgoing and incoming correspondence by defendant (except correspondence as to passes issued since January 1, 1911), and the defendant set up that its correspondence contains private communications between its various officers and agents regarding various matters which did not in any way pertain to the provisions of the act to regulate commerce, nor to any act of Congress, the provisions of which it is made the duty of the Interstate Commerce Commission to enforce, and avers that said correspondence contains communications of a private and confidential nature between the president of the railway company and the heads of the various departments, relative to its internal affairs, to its proposed constructions and extensions in the future, to its policies with competing and rival roads, to its relations with labor organizations represented in its operating department, and to a variety of other subjects of a private and confidential nature, and that do not relate to the provisions of the act to regulate commerce and acts amendatory thereto, or to any other act of Congress as to the enforcement of which any duty has been imposed upon the Interstate Commerce Commission, and that said correspondence also contains confidential, private, and privileged communications between [328] defendant and its attorneys. The answer further sets up that under the provisions of § 20 of the commerce act a uniform system of accounting has been prescribed by the Commission, and that defendant has fully complied with all such requirements, and that the Commission's examiners have full and complete access to the same; that if the act to regulate commerce can be construed as to give the said Commission or its examiners a right of access to, and the right to examine or inspect at will, any or all accounts, records, and memoranda, and all correspondence received, and all copies of correspondence sent out by the defendant or its officials in the manner and as set out and claimed in the petition, then the exercise of such alleged right in this respect will amount to and operate as an unreasonable search and seizure of the private papers of the defendant, in violation of the 4th Amendment to the Constitution of the United States.

The answer further sets out a copy of the

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the Western & Atlantic Railroad by the Nashville, Chattanooga & St. Louis Railway from the state of Georgia, and the arrangement made between the Louisville & Nashville and the Nashville, Chattanooga, & St. Louis Railway by which the former uses the tracks of the said Western & Atlantic Railway restrict competition, restrain trade, and determine and fix rates:

"Ninth. Any fact or facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

"Tenth. Any fact or facts showing or tending to show whether an agreement or arrangement has been entered into between the Louisville & Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville & Nashville Railroad, in consideration of the Louisville & Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

"Eleventh. What amount of stock, if any, the Atlantic Coast Line Company or Atlantic Coast Holding Company owns in the Louisville & Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

"Twelfth. What amount, if any, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, all or any of them, have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

"Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials, or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads."

Senate resolution, and the order of the Interstate Commerce Commission ordering the investigation and inquiry concerning the matters and things set forth in the resolution, and providing that the proceeding be set for hearing at such times and places, and that such persons be required to appear and testify, or to produce books, documents, and papers, as the Commission may direct, and that a copy be served upon certain railways, including the defendant. The answer also sets up that the subject-matter of the first twelve paragraphs of the Senate resolution was not within the authority of the Interstate Commerce Commission, and avers that as to the subject-matter of the thirteenth paragraph, which relates to free passes, since January 1, 1911, defendant permitted the Commission and its examiners and agents, on their request, to have access to and to examine and inspect all accounts, records, and memoranda, relating to such passes, whether interstate or intrastate, and also all correspondence relating to such passes (although [329] defendant claims that the Commission had no legal right to examine any of said correspondence, nor to examine any intrastate passes, or any accounts, records, and memoranda pertaining thereto).

Motion was made for the writ of mandamus to issue as prayed for in the petition, certain testimony was taken, showing the demand of the agent and the refusal of the company. Upon hearing, the motion was denied.

The testimony shows that the refusal withheld from the inspection of the agents making the demand all accounts, records, and memoranda kept prior to the 28th of August, 1906; all accounts, records, and memoranda subsequent to that date, except such as to which the form had been subsequently prescribed by the Commission; all correspondence and the indexes thereto upon any subject other than the issue of passes subsequent to January 1, 1911, and all certificates of destruction, if any, relating to papers antedating August 28, 1906.

The discussion in this case has taken a wide range, and much has been said of the constitutional rights of the defendant and the authority of the Commission to carry out the purpose of the interstate commerce act, and to make investigations which shall be the basis of the discharge of duties imposed upon it by the law. But, as we view the case, the real questions may be determined by a consideration of certain provisions of the act to regulate commerce We may at the beginning put aside any question of authority derivable from the *resolution* passed by the Senate. The resolution was passed by only one branch of the legislative body, and it is not contended by the government or the Commission that any authority is derivable from it.

To authorize the government to demand the writ of mandamus in this case two sections of the interstate commerce act are invoked,—12 and 20. It is enough to say of § 12 that the record discloses that the proceedings [330] and the demands for inspection in this case were not conducted under its authority. See Harriman Case, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115.

Section 12 deals with the production of evidence in certain cases; it does not make provision for inspection by examiners duly authorized by the Commission. That feature of the law was added by the amendment to § 20, of June 29, 1906.

The substantial question in the case is: Was the right of inspection of the accounts, records, and memoranda of the defendant in the manner attempted by the agents who represented the Commission in this respect, authorized by § 20 of the act, as the same is amended by the Hepburn act of June, 1906?

That section as amended provides in part:

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such [331] carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures

to be recoverable in the same manner as other forfeitures provided for in this act.

"Any person who shall wilfully make any false entry in the accounts of any book of accounts, or in any record or memoranda kept by a carrier, or who shall wilfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall wilfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both."

This section, it will be observed, gives authority to the Commission to employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. The copy of the authority issued by the Commission to the special agent or [332] examiner who made the demand for inspection in this case shows that he was clothed with authority to examine any and all "accounts, records, and memoranda" kept by carriers subject to the act to regulate commerce. The language here used, taken from § 20, shows that the Commission acted under authority of that section, and the examiner was thereby authorized to make the demand, the refusal to comply with which was the basis for the petition for the writ of mandamus in this case.

This part of the amended section, as the report of the Interstate Commerce Commission, 1905, page 11, shows, was framed by the Commission and became a part of the law upon its recommendation. The appendix to the report (p. 182) shows the amendment in the form in which it became a law. In commending the passage of such an act, the Commission, in its report to Congress, said:

"Examination of Books of Account."

"An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe a form in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants. This recommendation has been urged upon the attention of the Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this toward the detection and punishment of rebates and kindred wrongdoing.

"We have also called attention to the fact that certain carriers now refuse to make the statistical returns required by the Commission. For example, railways are required, among other things, to indicate what permanent improvements have been charged to operating expenses. Without an answer to this question, it is impossible to determine to what extent gross earnings have been used in improving the property and the actual cost of operation proper. [333] Admitting the right of a railroad company to use its money as it sees fit, it is certainly proper that the government should know what use is made of it, for the purpose of determining whether its rates and charges imposed are legitimate. Certain important railways decline to furnish this information at all, and others furnish it in a very imperfect and unsatisfactory manner.

"We have also recently required carriers to furnish statistics showing the rate per ton-mile actually received for the movement of certain kinds of carload traffic, but this requirement has not been generally complied with."

Responding to this recommendation, and acting upon the bill in the form proposed by the Commission, it was adopted as an amendment and became amended § 20 of the act to regulate commerce.

Of course, this act, like other acts, may be read in the light of the purpose it was intended to subserve and the history of its origin. We find, then, that in this section Congress has authorized the Commission to prescribe the forms of accounts, records, and memoranda, which shall include accounts, records, and memoranda of the movements of traffic, as well as the receipts and expenditures of money, to which accounts, records, and memoranda the Commission is given access at all times. The railroads are not allowed to keep any other than those prescribed by the Commission. The Commission is empowered to appoint

agents or examiners with authority to inspect and examine such accounts, records, and memoranda, and provision is made, penalizing the failure to comply with the orders of the Commission concerning such accounts, records, and memoranda, or the falsification thereof, or the wilful destruction or mutilation thereof, or the failure to make full, true, and correct entries in such accounts, records, and memoranda of all facts and transactions pertaining to the carrier's business, or keeping any other accounts, records, and memoranda.

[334] Reading these provisions of the act, there is nothing to suggest that they were intended to include correspondence relative to the railroad's business. In recommending the passage of the act, the Commission did not suggest that it was essential to its purpose to have an inspection of the correspondence of the railroad. And, with its expert consideration of the questions involved, and having clearly in mind the authority it was intended to secure, it can scarcely be supposed that the Commission would have confined its proposed amendment to the carefully chosen words "accounts, records, or memoranda," and would have omitted the word "correspondence," if it had intended to include the latter. If we apply the rule of construction,—*noscitur a sociis,*— we find that all the provisions of the act as to the inspection of accounts have relation to such as are kept in the system of bookkeeping to be prescribed by the Commission. It would be a great stretch of the meaning of the term as here used, to make "memoranda" include correspondence. The "records" of a corporation import the transcript of its charter and by-laws, the minutes of its meetings—the books containing the accounts of its official doings and the written evidence of its contracts and business transactions. Certainly it was not intended that the Commission should prescribe the forms of correspondence, although it was given the power to prescribe the forms of all accounts, records, and memoranda subject to the provisions of the act.

It is urged that the amendment to § 20 of February 25, 1909, adding a proviso to paragraph 7, shows the intention of Congress to provide for accounts, records, and memoranda, including more than those as to which the form may be prescribed by the Commission, and in the word "document" making this section broad enough to include correspondence. The language of this proviso is as follows:

"Any person who shall wilfully make any false entry [335] in the accounts of any *book of* accounts, or in any record or mem*oranda kept by a carrier,* or who shall wilfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall wilfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: Provided, that the Commission may, in its discretion, issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved." [35 Stat. at L. 649, chap. 193, Comp. Stat. 1913, § 8592.]

It may be that the section is broad enough, particularly when read in the light of this proviso, to authorize an inspection of accounts, records, and memoranda for which no form has been prescribed by the Commission, but we do not find in this proviso anything to indicate that Congress in the original act or the amendment intended to provide for the compulsory inspection of correspondence.

There is nothing from the beginning to the end of the section to indicate that Congress had in mind that it was making any provisions concerning the correspondence received or sent by the railroad companies. The primary object to be accomplished was to establish a uniform system of accounting and bookeeping, and to have an inspection thereof. If it intended to permit the Commission [336] to authorize examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose. A sweeping provision of that nature, attended with such consequences, would not be likely to have been enacted without probable exceptions as to some lines of correspondence required to be kept open and subject to inspection upon demand of the agents of the government.

In the brief filed on behalf of the United States, it is frankly admitted that there is much force in the objection that Congress did not intend in this grant of authority to include the confidential correspondence of the railroad companies between itself and

its counsel, and it is admitted that in this respect the demand of the agent of the Commission may be too broad. The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance. Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 458, 24 L. ed. 251, 252. And see the comments of this court in Blackburn v. Crawford, 3 Wall. 175, 192, 18 L. ed. 186, 193.

How far such a demand as embodied in this petition can be permitted within the constitutional rights set up by the defendant, we do not need to consider, as we do not think that the section of the act of Congress under which the demand was made authorizes the compulsory submission of the correspondence of the company to inspection. It is true that correspondence may contain a record, and it may be the only record of business transactions, but that fact does not authorize a judicial interpretation of this statute which shall include a right to inspection which Congress did not intend to authorize.

[337] The court below held that the right to demand inspection of documents before August 29, 1906, the date when the Hepburn act went into effect, was of such a doubtful character that the writ ought not to issue. We think the right of inspection and examination given by the interstate commerce act by the amendment to § 20 was not intended to be limited to such accounts, records, and memoranda only as were made after the passage of the act, but is intended to permit an examination of all such accounts, records, and memoranda, for the purpose of carrying out the provisions of the act. It is not contended that Congress might not do this within its constitutional authority, and the argument is that it had no such right in contemplation, and did not intend to authorize it; but we think it is clear from the terms of the act, read in the light of its purpose, that Congress did not intend to draw the line of inspection at pre-existing accounts, records, and memoranda.

The government argues that if it be held that the prayer for the writ of mandamus and the accompanying motion were too broad in requiring the production of confidential communications between attorney and client which were contained in this correspondence, nevertheless the court should have issued its writ of mandamus in so far as the relator showed it was entitled thereto, and the case of West Virginia Northern R. Co. v. United States, 67 C. C. A. 220, 134 Fed. 198, 203, is cited to the effect such practice is permissible. The case shows, however, an amendment was permitted so as to make the writ conform to the rights which could be properly granted. And that course might have been pursued in this case.

Whether the Commission would desire an inspection of the accounts, records, and memoranda as we have construed the terms of the act, without the right to examine the correspondence, we are not advised. As the petition in this case was dismissed by the court below [338] without prejudice, and a new proceeding may be started, asking for such inspection as the law allows, we think the order of the court refusing to grant the writ of mandamus in the broad terms prayed for in the petition and the motion for the writ should not be reversed to permit a grant of relief within the limits which the law allows as we interpret it.

It follows that the judgment of the District Court, refusing the writ and dismissing the petition, should be affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

RAIL & RIVER COAL COMPANY, Appt.,
v.
WALLACE D. YAPLE et al., as Members of and Constituting the Industrial Commission of Ohio, Appellees.

(See S. C. Reporter's ed. 338-350.)

Constitutional law — freedom to contract — wages of coal miners.

1. The freedom to contract secured by U. S. Const., 14th Amend., against state invasion, is not infringed by the so-called Ohio "run-of-mine" or "anti-screen" law (104 Ohio Laws, 181), under which coal miners, whose compensation is fixed on the basis of ton or other weight, must be paid according to the total of all the coal contained in the mine car in which it has been removed from the mine, provided that no greater percentage of dirt and impurities shall be contained therein than that ascertained to be unavoidable by the state Industrial Commission, whose orders are

NOTE.—As to statutory restrictions on contract between master and servant—see notes to Com. v. Perry, 14 L.R.A. 325, and Ramsey v. People, 17 L.R.A. 853.

On the constitutionality of statutes restricting contracts and business, generally—see note to State v. Loomis, 21 L.R.A. 789.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A.

subject to review, and provided that nothing therein contained shall affect the right of a miner and his employer to agree upon deductions by the system known as docking, on account of such impurities.

[For other cases, see Constitutional Law, 605–607, in Digest Sup. Ct. 1908.]

Constitutional law — police power — wages of coal miners.

2. There is such a reasonable or legal relation to the object to be attained as to justify, as an exercise of the police power, the so-called Ohio "run-of-mine" or "anti-screen" law (104 Ohio Laws, 181), under which coal miners, whose compensation is fixed on the basis of ton or other weight, must be paid according to the total of all the coal contained in the mine car in which it has been removed from the mine, provided that no greater percentage of dirt and impurities shall be contained therein than that ascertained to be unavoidable by the state Industrial Commission, whose orders are subject to review, and provided that nothing contained therein shall affect the right of a miner and his employer to agree upon deductions by the system known as docking, on account of such impurities.

[For other cases, see Constitutional Law, IV. c, in Digest Sup. Ct. 1908.]

Statutes — validity — wages of coal miners.

3. The authority of the state legislature, under Ohio Const. art. 2, § 36, to pass laws to "provide for the regulation of methods of mining, weighing, measuring, and marketing coal, oil, gas, and other minerals," extends to the enactment of the so-called Ohio "run-of-mine" or "anti-screen" law (104 Ohio Laws, 181), under which coal miners,

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51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

Excessive penalties as denial of constitutional rights.

Mr. Justice Brewer, writing the opinion in Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, says: "A statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws."

Later, when this question came up squarely for decision in Ex parte Young, 209 U. S. 123, 52 L. ed. 741, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, the court adopted Mr. Justice Peckham's view and held that a statute providing for the establishment of rates for railroad transportation without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates, is unconstitutional, as depriving the corporations of the equal protection of the laws.

There are a number of other cases to the same effect, some resting their decision on the due process of law clause of the 14th *Amendment* to the Federal Constitution, *either independently of or* in connection with the equal protection of the laws clause. Thus, in State v. Crawford, 74 Wash. 248, 46 L.R.A.(N.S.) 1039, 133 Pac. 590, a penalty of a fine of not more than $1,000, or imprisonment of not exceeding one year, or both, for violation of a statute forbidding the exaction of more than 5 cents for one continuous ride on a street car within any city or town, was held to be so excessive, although no minimum is prescribed, as practically to foreclose a street railway company of the right to litigate the validity of the statute, and hence to deny such a company the equal protection of the laws, and take its property without due process of law.

In Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 34 Sup. Ct. Rep. 961, the Federal Supreme Court, reversing 82 Kan. 228, 108 Pac. 89, held that the imposition by Kan. Laws 1905, chap. 353, of a liability of $500, as liquidated damages, together with a reasonable attorney's fee for every charge by a common carrier in excess of the rates therein fixed for the shipments of oil between points in the state, takes property without due process of law, contrary to the 14th Amendment to the Federal Constitution.

Penalties of $500, payable to the person aggrieved, for every violation of an act prescribing the maximum rates which railway companies may charge for the carriage of passengers within the state, and fine or imprisonment or both, imposed upon any agent of the company violating the act, are held in Ex parte Wood, 155 Fed. 190, to be so excessive and ruinous as to deny the company due process of law.

A gas company having some 390,000 customers is denied due process of law by a statute which subjects it to a penalty of $1,000 for each violation of its provisions respecting equipment, pressure, or rates. Consolidated Gas Co. v. Mayer, 146 Fed. 150; Consolidated Gas Co. v. New York, 157 Fed. 849, affirmed on this point in 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

In Southwestern Teleg. & Teleph. Co. v. Danaher, 238 U. S. 482, post, —, 35 Sup. Ct. Rep. 886, the Federal Supreme Court,

whose compensation is fixed on the basis of ton or other weight, must be paid according to the total of all the coal contained in the mine car in which it has been removed from the mine, provided that no greater percentage of dirt and impurities shall be contained therein than that ascertained to be unavoidable by the state Industrial Commission, whose orders are subject to review, and provided that nothing contained therein shall affect the right of a miner and his employer to agree upon deductions by the system known as docking, on account of such impurities.

[For other cases, see Statutes, I. d, 1, in Digest Sup. Ct. 1908.]

Courts — relation to legislative department — police power — impracticability of statute.

4. There is no such impossibility of the state Industrial Commission determining the quantity of dirt and other impurities in any coal mined as to justify the courts in declaring invalid because of impracticability—at least, in advance of an attempt to put the law in operation—the so-called Ohio "run-of-mine" or "anti-screen" law (104 Ohio Laws, 181), under which coal miners, whose compensation is fixed on the basis of ton or other weight, must be paid according to the total of all the coal contained in the mine car in which it has been removed from the mine, provided that no greater percentage of dirt and impurities shall be contained therein than that ascertained to be unavoidable by the state Industrial Commission, whose orders are subject to review, and provided that nothing therein contained shall affect the right of a miner and his employer to agree

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reversing 102 Ark. 547, 144 S. W. 925, condemned as taking property without due process of law, the imposition upon a telephone company under the supposed authority of Kirby's Dig. (Ark.) § 7948, of penalties aggregating $6,300, because of its impartial enforcement against one of its patrons of a regulation that it will not furnish telephone service to any patron in arrears for past service, and will not accord to a patron so in arrears the discount usually allowed for paying in advance of a designated time, where such regulation was not expressly prohibited by the statute, and there was no judicial decision in the state holding or indicating that it was unreasonable, and it had been adopted in good faith and had been uniformly and impartially enforced for many years.

In Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885, a penal clause of a general police regulation of tenement houses subjected every person violating the act to a fine of not less than $10 nor more than $200, or by imprisonment in the county jail not less than fifteen days and not more than sixty days, or by both such fine and imprisonment, at the discretion of the court, and to a fine of $10, at the discretion of the court, for each day after the first that such violation should continue. The court, in holding the act unconstitutional, said that where the penal feature of a police regulation is so severe, having regard to the character of the regulation, as to efficiently intimidate property owners from using their property at all for tenements or lodging house purposes, and from resorting to the courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. It is a defiance of the equal protection of the laws, rendering the act void, irrespective of whether its provisions would otherwise be valid.

The enforcement of those provisions of the California pipe line acts (Cal. Laws 1913, chaps. 327, 285, 286) which prescribe cumulative penalties of from $500 to $2,000 for each violation of those acts by a public utility, and render offending officers and employees liable to a heavy fine or imprisonment or both, will be enjoined pending a decision as to the validity of such acts, since their effect is to deter the corporation and its officers from resorting to the courts to test the validity of the statutes, and therefore to deny the equal protection of the laws. Kern Trading & Oil Co. v. Associated Pipe Line Co. 217 Fed. 273.

The severity of the pains and penalties prescribed by Ariz. Rev. Stat. 1913, title 9, chap. 11, for violation by public utilities of orders of the state Corporation Commission, *viz.*, cumulative fines of from $100 to $5,000 for each offense, together with fine or imprisonment or both, of the offending officers or employees, such orders not being subject to suspension by any court pending a judicial review, renders the statute repugnant to U. S. Const. 14th Amend., as practically preventing any appeal to the courts to determine the validity of the laws and the orders of the Corporation Commission. Van Dyke v. Geary, 218 Fed. 111.

But in State ex rel. Railroad Commission v. Oregon R. & Nav. Co. 68 Wash. 160, 123 Pac. 3, it is held that the Washington Railroad Commission act which imposes upon a railroad company penalties for failure to comply with orders of the Commission for furnishing additional facilities cannot be held unconstitutional, as contravening the 14th Amendment of the Federal Constitution, in that the penalties are excessive, since, as stated by the Supreme Court of the United States, in passing upon a similar contention in Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364–367, 37 L. ed. 769–771, 13 Sup. Ct. Rep. 870: "The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. . . . And the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control."

A carrier which, after reasonable notice of the making of an administrative order by the state Railroad Commission, failed to resort to the safe, adequate, and available

upon deductions by the system known as docking, on account of such impurities.

[For other cases, see Courts, I. e, 3, in Digest Sup. Ct. 1908.]

Constitutional law — excessive penalties — equal protection of the laws.

5. A penalty of from $300 to $600, imposed by the so-called Ohio "run-of-mine" or "anti-screen" law (104 Ohio Laws, 181) for each separate violation of the provisions of that act, is not so great as to render the statute open to the objection that it denies the equal protection of the laws guaranteed by U. S. Const., 14th Amend., by preventing a resort to the courts to test the constitutionality of the law.

[For other cases, see Constitutional Law, IV. a, 5, b, in Digest Sup. Ct. 1908.]

[No. 513.]

Argued December 1, 1914. Decided February 23, 1915.

APPEAL from the United States District Court for the Northern District of Ohio to review a decree refusing to enjoin enforcement of the Ohio "run-of-mine" or "anti-screen" law. Affirmed.

See same case below, 214 Fed. 273.

The facts are stated in the opinion.

Mr. A. C. Dustin argued the cause, and, with Messrs. Paul J. Bickel and Hermon A. Kelley, filed a brief for appellant:

Mining for coal is not affected with a public use.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631.

The right to choose one's business and to make any lawful contracts in respect thereto is property within the protection of the 14th Amendment to the Constitution of the United States.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Adair v. United States, 208 U. S. 161, 172, 52 L. ed. 436, 441, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

A law which interferes with private property, or which takes property, or denies or restricts freedom of contract, must, in order

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remedy under Ga. Civ. Code, 1911, § 2625, by which it could test the validity of such order by a suit in the courts against the Commission, but instead attacked its validity when sued under § 2667, for the penalty which that section imposes for violations of such order, and which may be any amount, up to $5,000 a day, could be subjected to such penalty, where that defense proved unsuccessful, without denying the equal protection of the laws or due process of law guaranteed by the 14th Amendment to the Federal Constitution. Wadley Southern R. Co. v. Georgia, 235 U. S. 651, ante, 405, P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214, affirming 137 Ga. 497, 73 S. E. 741.

The single penalty of from $100 to $10,000, which, under Or. Laws 1907, p. 67, may be imposed upon a railway company in case of its failure or refusal to obey an order made by the state Railroad Commission fixing reasonable rates, is not so excessive as to deny the railway company the equal protection of the laws. Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957.

A penalty not exceeding a fine of $100 or thirty days in the city jail, or both such fine and imprisonment, prescribed by municipal ordinance for violations of its provisions requiring street railway companies to sell 6 tickets for 25 cents, is not so excessive as to deter the street railway company and its employees from resorting to the courts to test the validity of the ordinance, and therefore does not take property without due process of law, or deny the equal protection of the laws. Portland R. Light & P. Co. v. Portland, 210 Fed. 667.

Penalties of from $50 to $300, together with costs and a reasonable attorney's fee, prescribed by Kirby's Dig. (Ark.) § 6620 *for each offense* by a carrier charging and collecting a greater rate of passenger fare than the law permits, are not so enormous, arbitrary, and oppressive, or so in excess of any amount allowed by law to be recovered for the infliction of equal injury under any other circumstances or conditions as to deprive the carrier of its property without due process of law, or deny it the equal protection of the laws, contrary to the 14th Amendment to the Federal Constitution. Chicago, R. I. & P. R. Co. v. Davis, — Ark. —, 170 S. W. 245.

Penalties imposed by the jury and confirmed by the state courts at the rate of $1,500 and $50 per day for violating respectively, through a series of years, the Texas anti-trust laws of May 25, 1899, and March 31, 1903, are not so excessive as to deprive the defendant corporation of its property without due process of law, where such property amounts to more than $40,000,000, and its dividends have been as high as 700 per cent per annum. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220.

Fixing the damages for culpable violations of Neb. Laws 1905, chap. 107, p. 506, which impose a limitation of the time for the transportation of live stock by common carriers, at $10 for each car for every hour by which the time of transportation exceeds the statutory limit, is not such a legislative usurpation of judicial functions as renders the statute repugnant to the due process of law clause of U. S. Const., 14th Amend., where the highest court of the state holds that the statute imposes only compensatory damages, fixing them at a sum certain because of the difficulty of the ascertainment of the actual damages suffered. Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70, 57 L. ed. 734, 33 Sup. Ct. Rep. 437.

to come within the scope of the police power, bear some substantial relation to the public peace, safety, health, morals, or welfare of the community, and must not be arbitrary or unreasonable. When a statute does not comply with these conditions, it constitutes the taking of property without due process of law.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Smith v. Texas, 233 U. S. 630, L.R.A. 1915D, 677, 58 L. ed. 1129, 34 Sup. Ct. Rep. 681; Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

Since when has it been considered appropriate to employ the police power of the state to protect the employer against making unwise contracts? The cases that sustain the regulation by law of the method of paying employees, the hours of labor, etc., taking from parties concerned freedom of contract in that regard, are all sustained on the theory of the protection of the weaker party against imposition by the stronger. They are all founded upon a supposed inequality of position of the parties to the contract. In such cases the state is permitted, under certain circumstances, to legislate for the protection of the dependent party against unwise contracts, and to abridge the otherwise absolute freedom of contract.

Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Holden v. Hardy, 169 U. S. 366, 395, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761.

The constitutionality of the act must be determined not by what has been or will necessarily be done under it, but by what may, under its authority, be done.

Eubank v. Richmond, 226 U. S. 137, 144, 57 L. ed. 156, 159, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co. 32 S. D. 260, 143 N. W. 124; Sterritt v. Young, 14 Wyo. 146, 4 L.R.A. (N.S.) 169, 116 Am. St. Rep. 994, 82 Pac. 946.

The owner of coal land has as complete a right over his property as the owner of agricultural land.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 202, 44 L. ed. 729, 736, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

The penalties prescribed by this act are so excessive as to deprive the appellant of the equal protection of the law, in violation of the 14th Amendment of the United States Constitution.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 100, 102, 46 L. ed. 92, 105, 106, 22 Sup. Ct. Rep. 30; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961.

Mr. Clarence D. Laylin argued the cause, and, with Mr. Timothy S. Hogan, Attorney General of Ohio, and Messrs. Robert M. Morgan and James I. Boulger, filed a brief for appellees:

The main object of the Ohio law, and the principal means of accomplishing that object embodied therein, are unquestionably within the police power of the state, so far as the 14th Amendment of the Constitution of the United States is concerned.

McLean v. Arkansas, 211 U. S. 539, 543, 53 L. ed. 315, 318, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 U. S. 87, 54 L. ed. 676, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Engel v. O'Malley, 219 U. S. 138, 55 L. ed. 136, 31 Sup. Ct. Rep. 190; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 569, 55 L. L. ed. 339, 31 Sup. Ct. Rep. 259; Quong Wing v. Kirkendall, 223 U. S. 62, 56 L. ed. 351, 32 Sup. Ct. Rep. 192; Schmidinger v. Chicago, 226 U. S. 589, 57 L. ed. 368, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Barrett v. Indiana, 229 U. S. 29, 57 L. ed. 1052, 33 Sup. Ct. Rep. 692.

Restraint and compulsion are the natural methods of the police power.

Freund, Pol. Power, §§ 3, 8.

The police power extends to all the great public needs.

Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

The appellant is precluded from invoking the protection of the 14th Amendment; for

1. Not being a natural person it cannot assert a right to liberty of contract, and therefore cannot show that it is within the class whose rights of this character are protected by the Amendment.

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 532, 58 L. ed. 714, 34 Sup. Ct. Rep. 359; Western Turf Asso. v. Greenberg, 204 U. S. 361, 363, 51 L. ed. 521, 522, 27 Sup. Ct. Rep. 384.

2. The peculiar provisions of the Ohio law do not affect property rights as such.

McLean v. Arkansas, 211 U. S. 539, 543, 53 L. ed. 315, 317, 29 Sup. Ct. Rep. 206.

3. Coal operators as a class are not injured in the conventional sense by the peculiar features of the Ohio law.

Plymouth Coal Co. v. Pennsylvania and McLean v. Arkansas, supra.

The alleged objection grounded upon the supposed impracticability of the regulative features of the law is premature.

Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 346, 43 L. ed. 192, 18 Sup. Ct. Rep. 862; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The claim that the law imposes standards having no relation to market conditions is not well taken.

Report of Ohio Coal Mining Commission, pp. 1–13.

The main purpose of the act, though clearly within the police power, cannot be accomplished by legislation as simple as that of Arkansas without resulting in evils which should be obviated by further legislation; and experience of which the court may take judicial notice discloses the necessity for such legislation.

McLean v. Arkansas, supra; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Report of Ohio Coal Mining Commission, pp. 56–58; Re Preston, 63 Ohio St. 428, 52 L.R.A. 523, 81 Am. St. Rep. 642, 59 N. E. 101; Freund, Pol. Power, § 32; Schmidinger v. Chicago, 226 U. S. 589, 57 L. ed. 368, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284.

That such additional legislation involves an interference with a private business is immaterial.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 34 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The business of mining coal in Ohio has become charged with a public interest.

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612; Roport of Ohio Coal Mining Commission, p. 13; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Wyman Public Service Corp. §§ 50, 90.

The penalty provided for in § 6 of the Ohio law constitutes the sanction of a regulation, the validity of which has been adjudicated, is clearly separable from the provisions peculiar to the Ohio law and complained of by the appellant, and the penalties are not excessive. Therefore, and because there is no actual or threatened effort to enforce the penalty against appellant, it cannot be made the basis of an attack upon the validity of the whole law.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 417, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 172, 56 L. ed. 710, 717, 32 Sup. Ct. Rep. 449; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct. Rep. 372.

Article 2, § 36, of the Ohio Constitution adopted in 1912, declares the public interest in the conservation of natural resources, and the Ohio act complained of may be justified as a measure looking to that end, and is appropriate thereto.

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612; Opinion of Justices, 103 Me. 506, 19 L.R.A.(N.S.) 422, 69 Atl. 627, 13 Ann. Cas. 745; West v. Kansas Natural Gas Co. 221 U. S. 229, 35 L.R.A. (N.S.) 1193, 55 L. ed. 716, 31 Sup. Ct. Rep. 564; Barrett v. Indiana, 229 U. S. 26, 29, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; Noble State Bank v. Haskell, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

Mr. Justice Day delivered the opinion of the court:

This case is brought here by appeal from an order of the district court of the United States for the northern district of Ohio, refusing an application for interlocutory injunction upon the petition of the Rail & River Coal Company, a West Virginia corporation, against Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, as members of and constituting the Industrial Commission of Ohio. The application was heard under § 266 of the Judicial Code [36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1243], before a circuit judge and two district judges. The object of the bill was to restrain the Industrial Commission from

putting into effect the so-called "run-of-mine" or "anti-screen" law of the state of Ohio, passed February 5th, 1914, by the legislature of that state, being entitled, "An Act to Regulate the Weighing of Coal at the Mines." 104 Ohio Laws, 181. A copy of the act is inserted in the margin.[1]

[343] Summarized, the bill sets forth that plaintiff is engaged in the mining business in Ohio, owning a large tract of coal lands, of approximately 32,000 acres, upon which it has four coal mines properly developed, employing upward [344] of 2,000 persons; that in the state of Ohio there are about 600 coal mines, employing upwards of 45,000 persons; that in the year 1913 more than 36,000,000 tons of coal were produced, and there was expended in wages to said employees upwards of $26,000,000; that the defendants are the members of the Industrial Commission of Ohio, vested by the legislature of that state with authority to enforce the provisions of the "mine-run law;" that for many years mining has been conducted in the state of Ohio by the miners entering into contracts with their employers for a period of two years; that the last contracts expired on April 1, 1914.

The bill set forth the provisions of the act, and alleged that the same are unreasonable and arbitrary and impracticable in operation, and that the act is unconstitutional, as in violation of the 14th Amendment to the Constitution of the United States, and in violation of the Constitution of the state of Ohio, and that it delegates legislative authority to the Industrial Commission of the state; and although the bill

[1] Be it enacted by the General Assembly of the State of Ohio:

Section 1. Every miner and every loader of coal in any mine in this state, who, under the terms of his employment, is to be paid for mining or loading such coal on the basis of the ton or other weight, shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the Industrial Commission of Ohio as hereinafter enacted.

Section 2. Said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

Section 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust, and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said Industrial Commission shall forthwith, upon request of such miner or loader, or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said Industrial Commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said Industrial Commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said Industrial Commission has been in force exceeds the percentage so fixed by it, said Industrial Commission shall at once make, enter, and cause to be enforced such order or orders relative to the production of coal at such mine as will result in reducing the percentage of such fine coal to the amount so fixed by said Industrial Commission.

Section 4. Said Industrial Commission shall, as to all coal mines in this state which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

Section 5. Said Industrial Commission shall have full power from time to time to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

Section 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined for each separate offense not less than $300 nor more than $600.

Section 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said Industrial Commission, as hereinabove provided, shall be guilty of a misdemeanor, and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined 50 cents; for a second offense within such period of three days he shall be fined $1; and for the third offense within such period of three days he shall be fined not less than $2 nor more than $4. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt, or other impurity.

was filed before the act went into effect, it was alleged that the Industrial Commission, in putting the same into effect, would work an irreparable [345] injury to the plaintiff. Upon application under this bill to the district court, composed of three judges, the injunction was denied (214 Fed. 273), and the case is appealed to this court.

Under the system of wage payment and mining of coal in use before the passage of this statute, miners in Ohio were paid at a certain price per ton for screened lump coal, that is, for coal which, after it is mined and brought to the surface, is passed over a screen, the bars of which are 1¼ inches apart. The report of the Ohio Coal Mining Commission, a public document, copies of which have been filed by counsel in this case, shows that that system of mining was regarded as objectionable by the miners, on the ground that they were not paid for mining of a considerable quantity of marketable coal, and there was dissatisfaction because of the wearing of the screens so as to increase the size of the apertures between the bars above the standard. In Ohio, as in some other states, there was much complaint because of this system. It appears that the employers generally desired to preserve the screened-coal basis of payment, and objected to the run-of-mine system, in which the miner is paid for mining coal as it is when mined without screening. Before enacting the legislation now in controversy in the state of Ohio, the question was referred to a Coal Mining Commission, which commission, after full investigation of the subject, made the report referred to, in which it appears that the arguments pro and con were considered and reported upon, and a bill was recommended in the form in which the legislature passed the present law. The report of the commission cannot be read without a conviction that there was an earnest attempt to eliminate the objections of the "run-of-mine" basis of payment to the miners, and to enact a system fair alike to employer and miner.

The principal objection of the employers to the run-of-mine system adopted in some of the states are: a tendency [346] to produce coal unduly mixed and mingled with slate, sulphur, rock, dirt, and other impurities; and to yield an increased quantity of fine coal, to the loss of the employer.

As we have said, the result of the consideration of the objections to this system, by the commission report, was the enactment of the present law.

Its 1st section shows that it attempts to substitute for the system theretofore in use in the state, where the terms of employment *required payment* for mining or loading coal on the basis of the ton or other weight, one by which the miner shall be paid according to the total weight of all the coal contained in the mine car in which the same has been removed from the mine; providing, however, that no greater percentage of slate, sulphur, rock, dirt, or other impurity shall be contained in the contents of such car than that ascertained and determined by the Industrial Commission of Ohio.

By the 2d section of teh act, the Industrial Commission is required to ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity *unavoidable* in the proper mining or loading of such cars in the mines of the state. Evidently this section recognized and considered the objections to the plan of payment adopted in the 1st section, payment by run of mine, and provided for ascertaining by means of the commission of the percentage of slate, sulphur, rock, dirt, or other impurity which evidently the lawmakers regarded as impracticable to prevent altogether in the mining of coal. In other words, the employer was not obliged to compensate the miner for everything sent up in the car, no matter how loaded with dirt and impurities. The object was to ascertain the amount of unavoidable impurities in proper mining, and place a limitation upon the miner to that extent.

In fixing the penalties for infractions of the act, § 7 [347] penalizes the miner or loader for the contents of a car containing a greater percentage of impurities than that ascertained or determined by the Industrial Commission, and the miner for such infraction is made guilty of a misdemeanor and punishable upon conviction. Section 7 contains the important proviso that nothing contained in the section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt, or other impurity.

In other words, the ascertainment of the Industrial Commission which is provided in §§ 1 and 2 is not to be a limitation upon the right of the employer and miner to agree upon deductions of their own arrangement as to the amount of slate, sulphur, rock, dirt, or other impurity permitted in the mining of coal. The employer and miner may substitute their own agreement in that respect for the ascertainment of the commission, and the law fixes no penalty for the mining of coal with such measure of impurities as the employer and miner have thus agreed upon.

Section 3 makes it the duty of the miner and employer to agree upon and fix the percentage of fine coal commonly known as nut, pea, dust, and slack allowed in the out-

put of the mines, and where they do not agree, the Industrial Commission may fix such percentage, which percentage thus established shall remain in force until otherwise agreed upon between miner and employer, and the commission, when it finds the percentage of the fine coal as fixed by the Industrial Commission has been exceeded, may make, enter, and cause to be enforced such order or orders as will result in reducing the percentage of fine coal to the amount fixed by it.

The report of the Coal Commission (pages 59 and 60) shows the consideration which that body gave to this subject in the interest of fair mining, and its desire to [348] obviate by this provision the undue production of fine coal to the disadvantage of the employer.

By § 5, the Industrial Commission is given power from time to time, upon investigation, to change the percentage by it ascertained and determined, or fixed by its previous orders.

The only penalty fixed by the law against the employer is contained in § 6, where it is made unlawful for the employer to pass the coal over a screen or other device, for the purpose of ascertaining and calculating the amount to be paid the miner or loader for mining or loading such contents shall be by the total weight of such contents shall be reduced or diminished.

There is nothing in the law to prevent the employer from screening his coal as he sees fit for other purposes, and so as to fit it for the market, in such wise as he may deem admisible. The inhibition on screening is only upon that operation when it is done for the purpose of calculating the amount to be paid to the miner for mining the coal Moreover, it is important to be considered in this connection that the orders of the commission are not final, but are subject to review under the statute of Ohio found in 103 Ohio Laws, at page 95, where the orders of the commission are declared to be only prima facie reasonable, and any employer or other person interested is entitled upon petition to a hearing upon the reasonableness and lawfulness of the order before the commission, and under § 38 of the law, any employer or other person in interest, being dissatisfied with any order of the commission, may commence an action in the supreme court of Ohio to vacate or amend any such order upon the ground that the same is unreasonable or unlawful, and the supreme court is authorized to hear and determine such action, and may, in its discretion (§ 41) suspend all or any part of the order of the commission. The statute makes provision for the prompt hearing of all such actions, in preference [349] to other civil cases, with some exceptions. It would seem that this system of law, with a right to review in the manner we have stated in the supreme court of Ohio, has provided a system ample for the protection of the rights of the employers (see Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359). And of course in this, as in other cases, only alleged infractions of constitutional rights of those complaining can be considered in determining the constitutionality of the law. Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, ante, 364, 35 Sup. Ct. Rep. 167.

The objection that the law is unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, in which this court sustained a law of the state of Arkansas, requiring coal mined to be paid for according to the run-of-mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the state, in the exercise of its police power, to place reasonable restraints like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing. Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, and cases therein cited and reviewed.

The contention that this law has no reasonable or legal relation to the object to be attained seems to us to be equally without foundation, in view of the recognized right of the legislature to regulate a business of this character, and to determine for itself, in the absence of arbitrary action, the measure of relief necessary to effect the desired purposes. That the law is within the authority [350] of the Ohio legislature, acting under the Constitution of Ohio, there can be no question, in view of the authority conferred by that instrument in § 36, which provides that "laws may be passed . . . to provide for the regulation of methods of mining, weighing, measuring, and marketing, coal, oil, gas, and other minerals."

As to the alleged impracticability of the law, because of the impossibility of the In-

dustrial Commission determining the quantity of dirt and other impurities in any coal mined, we can find no force in that objection. Agreements as to the amount of docking for dirt and impurities in the mining of coal have been constantly made, and it is not the province of a court to revise conclusions which men versed in the business have found practicable; certainly not in advance of an attempt to put the law into operation. The consideration of the law already given shows the means enacted to do away with these impurities, and to insure as far as possible the production of clean coal.

As to the objection because of the penalties, this is not a suit to enforce penalties; nor, in view of the provisions of the statute, can we say that the penalties are so great as to prevent a resort to the courts to ascertain the constitutionality of the law. Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct. Rep. 372.

We are unable to discover in the statute any infraction of the constitutional rights of the appellant, and the order denying the temporary injunction is accordingly affirmed.

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[351] PENNSYLVANIA COMPANY, Appt.,
v.
UNITED STATES et al.

(See S. C. Reporter's ed. 351–373.)

Trial — question of law or fact — preference or advantage.

1. What is an undue or unreasonable preference or advantage, forbidden by the act of February 4, 1887 (24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565), § 3, is a question not of law, but of fact.

[For other cases, see Trial, VI. c, 2, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — judicial review of order.

2. An order of the Interstate Commerce Commission which does not contravene any constitutional limitation, and is within the constitutional and statutory authority of that body, and is not unsupported by testimony, cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission.

[For other cases, see Interstate Commerce Commission, 8–14, in Digest Sup. Ct. 1908.]

Carriers — government control — discrimination — use of terminal facilities.

3. The transportation which, under the act of February 4, 1887 (24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565), § 3, when read in connection with the acts of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), and June 18, 1910 (36 Stat. at L. 545, chap. 309, Comp. Stat. 1913, § 8563), must be furnished to all upon equal terms, covers the entire carriage and services in connection with the receipt and delivery of property transported in interstate traffic, including the use of terminal facilities in connection with the receipt and delivery of carload freight.

[For other cases, see Carriers, III. e; III. h, in Digest Sup. Ct. 1908.]

Carriers — government control — discrimination — use of terminal facilities.

4. Reciprocal switching arrangements between a carrier and three of four connecting lines, involving an exchange of traffic which varies greatly in amount, do not remove the discriminatory character, under the act of February 4, 1887 (24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565), § 3, of the practice of the first

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Note.—Duty of carrier to furnish equal connecting facilities to other carriers.

At common law a common carrier is not bound to carry, except on its own line, and, if it contracts to go beyond, it may, in the absence of statutory regulations, determine for itself what agencies it will employ, and its contract is equivalent to an extension of its line for the purpose of the contract. And if it holds itself out as a carrier beyond its line, so that it may be required to carry in that way for all alike, it may nevertheless confine its carrying to the particular route which it chooses to use. It puts itself in no worse position by extending its route by the help of others than it would occupy if the means of transportation employed were all its own. It may select its own agencies and its own associates for doing its own work. Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407.

A railway company may permit through billing and routing with one forwarding road without the necessity of doing likewise with another road, and it may insist on carrying all freight from another road in its own cars, even though the reloading and rebilling of the cars is thereby made necessary. Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 4 Inters. Com. Rep. 537, 59 Fed. 400, affirmed in 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775.

See, however, Alabama & V. R. Co. v. Railroad Commission, 86 Miss. 667, 38 So. 356, where a rebilling rate, having been so enforced that it operated substantially to increase the freight rates from one point over a certain line over those from points on other and associate lines, was held void as being discriminatory.

One of the component companies of a con-

carrier to refuse to interchange carload freight with the fourth connecting line within the switching limits of a city, while performing such service in connection with the other connecting carriers within such switching limits.

[For other cases, see Carriers, III. e; III. h, in Digest Sup. Ct. 1908.]

Carriers — government control — exchange of traffic — use of terminal facilities.

5. The use of the tracks or terminal facilities of one carrier is not given to another carrier, contrary to the provisions of the act of February 4, 1887 (24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565), § 3, by an order of the Interstate Commerce Commission requiring a carrier to desist from its practice of refusing to interchange carload freight with one connecting carrier within the switching limits of a city, while performing such service in connection with other connecting carriers within such switching limits, such order giving the connecting carrier no right to run its cars over the terminals of the first carrier, or to use or occupy that carrier's stations or depots for purposes of its own, and containing no requirement that the connecting carrier be permitted to store its cars in the other carrier's yards, or make use of that carrier's freight houses or other facilities.

[For other cases, see Carriers, III. h, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compelling interchange of traffic.

6. The property of one carrier is not appropriated without compensation to the use of another carrier, contrary to U. S. Const., 5th Amend., by an order of the Interstate Commerce Commission, made under the supposed authority of the act of February 4, 1887 (24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565), § 3, requiring the first carrier to desist from its practice of refusing to interchange carload freight with one connecting carrier within the switching limits of a city, while performing such service in connection with other connecting carriers within such switching limits.

[For other cases, see Constitutional Law, 458–466, in Digest Sup. Ct. 1908.]

[No. 591.]

Argued December 14 and 15, 1914. Decided February 23, 1915.

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necting through railway line is not obliged at common law to grant to a competitor of any of the other companies the same facilities and rates that it accords to its associates, merely because the tracks of such competitor unite with its own and admit of a free and convenient interchange of business. Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 668, 28 L. ed. 292, 4 Sup. Ct. Rep. 185.

Neither will it amount to discrimination to grant through rates to steamboat owners at certain ports and refuse such rates at a particular port. Ayr Harbour v. Glasgow & S. W. R. Co. 4 Eng. Ry. & C. Traffic Cas. 81, cited in 4 Rapalje & M. Digest of Railway Law, p. 117.

The courts are not in absolute accord as to the effect of statutes or constitutions which, like the interstate commerce act, forbid unjust discrimination.

There is nothing in the interstate commerce act which makes unlawful as discriminatory an arrangement by one railway company with another for through routing, and a refusal to make a simlar arrangement with another company. Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. supra.

The prohibitions of the interstate commerce act against discrimination do not prevent a common carrier from demanding prepayment of freight from one connecting carrier, and not from another, or from advancing freight charges to one connecting carrier without making such advances to other connecting carriers, or from entering into a contract with one connecting carrier for a through transportation of freight, for through joint rates, for through billing, and for the division of through rates, without being obligated to make the same contract with another connecting carrier. Gulf, C. & S. F. R. Co. v. Miami S. S. Co. supra.

In Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330, the right of a carrier to make routing arrangements with a connecting line was recognized; and it was there held that, in the handling of citrus fruits, it was not discriminatory, or a violation of the interstate commerce act, for a carrier to make a routing arrangement by which shipments of this character over its line were to be handled by certain connecting carriers.

Prior to the enactment of the provisions of the 4th section of the act of June 29, 1906, known as the Hepburn act (empowering the Interstate Commerce Commission to establish through routes and joint rates), there was, said Adams, C. J., in United States v. Union P. R. Co. 188 Fed. 102, reversed on other grounds in 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53, no way of coercing railway companies into establishing through routes or joint rates with each other. He added: "Whether, therefore, the great Eastern lines and their connections which gathered up the west bound freight should favor the Union Pacific, the Southern Pacific, or the Santa Fe routes as their final connection into San Francisco, was optional with them."

In Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567, it was held that there is nothing in the interstate commerce act which requires a common carrier, because it has furnished certain facilities for the interchange of freight to another connecting

APPEAL from the United States District Court for the Western District of Pennsylvania to review a decree refusing to restrain the enforcement of an order of the Interstate Commerce Commission requiring a carrier to desist from its practice of refusing to interchange carload freight with one connecting carrier within the switching limits of a city, while performing such service in connection with other connecting carriers within such switching limits. Affirmed.

See same case below, 214 Fed. 445.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. A. P. Burgwin and Gordon Fisher, filed a brief for appellant:

The various provisions of the act to regulate commerce requiring carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and other similar provisions of the act, were not intended, as was said by the Interstate Commerce Commission (Chicago & M. Electric R. Co. v. Illinois C. R. Co. 13 Inters. Com. Rep. 25), to afford a means by which new lines, with the aid of the Commission, may profitably force their way into shipping districts built up and already well and adequately served by older lines, and thus seize and divide with the latter such traffic as may be offered for movement. With the development of the power of the Commission to regulate rates, to protect the public interests by readjusting them when in excess of reasonableness and fairness, the need of competing lines becomes less vital to shipping communities whose transportation facilities are already ample. We regard it as clear that the purpose of the clause was to afford relief to shipping communities, and not to aid carriers to ac-

line or lines at one point, to furnish similar facilities to another company making a physical connection with such road at another different and distant place.

But see New York & N. R. Co. v. New York & N. E. R. Co. 4 Inters. Com. Rep. 117, 50 Fed. 867, where Lacombe, C. J., said that to refuse altogether to receive traffic from one connecting line, to receive it only under arrangements which imposed such obligations upon the shipper as to transfer and rebilling as would make the transaction of the business impracticable in competition with a more favored line, to receive it without reshipment and transfer, but systematically to neglect to forward it, to receive and forward it, but so to arrange the hours or manner of its delivery as to deprive it of facilities equal to those afforded the traffic coming from the competitor,—any one of these or of a variety of other devices which might be suggested would justify the conclusion that a common carrier subject to the provisions of the interstate commerce act is deliberately refusing to "afford all reasonable, proper, and equal facilities for the interchange of traffic" with a connecting line which the statute makes it such carrier's affirmative duty to afford.

A Virginia statute corresponding very closely to § 3 of the interstate commerce act, prohibiting discrimination and preference, was held in Com. ex rel. Norton Bd. of Trade v. Norfolk & W. R. Co. 111 Va. 59, 68 S. E. 351, not to require railway companies owning and operating a union depot to permit the use of such depot and terminal facilities by another railway company.

A constitutional prohibition against undue or unreasonable discrimination in facilities does not require a railway company to stop at a junction point with another railway and afford the latter the same facilities and rates that it accords to another connecting railway with which it has established at another place joint depot accommodations and provided facilities for doing a connecting business. Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. supra.

A constitutional right of one railway company to connect its road with that of another company does not include the right to form the same business connection and make the same traffic arrangements with such company as the latter grants to, or makes with, any competing company operating a connecting road. Ibid.

The constitutional requirement that all railway companies whose lines connect shall receive and transfer each other's passengers, freight, and loaded or empty cars without delay or discrimination does not oblige railway companies owning and operating a union depot to permit the use of such depot and terminal facilities by another railway company. Com. ex rel. Norton Bd. of Trade v. Norfolk & W. R. Co. supra.

So long as two railway carriers furnish switching service to each other in their yards in a certain city on all business and to a third carrier on all except coal and competitive business, they may be compelled by the Interstate Commerce Commission, under the equal facilities requirement of the act of February 4, 1887, § 3, respecting interchange of traffic, to discontinue such discrimination against such third carrier, and to switch for it as they do for each other, since the carriers, having opened their yards for most purposes, cannot claim the protection of the proviso to that section that it shall not be construed as requiring any carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. Louisville & N. R. Co. v. United States, 238 U. S. 1, post, —, 35 Sup. Ct. Rep. 696.

An order of a state Railway Commission directing a railway company to discontinue the practice of demanding the prepayment of freight from one connecting carrier while not exacting it from another is authorized

quire strategic advantages in their contests with one another.

The object was not to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily, at least, to provide for shippers seeking an outlet either by private road or a branch.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 537, 54 L. ed. 605, 607, 30 Sup. Ct. Rep. 415.

The case at bar comes within and should be adjudged by the rule of the Central Stock Yards Co. Cases.

192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

The proviso or exemption of § 3 has not infrequently enjoyed the consideration of the Federal courts, where always, until the decision in the case at bar, it has been construed in accord with the appellants' contention above outlined.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Oregon Short-Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775.

The fact that the Congress, when making the extensive revision of the act to regulate commerce which was effected by the amendments of 1906 and 1910, did not see fit to alter § 3, relating to the affording of equal facilities for the interchange of traffic between carriers (on which the order here made was based), is highly persuasive that it was the intention of that body to leave the law and its practical working exactly as it had been.

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by a statute requiring railway companies to furnish customary facilities for the exchange of freight, and empowering the Commission to prevent unjust discrimination. Wadley Southern R. Co. v. State, 137 Ga. 497, 73 S. E. 741.

The prohibition of Ind. act of March 7, 1901, against the granting by express companies to any one carrier, class, or combination of carriers, of any terms, credits, privileges, advantages, usages, accommodations, or facilities in the receipt, transmission, or delivery of express matter which they do not grant to all others, is violated where an express company refuses to receive a package from another express company unless the charges are prepaid, while its custom and usage is to accept packages from other express companies without exacting such prepayment. Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033.

An agreement between connecting railway and steamship carriers and a wharfage company to establish a through route and joint rates for transportation between Puget Sound and Yukon river points, to refuse to make such arrangements with other connecting carriers, and to charge high local rates and discriminating wharfage charges,—all with the intent and result of eliminating all competition,—violates the prohibitions of the anti-trust act of July 2, 1890, against combinations or conspiracies in restraint of interstate or foreign trade or commerce, or the monopolization of, or attempt to monopolize, any part of such trade or commerce. United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443.

The combination and unification of the terminal facilities at St. Louis under the exclusive ownership and control of less than all the railway companies under compulsion to use them—the inherent conditions being such as to prohibit any other reasonable means of railway access to that city—violates the provisions of the Sherman anti-trust act of July 2, 1890, §§ 1 and 2, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize such commerce which must pass through the gateway of St. Louis. United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507. Such combination, if it is to escape the condemnation of the statute, must be reorganized so that it will act as the impartial agent of every railway line which must use the terminal instrumentalities.

On the general question of the right of a carrier to discriminate with respect to special or unusual service—see note to State ex rel. Ellis v. Atlantic Coast Line R. Co. 12 L.R.A.(N.S.) 506.

And see the following notes on analogous questions:—

Right of carrier to grant exclusive train privilege to baggage or passenger transfer companies—see note to Dingman v. Duluth, S. S. & A. R. Co. 32 L.R.A.(N.S.) 1181.

Right of railroad to give exclusive or preferential facilities to an express company for an express business—see notes to State v. Missouri, K. & T. R. Co. 5 L.R.A.(N.S.) 783, and Atlantic Exp. Co. v. Wilmington & W. R. Co. 18 L.R.A. 393.

Right to discriminate between hackmen and other solicitors of patronage at depots, wharves, etc.—see notes to Cole v. Rowen, 13 L.R.A. 848; Oregon Short Line R. Co. v. Davidson, 16 L.R.A.(N.S.) 777; and Chicago, R. I. & P. R. Co. v. Armstrong, 39 L.R.A.(N.S.) 126.

Remedy by injunction for unlawful discrimination by railroad against hack driver—see note to Cooper v. Duvall, 8 L.R.A. (N. S.) 1027.

Right of railroad to discriminate as to wharf privileges—see note to Cœur D'Alene & St. J. Transp. Co. v. Farrell, 43 L.R.A. (N.S.) 965.

Spokane v. Northern P. R. Co. 15 Inters. Com. Rep. 376.

The Commission itself, in several proceedings before it, has held that, as industrial tracks of this character formed a part of the terminal facilities of a carrier, it was without power to compel their use in favor of another carrier engaged in like business.

Morris Iron Co. v. Baltimore & O. R. Co. 26 Inters. Com. Rep. 240. See also Waverly Oil Works Co. v. Pennsylvania R. Co. 28 Inters. Com. Rep. 621.

Solicitor General Davis argued the cause, and, with Mr. Blackburn Esterline, filed a brief for the United States:

Undue discrimination is a question of fact, as to which the finding of the Commission is conclusive.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 196, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1913A, 315; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 255–257, 57 L. ed. 1472, 1475, 1476, 33 Sup. Ct. Rep. 916.

And this finding of fact is not now open to review.

Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; United States v. Louisville & N. R. Co. 235 U. S. 314, ante, 245, 35 Sup. Ct. Rep. 113; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 251, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392; Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 311, 58 L. ed. 1319, 1327, 34 Sup. Ct. Rep. 814; Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 359, 58 L. ed. 1341, 1351, 34 Sup. Ct. Rep. 833.

The service sought by the complaining company is a service of transportation, the performance of which is expressly commanded.

United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 303, 304, 57 L. ed. 226, 232, 233, 33 Sup. Ct. Rep. 83.

The order of the commission and the opinion of the court below are fully supported by the decision of this court in Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152. See also Louisville & N. R. Co. v. United States, 216 Fed. 672.

A carrier's terminal tracks may be put to legitimate uses of transportation for the benefit of the public, just as may its main lines.

St. Louis, S. & P. R. Co. v. Peoria & P. U. R. Co. 26 Inters. Com. Rep. 226; Waverly Oil Works Co. v. Pennsylvania R. Co. 28 Inters. Com. Rep. 621; Cardiff Coal Co. v. Chicago, M. & St. P. R. Co. 13 Inters. Com. Rep. 460; State ex rel. Atty. Gen. v. Terminal R. Asso. 182 Mo. 284, 81 S. W. 395; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; Missouri & I. Coal Co. v. Illinois C. R. Co. 22 Inters. Com. Rep. 49.

What is sought here is a mere regulation of a discriminatory practice. There is no taking of property, and the question of compensation is not involved.

Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 263, 46 L. ed. 1151, 1156, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 27, 51 L. ed. 933, 941, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

Mr. Charles W. Needham argued the cause, and, with Mr. Joseph W. Folk, filed a brief for the Interstate Commerce Commission:

The movement of cars on terminal tracks between established points of receipt and delivery is "transportation" under the act to regulate commerce.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 457, 38 L. ed. 1047, 1050, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 212, 40 L. ed. 940, 945, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 108, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651.

Congress intended that the broad provisions of the last paragraph of § 3 should be confined to a regulation of transportation furnished by carriers, and that the powers asserted should not be so construed as to compel a carrier to give the physical use of its tracks and terminals as instruments of terminal service and delivery to another company without the carrier's consent.

Chicago, M. & St. P. R. Co. v. Iowa, 233

U. S. 334–344, 58 L. ed. 988–993, 34 Sup. Ct. Rep. 592; Colonial City Traction Co. v. Kingston City R. Co. 153 N. Y. 540, 47 N. E. 810; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 36 L. ed. 277, 12 Sup. Ct. Rep. 479; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 582, 583, 41 L. ed. 265, 271, 272, 16 Sup. Ct. Rep. 1173; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Louisville & N. R. Co. v. United States, 216 Fed. 672.

Mr. William A. Glasgow, Jr., argued the cause and filed a brief for the Buffalo, Rochester, & Pittsburgh Railway Company:

The service required of the Pennsylvania Company was a transportation service, and that company was required by § 1 of the act to furnish such transportation upon reasonable request therefor.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 467, 58 L. ed. 310, 316, 34 Sup. Ct. Rep. 152; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 196, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 255, 55 L. ed. 448, 458, 31 Sup. Ct. Rep. 392.

The commission's order is justified by the second paragraph of § 3 of the act to regulate commerce.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Louisville & N. R. Co. v. United States, 216 Fed. 672; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567.

Mr. Justice Day delivered the opinion of the court:

This case comes here by appeal from an order of the district court of the United States for the western district [356] of Pennsylvania, denying a motion for interlocutory injunction against the Interstate Commerce Commission. 214 Fed. 445.

The Buffalo, Rochester, & Pittsburgh Railway Company, hereinafter called the Rochester Company, filed its petition before the Interstate Commerce Commission against the Pennsylvania Company, averring that in the city of New Castle, Pennsylvania, there was a physical connection between the railroads jointly operated by the Rochester Company and the Baltimore & Ohio Railroad Company, and the terminal facilities of the Pennsylvania Company, at which joint traffic could be properly exchanged, and is exchanged between the railroad operated by the Rochester Company and the Baltimore & Ohio Railroad, so that traffic on the lines owned and operated by the Rochester Company, and from manufactories and industries reached by the terminal lines of said company in the city of New Castle, can be delivered to the Pennsylvania Company, and thus transported to its destination; that there are no joint routes or through rates in effect between the Rochester Company and the Pennsylvania Company by which traffic to and from industries upon the terminal line of the Pennsylvania Company in or near the city of New Castle may be carried, and although complainant had frequently requested the Pennsylvania Company to join in establishing the same, the Pennsylvania Company failed and neglected so to do; that the Rochester Company, upon interstate traffic carried by it to the point of physical connection with the road of the Pennsylvania Company, which traffic is destined to manufactories or industries upon the lines of the Pennsylvania Company in or near the city of New Castle, is ready and willing, and has offered, to pay the Pennsylvania Company its lawful and proper charges for receiving, carrying, and delivering such traffic, which charges it makes to other persons or companies for like services; [357] that the action of the Pennsylvania Company in declining to receive, carry, and deliver to the point of physical connection aforesaid, interstate traffic offered by the Rochester Company, subjects said company and shippers of interstate traffic over its lines, destined to the manufactories and industries upon the line of the said Pennsylvania Company, to an undue and unreasonable prejudice and disadvantage, and is in violation of § 3 of the act to regulate commerce, [24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565], in that it constitutes a failure to afford reasonable, proper, and equal facilities to complainant with those afforded to other persons for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of property to and from their several lines; that there are no other through routes and joint rates in effect to which the Rochester Company and Pennsylvania Company are parties for the through transportation of interstate traffic carried by the Rochester Company, destined to the manufactories and industries on the lines of the Pennsylvania Company, in or near said city, nor are there any through routes or joint rates in effect between the companies for interstate traffic originating at the manufactories and industries on the lines of the Pennsylvania Company in or near New Castle, destined to points upon the line of the Rochester Company, or points which are reached by its connections; and that the failure and

refusal of the Pennsylvania Company is forbidden by § 15 of the act to regulate commerce. The Rochester Company prayed for an order commanding the Pennsylvania Company to cease and desist from such violations of the act to regulate commerce, and for such orders as might be deemed necessary, and that the Commission should establish through routes and joint rates on articles of merchandise tendered to the Pennsylvania Company at the point of physical connection above set forth for delivery on the lines of defendant's railroad, in or near [358] the said city of New Castle, and from the industries and manufactories on the lines of the above-named railroad in or near the city of New Castle to points on the line of the Rochester Company or its connections; said joint rates so established to be the maximum to be charged, and that the Commission prescribe a division of the same and the terms upon which such through route can be operated.

The Commission made no order establishing through routes and joint rates, but held that inasmuch as the Pennsylvania Company's refusal to accept from and move to the Rochester Company carload lots of freight within the switching limits of New Castle, while performing the service in connection with the said other three carriers within said switching limits, was a discrimination, the same was undue, unreasonable, and in violation of the act to regulate commerce. The Commission ordered that the Pennsylvania Company be required, on or before March 15th, 1914, to cease and desist from such undue and unreasonable prejudice and disadvantage as against the Rochester Company, and required the Pennsylvania Company to establish and maintain rates, regulations, and practices which would prevent and avoid the aforesaid undue and unreasonable prejudice and disadvantage for a period of two years. Subsequently orders were made, making the order effective from a later date, to wit, April 15th, 1914.

From the facts found by the Commission it appears that New Castle is a manufacturing city of much importance, having a population of about forty thousand people, situated near the center of the iron, steel, and ore industries of the Mahoning and Shenango valleys. The switching limits of New Castle in their greatest length are about 4 miles in extent, and included therein are about 100 industries. The Pennsylvania Railroad, the Baltimore & Ohio Railroad, the Pittsburgh & Lake Erie Railroad, Erie Railroad, and the Rochester Railroad all reach and [359] serve New Castle by their several lines of railroad. Each of the four roads has switching connections with the Pennsylvania Company, with interchange tracks and terminals within the switching limits. The Rochester road operates a line of railroad from Rochester and Buffalo, in the state of New York, to New Castle and Pittsburgh, in the state of Pennsylvania. It reaches New Castle from the town of Butler, Pennsylvania, over the rails of the Allegheny & Western Railroad, which are now jointly used by the Rochester Company and the Baltimore & Ohio Railroad, under a contract between them. The terminal facilities of the Pennsylvania Company at New Castle consist of depots, freight stations, yards, team tracks, and side tracks, together with spur tracks reaching 26 industries within the switching limits. Within the switching limits there are two points of connection with the lines of the Pennsylvania Company, and those jointly used by the Baltimore & Ohio and the Rochester road. One of these points is at Moravia street, near the center of the city, where the Pennsylvania Company has interchange yards with a capacity for 250 cars. This point is about 1,000 feet from the freight station of the Rochester road, where the latter road has two unloading tracks of ten cars' capacity each and a team track of twelve cars' capacity. The second point of connection is near the outer yards of the Pennsylvania Company, where there are ample facilities for interchange of traffic.

The Pennsylvania Company refuses all interchange of carload freight, whether incoming or outgoing, with the Rochester road within the switching limits of New Castle, but it does conduct such interchange with the Erie, the Pittsburgh & Lake Erie, and the Baltimore & Ohio roads. As to these roads the Pennsylvania Company has published its tariffs, and offers to receive, transport, and deliver to and from the lines of these three carriers carload shipments to and from about 128 industries within the [360] switching limits and immediate vicinity of New Castle, at a charge of $2 per car within the limits and a varying charge with a maximum of $5 per car without the limits. The industries on the tracks of the Pennsylvania Company within the switching limits, which receive carload freight from the Rochester road, or which may desire to ship such freight over the Rochester road, to points beyond New Castle, must dray their traffic to and from the depot or team track of the Rochester Company. Representatives of such industries testified as to the disadvantage to them resulting from the refusal of the Pennsylvania Company to perform switching service on traffic moving over the line of the Rochester Company.

The Commission found this practice to be

an undue and unreasonable discrimination against the Rochester Company, and made an order requiring the Pennsylvania Company to desist therefrom. Commissioner Harlan, dissenting, was disposed to agree to an order fixing reasonable joint through rates for the use of the terminals of the Pennsylvania Company and over the rails of the Rochester Company, but disagreed with the order on the grounds made. The Pennsylvania Company then filed the bill in this case in the district court of the United States for the western district of Pennsylvania, and moved for a preliminary injunction, restraining the enforcement of the order. Answer was filed on behalf of the United States, and the Interstate Commerce Commission and the Rochester Company intervened, and, after hearing, the motion was denied, two judges concurring and one judge dissenting. 214 Fed. 445. From this action the Pennsylvania Company appeals, and the case is now before this court.

Section 3 of the act to regulate commerce, 24 Stat. at L. 379, 380, chap. 104, Comp. Stat. 1913, §§ 8563, 8565, provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue [361] or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45. If the order made by the Commission does not contravene any constitutional limitation, and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission. Interstate Commerce Commission v. Delaware L. & W. R. Co. 220 U. S. 235, 251, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392; Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 311, 58 L. ed. 1319, 1327, 34 Sup. Ct. Rep. 814; Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 359, 58 L. ed. 1341, 1351, 34 Sup. Ct. Rep. 833.

It is to be remembered that in the aspect which the case [362] now presents, there is no question as to the terms which the Commission might prescribe, or the compensation which the Pennsylvania Company should receive for the service to be rendered. The sole question is whether the Commission exceeded its authority in requiring the Pennsylvania Company to cease and desist from what the Commission found to be a discriminatory practice.

In determining whether the Commission exceeded its authority under § 3 of the act to regulate commerce, it is essential to consider the character of the service required in the present case. Section 3 was a part of the original act, and remains unchanged, but there are certain amendments to the act which are to be read in connection with § 3 as if they were originally incorporated within the act. Blair v. Chicago, 201 U. S. 400, 475, 50 L. ed. 801, 832, 26 Sup. Ct. Rep. 427. The act as amended June 29th, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), defines what is meant by common carriers—engaged in transportation by railroad—which are brought within the control of the act, and a railroad is defined to include all switches, spurs, tracks, and terminal facilities of every kind, used or necessary in the transportation of persons or property designated in the act, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. Not only does the act define railroads, but it specifically defines what is meant by transportation, which is made to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling

of property transported." It is made the duty of every carrier "subject to the provisions of this act to provide and furnish such transportation, upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable [363] thereto;" and on June 18, 1910 (36 Stat. at L. 545, chap. 309, Comp. Stat. 1913, § 8563), it was additionally provided that the carrier should "provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." See United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83, and as to the character of such commerce, Illinois Central R. Co. v. De Fuentes, decided February 1, 1915 [236 U. S. 157, ante, 517, 35 Sup. Ct. Rep. 275].

It follows that the provisions of § 3 of the act must be read in connection with the amendments and subsequent provisions, which show that transportation as used in the act covers the entire carriage and services in connection with the receipt and delivery of property transported. There can be no question that when the Pennsylvania Railroad used these terminal facilities in connection with the receipt and delivery of carload freight transported in interstate traffic, it was subject to the provisions of the act, and it was obliged as a common carrier in that capacity to afford all reasonable, proper, and equal facilities for the interchange of traffic with connecting lines, and for the receiving, forwarding, and delivering of property to and from its own lines and such connecting lines, and was obliged not to discriminate in rates and charges between such connecting lines. By the amendments to the act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated.

The cars transported over the Rochester road are brought to a physical connection with the Pennsylvania road at a point where it receives carloads of freight from other roads and transports them over its connecting terminals to points of destination, and at that point in like [364] manner forwards over other railroads carloads of freight transported in interstate commerce, and destined for points on such other connecting railroads.

If the cars of the Rochester Company reaching the point of connection are drawn by a Baltimore & Ohio locomotive, they are received and delivered by the Pennsylvania Company over its terminals.

The Pennsylvania Company insists that these statutory provisions do not apply to it under the circumstances of this case, and that the Commission exceeded its authority in requiring it to desist from what the Commission found to be a discriminatory practice, for certain reasons which, as we understand them, may be reduced to three: (a) That upon the facts shown there is no discrimination in a real sense, and certainly none which warrants the making of the order in question; (b) that the order requires the railroad company to give up the use of its terminals to another company, in violation of the last clause of § 3; and (c) that the order is a taking of the railroad company's property in violation of the protection afforded to it under the Constitution of the United States, preventing the taking of property without due process of law, for the contention is that the effect of the order is to subject the Pennsylvania Railroad's property to the use of the Rochester Company without compensation.

That there is no discrimination in fact is rested upon the argument that with the other three roads the Pennsylvania Railroad has certain reciprocal arrangements in the Mahoning and Shenango valleys, by which these three roads interchange cars with the Pennsylvania Railroad. It is contended that this, more than the $2 per car, is the real inducement for the treatment of those railroads. But, as the Commission found, the amount of traffic exchanged between these three railroads is of a varying and differing quantity, and to ascertain the value of such service to the Pennsylvania Railroad would be a futile undertaking, [365] involving uncertain and speculative considerations as to the value of this and that service and the varying cost of performing such service at remote and different places. The statements in the record, presented to the Commission by the Pennsylvania Company, show the great difference in service of this character rendered by the three railroads and by the Pennsylvania Company for the different roads. For instance, it is shown that during 1911 the Baltimore & Ohio switched for the Pennsylvania 69 cars at New Castle, and in the valleys generally 4,185 cars, while the Pennsylvania Company switched for the Baltimore & Ohio 8,286 cars in New Castle, and in the valleys generally 8,900 cars. The Rochester Company switched for the Pennsylvania in the same year 406 cars in New Castle and 3,661 cars to points adjacent thereto. The Rochester Company moved for the Pennsylvania Company in New Castle 337 cars more than did the Baltimore & Ohio, and in gross totals,

through and into adjacent regions, 187 cars less. The Pennsylvania Company moved nearly twice as many cars for the Baltimore & Ohio road as the Baltimore & Ohio did for it. The government therefore contends with much force that such reciprocal switching arrangements ought not to justify giving cars shipped over the Baltimore & Ohio Railroad a preference denied the cars shipped over the lines of the Rochester road, which cars enter New Castle on the same track and reach the same junction points. And, as we have said, the question of compensation is not here involved, and what compensation the Pennsylvania Company might require from the Rochester Company is not now to be determined. We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road.

The objection that the railroad is required to give up the use of its terminals to another company is perhaps [366] the principal contention of the Pennsylvania Company, and is based upon the last clause of the second paragraph of § 3, which provides that the section shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

As we have heretofore shown, the act, as it now is, provides that transportation which must be furnished to all upon equal terms includes the delivery of freight as part of its transportation. While § 3 remains part of the act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the act and to make every part of it effective, in accordance with the intention of Congress.

The majority of the district court thought the present case was controlled by the case of Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152, and certainly that case is closely analogous to the present one. In that case the Michigan statute, which was enforced by the State Commission, as to intrastate commerce, required railroads in that state to afford reasonable and proper facilities, by the establishment of switching connections between the roads and the establishment of depots and freight yards for the interchange of traffic, for the receiving, forwarding, and delivering of passengers and property to and from other lines and those connecting therewith, and to transport and deliver without undue delay and discrimination freight and cars destined to any point on its own lines or connecting lines, and not to discriminate in rates and charges between connecting lines. That act, like the Federal act, contained a provision that nothing therein should be construed as requiring any railroad to give the use of its tracks and terminal facilities to another railroad engaged in like business. This court sustained an order of the Commission requiring the Grand Trunk Railway to accept freight for other roads at connected [367] points for shipment in the city of Detroit. In that connection this court stated the question to be:

"Whether, under the statutes of the state of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic; or, stating the question more specifically, whether the companies shall receive cars from another carrier at a junction point or physical connection with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits, and be required to haul such cars in either of the above-named movements or between industrial sidings."

In answering the contention that the service required was not transportation, but amounted to an appropriation of the terminal facilities of the Grand Trunk Railway, this court said:

"The proposition of appellants is, as said by the district court, that such service and team track service 'are not in a proper sense transportation, but are essentially distinguishable therefrom;' or, to put it another way,—and one which expresses more specially the contention of appellants, —they are mere conveniences at the destination or initial point of the transportation, and hence are terminal facilities merely, and their use is not required to be given to other railroads. The district court did not regard them in the latter character. After stating the conditions which exist in Detroit and its extent, the court said of them: 'Such tracks are necessary to prevent the congestion which would result from requiring all carload freight, both in and out, to be delivered at the freight depots of the respective roads, and in a very proper sense are shipping stations.' The court concluded that the services were [368] transportation, and that the statute of the state validly empowered the Commission 'to require local transportation by a railroad between its own shipping stations within a city, whether such plurality of shipping stations has been voluntarily es-

tablished by the railroad, as here, or has been required by the Commission under its lawful powers; and provided such transportation is for such substantial distance and of such a character as reasonably to require a railroad haul, as distinguished from other means of carriage.' The court further said: 'It is clear that a statute validly may, and the statutes we are considering do, authorize the employment of such depots, side tracks, and team tracks of a railroad for transporting carload freight to and from the junction of such road with another road as a substantial part of a continuous transportation routing, where such junction is outside the city limits.' And it was remarked that the fact that the freight movement begins and ends within the limits of a city does not take from it its character 'of an actual transportation between two termini,' the other conditions obtaining. We concur in the conclusion of the court."

After describing the extent of the city of Detroit to be about 22 miles, and its population about 500,000, the court held that it was competent for the state commission to require transportation between points in that city, as the beginning and destination of traffic, and that to call the service necessary to such movement a taking of terminals was misleading, and that the statute involved was a proper regulation of the business of appellants, and not an appropriation of their terminal facilities for the use and benefit of another road.

In the present case we think there is no requirement in the order of the Commission amounting to a compulsory taking of the use of the terminals of the Pennsylvania Company by another road, within the inhibition of this clause of § 3. The order gives the Rochester road no right [369] to run its cars over the terminals of the Pennsylvania Company, or to use or occupy its stations or depots for purposes of its own. There is no requirement that the Rochester Company be permitted to store their cars in the yards of the Pennsylvania Company, or to make use of its freight houses or other facilities; but simply that the Pennsylvania Company receive and transport the cars of the Rochester Company over its terminals at New Castle in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania railroad at the same point.

The third and last objection is that the effect of the order of the Commission is to appropriate the property of the Pennsylvania Railroad without compensation, to the use of the Rochester Company, in violation of the Constitution of the United States. Certainly the railroad cannot maintain, in view of the provisions of the statute to which we have referred, that these terminal facilities are exempt from public regulation and under all circumstances subject to its own control, to be dealt with in such manner as it may see fit. This court recognized, in the case of United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507, that terminal facilities might be so used as to create monopolies, which it was within the power of Congress to control,—a power which it might exercise within the prohibitions and limitations of the Sherman act. So, in the present case, all that the order requires the Pennsylvania Company to do is to receive and transport over its terminals by its own motive power, for the Rochester Company, as it does for other companies, similarly situated, carload freight in the course of interstate transportation.

To support the constitutional argument in this connection, reliance is had upon the decision of this court in Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246. That case was also relied upon to support a like argument in the Grand Trunk Case, supra, and in the opinion of the [370] court was analyzed and its application to the situation then presented denied. An examination of the Louisville case shows that it was unlike the one now presented. The Louisville & Nashville Company and the Southern Railway Company were competing companies for the live stock business at Louisville. Each maintained its own stock yards, the yard of the Louisville & Nashville Company being known as the Bourbon Stock Yard, and that of the Southern Railway Company as the Central Stock Yard. See 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, and the same case in this court in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339. The railway company was ordered in the state court to receive at its stations in Kentucky, and to bill, transport, transfer, switch, and deliver in the customary way, at some point of physical connection with the tracks of the Southern Railway, and particularly at one described, all live stock or other freight consigned to the Central Stock Yards or to persons doing business there; to transfer, switch, and deliver to the Southern Railway at the said point of connection any and all live stock or other freight coming over its lines in Kentucky, consigned to the Central Stock Yards or persons doing business there; to receive at the same point and to transport, switch, transfer, and deliver all live stock consigned to anyone at the Bourbon Stock Yards, the shipment of which originates at the Central Stock Yards; and was required,

whenever requested by the consignor, consignee, or owner of the stock, at any of the stations, and particularly at its break-up yards in South Louisville, Kentucky, to recognize their right to change the destination, and upon payment of the whole freight rate and proper presentation of the bill of lading, duly indorsed, to change the destination and deliver at a point of connection with the Southern Railway tracks for delivery by the latter to the Central Stock Yards. This judgment of the state court was reversed in this court, among other things the court saying:

[371] "If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone." [212 U. S. 145.]

As this court said in the Grand Trunk Case, the case turned upon the point that the roads were competitive, and the point of delivery an arbitrary one, and that thereby the terminal station of one company was required to be shared with the other. In that connection it used language applicable to the present situation:

"In the case at bar a shipper is contesting for the right, as a part of transportation. The order of the Commission was a recognition of the right, and legally so. Considering the theater of the movements, the facilities for them are no more terminal or switching facilities than the depots, side tracks, and main lines are terminal facilities in a less densely populated district. A precise distinction between facilities can neither be expressed nor enforced. Transportation is the business of railroads, and when that business may be regulated and to what extent regulated, may depend upon circumstances."

So here there is no attempt to appropriate the terminals of the Pennsylvania Railroad to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and [372] the Rochester Company shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the district court was right in so determining.

It follows that the order denying the application for temporary injunction was properly made, and the judgment must be affirmed.

Mr. Chief Justice White, dissenting:

The court now holds that this controversy involves merely a switching privilege and the duty of one railroad not to refuse such privilege to another; or, at all events, if it permits it to one, to allow it to other roads on terms of equality. By a necessary inference, therefore, the decision now made is concerned alone with that subject, and does not in any degree whatever, as a matter of law, involve the right of one railroad company to compel another to permit it to share in its terminal facilities. If I could bring my mind to understand the facts of the controversy as they are now appreciated by the court, there would be no difficulty whatever on my part in accepting the legal principle which is applied to them. But the difficulty which I have is in the premise of fact upon which the case is decided. In other words, I have found it impossible to escape the conclusion that instead of being one concerning a mere switching privilege, the case is really one involving the using of terminal facilities. Differing only, therefore, as to an appreciation of the facts, I am very reluctant to express a dissent,—a reluctance which is greatly increased by the consideration that the view [373] of the facts now taken by the court is the one which was adopted by the court below, and which was stated by the Interstate Commerce Commission. Strong, however, as is the admonition resulting from this situation, it is not strong enough to overcome the force of my conviction as to what the case really concerns, and to overcome the belief that it is my duty, at least, to state the fact of my dissent.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

F. A. MILLER, Plff. in Err.,
v.
F. P. WILSON, Sheriff of the County of Riverside, State of California.

(See S. C. Reporter's ed. 373–384.)

Constitutional law — due process of law — freedom to contract — hours of women employees.

1. Forbidding the employment of women in certain specified establishments for more than eight hours in one day, or forty-eight hours in one week, as is done by Cal. Stat. 1911, p. 437, does not, as applied to women employed in hotels, violate U. S. Const., 14th Amend., as infringing freedom to contract.

[For other cases, see Constitutional Law, 605–607, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — hours of women employees.

2. Including hotels among the specified establishments in which, under Cal. Stat. 1911, p. 437, women must not be employed more than eight hours in one day, or forty-eight hours in one week, does not render the statute invalid as discriminatory, although the classification may, to some extent, be based upon the nature of the employer's business, rather than the character of the employee's work.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — hours of women employees.

3. Exempting women employed in harvesting, curing, canning, or drying any variety of perishable fruit or vegetable from the operation of Cal. Stat. 1911, p. 437, forbidding the employment of women in certain specified establishments for more than eight hours in one day, or forty-eight hours in one week, does not render the statute invalid as unreasonably discriminatory.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — hours of women employees.

4. The state may forbid women employed in hotels from working more than eight hours in one day, or forty-eight hours in one week, as is done by Cal. Stat. 1911, p. 437, without imposing a similar restriction upon those employed in boarding houses, lodging houses, etc., or upon such classes of women employees as stenographers, clerks, and assistants employed by the professional classes, and domestic servants.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 112.]

Argued and submitted January 12, 1915.
Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of California to review a judgment denying relief by habeas corpus to a person in custody upon the charge of violating a statute of the state relating to the hours of women employees. Affirmed.

See same case below, 162 Cal. 687, 124 Pac. 427.

The facts are stated in the opinion.

Messrs. **Frank P. Flint**, and **Henry S. Van Dyke** submitted the cause for plaintiff in error:

The restrictions imposed by the act upon women and their employers as to their freedom of contract in certain designated employments are not reasonably necessary, and are not such a necessary invasion of freedom of contract as will be justified under the sanction of the police power or of any other constitutional power.

Bierly, Pol. Power, State & Federal, p. 13; People v. Jackson & M. Pl. Road Co. 9 Mich. 285; Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; Russell, Pol. Power, p. 34; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Brannon, 14th Amend. p. 172; Lochner v. New York, 198 U. S. 45, 61, 49 L. ed. 937, 943, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Ex parte Kuback, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; Opinion of Justices, 208 Mass. 619, 34 L.R.A.(N.S.) 771, 94 N. E. 1044; Seattle v. Smyth, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; Re Martin, 157 Cal. 51, 26 L.R.A.(N.S.) 242, 106 Pac. 235; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Jacobs, 98

NOTE.—On constitutionality of statutes limiting hours of labor by women and children—see note to Riley v. Massachusetts, 58 L. ed. U. S. 788.

On validity of legislation regulating hours of labor, generally,—see notes to Atkin v. Kansas, 48 L. ed. U. S. 148, and Ex parte Wong Wing, 51 L.R.A.(N.S.) 361.

On the constitutionality of statutes restricting contracts and business, generally—*see note* to State v. Loomis, 21 L.R.A. 789.

On statutory restrictions of contracts between master and servant—see notes to Com. v. Perry, 14 L.R.A. 325, and Ramsey v. People, 17 L.R.A. 853.

On validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

N. Y. 98, 50 Am. Rep. 636; People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Burcher v. People, 41 Colo. 495, 124 Am. St. Rep. 143, 93 Pac. 14.

The act is vitiated by manifold and fatal discriminations, and is therefore unconstitutional.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 104, 46 L. ed. 107, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Allgeyer v. Louisiana, 165 U. S. 578–589, 41 L. ed. 832–836, 17 Sup. Ct. Rep. 427; State v. Peel Splint Coal Co. 36 W. Va. 856, 17 L.R.A. 385, 15 S. E. 1000; State v. Goodwill, 33 W. Va. 179, 6 L.R.A.621, 25 Am. St. Rep. 863, 10 S. E. 285; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Dougherty v. Austin, 94 Cal. 620, 16 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092; Darcy v. San José, 104 Cal. 642, 645, 38 Pac. 560; Lodi Twp. v. State, 51 N. J. L. 402, 6 L.R.A. 56, 18 Atl. 749; Hellman v. Shoulters, 114 Cal. 146, 44 Pac. 915, 45 Pac. 1057; Budd ex rel. State Comr. v. Hancock, 66 N. J. L. 135, 48 Atl. 1023; Ex parte Sohncke, 148 Cal. 262, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 82 Pac. 956, 7 Ann. Cas. 475; Slocum v. Bear Valley Irrig. Co. 122 Cal. 555, 68 Am. St. Rep. 68, 55 Pac. 403; Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; Krause v. Durbrow, 127 Cal. 681, 60 Pac. 438; Beveridge v. Lewis, 137 Cal. 619, 59 L.R.A. 581, 92 Am. St. Rep. 188, 67 Pac. 1040, 70 Pac. 1083; Ex parte Westerfield, 55 Cal. 552, 36 Am. Rep. 47; Ex parte Jentzsch, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Re Spencer, 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105; Re Martin, 157 Cal. 51, 26 L.R.A. (N.S.) 242, 106 Pac. 235.

Mr. William Denman argued the cause, and, with Mr. U. S. Webb, Attorney General of California, and Mr. G. S. Arnold, filed a brief for defendant in error:

California has the power to prevent the gainful employment of women for over eight hours a day in hotels and hospitals, and such a restriction is not an unconstitutional denial of freedom of contract:—

(a) Because the limitation of the number of hours women must work in these two employments has a direct relationship to women's health, and hence to the health of the race as a whole, as well as the safety and health of those she serves.

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Hawley v. Walker, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 479; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 79, 55 L. ed. 369, 377, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Riley v. Massachusetts, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469; Re Miller, 162 Cal. 687, 124 Pac. 427.

(b) Because women are admittedly weaker than men in the struggle of economic competition, and may be protected by legislative enactment against the oppressive bargaining or control of their employer, whether arising from cupidity or such a mistaken philanthropy, as that of a hospital, which admittedly works its undergraduate girl nurses the equivalent of twelve hours a day for a six-day week to make a better showing of the number of poor people cared for.

Holden v. Hardy, 169 U. S. 366, 397, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; Muller v. Oregon, 208 U. S. 412, 422, 423, 52 L. ed. 551, 556, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Wenham v. State, 65 Neb. 395, 58 L.R.A. 825, 91 N. W. 421.

(c) Because the limitation of the number of hours of woman's labor in gainful occupations to not over a half of her waking time may check the rapid decline in reproduction of the older American stocks, and in any event leaves her free for the development of mind and body for wifehood and motherhood, and hence insures the increased intelligence and strengthening of the race through the mother, to whom (in California, at least) the shaping of the child mind, the directing of his habits, and the development of his character is primarily intrusted.

The California statutes in question do not deny equal protection of the law because:—

(a) The continuous work of women in hotels and hospitals differs essentially from the intermittent seasonal work of women in harvesting, curing, canning, or drying of any variety of perishable fruit or vegetables.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 76, 79, 55 L. ed. 376, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Riley v. Massachusetts, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469; Hawley v. Walker, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 479; Re Miller, 162 Cal. 687, 124 Pac. 427.

(b) There is an essential difference be-

tween the work of women in hotels and in lodging houses.

Re Miller, supra; People v. Elerding, 254 Ill. 579, 40 L.R.A.(N.S.) 893, 98 N. E. 982.

(c) The graduate nurse belongs to a class composed of women mentally better educated, physically better trained, professionally more experienced, and economically better organized to resist oppressive regulation imposed by their employers, and hence may be left free from legislative restriction in the performance of her distinctive functions in the hospital. She is the best fitted to cope with those emergencies arising in the operating room and ward, which often require attendance for more than the eight-hour period, and hence excepting her from the law provides for such emergencies.

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 76, 55 L. ed. 376, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281.

Mr. Louis D. Brandeis also argued the cause and filed a brief for defendant in error:

Eight-hour laws for women are valid.

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Hawley v. Walker, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 479.

The classifications made in Cal. Stat. 1911, chap. 238, are not arbitrary.

People v. Elerding, 254 Ill. 579, 40 L.R.A. (N.S.) 893, 98 N. E. 982; Hawley v. Walker, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 479; Withey v. Bloem, 163 Mich. 419, 35 L.R.A.(N.S.) 628, 128 N. W. 913; Ex parte Hawley, 85 Ohio St. 494, 98 N. E. 1126; State v. Somerville, 67 Wash. 638, 122 Pac. 324.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error, the proprietor of the Glenwood Hotel in the city of Riverside, California, was arrested upon the charge of employing and requiring a woman to work in the hotel for the period of nine hours in a day, contrary to the statute of California which forbade such employment for more than eight hours a day, or forty-eight hours a week. Act of March 22, 1911; Stat. 1911, p. 437. It was stated in the argument at this bar that the woman was employed as a chambermaid. Urging that the act was in violation of the state Constitution, and also that it was repugnant to the 14th Amendment, as an arbitrary invasion of liberty of contract, and as unreasonably discriminatory, the plaintiff in error obtained a writ of habeas corpus from the supreme court of the state. That court, characterizing the statute as one "intended for a police regulation to preserve, protect, or promote the general health and welfare," upheld its validity and remanded the plaintiff in error to custody. 162 Cal. 687, 124 Pac. 427. This writ of error was then sued out.

The material portion of the statute, as it then stood, was as follows:

"No female shall be employed in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in this state more than eight hours during any one day, or [380] more than forty-eight hours in one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of one day, or forty-eight hours during any one week; provided, however, that the provisions of this section in relation to the hours of employment shall not apply to nor affect the harvesting, curing, canning, or drying of any variety of perishable fruit or vegetable."

As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint,—not immunity from reasonable regulation to safeguard the public interest,—the question is whether the restrictions of the statute have reasonable relation to a proper purpose. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 567, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259; Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. ed. 1155, 1160, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761; Coppage v. Kansas, 236 U. S. 1, 18, ante, 441, 35 Sup. Ct. Rep. 240. Upon this point, the recent decisions of this court upholding other statutes limiting the hours of labor of women must be regarded as decisive. In Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, the statute of that state, providing that "no female shall be employed in any mechanical establishment or factory or laundry" for "more than ten hours during any one day" was sustained as applied to the work of an adult woman in a laundry. The decision was based upon considerations relating to woman's physical structure, her maternal functions, and the vital importance of her protection in order to preserve the strength and vigor of the race. "She is properly placed in a class by

herself," said the court, "and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . . Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to [381] him for protection; that her physical structure and a proper discharge of her maternal functions —having in view not merely her own health, but the well-being of the race— justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence." In Riley v. Massachusetts, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469, the plaintiff in error had been convicted upon the charge of employing a woman in a factory at a different hour from that specified in a notice posted in accordance with the statute relating to the hours of labor. The general provisions of the statute being found to be valid, the particular requirements which were the subject of special objection were also upheld as administrative rules designed to prevent the circumvention of the purpose of the law. The case of Hawley v. Walker, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 479, arose under the Ohio act prohibiting the employment of "females over eighteen years of age" to work in "any factory, workshop, telephone or telegraph office, millinery or dressmaking establishment, restaurant, or in the distributing or transmission of messages more than ten hours in any one day, or more than fifty-four hours in any one week." The plaintiff in error was charged with employing a woman in a millinery establishment for fifty-five hours in a week. The constitutionality of the law as thus applied was sustained by this court.

[382] It is manifestly impossible to say that the mere fact that the statute of California provides for an eight-hour day, or a maximum of forty-eight hours a week, instead of ten hours a day, or fifty-four hours a week, takes the case out of the domain of legislative discretion. This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme, but there is no ground for the conclusion here that the limit of the reasonable exertion of protective authority has been overstepped. Nor, with respect to liberty of contract, are we able to perceive any reason upon which the state's power thus to limit hours may be upheld with respect to women in a millinery establishment, and denied as to a chambermaid in a hotel.

We are thus brought to the objections to the act which are urged upon the ground of unreasonable discrimination. These are (1) the exception of women employed in "harvesting, curing, canning, or drying of any variety of perishable fruit or vegetable;" (2) the omission of those employed in boarding houses, lodging houses, etc.; (3) the omission of several classes of women employees, as, for example, stenographers, clerks, and assistants employed by the professional classes, and domestic servants; and (4) that the classification is based on the nature of the employer's business, and not upon the character of the employee's work.

With respect to the last of these objections, it is sufficient to say that the character of the work may largely depend upon the nature and incidents of the business in connection with which the work is done. The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class [383] a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences, and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will, as a whole, fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one, considered in its general application, the classification is not to be condemned. See Louisville & N. R. Co. v. Melton, 218 U. S. 36, 53, 54, 54 L. ed. 921, 928, 929, 47 L.R.A.(N.S.) 84, 30 Sup. Ct.

Rep. 676. Hotels, as a class, are distinct establishments not only in their relative size, but in the fact that they maintain a special organization to supply a distinct and exacting service. They are adapted to the needs of strangers and travelers who are served indiscriminately. As the state court pointed out, the women employees in hotels are, for the most part, chambermaids and waitresses; and it cannot be said that the conditions of work are identical with those which obtain in establishments of a different character, or that it was beyond the legislative power to recognize the differences that exist.

If the conclusion be reached, as we think it must be, that the legislature could properly include hotels in its classification, the question whether the act must be deemed to be invalid because of its omission of women employed in certain other lines of business is substantially the same as that presented in Hawley v. Walker, supra. There, the statute excepted "canneries or establishments engaged in preparing for use perishable goods;" and it was asked in that case, on behalf of the owner of a millinery establishment, why the act should omit mercantile establishments and hotels. The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, [384] in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. Patsone v. Pennsylvania, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business" it is not necessary that the prohibition "should be couched in all-embracing terms." Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856. Upon this principle, which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels. Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 256, 52 L. ed. 195, 197, 28 Sup. Ct. Rep. 89; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 354, 52 L. ed. 236, 243, 28 Sup. Ct. Rep. 114; Engel v. O'Malley, 219 U. S. 128, 138, 55 L. ed. 128, 136, 31 Sup. Ct. Rep. 190; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 56 L. ed. 175, 179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Rosenthal v. New York, 226 U. S. 260, 270, 57 L. ed. 212, 216, 33 Sup. Ct. Rep. 27; Barrett v. Indiana, 229 U. S. 26, 29, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 326, 58 L. ed. 245, 250, L.R.A. 1915A, 1196, 34 Sup. Ct. Rep. 60; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 418, 58 L. ed. 1011, 1024, 34 Sup. Ct. Rep. 612; International Harvester Co. v. Missouri, 234 U. S. 199, 213, 58 L. ed. 1276, 1283, 34 Sup. Ct. Rep. 859; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 289, 58 L. ed. 1312, 1317, 34 Sup. Ct. Rep. 829.

For these reasons the judgment must be affirmed.

Judgment affirmed.

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[385] WILLIAM B. BOSLEY, Peter L. Wheeler, and Samuel H. Buteau, Trustees of "The Samuel Merritt Hospital," and Ethel E. Nelson, Appts.,

v.

JOHN P. McLAUGHLIN, Labor Commissioner of the State of California, et al. (No. 362.)

SAME v. SAME. (No. 363.)

(See S. C. Reporter's ed. 385-396.)

Constitutional law — due process of law — freedom to contract — hours of women employees.

1. A graduate woman pharmacist employed in a hospital is not denied the freedom to contract guaranteed by U. S. Const., 14th Amend., because, under Cal. Stat. 1911, p. 437, as amended by Stat. 1913, p. 713, she is forbidden to work more than eight hours in one day, or forty-eight hours in one week.

[For other cases, see Constitutional Law, 605-607, in Digest Sup. Ct. 1908.]

NOTE.—On constitutionality of statutes limiting hours of labor by women and children—see note to Riley v. Massachusetts, 58 L. ed. U. S. 788.

Constitutional law — due process of law — freedom to contract — hours of women employees.

2. Forbidding women student nurses in a hospital training school to work more than eight hours in one day, or forty-eight hours in one week, as is done by Cal. Stat. 1911, p. 437, as amended by Stat. 1913, p. 713, does not infringe the freedom to contract guaranteed by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 605-607, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — freedom to contract — hours of women employees.

3. The extension by Cal. Stat. 1913, p. 713, to women employed in hospitals, such as matrons, seamstresses, bookkeepers, office assistants, and persons engaged in household work, of the provisions of Cal. Stat. 1911, p. 437, forbidding the employment of women in certain specified establishments for more than eight hours in one day, or forty-eight hours in one week, does not render the statute invalid as denying the constitutional freedom to contract.

[For other cases, see Constitutional Law, 605-607, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — hours of women employees.

4. Exempting graduate nurses in hospitals from the operation of Cal. Stat. 1911, p. 437, as amended by Stat. 1913, p. 713, forbidding the employment of women in certain specified establishments for more than eight hours in one day, or forty-eight hours in one week, does not render the statute invalid as unreasonably discriminatory, although such prohibition applies to student nurses in hospital training schools, to experienced nurses, to graduate women pharmacists and other hospital employees, such as matrons, seamstresses, bookkeepers, office assistants, and those engaged in household work.

[For other cases, see Constitutional Law, IV. a, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — hours of women employees.

5. The state may forbid women employed in hospitals to work more than eight hours in one day, or forty-eight hours in one week, as is done by Cal. Stat. 1911, p. 437, as amended by Stat. 1913, p. 713, without imposing a similar restriction upon women engaged in similar employments elsewhere.

[For other cases, see Constitutional Law, IV. a, in Digest Sup. Ct. 1908.]

[Nos. 362 and 363.]

Argued January 12, 1915. Decided February 23, 1915.

TWO APPEALS from the District Court of the United States for the Northern District of California to review decrees refusing to enjoin the enforcement of a state statute restricting the hours of women employees. Affirmed.

The facts are stated in the opinion.

Mr. John F. Bowie argued the cause, and, with Mr. Charles S. Wheeler, filed a brief for appellants:

The provision of the statute excepting graduate nurses from the operation of the law results in denying equal protection of the laws to all other women working in hospitals.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 112, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Smith v. Texas, 233 U. S. 630, 641, 58 L. ed. 1129, 1134, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; Ex parte Jentzsch, 112 Cal. 474, 32 L.R.A. 664, 44 Pac. 803.

The statute is not a health law.

Minnesota v. Barber, 136 U. S. 313, 319, 34 L. ed. 455, 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Lochner v. New York, 198 U. S. 64, 49 L. ed. 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

Laws limiting the period of time during which adults may work at a lawful calling operate to deprive those subject thereto of liberty.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Smith v. Texas, 233 U. S. 636, 58 L. ed. 1132, L.R.A. 1915D, 677, 34 Sup. Ct. Rep. 681; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; People v. Williams, 189 N. Y. 135, 12 L.R.A.(N.S.)

On validity of legislation regulating hours of labor—see notes to Atkin v. Kansas, 48 L. ed. U. S. 148, and Ex parte Wong Wing, 51 L.R.A.(N.S.) 361.

On the constitutionality of statutes restricting contracts and business, generally—see note to State v. Loomis, 21 L.R.A. 789.

On statutory restrictions of contracts between master and servant—see notes to Com. v. Perry, 14 L.R.A. 325, and Ramsey v. People, 17 L.R.A. 853.

On validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Ex parte Drayton, 153 Fed. 989; Re Sing Tuck, 126 Fed. 388; State ex rel. Galle v. New Orleans, 113 La. 371, 67 L.R.A. 70, 36 So. 999, 2 Ann. Cas. 92.

The statute is invalid even if intended as an exercise of police power, the restrictions of liberty therein contained being arbitrary and unnecessarily oppressive.

Smith v. Texas, 233 U. S. 630, 636, 58 L. ed. 1129, 1132, L.R.A. 1915D, 677, 34 Sup. Ct. Rep. 681; Smith v. Alabama, 124 U. S. 465, 480, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Lochner v. New York, 198 U. S. 56, 49 L. ed. 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Opinion of Justices, 208 Mass. 622, 34 L.R.A.(N.S.) 771, 94 N. E. 1044; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

Mr. William Denman argued the cause, and, with Mr. U. S. Webb, Attorney General of California, and Mr. G. S. Arnold, filed a brief for appellees. For their contentions, see their brief as reported in Miller v. Wilson, ante, 628.

Mr. Louis D. Brandeis also argued the cause and filed a brief for appellees. For his contentions, see his brief as reported in Miller v. Wilson, ante, 628.

Mr. Justice Hughes delivered the opinion of the court:

This is a suit to restrain the enforcement of the statute of California prohibiting the employment of women for more than eight hours in any one day, or more than forty-eight [389] hours in any one week. The act is the same as that which was under consideration in Miller v. Wilson, 236 U. S. 373, ante, 628, 35 Sup. Ct. Rep. 342, as amended in 1913. By the amendment, the statute was extended to public lodging houses, apartment houses, hospitals, and places of amusement. The proviso was also amended so as to make the statute inapplicable to "graduate nurses in hospitals." Stat. (Cal.) 1913, p. 713.

The complainants are the trustees of "The Samuel Merritt Hospital" in Alameda, California, and one of their employees, Ethel E. Nelson. Their bill set forth that there were employed in this hospital approximately eighty women and eighteen men; that of these women ten were what are known as "graduate nurses," that is to say, those who had "pursued and completed, at some training school for nurses in a hospital, courses of study and training in the profession or occupation of nursing and attending the sick and injured," and had received diplomas or certificates of graduation. By reason of their qualifications, they were paid "a compensation greatly in excess of that paid to female pupils engaged in nursing in hospitals while students of the training school."

It was further averred that, in addition to these ten graduate nurses, certain other women were employed in the hospital, one as bookkeeper, two as office assistants, one as seamstress, one as matron or housekeeper, five who were engaged in ordinary household duties, and one—the complainant Ethel E. Nelson—as pharmacist. It was stated that this complainant was a graduate pharmacist, licensed by the state board; that she also acted as storekeeper, but that her chief duty was to mix and compound drugs for use in the treatment of the hospital patients. The general allegation was made that these last-mentioned eleven employees performed work that was in no manner different from that done by "persons engaged in similar employments or occupations and not [390] employed in hospitals." The apprehended injury to the complainant Nelson by reason of the interference of the statute with her freedom to contract was specially alleged.

It was also set forth that the hospital maintained a school with a three years' course of study wherein women were trained to nurse the sick and injured; that in this school there were enrolled twenty-four in the third-year class, eighteen in the second-year class, and twenty-three in the first-year class; that a part of the "education and training" of these "student nurses" consisted in "aiding, nursing, and attending to the wants of the sick and injured persons" in the hospital, this work being done while the student was pursuing the prescribed course of study; that the student nurses were paid $10 a month during each of the first two years of their course and $12.50 a month in the third year, and were also provided throughout the three years "with free board, lodging, and laundry." It was averred that the cost to the hospital of maintaining the school was $2,500 a month, and that the cost of procuring the work to be performed by graduate nurses that was being done by the student nurses would be not less than $3,600 a month. It was set forth as a reason why the work of the student nurses was done at less expense, that their compensation was paid not only in money, board, etc., but also partially in their education and training, their attendance on patients being in itself an indispensable

part of their course of preparation. It was said further that their hours of labor must be determined by the exigencies of the cases they were attending.

The enforcement of the act with respect to these student nurses, it was stated, would require the hospital either to cease the operation of the school, or largely to increase the number in attendance in order that an equal return in service could be obtained; and such increase would involve a greatly enlarged expense.

The complainants attacked the act on the grounds [391] that it interfered with their liberty of contract, and denied to them the equal protection of the laws, contrary to the 14th Amendment. And in support, it was asserted in substance, that labor in hospitals did not afford, in itself, a basis for classification; that there was no difference between such labor and the "same kind of labor" performed elsewhere; that a hospital is not an unhealthful or unsanitary place; and, generally, that the statute and its distinctions were arbitary.

Upon the bill, an application was made for an injunction pending the suit. It was heard by three judges and was denied. The appeal in No. 362 is from the order thereupon entered.

The defendants, the officers charged with the enforcement of the law, filed an answer. On final hearing, the complainants made an offer to prove that "all the allegations of fact set forth in the bill were true; that the fact that a woman was a graduate nurse merely showed that she had completed a course of study for the treatment of the sick, but that the course of study which a woman must take for that purpose was not prescribed by law or fixed by custom, but was such as any hospital or training school might, in the discretion of its governing officers, see fit to prescribe; that the difference between a graduate nurse and an experienced nurse is a difference of technical education only, and that there is no standard by which this difference can be measured; that graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers to assistants to the medical staff." The district judge thereupon stated that upon the hearing of the motion for an interlocutory injunction it had been held that the complaint did not state a cause of action, and that it was considered unnecessary to take the evidence. The offer of proof was rejected and the bill of complaint dismissed. No. 363 is an appeal from the final decree.

[392] 1. As to liberty of contract—The gravamen of the bill is with respect to the complainant Nelson, a graduate pharmacist, and the student nurses. As to the former, —it appears that a statute of California limits the hours of labor of pharmacists to ten hours a day and sixty hours a week. Stat. (Cal.) 1905, p. 28. In view of the nature of their work, and the extreme importance to the public that it should not be performed by those who are suffering from overfatigue, there can be no doubt as to the legislative power reasonably to limit the hours of labor in that occupation. This, the appellants expressly concede. But this being admitted to be obviously within the authority of the legislature, there is no ground for asserting that the right to contractual freedom precludes the legislature from prohibiting women pharmacists from working for more than eight hours a day in hospitals. The mere question whether in such case a practical exigency exists, that is, whether such a requirement is expedient, must be regarded as a matter for legislative, not judicial, consideration.

The appellants, in argument, suggest a doubt whether the statute is applicable to the student nurses, but the bill clearly raises the question of its validity as thus applied, and urges the serious injury which its enforcement would entail upon the hospital. Assuming that these nurses are included, the case presented would seem to be decisive in favor of the law. For it appears that these persons, upon whom rests the burden of immediate attendance upon, and nursing of, the patients in the hospital, are also pupils engaged in a course of study, and the propriety of legislative protection of women undergoing such a discipline is not open to question. Considerations which, it may be assumed, moved the legislature to action, have been the subject of general discussion, as is shown by the bulletin issued by the United States Bureau of Education on the "Educational Status of Nursing" (Bulletin, 1912, [393] No. 7). With respect to the "hours of duty" for student nurses, it is there said (pp. 29-32): "These long hours have always formed a persistent and at times an apparently immovable obstacle in efforts to improve the education of nurses and to establish a rational adjustment of practice to theory. . . . Ten or more hours a day in addition to class work and study might be endured for a period of two years without obvious or immediate injury to health. The same hours carried on for three years would prove a serious strain upon the student's physical resources, inflicting perhaps irreparable injury. The conclusions reached in this first study of working hours of students (1896) were that they were universally excessive, that their

requirement reacted injuriously not only upon the students, but eventually upon the patients and the hospital, that it was a short-sighted and unjustifiable economy in hospital administration which permitted it to exist. Fifteen years later, statistics show that though the course of training has now in the great majority of schools been lengthened to three years, shorter hours of work have not generally accompanied this change, and that progress in that direction has been slow and unsatisfactory." After quoting statistics the bulletin continues: "In speaking of hours it must be remembered that these statistics refer only to practical work in ward, clinic, operating room, or other hospital department, and not to any portion of theoretical work; that the ten hours in question are required of the student irrespective of lectures, class, or study. This practical work, also, is in many of its aspects unusually exacting and fatiguing; much of it is done while standing, bending, or lifting; much of it is done under pressure of time and nervous tension, and to a considerable degree the physical effort which the student must make is accompanied by mental anxiety and definite, often grave, responsibility. Viewed from any standpoint whatever, real nursing is difficult, [394] exacting work, done under abnormal conditions, and all the extraordinary, subtile, intangible rewards and satisfactions which are bound up in it for the worker cannot alter that fact. Ten hours, or even nine hours, of work daily of this nature, cannot satisfactorily be combined with theoretical instruction to form a workable educational scheme. . . . How largely the superintendents of training schools feel the need of improvement in this direction may be gathered from the fact that over two thirds of the replies to the questions on this subject suggested shorter hours as advisable or necessary, that a large proportion of these stated their firm belief in an eight hour day, and that almost every reply which came showed clearly in one way or another the difficulties under which the schools were laboring in trying to carry on the hospital work with the existing number of students."

Whatever contest there may be as to any of the points of view thus suggested, there is plainly no ground for saying that a restriction of the hours of labor of student nurses is palpably arbitrary.

As to certain other women (ten in number) employed in the hospital, such as the matron, seamstress, bookkeeper, two office assistants, and five persons engaged in so-called household work, the bill contains merely this general description, without *further specifications*; and from any point of view it is clear, that, with respect to the question of freedom of contract, no facts are alleged which are sufficient to take the case out of the rulings in Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Riley v. Massachusetts, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469; Hawley v. Walker, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 479; and Miller v. Wilson, 236 U. S. 373, ante, 628, 35 Sup. Ct. Rep. 342.

2. As to the equal protection of the laws. —The argument in this aspect of the case is especially addressed to the exception of "graduate nurses." The contention is that they are placed "on one side of the line, and doctors, surgeons, pharmacists, experienced nurses and student nurses [395] and all other hospital employees on the other side of the line." So far as women doctors and surgeons are concerned, the question is merely an abstract one, as no such question is presented by the allegations of the bill with regard to the complainant hospital. Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784. With regard to other nurses, whether so-called "experienced" nurses or student nurses, it sufficiently appears that the graduate nurse is in a separate class. The allegations of the bill itself show this to be the fact. It is averred that the graduate nurses are those who "have pursued and completed, at some training school for nurses in a hospital, courses of study and training in the profession or occupation of nursing and attending the sick and injured, and have received, in recognition thereof, diplomas or certificates of graduation from said courses of study." And, in the appellants' offer of proof, it is said that "graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers to assistants to the medical staff." It may be, as asserted, that the difference in qualifications between a graduate nurse and an "experienced nurse" is a difference of technical education only, but that difference exists and is not to be brushed aside. It is one of which the legislature could take cognizance. Not only so, but as such nurses act as overseers of wards or assistants to surgeons and physicians, it would be manifestly proper for the legislature to recognize an exigency with respect to their employment making it advisable to take them out of the general prohibition. Again, with regard to the complainant Nelson, who is a graduate pharmacist, while she has been graduated from a course of training

for her chosen vocation, it is a different vocation. The work is not the same. There is no relation to the supervision of the wards, and, putting mere matters of expediency aside, there is no basis for concluding that [396] the legislature was without power to treat the difference as a ground for classification.

As to the ten other women employees, the validity of the distinction made in the case of graduate nurses is obvious. It should further be said, aside from the propriety of classification of women in hospitals with respect to the general conditions there obtaining (Louisville & N. R. Co. v. Melton, 218 U. S. 36, 53, 54, 54 L. ed. 921, 928, 929, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676), that the bill wholly fails to show as to the employment of any of these persons any such injury—actual or threatened—as would warrant resort to a court of equity to enjoin the enforcement of the law.

And the objection based upon the failure of the legislature to extend the prohibition of the statute to persons employed in other establishments is not to be distinguished in principle from that which was considered in Miller v. Wilson, supra, and cases there cited.

Decrees affirmed.

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[397] WRIGHT-BLODGETT COMPANY, Limited, Appt.,
v.
UNITED STATES. (No. 151.)

SAME v. SAME. (No. 152.)

SAME v. SAME. (No. 154.)

SAME v. SAME. (No. 155.)

SAME v. SAME. (No. 156.)

(See S. C. Reporter's ed. 397-405.)

Appeal — review of facts — concurrent findings below.

1. The principle that the Federal Supreme Court will not disturb, unless clearly erroneous, the concurrent findings of fact of the two courts below, such as findings as to residence and cultivation by homestead entrymen, will be applied to a suit in which a circuit court of appeals affirmed, on the ground that fraud was proved and the grantees charged with knowledge thereof, five separate decrees of the district court, rendered on the same day without opinion, canceling in each case a homestead patent, where, although in three of the five cases there was evidence not only of the lack of residence and cultivation alleged, but also of agreements to sell prior to commutation proofs, the several cases are so far alike in their main features in respect to residence or cultivation as to make it absolutely impossible to assume that any different conclusion of fact was reached by the district court in the three cases from that at which it arrived in the two others.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — suit to cancel patent — bona fide purchase.

2. A bona fide purchase for value from a homestead entryman is an affirmative defense which the grantee must establish in order to defeat the right of the government to cancel the patent as obtained by false and fraudulent proofs, submitted for the purpose of deceiving the officers of the government, and of thus obtaining public lands without compliance with the legal requirements.

[For other cases, see Evidence, II. c, in Digest Sup. Ct. 1908.]

Evidence — admissibility under pleadings — surplusage.

3. The government, in an action to cancel for fraud a patent to land held by a grantee of the entryman, may show the grantee's knowledge of the fraud through other agents than those named in the bill, since the allegation as to the particular agents was surplusage.

[For other cases, see Evidence, XIII.; Pleading, I. q, in Digest Sup. Ct. 1908.]

[Nos. 151, 152, 154, 155, and 156.]

Argued January 26 and 27, 1915. Decided February 23, 1915.

FIVE APPEALS from the United States Circuit Court of Appeals for the Fifth Circuit to review decrees which affirmed decrees of the District Court for the Western District of Louisiana, canceling patents issued under the homestead laws. Affirmed.

See same case below, 121 C. C. A. 461, 203 Fed. 263.

The facts are stated in the opinion.

Mr. J. Blanc Monroe argued the cause, and, with Messrs. Monte M. Lemann and A. R. Mitchell, filed a brief for appellant:

When the United States brings a suit to annul a patent to land held by a vendee of the entryman, on the ground of fraud in the entryman it must prove actual notice of such fraud in said vendee.

United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282.

When the United States seeks to annul a

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On setting aside land patent for fraud—see note to Miller v. Kerr, 5 L. ed. U. S. 381.

patent on grounds of fraud in the entryman and notice in his vendee, the specific details of the fraud and of the notice must be set out in the bill, and the *probata* must conform of the *allegata*.

Maxwell Land-Grant Case, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; United States v. Barber Lumber Co. 172 Fed. 950; United States v. Atherton, 102 U. S. 372, 26 L. ed. 213; Harrison v. Nixon, 9 Pet. 503, 9 L. ed. 208; Boone v. Chiles, 10 Pet. 209, 9 L. ed. 399; Byers v. Surget, 19 How. 309, 15 L. ed. 672; Providence Rubber Co. v. Goodyear, 9 Wall. 793, 19 L. ed. 567; United States v. Tichenor, 8 Sawy. 142, 12 Fed. 425; Phelps v. Elliott, 35 Fed. 461; Piatt v. Vattier, 9 Pet. 405, 9 L. ed. 173; Blandy v. Griffith, Fed. Cas. No. 1,529; Dashiell v. Grosvenor, 27 L.R.A. 67, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed. 334; Eyre v. Potter, 15 How. 42, 14 L. ed. 592; United States v. Throckmorton, 98 U. S. 69, 25 L. ed. 96.

It will not do for the United States to allege notice in one way and through named individuals, and to attempt to prove notice in another way and through other individuals.

Maxwell Land-Grant Case, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; United States v. Barber Lumber Co. 172 Fed. 950; United States v. Atherton, 102 U. S. 372, 26 L. ed. 213; Harrison v. Nixon, 9 Pet. 503, 9 L. ed. 208; Boone v. Chiles, 10 Pet. 209, 9 L. ed. 399; Byers v. Surget, 19 How. 309, 15 L. ed. 672; Providence Rubber Co. v. Goodyear, 9 Wall. 793, 19 L. ed. 567; United States v. Tichenor, 8 Sawy. 142, 12 Fed. 425; Phelps v. Elliott, 35 Fed. 461; Piatt v. Vattier, 9 Pet. 405, 9 L. ed. 173; Blandy v. Griffith, Fed. Cas. No. 1,529; Dashiell v. Grosvenor, 27 L.R.A. 67, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed. 334; Eyre v. Potter. 15 How. 42, 14 L. ed. 592; United States v. Throckmorton, 98 U. S. 69, 25 L. ed. 96.

When seeking to annul a patent under the seal and signature of the President, the United States, to succeed, must adduce that class of evidence which commands respect and that amount which produces conviction. A patent cannot be set aside upon a bare preponderance of evidence which leaves the issue in doubt.

Maxwell Land-Grant Case, 121 U. S. 381, 30 L. ed. 959, 7 Sup. Ct. Rep. 1015; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; United States v. Hancock, 133 U. S. 193, 33 L. ed. 601, 10 Sup. Ct. Rep. 264; United States v. Stinson, 197 U. S. 200, 49 L. ed. 724, 25 Sup. Ct. Rep. 426.

The officials of the Land Office of the United States are affirmatively charged with the *duty of investigating* land entries and of ascertaining before issuing either a final receipt or patent, that the law is fully complied with. The purchaser from a person holding a final receipt is charged with no such duty. On the contrary, he is entitled to buy on the faith of the patent and receipt, and without looking for grounds of doubt. If the bill shows that the entryman's actions, settlement, and proof deceived the trained sleuths of the government Land Department, and that they issued both final receipt and patent, a strong *de facto* presumption arises that the entryman's vendee was likewise deceived.

General statements that representatives of the defendant were in the general neighborhood at the time of the purchase are not sufficient to overcome this presumption; particularly so when the improvements placed upon the land were such as to create in the casual observer the belief that the law was fully complied with.

Maxwell Land-Grant Case, 121 U. S. 381, 30 L. ed. 959, 7 Sup. Ct. Rep. 1015; United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340.

Nor will such general statements prevail when the record shows that defendants were in the habit of buying land on a general cruiser's estimate without special examination, and that they purchased the particular land in controversy on the advice of counsel of high standing after examination of the abstract of title thereto.

As U. S. Rev. Stat. § 2301, Comp. Stat. 1913, § 4589, does not require a commuter to prove that he has not agreed to sell his land before receiving his final receipt, this court will not write such a provision into that statute.

Williamson v. United States, 207 U. S. 455, 52 L. ed. 294, 28 Sup. Ct. Rep. 163; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; United States v. Sullenberger, 211 U. S. 522, 53 L. ed. 311, 29 Sup. Ct. Rep. 186; United States v. Freeman, 211 U. S. 525, 53 L. ed. 311, 29 Sup. Ct. Rep. 185.

Assistant Attorney General **Knaebel** argued the cause, and, with Mr. S. W. Williams, filed a brief for appellee:

The two lower courts having concurred in finding that the testimony respecting cultivation, residence, and improvements was false, and that the appellant had notice through its agent on the ground at the time of its purchase, the finding should not be disturbed unless clearly erroneous.

Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, 58 L. ed. 630, 34 Sup. Ct. Rep. 438; Gilson v. United States, 234 U.

S. 380, 58 L. ed. 1361, 34 Sup. Ct. Rep. 778.

The government having, with the requisite certainty, established that the entries were fraudulent, the onus was upon the appellant to make good its plea of bona fide purchase without notice.

Boone v. Chiles, 10 Pet. 177, 211, 9 L. ed. 388, 400; United States v. Brannan, 217 Fed. 849; United States v. Hill, 217 Fed. 841.

Mr. Justice Hughes delivered the opinion of the court:

These five cases, although involving separate transactions, may conveniently be considered in a single opinion. The suits were brought by the United States to annul certain land patents [1] issued under the homestead laws upon [401] the ground that the respective entrymen had defrauded the government in securing the patents in that they had not actually resided upon the land and cultivated it as required by the statute, the statements in their proofs upon commutation being false. Rev. Stat. § 2301, Comp. Stat. 1913, § 4589. It was further averred that the Wright-Blodgett Company, the appellant, at the time of its purchase of the respective tracts, had notice through its agents of the fraud which had been perpetrated by the entrymen. The appellant answered in each case, disclaiming all knowledge of the alleged fraud, and setting up that it was a bona fide purchaser for value after the issuance to the entrymen of the final receipts. The cases were separately heard and in each, upon pleadings and proofs, a decree was entered canceling the patent. Upon appeal, the circuit court of appeals affirmed the decrees. The opinion of that court stated that it found "that fraud in the homestead entry" was proved, and that the appellant was "charged through their active agents on the ground with knowledge of the fraud."

[402] The appellant urges that it does not appear that the two courts concurred in their findings, as the cases were decided in the district court without opinion, and, in three of the cases, there was testimony which, according to the government, tended to show that the transactions were fraudulent not only because there had not been the residence and cultivation required by the statute and stated in the proofs, but also because of agreements prior to the commutation proofs to sell the lands to the appellant. But the district court rendered its decree in the five cases on the same day; in two of these it is not suggested that there was evidence of such anticipatory agreements, but the same decree was entered and must have proceeded on the evidence as to the lack of residence and cultivation. While the facts in the several cases vary in details, they are so far alike in their main features with respect to residence and cultivation as to make it absolutely impossible to assume that any different conclusion of fact was reached by the district court in the three cases than that at which it arrived in the two others. The two courts must be deemed to have concurred in their findings, and, in accordance with the well-settled rule, their determination upon mere questions of fact will not be disturbed, unless clear error is shown. Stuart v. Hayden, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274; Towson v. Moore, 173 U. S. 17, 24, 43 L. ed. 597, 600, 19 Sup. Ct. Rep. 332; Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, 339, 58 L. ed. 630, 34 Sup. Ct. Rep. 438; Washington Securities Co. v. United States, 234 U. S. 76, 78, 58 L. ed. 1220, 1222, 34 Sup. Ct. Rep. 725; Gilson v. United States, 234 U. S. 380, 384, 58 L. ed. 1361, 1363, 34 Sup. Ct. Rep. 778. An examination of the record fails to disclose any such error in the finding as to the fraud of the entrymen, and it is not necessary to recite the evidence.

It is insisted, however, that in the finding as to the standing of the appellant there was involved an erroneous applica-

[1] In No. 151 the entry was made October 19, 1898, by Joe J. Hicks; commutation proof was offered June 11, 1901, and final certificate issued July 6, 1901; on July 10, 1901, the entryman sold the land to the appellant. Patent was issued April 1, 1902.

In No. 152 the entry was made April 10, 1899, by Walter O. Allen; commutation proof was offered June 11, 1901, and final certificate issued July 8, 1901; on July 10, 1901, the entryman sold the land to the appellant. Patent was issued July 5, 1902.

In No. 154 the entry was made January 13, 1900, by Elijah Z. Boyd; commutation proof was offered May 18, 1901, and final certificate issued May 24, 1901; on June 21, 1901, the entryman sold the land to the appellant. Patent was issued February 15, 1902.

In No. 155 the entry was made May 4, 1899, by Samuel S. Akin, J., commutation proof was offered August 17, 1901, and final certificate issued September 18, 1901; on September 28, 1901, the entryman sold the land to the appellant. Patent was issued April 1, 1902.

In No. 156 the entry was made January 31, 1900, by Samuel E. Bryers; commutation proof was offered August 17, 1901, and final certificate issued September 18, 1901; on September 28, 1901, the entryman sold the land to the appellant. Patent was issued April 1, 1902.

tion of the law. In substance, the argument comes to this,—that in a suit by the United States to cancel a patent upon the ground of fraud, where the land is held [403] by a grantee of the entrymen, the government must establish that the grantee is not a bona fide purchaser for value; that this must be shown by proof of a clear and cogent character; and that, measured by this standard, the government's case was not made out. This contention proceeds upon an erroneous view of the governing principles as repeatedly set forth in the decisions of this court. These principles may be briefly restated: Where a patent is obtained by false and fraudulent proofs submitted for the purpose of deceiving the officers of the government, and of thus obtaining public lands without compliance with the requirements of the law, while the patent is not void or subject to collateral attack, it may be directly assailed in a suit by the government against the parties claiming under it. In such case, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction. United States v. Minor, 114 U. S. 233, 239, 29 L. ed. 110, 112, 5 Sup. Ct. Rep. 836; Maxwell Land-Grant Case, 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015; United States v. Stinson, 197 U. S. 200, 204, 205, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, 58 L. ed. 936, 939, 34 Sup. Ct. Rep. 507. And, despite satisfactory proof of fraud in obtaining the patent, as the legal title has passed, bona fide purchase for value is a perfect defense. Colorado Coal & I. Co. v. United States, 123 U. S. 307, 313, 31 L. ed. 182, 185, 8 Sup. Ct. Rep. 131; United States v. Stinson, and Diamond Coal & Coke Co. v. United States, supra; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340. But this is an affirmative defense which the grantee must establish in order to defeat the government's right to the cancelation of the conveyance which fraud alone is shown to have induced. The rule as to this defense is thus stated in Boone v. Chiles, 10 Pet. 177, 211, 212, 9 L. ed. 388, 400, 401: "In setting it up by plea or answer, it must state the deed of purchase, the [404] date, parties, and contents briefly; that the vendor was seised in fee, and in possession; the consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title . . . The title purchased must be apparently perfect, good at law, a vested estate in fee-simple. . . . It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity . . . Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out." See also Smith v. Orton, 131 U. S. lxxv., lxxviii., Appx. and 18 L. ed. 62, 64; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 313, 31 L. ed. 182, 185, 8 Sup. Ct. Rep. 131; United States v. California & O. Land Co. 148 U. S. 31, 41, 42, 37 L. ed. 354, 359, 360, 13 Sup. Ct. Rep. 458; United States v. Stinson, 197 U. S. 200, 204, 205, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426; Story, Eq. Pl. §§ 805, 805a, 806; 2 Pom. Eq. Jur. §§ 745, 784; Jewett v. Palmer, 7 Johns. Ch. 65, 68, 11 Am. Dec. 401; Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; Graves v. Coutant, 31 N. J. Eq. 763; Sillyman v. King, 36 Iowa, 207; Prickett v. Muck, 74 Wis. 199, 42 N. W. 256; Bank of Farmington v. Ellis, 30 Minn. 270, 15 N. W. 243; Lewis v. Lindley, 19 Mont. 422, 48 Pac. 765. In United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282, the circuit court of appeals found that the Detroit Company was a purchaser in good faith, and this court, reviewing the facts, reached the same result. The company had no knowledge or intimation of wrong until long after the issuance of the patents. In United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340, both courts below had found that Clark had no actual knowledge of the alleged frauds or of facts sufficient to put [405] him upon inquiry. Clark, his agents and advisers, testified that they did not know or suspect anything wrong. (Id. p. 608.) The defense of bona fide purchaser for value was completely made out, and what is said in the opinion must be read in the light of that fact. Nothing was shown to impair the case which the defendant had established; and there was no in-

tention to depart from the well-settled rule to which we have referred.

In the present case the appellant had its agents upon the ground, and it has been found that through these agents it had knowledge of the fraud. The contention that, as the government had alleged notice through particular agents, it could not be shown that the company had acquired knowledge through other agents than those named, is without merit; the allegation in the bill as to the particular agents was surplusage. Upon the question of fact, with respect to bona fides in its purchase, both courts below have found against the appellant, and the record does not show any error requiring the reversal of the decrees.

Decrees affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

UNITED STATES, Plff. in Err.,
v.
LUTHER JEROME SMULL.

(See S. C. Reporter's ed. 405–412.)

Perjury — oath authorized by law — affidavit of homestead applicant — departmental regulations.

1. A charge of perjury under U. S. Crim. Code, § 125, providing that "whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered . . . shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury," may be based upon false statements in an affidavit required either expressly by an act of Congress, or by an authorized regulation of the General Land Office.

[Matters as to Perjury, see Perjury, in Digest Sup. Ct. 1908.]

Public lands — regulation of Land Department — affidavit by homestead applicant.

2. A regulation of the Land Department requiring an affidavit from the applicant for a homestead entry, stating whether or not he has made other entries, is suitably addressed to the enforcement of the express prohibition of the homestead laws (act of May 20, 1862 [12 Stat. at L. 393, chap. 75, Comp. Stat. 1913, § 4557], § 6; Rev. Stat. §§ 2289, 2298, 2478; act of March 3, 1891 [26 Stat. at L. 1098, chap. 561, Comp. Stat. 1913, §§ 4530, 4557, 5120], § 5), with respect to the amount of land which any one person may secure under their provisions, the execution of which is confided to the Commissioner of the General Land Office.

[For other cases, see Public Lands, I. e, 2, in Digest Sup. Ct. 1908.]

Public lands — regulation of Land Department — affidavit by homestead applicant.

3. A department regulation that an applicant for a homestead entry must make an affidavit as to whether he has made other entries is not repugnant to the requirements of U. S. Rev. Stat. § 2290, as amended by the act of March 3, 1891 (26 Stat. at L. 1098, chap. 561, Comp. Stat. 1913, § 4531), in relation to the affidavit to be made by such applicant, although the statute, while specific as to certain matters which such affidavit must contain, is silent on this subject.

[For other cases, see Public Lands, I. e, 2, in Digest Sup. Ct. 1908.]

[No. 598.]

Argued January 7, 1915. Decided February 23, 1915.

IN ERROR to the District Court of the United States for the District of Oregon to review a judgment sustaining a demurrer to an indictment for perjury. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for plaintiff in error:

Without regard to acreage, one enjoyment of the homestead privilege exhausts the right.

Re Thornton, 3 Land Dec. 509; Re Hartzell, 5 Land Dec. 124; Stephens v. Ray, 5 Land Dec. 133; Graham v. Hartman, 36 Land Dec. 96.

Where a matter *in pais* is vital to the validity of a homestead application, the Department may require the applicant to show the facts, and show them under oath, even though the literal requirements of U. S. Rev. Stat. § 2290, Comp. Stat. 1913, § 4531, are thereby exceeded.

Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760.

The duty to examine the applicant includes the duty, and hence the power, to examine him on oath.

United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; Leonard v. Lennox, supra; United States v. Nelson, 199 Fed. 464; United States v. Hearing, 26 Fed. 744; United States v. Boggs, 31 Fed. 337; United States v. Hardison, 135 Fed. 419; Caha v. United States, 152 U. S. 211, 218, 38 L. ed. 415, 417, 14 Sup. Ct. Rep. 513; United States v. Minor, 114 U. S. 233, 240, 29 L. ed. 110, 112, 5 Sup. Ct. Rep. 836.

That such oaths were intended to be in-

cluded by § 125 of the Criminal Code (U. S. Rev. Stat. § 5392) is demonstrated by its broad terms and its evident purpose, illuminated by the statutes from which it was derived.

United States v. Nelson, 199 Fed. 464; Caha v. United States, 152 U. S. 211, 218, 220, 38 L. ed. 417, 418, 14 Sup. Ct. Rep. 513; United States v. Hearing, 26 Fed. 744; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; United States v. Hardison, 135 Fed. 419.

The circumstance that certain matters to be covered by the claimant's initial affidavit are specified in § 2290 implies no prohibition against his examination under oath upon other matters which are vital to the right of entry.

United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412; Leonard v. Lennox, supra; United States v. Hearing, 26 Fed. 744; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

A person who wilfully and corruptly foreswears himself in an effort to defraud the government ought not to receive the protection of refined technicalities. This court has even held that a defendant prosecuted for filing a false affidavit in support of a claim against the government is estopped to deny the validity of his oath.

Ingraham v. United States, 155 U. S. 434, 437, 39 L. ed. 213, 214, 15 Sup. Ct. Rep. 148.

No appearance for defendant in error.

[408] Mr. Justice Hughes delivered the opinion of the court:

This is an indictment for perjury. It is charged that Luther Jerome Smull, the defendant in error, in making application for a homestead entry under § 2289 of the Revised Statutes (Comp. Stat. 1913, § 4530), swore falsely, before the receiver of the land office, that he had not theretofore "made any entry under the homestead laws," whereas in fact, as he well knew, he had previously made a homestead entry upon which he had obtained patent. The defendant demurred upon the ground that the indictment did not state a crime. The district court sustained the demurrer, ruling that the affidavit was not within the statute defining perjury. Criminal Code, § 125 [35 Stat. at L. 1111, chap. 321, Comp. Stat. 1913, § 10, 295]. The government brings the case here under the criminal appeals act.

The charge of crime must have clear legislative basis. Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412; United States v. Birdsall, 233 U. S. 223, 58 L. ed. 930, 34 Sup. Ct. Rep. 512. The Criminal Code, § 125, provides: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, . . . shall wilfully, and contrary to such oath, state or subscribe any material matter which he does not believe to be true, is guilty of perjury. . . . " This statute takes the place of the similar provision of § 5392 of the Revised Statutes, which in turn was a substitute for a number of statutes in regard to perjury, and was phrased so as to embrace all cases of false swearing, whether in a court of justice or before administrative officers acting within their powers (see revisors' report, vol. 2, pp. 2582, 2583.) [1] It cannot be [409] doubted that a charge of perjury may be based upon § 125 of the Criminal Code where the affidavit is required, either expressly by an act of Congress, or by an authorized regulation of the General Land Office, and is known by the affiant to be false in a material statement. That is, the Land Department has authority

[1] Among these statutes was the act of March 3, 1857, chap. 116, § 5 (11 Stat. at L. 250), which provided:

"That in all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver, or either or both of them, of any local land office in the United States or any territory thereof, or where any oath, affirmation, or affidavit shall be made or taken before any person authorized by the laws of any state or territory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of said local land offices, or in the General Land Office, as well in cases arising under any or either of the orders, regulations, or instructions, concerning any of the public lands of the United States, issued by the Commissioner of the General Land Office, or other proper officer of the government of the United States, as under the laws of the United States, in any wise relating to or affecting any right, claim, or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, affirmation, or affidavit, knowingly, wilfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offense by the laws of the United States."

See also acts of May 20, 1862, chap. 75, § 7, 12 Stat. at L. 393; March 3, 1873, chap. 277, § 7, 17 Stat. at L. 606; March 13, 1874, chap. 55, § 7, 18 Stat. at L. 22; June 14, 1878, chap. 190, § 6, 20 Stat. at L. 114.

to make regulations which are not inconsistent with law, and are appropriate to the performance of its duties (Revised Statutes, §§ 161, 441, 453, 2478, Comp. Stat. 1913, §§ 235, 681, 699, 5120), and when, by a valid regulation, the Department requires that an affidavit shall be made before an officer otherwise competent, that officer is authorized to administer the oath within the meaning of § 125. The false swearing is made a crime, not by the Department, but by Congress; the statute, not the Department, fixes the penalty. United States v. Grimaud, 220 U. S. p. 522, 55 L. ed. 569, 31 Sup. Ct. Rep. 480. Section 125 of the Criminal Code must be read in the light of § 2246 of the Revised Statutes (Comp. Stat. 1913, § 4494), which is explicit:

"The register or receiver is authorized, and it shall [410] be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands."

As it is apparent that the departmental rule makes it necessary for the applicant to state under oath whether or not he has made a former entry under the homestead laws, the sole question in the present case is whether this requirement was one which the Department could impose. This inquiry is naturally divided into two branches: (1) Was the regulation addressed to the enforcement of the laws, the administration of which was confided to the Department, and (2) Was it inconsistent with any specific provision of the statutes?

As to the former, it is sufficient to say that the homestead laws contain an express prohibition with respect to the amount of land which any one person may secure under their provisions, and the Commissioner of the General Land Office is intrusted with the duty of promulgating appropriate rules to make this prohibition effective. Thus, by the act of May 20, 1862, chap. 75, § 6 (12 Stat. at L. 393, Comp. Stat. 1913, § 4557), it was provided: "That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect." The prohibition was carried forward into the Revised Statutes (§§ 2289, 2298; act of March 3, 1891, chap. 561, § 5, 26 Stat. at L. 1098, Comp. Stat. 1913, §§ 4530, 4557) and the authority of the Department to enforce it was continued, and not diminished (§ 2478, Comp. Stat. 1913, § 5120). It would seem to be plain that a rule requiring an affidavit from the applicant, stating whether or not he had made other entries, was suitably addressed to the execution of the law. United States v. Bailey, 9 Pet. 238, 9 L. ed. 115; Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; [411] United States v. Grimaud, supra; United States v. Birdsall, 233 U. S. 223, 58 L. ed. 930, 34 Sup. Ct. Rep. 512; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760, 766, 767.

There remains the question whether the regulation is inconsistent with the terms of the statute; that is, as there is no suggestion of inconsistency otherwise, whether it is repugnant to the specific requirements of § 2290 of the Revised Statutes, as amended by the act of March 3, 1891, chap. 561, supra, in relation to the affidavit to be made by the applicant for a homestead entry. We do not think that it is. Section 2290, it is true, does not provide that the affidavit of the applicant shall set forth whether there has been a previous entry Neither does it provide that the applicant shall state that he is a citizen, or has filed his declaration of intention to become such. Yet, under § 2289, he cannot make entry unless this qualification exists. We are concerned with positive requirements of the law, which are to be enforced by the Department. They are not superadded by an unauthorized departmental caution. And this being true, the fact that § 2290 is specific as to certain matters which the applicant's affidavit must contain cannot be regarded as destroying the authority of the Department to exact proof as to other facts which are also essential conditions of the right of entry, and as to the existence of which the Department must be satisfied.

It is not a case where the statute points out the character of the proof to be required as to the particular fact, and thus impliedly denies authority to exact proof of a different sort. Thus, with respect to final proof of residence and cultivation, § 2291 of the Revised Statutes requires the proof to be made by "two credible witnesses"—not by the claimant; accordingly it was held that Congress had provided the "exact measure" of the claimant's obligation, and that the Department could neither add to nor detract from it. United States v. George 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412. But [412] here the statute is silent as to the mode of proving the particular fact. Still it is an essential fact; Congress made it the duty of the Department to enforce the condition prescribed, and, in the absence either of inhibition or of a requirement of some other procedure, we are unable to find any ground for saying that Congress debarred the De-

partment from availing itself of the natural and appropriate course in examining the applicant. It has been the long-established departmental practice to insist upon a verified statement by him, whether or not he has made an earlier entry, and we are of the opinion that the practice is authorized. The oath in such cases is administered by authority of law as provided in § 125 of the Criminal Code.

The judgment of the District Court is reversed and the case is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

HENRY E. MEEKER, Surviving Partner of the Firm of Meeker & Company, Petitioner,

v.

LEHIGH VALLEY RAILROAD COMPANY.

(See S. C. Reporter's ed. 412–433.)

Limitation of actions — penalties or forfeitures — reparation to shippers — unreasonable rates — unjust discrimination.

1. The five years' limitation prescribed by U. S. Rev. Stat. § 1047, Comp. Stat. 1913, § 1712, for suits or prosecutions for a "penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not govern a reparation action brought under the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 16, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), to recover from a carrier the damages alleged to have been sustained by a shipper, and awarded by the interstate Commerce Commission, by reason of the carrier's violation of the prohibitions of those acts against unreasonable rates and unjust discrimination.

[For other cases, see Limitation of Actions, III, a, in Digest Sup. Ct. 1908.]

Federal courts — rules of decision — state statutes of limitation.

2. State statutes of limitation which might otherwise be applicable were superseded as to reparation claims already accrued, if not already barred by such statutes, as well as to those thereafter accruing, by the provisions of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), amending the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 16, by limiting to two years from the accrual of the claim the time for invoking action by the Interstate Commerce Commission upon complaints by shippers for damages alleged to have been sustained by reason of a carrier's overcharges or unjust discriminations, with a proviso that "claims accrued prior to the passage of this act may be presented within one year."

[For other cases, see Courts, VII. c, 17; Limitation of Actions, I. d, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — reparation claim — limitation — accrued claims.

3. All accrued claims for damages sustained by a shipper through a carrier's violation of the prohibitions in the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), §§ 1 and 2, against unreasonable rates and unjust discriminations, if not already barred by the applicable state statutes of limitation, were saved, though accruing more than two years before the enactment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), amending § 16 of the earlier act by limiting the time for invoking action by the Commission upon such claims to two years from the accrual of the claim, by the proviso that "claims accrued prior to the passage of this act may be presented within one year."

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Dig. Sup. Ct. 1908.]

Interstate Commerce Commission — reparation claim — limitation — accrued claims.

4. The year granted by the amendment of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 16, for the presentment to the Interstate

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NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 656; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On validity of statutory provision for attorney's fee—see note to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 909.

On unconstitutional inequality or discrimination in statutes allowing attorneys' fee—see note to Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 821.

Commerce Commission of claims accrued prior to the passage of the amendatory act for damages sustained by a shipper through a carrier's violation of the prohibitions in §§ 1 and 2 of the earlier act against unreasonable rates and unjust discriminations must be deemed to have begun to run from August 28, 1906, notwithstanding the proviso of the concluding section of the amendatory act that "this act shall take effect and be in force from and after its passage," in view of the postponement of its effective date for sixty days by a joint resolution adopted on the day following its approval.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Appeal — objections — admission of documentary evidence — waiver.

5. An objection to admitting the reports of the Interstate Commerce Commission in evidence in an action brought under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 16, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), to recover from a carrier damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission, by reason of the carrier's violation of the prohibitions of those statutes against unreasonable rates and unjust discriminations, which objection is based upon the ground that such reports contain other statements than findings of fact, if not obviated by excluding the supposed objectionable portions of the reports from what was read by counsel to the jury, was waived where the court's attention was not directed to the subject when the jury was charged.

[For other cases, see Appeal and Error, VIII. k. 3, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — reports — ultimate or evidentiary facts.

6. The ultimate facts rather than the evidential facts are to be stated by the Interstate Commerce Commission in the report which that Commission, under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 14, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), must make upon investigating a complaint, which report under that statute "shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," and if damages be awarded "shall include the findings of fact on which the award is made."

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Damages — reparation to shipper — rebating — unreasonable rates.

7. The damages awarded to a shipper by the Interstate Commerce Commission as reparation for unjust discrimination and unreasonable rates, which, under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 8, shall be the "full amount of damages sustained," may be measured respectively by the rebate to a favored competitor, and by the charge in excess of what would have been a reasonable rate, if the evidence shows that such amounts represent the claimant's actual pecuniary loss.

[Damages from carrier's default, see Damages, VI. e, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — review of findings.

8. Findings of the Interstate Commerce Commission on a claim by a shipper for reparation because of rebating and unreasonable rates, which plainly import that the amounts awarded represent the claimant's actual pecuniary loss, must be presumed, there being no showing to the contrary, to have been justified by the evidence, where there is a recital in the Commission's report that the findings are based upon the evidence adduced.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — jury trial — statute creating presumption.

9. The rebuttable presumption established by the provision of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563) § 16, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), that, in actions under that section to recover from a carrier the damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the carrier's violation of the provisions of those statutes, "the findings and order of the Commission shall be prima facie evidence of the facts therein stated," does not infringe upon the right of trial by jury, nor deny due process of law.

[For other cases, see Constitutional Law, 774–778; Jury, I. c, in Digest Sup. Ct. 1908.]

Appeal — review of facts — allowance of attorney's fee.

10. The carrier is not in a position to claim that the allowance of an attorney's fee to a shipper in an action under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 16, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), to recover from the carrier the damages alleged to have been sustained by the shipper and awarded by the Interstate Commerce Commission by reason of the carrier's violations of those statutes, is excessive as a matter of fact, where such allowance was based upon an exhibition of a transcript of the proceedings before the Commission, and upon a statement made in open court in the presence of counsel for the carrier of the services rendered before the Commission and in the action, and such transcript and statement have not been made a part of the record, and it does not appear that the carrier offered any evidence tending to show what would be a reasonable allowance, or that it made any objec-

tion or exception other than an exception to the allowance of any fee.

[For other cases, see Appeal and Error, VIII. 1, in Digest Sup. Ct. 1908.]

Costs — attorney's fees — services before Interstate Commerce Commission.

11. The services for which an attorney's fee is to be taxed and collected under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), §§ 8, 16, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), in case of plaintiff's final success in an action to recover from a carrier the damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the carrier's violation of the provisions of those statutes must be deemed to be those incident to the action in which the recovery is had, and not to those before the Commission, in view of the fact that the Commission is not to allow a fee, but only to find the amount of the damages and fix a time for payment, and that if the carrier pays the award within the time named no right to an attorney's fee arises.

[Attorney's fee, see Costs and Fees, IV, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — allowance of attorney's fee to successful plaintiff.

12. There is no merit in the objection that the provision of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), §§ 8, 16, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), for the allowance of a reasonable attorney's fee in case of plaintiff's final success in an action to recover from a carrier the damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the carrier's violation of the provisions of those statutes, is invalid as being purely arbitrary, and as imposing a penalty for merely failing to pay a debt.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 434.]

Argued October 13 and 14, 1914. Decided February 23, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of Pennsylvania in favor of plaintiff in an action to recover from a carrier the damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the carrier's overcharges and unjust discrimination. Judgment of Circuit Court of Appeals reversed; judgment of District Court modified by eliminating an allowance of attorneys' fees for services before the Commission, and, as modified, affirmed.

See same case below, 128 C. C. A. 311, 211 Fed. 785.

The facts are stated in the opinion.

Messrs. **John A. Garver** and **William A. Glasgow, Jr.**, argued the cause and filed a brief for petitioner:

The main purpose of the act to regulate commerce was to insure the reasonable and equal treatment of shippers by the common carriers, and to provide for a simple, effective, and inexpensive method of obtaining redress for violations of the law.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 509, 56 L. ed. 288, 289, 32 Sup. Ct. Rep. 114.

Not one of the commissioners is required to be a lawyer It was therefore evidently not intended to have the strict rules of evidence applied in hearings before the Commission.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep 563; Interstate Commerce Commission v Louisville & N R. Co. 227 U. S. 88, 93, 57 L. ed. 431, 434, 33 Sup. Ct. Rep. 185.

All that a person aggrieved is required to do under the act is to apply to the Commission by petition, "which shall briefly state the facts." It was not contemplated that a shipper would be obliged to employ counsel to draft the petition. Indeed, § 17 expressly provides that any party may appear in person; and it has been held that the complaint may be made in a letter to the Commission.

Woodward v. Louisville & N. R. Co. 15 Inters. Com. Rep. 170, 112 C. C. A. 295, 191 Fed. 705.

Findings of fact made by the Commission, where there is evidence to support them, will not be disturbed by the courts, and findings as to the reasonableness of rates, or as to any administrative act, are conclusive.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 251, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 92, 100, 57 L. ed. 431, 433, 436, 33 Sup.

Ct. Rep. 185; Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.) 234 U. S. 476, 490, 491, 58 L. ed. 1408, 1423, 1424, 34 Sup. Ct. Rep. 986.

Having obtained a report of the Commission in his favor and an order awarding him reparation, the shipper would be entitled to proceed forthwith to enforce payment of the amount awarded, were it not for the constitutional provision entitling the carrier to a trial by jury, where a claim for damages is sought to be enforced. That provision, however, does not prevent the legislature from prescribing rules of evidence.

2 Wigmore, Ev. § 1354, subdiv. 3; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Holmes v. Hunt, 122 Mass. 516, 23 N. E. 381; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Western New York & P. R. Co. v. Penn Ref. Co. 70 C. C. A. 23, 137 Fed. 343; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 175, 42 L. ed. 414, 426, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 546, 56 L. ed. 308, 310, 32 Sup. Ct. Rep. 108.

Even if absolute discretion as to the procedure had not been expressly conferred upon the Commission, its construction of the act would be entitled to the greatest consideration (Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257), and when it has long been continued, the courts will recognize it as conclusive.

United States v. Hill, 120 U. S. 169, 180, 30 L. ed. 627, 631, 7 Sup. Ct. Rep. 510; Robertson v. Downing, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272; Logan v. Davis, 233 U. S. 613, 627, 58 L. ed. 1121, 1128, 34 Sup. Ct. Rep. 685.

In the absence of rebutting evidence, the order making an award has precisely the same force and effect as the findings on the question of reasonableness and discrimination.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 258, 57 L. ed. 1472, 1476, 33 Sup. Ct. Rep. 916.

In the absence of any other evidence, it was entirely proper for the Commission to base its award upon the difference between the excessive charges and the charge which it found to be reasonable.

Perry v. Florida C. & P. R. Co. 3 Inters. Com. Rep. 740; Burgess v. Transcontinental Freight Bureau, 13 Inters. Com. Rep. 668; Memphis Freight Bureau v. Kansas City Southern R. Co. 17 Inters. Com. Rep. 90; Arkansas Fuel Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 95; J. H. Allen & Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 293; Michael Cohen & Co. v. Southern R. Co. 16 Inters. Com. Rep. 177; American Creosote Works v. Illinois C. R. Co. 18 Inters. Com. Rep. 212; E. Sondheimer Co. v. Illinois C. R. Co. 20 Inters. Com. Rep. 606; Humboldt Ref. Co. v. Missouri, K. & T. R. Co. 22 Inters. Com. Rep. 363; Riverside Mills v. St. Louis & S. F. R. Co. 24 Inters. Com. Rep. 264; Charles Betcher Lumber Co. v. Chicago, M. & St. P. R. Co. 26 Inters. Com. Rep. 335; J. E. Bryant Co. v. Ft. Worth & D. C. R. Co. 28 Inters. Com. Rep. 594; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 260, 57 L. ed. 1472, 1477, 33 Sup. Ct. Rep. 916; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 436, 51 L. ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Southern R. Co. v. Tift, 206 U. S. 428, 440, 51 L. ed. 1124, 1127, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846.

The proper measure of damages, in the case of discrimination, is the amount of the rebate allowed to the favored shipper.

Union P. R. Co. v. Goodridge, 149 U. S. 680, 697, 37 L. ed. 896, 904, 13 Sup. Ct. Rep. 970; Hays v. Pennsylvania Co. 12 Fed. 309; Seawell v. Kansas City, Ft. S. & M. R. Co. 119 Mo. 245, 5 Inters. Com. Rep. 262, 24 S. W. 1002; McGrew v. Missouri P. R. Co. 230 Mo. 496, 132 S. W. 1076; Western U. Teleg. Co. v. Call Pub. Co. 44 Neb. 346, 27 L.R.A. 622, 48 Am. St. Rep. 729, 62 N. W. 506; Cook v. Chicago, R. I. & P. R. Co. 81 Iowa, 551, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080.

Not only is it proper for the Commission to consider the findings previously made by it in the same proceeding, where all the parties before it were heard, but it may take notice of results reached by it in other cases, where other parties were before it, when its doing so is made to appear in the record and the facts thus noticed are specified.

United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, 20, 57 L. ed. 104, 107, 33 Sup. Ct. Rep. 5.

Prima facie evidence of a fact is such evidence as is sufficient to establish the fact, unless rebutted.

Kelly v. Jackson, 6 Pet. 622, 632, 8 L. ed. 523, 526.

In making the findings and order prima

facie evidence, the act determines their probative force in case the defendant produces no evidence in rebuttal. In considering the effect of orders of reparation, this court has expressly recognized that the orders are prima facie evidence of the amount of damages.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

Under the act to regulate commerce, the award of damages takes the place of the verdict of the jury; and findings that would support a verdict in an action at law would support an award of the Commission under the interstate commerce act. The only findings that the Commission is required to make are the ultimate findings, upon which liability at law may be predicated.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185.

The damage being, prima facie, that found by the Commission, to which the plaintiff is entitled if no rebutting evidence be given, it is reasonable and proper that the pleader should demand judgment accordingly.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 509, 56 L. ed. 288, 289, 32 Sup. Ct. Rep. 114; Great Northern R. Co. v. United States, 208 U. S. 452, 468, 52 L. ed. 567, 576, 28 Sup. Ct. Rep. 313.

Prima facie evidence is not an exception to the ordinary rule of evidence. It is one of the elementary rules of evidence recognized at common law. All legal presumptions of facts, of which the number is limitless, constitute prima facie evidence thereof.

4 Wigmore, Ev. § 2490.

The award of damages is necessarily a finding of fact. When the Commission refuses to make an award, that is a finding that, in its opinion, no damages have been sustained. When it makes an award, that award constitutes its finding of the damages, in precisely the same manner as does the verdict of a jury.

13 Cyc. 233.

So important is the order of reparation that an action cannot be maintained to recover damages for an unjust discrimination involving the question of reasonableness, without first obtaining an order of the Commission.

Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

In holding that the two-year statute applied to claims existing at the time of the amendment, the court reached a conclusion different from that which had long been recognized by the Commission.

Nicola, S. & M. Co. v. Louisville & N. R. Co. 14 Inters. Com. Rep. 199; Fels & Co. v. Pennsylvania R. Co. 23 Inters. Com. Rep. 483.

This construction of the act by the Commission has also been recognized by the circuit court of appeals for the sixth circuit.

Louisville & N. R. Co. v. Dickerson, 112 C. C. A. 295, 191 Fed. 705; A. J. Phillips Co. v. Grand Trunk Western R. Co. 115 C. C. A. 94, 195 Fed. 12.

Prior to the passage of the amendatory act of 1906, there was no limitation in the act to regulate commerce; and the statutes of the various states were consequently held to be applicable.

Ratican v. Terminal R. Asso. 114 Fed. 666; Carter v. New Orleans & N. E. R. Co. 74 C. C. A. 293, 143 Fed. 99; Lyne v. Delaware, L. & W. R. Co. 170 Fed. 847.

A statute of limitations, in so far as it applies to accrued rights of action, is unconstitutional, unless a reasonable time is allowed for their enforcement.

19 Am. & Eng. Enc. Law, 2d ed. 169–171; 25 Cyc. 986; Cooley, Const. Lim. 7th ed. p. 523; Black, Const. Law, 2d ed. p. 498; Terry v. Anderson 95 U. S. 628, 24 L. ed. 365; Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737.

When possible, a statute will always be construed in such manner as to render it constitutional.

Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737.

The error of the court below upon this point was in disregarding the plain terms of the proviso, that claims which had accrued prior to the passage of the act might be presented within one year. The importance of this proviso was noticed by this court in Great Northern R. Co. v. United States, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313.

The phrase, "passage of this act," refers to the time when the act takes effect.

36 Cyc. 1197, 1198; 26 Am. & Eng. Enc. Law, 2d ed. 565; Re Howe, 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 513; Harding v. People, 10 Colo. 387, 15 Pac. 727; Patrick v. Perryman, 52 Ill. App. 514; Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N. W. 982; State ex rel. Churchill v. Bemis, 45 Neb. 724, 64 N. W. 348; Nicola, S. & M. Co. v. Louisville & N. R. Co. 14 Inters. Com. Rep. 199.

A joint resolution, approved by the President, has all the force and effect of a bill.

8 Fed. Stat. Anno. 338; Story, Const. 5th ed. § 892; 6 Ops. Atty. Gen. 680.

The object of the interstate commerce act

was to protect the shipper against the arbitrary and unjust acts of the common carrier. This object could not be effectively accomplished unless it was practicable for the shipper to establish his grievances before the Commission. But he could rarely do this, if the cost of the proceeding were thrown upon him.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 77, 78, 52 L. ed. 108, 110, 111, 28 Sup. Ct. Rep. 28; Riverside Mills v. Atlantic Coast Line R. Co. 168 Fed. 990.

This court should direct the judgment that should have been entered by the circuit court of appeals.

Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 589, 55 L. ed. 590, 596, 31 Sup. Ct. Rep. 617; Baker v. Warner, 231 U. S. 588, 593, 58 L. ed. 384, 388, 34 Sup. Ct. Rep. 175; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 490, 58 L. ed. 1055, 1061, 34 Sup. Ct. Rep. 641.

Messrs. Joseph W. Folk and Charles W. Needham filed a brief for the Interstate Commerce Commission:

Congress, by the use of the legal phrase, "finding of fact," meant that it was to be a finding of all the ultimate facts raised by the pleadings necessary to an award by the Commission or a judgment thereon by the court.

Norris v. Jackson, 9 Wall. 125, 127, 19 L. ed. 608, 609; Burr v. Des Moines R. & Nav. Co. 1 Wall. 99, 17 L. ed. 561; Graham v. Bayne, 18 How. 62, 15 L. ed. 266; Brock v. Louisville & N. R. Co. 114 Ala. 431, 21 So. 994; Williams v. Giblin, 86 Wis. 648, 57 N. W. 1111; Elder v. Frevert, 18 Nev. 278, 3 Pac. 237.

The main purposes of the act to regulate commerce were to insure reasonable rates, equality of treatment to all shippers under like conditions, and to provide a simple, effective, and inexpensive method of obtaining redress for violations of the law.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 438, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 509, 56 L. ed. 288, 289, 32 Sup. Ct. Rep. 114; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 257, 258, 57 L. ed. 1472, 1476, 1477, 33 Sup. Ct. Rep. 916.

Every act should be construed in the light of circumstances existing at the time the act was passed, and the intent of Congress should be gathered from the objects and purposes in view.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The Commission is more than a jury. It finds the facts and also enters judgment thereon, and to its findings and judgment this court has ascribed the strength due to the judgments of a tribunal appointed by law and informed by experience.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700.

When its findings of ultimate facts are presented to the court in these cases, the court and jury have nothing to do but accept them as making a prima facie case for the plaintiff, provided always that every essential ultimate fact has been found by the Commission. If the Commission, in its report, has omitted an essential fact,—for instance, that the plaintiff was injured, or the amount of the damages,—then, of course, the report does not make out a prima facie case. But if all the essential facts—ultimate facts—are found which are necessary to the determination of the issues raised by a general denial of the plaintiff's complaint, then no further proof is necessary in the first instance. It is a prima facie case.

Kelly v. Jackson, 6 Pet. 622, 8 L. ed. 523; Carver v. Jackson, 4 Pet. 1, 7 L. ed. 761; United States v. Wiggins, 14 Pet. 344, 10 L. ed. 486; Lilienthal v. United States, 97 U. S. 237, 268, 24 L. ed. 901, 905; Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 154, 51 L. ed. 995, 1000, 27 Sup. Ct. Rep. 648; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 546, 56 L. ed. 308, 310, 32 Sup. Ct. Rep. 108.

There are three issues in this class of cases that must be determined by the Commission and upon which its decisions are final, namely:

(1) Is a discrimination "undue" or "unreasonable?"

(2) Are the carrier's rates unreasonable?

(3) If a rate is found by the Commission to be unreasonable, what would have been for a past period, and what will be for a future period, a reasonable rate?

All of these questions are for determination by the Commission.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S.

452, 475, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 251, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 92, 100, 57 L. ed. 431, 433, 436, 33 Sup. Ct. Rep. 185; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833; Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.) 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. Rep. 986.

It is not "trial by jury," but "the right of trial by jury" which the 7th Amendment to the Federal Constitution declares "shall be preserved."

Capital Traction Co. v. Hof, 174 U. S. 1, 23, 43 L. ed. 873, 881, 19 Sup. Ct. Rep. 580.

Whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. This is not a violation of the right of trial by jury.

Bowditch v. Boston, 101 U. S. 16, 18, 25 L. ed. 980, 981; Coughran v. Bigelow, 164 U. S. 301, 307, 41 L. ed. 442, 444, 17 Sup. Ct. Rep. 117.

Trial by jury is never had where a rule of the court, in actions *ex contractu*, requires in certain cases an affidavit of merits to be filed by the defendant, and it is not filed. The judgment is rendered upon the sworn complaint of the plaintiff.

Fidelity & D. Co. v. United States, 187 U. S. 315, 47 L. ed. 194, 23 Sup. Ct. Rep. 120.

Where action is brought for a sum certain, or which may be rendered certain by computation, judgment for damages may be entered by the court without a writ of inquiry.

Renner v. Marshall, 1 Wheat. 215, 4 L. ed. 74; Aurora v. West, 7 Wall. 82, 104, 19 L. ed. 42, 50.

But where the sum for which judgment should be rendered is uncertain, the rule in the Federal courts is that the damage shall, if either of the parties request it, be assessed by the jury.

Aurora v. West, supra; Armstrong v. Carson, 2 Dall. 302, 1 L. ed. 391, Fed. Cas. No. 543.

Under the act to regulate commerce, the court and jury cannot determine the question whether the rate charged and collected was unreasonable, nor can they determine what would have been a reasonable rate. These two questions of fact must be determined by the Commission.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 509, 56 L. ed. 288, 289, 32 Sup. Ct. Rep. 114; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 258, 57 L. ed. 1472, 1476, 33 Sup. Ct. Rep. 916; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315.

The general or fundamental measure of damages in all these cases is, however, the difference between the unreasonable rate paid by the plaintiff and the reasonable rate found by the Commission which ought to have been charged. This measure of damages had been applied by the Commission ever since the enactment authorizing them to grant reparation in such cases. It was the rule applied by the Commission in an order approved by the court in Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641.

Claims filed with the Commission since August 28, 1907, must have accrued within two years prior to the date when they are filed; otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two-years' limitation.

Louisville & N. R. Co. v. Dickerson, 112 C. C. A. 295, 191 Fed. 705; A. J. Phillips Co. v. Grand Trunk Western R. Co. 115 C. C. A. 94, 195 Fed. 12; Nelson Interstate Commerce Commission, p. 97.

Mr. John G. Johnson argued the cause, and, with Messrs. Edgar H. Boles, Frank H. Platt, and George W. Field, filed a brief for respondent:

The conclusion as to discrimination was based on a mistake of law, and for this reason it has no binding effect in this suit.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Atchison, T. & S. F. R. Co. v. Interstate Commerce Commission, 188 Fed. 229; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 92, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185.

The rates paid were the tariff rates, and

in the absence of a finding by the Commission to the contrary, they are the only lawful rates.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The Commission has repeatedly held that it will not grant reparation unless it can affirm with confidence that the rate charged in the past was unreasonable when paid; and that the fact that a rate is unreasonable at present raises no presumption that it was unreasonable in the past.

Farmers' Warehouse Co. v. Louisville & N. R. Co. 12 Inters. Com. Rep. 457.

The plain question presented in every application for reparation is whether the rate which has been charged is reasonable or unreasonable; and, if unreasonable, the extent to which it is so. On this both the shipper and the carrier are entitled to an explicit finding; this, if found in favor of the shipper, being the foundation of his cause of action.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 437, 51 L. ed. 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Russe v. Interstate Commerce Commission, 193 Fed. 678.

The decision in Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315, is controlling.

The use of the Commission's orders in a reparation case will be confined to the reading before the jury of specific relevant facts stated in the reports.

Lehigh Valley R. Co. v. Clark, 125 C. C. A. 235, 207 Fed. 717; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Darnell-Taenzer Lumber Co. v. Southern P. Co. 190 Fed. 659; Western New York & P. R. Co. v. Penn. Ref. Co. 70 C. C. A. 23, 137 Fed. 343.

The Commission's opinions contain statements, arguments, and conclusions which the act does not purport to make admissible as prima facie evidence in a suit for damages. In admitting the reports in evidence the trial court prejudiced the rights of defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by the incompetent and misleading statements in the opinions.

Western New York & P. R. Co. v. Penn Ref. Co. 70 C. C. A. 23, 137 Fed. 343; Darnell-Taenzer Lumber Co. v. Southern P. Co. 190 Fed. 659; Southern R. Co. v. St. Louis Hay & Grain Co. 82 C. C. A. 614, 153 Fed. 728.

The constitutional guaranty of the right of trial by jury is a real and practical guaranty. It relates not to technical forms of procedure, but to the fundamental right to have issues of fact passed upon by unprejudiced jurors.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Parsons v. Bedford, 3 Pet. 433, 446, 7 L. ed. 732, 736.

The case cannot be presented to a jury without conveying to the jury knowledge that the issues have already been decided against the defendant by a commission whose experience and ability must exceed that of the average jurors. However great is the care taken, there is this inherent vice, and practically, if not technically, the right of trial by jury is abrogated. The prejudice to the defendant as a litigant is aggravated by the fact that in order to maintain uniformity of administration under the commerce act, it has seemed necessary to impose upon the jury as conclusive, the Commission's determination as to defendant's wrongdoing.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 295, 57 L. ed. 1472, 1491, 33 Sup. Ct. Rep. 916; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The Commission, in awarding reparation, is determining a private matter, and measuring past injuries sustained by a private shipper.

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 486, 58 L. ed. 1055, 1060, 34 Sup. Ct. Rep. 641; Lehigh Valley R. Co. v. Clark, 125 C. C. A. 235, 207 Fed. 717.

The jurisdiction of the Commission over Mr. Meeker's claims was limited by the two years' limitation in § 16 of the act.

Woodward v. Louisville & N. R. Co. 15 Inters. Com. Rep. 170, 112 C. C. A. 295, 191 Fed. 705.

The Hepburn act was, in any event, effective from June 29 to June 30, 1906.

United States v. Standard Oil Co. 148 Fed. 719.

The plaintiff's entire claim for discrimination expired by limitation on or before August 1, 1906, or five years after the cause of action accrued. The claims are barred by § 1047 of the United States Revised Statutes (Comp. Stat. 1913, § 1712).

Parsons v. Chicago & N. W. R. Co. 167 U. S. 447, 455, 42 L. ed. 231, 234, 17 Sup. Ct. Rep. 887; Carter v. New Orleans & N. E. R. Co. 74 C. C. A. 293, 143 Fed. 99; McClaine v. Rankin, 197 U. S. 158, 49 L.

ed. 704, 25 Sup. Ct. Rep. 410, 3 Ann. Cas. 500.

If it should be held that the five-year limitation in § 1047 of the Revised Statutes (Comp. Stat. 1913, § 1712) does not apply, then plaintiff's claim is barred (with the exception of $3,853.30 and interest) by the six years' limitation under the Pennsylvania statute.

We can find no authority for the proposition that the beginning of a proceeding before the Commission constitutes a beginning of the action at law for damages. In fact, the contrary has always been assumed. The effect of the proceeding before the Commission is solely to furnish the claimant evidence to prove his case.

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 200 Fed. 614; Jacoby v. Pennsylvania R. Co. 200 Fed. 989; Morrisdale Coal Co. v. Pennsylvania R. Co. 106 C. C. A. 269, 183 Fed. 929; Western New York & P. R. Co. v. Penn Ref. Co. 70 C. C. A. 23, 137 Fed. 343; Interstate Commerce Commission v. Cincinnati, P. & V. R. Co. 124 Fed. 624; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567.

The doctrine of these cases clearly is that he who seeks damages for a violation of the act to regulate commerce must sue as any other suitor in a court of law. This is entirely consistent with the opinions of this court in the recent cases of Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; and Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938. The action is the same as any other action for damages, and the rules applicable to the action are the same as those applicable to the ordinary action for damages.

The proceedings before the Commission are entirely independent of the action. The action is not a continuation of the proceedings before the Commission, but is an independent legal proceeding.

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 200 Fed. 614; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Interstate Commerce Commission v. Cincinnati, P. & V. R. Co. 124 Fed. 630.

The word "costs" in connection with a lawsuit has a definite, established meaning. It refers to the expenses incurred by the parties in the prosecution or defense of a suit at law.

1 Bouvier's Law Dict. p. 370.

Costs will not be granted unless specifically provided for by statute. They are not granted as a common-law right.

Coggill v. Lawrence, 2 Blatchf. 304, Fed. Cas. No. 2,957; Equitable Life Assur. Soc. v. Hughs, 125 N. Y. 106, 11 L.R.A. 280, 26 N. E. 1.

Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly.

1 Bouvier's Law Dict. p. 374.

The provision of the act permitting the allowance of an attorney's fee is unconstitutional, within the authority of Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

In any event, petitioner is not entitled to an attorney's fee unless he is sustained in his recovery in the entire amount.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 77, 52 L. ed. 108, 110, 28 Sup. Ct. Rep. 28.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action under § 16 of the act to regulate commerce[1] to recover from the Lehigh Valley Railroad Company damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the company's violation of the prohibition in §§ 1 and 2 of that act against unreasonable rates and unjust discrimination. The plaintiff prevailed in the district court, but the circuit court of appeals reversed the judgment (128 C. C. A. 311, 211 Fed. 785), and a writ of [418] certiorari granted under § 262 of the Judicial Code [36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1239] brings the case here (234 U. S. 749, 58 L. ed. 1576, 34 Sup. Ct. Rep. 674).

The plaintiff was the surviving member of Meeker & Company, a copartnership, and sued in that capacity. This firm was engaged in the anthracite coal trade in New York city, and was accustomed to purchase its coal at collieries in Pennsylvania, and to ship it over the defendant's railroad to tidewater at Perth Amboy, New Jersey, and thence by vessel to New York. Two distinct claims were involved. The first covered shipments from November 1, 1900, to August 1, 1901, and was grounded upon a charge that the railroad company had

[1] See act February 4, 1887, 24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563, and amendments of March 2, 1889, 25 Stat. at L. 855, chap. 382, Comp. Stat. 1913, § 8569; February 10, 1891, 26 Stat. at L. 743, chap. 128, Comp. Stat. 1913, § 8576; February 8, 1895, 28 Stat. at L. 643, chap. 61, Comp. Stat. 1913, § 8595; June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563; and June 30, 1906, 34 Stat. at L. 838, Joint Resolution No. 47.

unjustly and injuriously discriminated against Meeker & Company by giving (on August 1, 1901) to another and extensive shipper of anthracite between the same points an indirect but substantial rebate upon all shipments during the same period, and that by reason of this rebate the other shipper had obtained a contemporaneous service in all respects like that rendered for Meeker & Company at a less rate than was exacted from the latter. The second covered shipments from August 1, 1901, to July 17, 1907, and was based upon the charge that the established rate paid by Meeker & Company during that period was excessive and unreasonable.

On July 17, 1907, a complaint embodying both claims was presented to the Interstate Commerce Commission under §§ 9 and 13 of the act, and after a full hearing in which the railroad company was an active participant, the Commission made a written report (21 Inters. Com. Rep. 129) finding that the charge of unjust discrimination was sustained by the evidence, condemning as excessive and unreasonable the rate which was in effect from August 1, 1901, to the date of the report, naming what was deemed a maximum reasonable rate, holding that the claimant was entitled to an award of reparation upon both claims, and directing that further proceedings be had to determine the [419] amount to be awarded. Under § 15 of the act an order was then made requiring the railroad company, within a time named, to cease giving effect to the prior rate found unreasonable, and to establish a new rate not exceeding that found reasonable.

Thereafter a further hearing was had at which additional evidence bearing upon the question of reparation was presented, and, on May 7, 1912, the Commission made a supplemental report, saying (23 Inters. Com. Rep. 480):

"In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, New Jersey, during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory in violation of § 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of $1.40 per gross ton on prepared sizes, $1.30 on pea, and $1.15 on buckwheat.

"On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, New Jersey, 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to $129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and $118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments [420] of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of $11,009.33; with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, New Jersey, 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal, and 87,250 tons of buckwheat coal, and paid charges thereon amounting to $685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay $626,945.62, the amount which he would have paid at the rates found reasonable, less $193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of $58,236.45, with interest, amounting to $27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of $58,236.45 from September 1, 1911.

. . . . . .

"The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved."

Thereupon the Commission made and entered of record an order for reparation which, with a slight amendment made June 15, 1912, was as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and

full investigation of the matters and [421] things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, that defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, copartners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of $11,009.33, with interest thereon, at the rate of 6 per cent per annum, from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, New Jersey, which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

"It is further ordered, that defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, copartners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of $58,236.45, with interest thereon at the rate of 6 per cent per annum, amounting to $27,750.64, upon the various individual charges comprising said sum from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent per annum on said sum of $58,236.45, from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, New Jersey, which rates so charged have been found by this Commission [422] to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

Although duly served with a copy of this order, the railroad company refused to comply with it; and, on September 3, 1912, after the time allotted for compliance had expired, the plaintiff, conformably to § 16 of the act, filed in the district court his petition setting forth briefly the causes for which he claimed damages and the reports and orders of the Commission, and praying judgment against the railroad company for the amounts claimed and awarded and for interest and costs, including a reasonable attorney's fee. The defendant answered denying the claims set forth in the petition, and asserting that they were barred by the applicable statute of limitations, that the Commission was without jurisdiction "to make the findings and order of reparation" relied upon, and that "there was before the Commission no substantial evidence to sustain said findings and said order." A trial resulted in a verdict for the plaintiff assessing the damages at $109,280.17, the total amount awarded by the Commission with interest, and judgment was entered for this sum with costs, including an attorney's fee.

At the trial the plaintiff produced no evidence tending to show unjust discrimination, exaction of unreasonable rates, injury to Meeker & Company, or what damages were sustained by them, other than the evidence afforded by the reports and orders of the Commission; and the defendant produced no evidence whatever, save some computations intended to be helpful in determining how much of the claims was barred according to each of several views advanced respecting the applicable statute of limitations.

Whether the claims were barred in whole or in part by some applicable statute is one of the questions which the record presents, and to dispose of it we must notice three statutes upon which the defendant relies.

[423] One of these is Rev. Stat. § 1047, Comp. Stat. 1913, § 1712, which places a limitation of five years upon any "suit or prosecution for a penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States.'" The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such. Here the liability sought to be enforced was not punitive, but strictly remedial, as is shown by §§ 8, 9, 14, and 16 of the act to regulate commerce. So § 1047 was not applicable. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 397, 51 L. ed. 241, 244, 27 Sup. Ct. Rep. 65; O'Sullivan v. Felix, 233 U. S. 318, 58 L. ed. 980, 34 Sup. Ct. Rep. 596; Huntington v. Attrill, 146 U. S. 657, 666-669, 36 L. ed. 1123, 1127, 1128, 13 Sup. Ct. Rep. 224; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62.

Next in order is a Pennsylvania statute containing a limitation of six years. 2 Stewart's Purdon's Dig. 13th ed. 2282. It could apply only in the absence of a controlling Federal statute. Rev. Stat. § 721, Comp. Stat. 1913, § 1538; Campbell v.

Haverhill, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; McClaine v. Rankin, 197 U. S. 154, 158, 49 L. ed. 702, 704, 25 Sup. Ct. Rep. 410, 3 Ann. Cas. 500; O'Sullivan v. Felix, 233 U. S. 318, 58 L. ed. 980, 34 Sup. Ct. Rep. 596. Such a statute was adopted and put in force before any part of either claim fell within the bar of the local limitation. By the act of June 29, 1906, 34 Stat. at L. 584, 590, chap. 3591, Comp. Stat. 1913, §§ 8563, 8584, Congress amended § 16 of the act to regulate commerce by incorporating therein the following limitations: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court[3] within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this act may be presented [424] within one year." The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several states and subject them to limitations of its own creation which would operate alike in all the states.

This amendment is the third statute upon which the defendant relies, the contentions advanced thereunder being (a) that it prevented the Commission from considering any claim accrued more than two years prior to the amendment, and (b) that the year granted for filing claims which accrued before the amendment expired June 8, 1907. Either contention, if sound, would defeat all of the first claim in suit and the major part of the second.

The first contention is plainly not tenable. The amendment contained a general provision limiting the time for invoking action by the Commission upon complaints for damages to two years from the accrual of the claim, and also a proviso saying that claims accrued prior to the passage of this act may be presented within one year." The proviso was in the nature of a saving clause, and, while, as before observed, it probably was not intended to revive claims which were then barred by applicable local laws, we think there is no warrant for saying that it was not intended to include claims accrued more than two years before the amendment. The plain import of the words is to the contrary. The Commission has uniformly construed it as permitting all accrued claims, not already barred, to be presented within the year named, and we think they reasonably could not have done otherwise.

The other contention turns upon the sense in which the words "the passage of this act" were used in the proviso. The act contained a concluding section saying, [425] "this act shall take effect and be in force from and after its passage;" but, on the day following its approval, its effective date was postponed by a joint resolution for sixty days; that is, from June 29 to August 28, 1906. 34 Stat. at L. 838. If the act be separately considered and the proviso read in connection with the concluding section, we think it is apparent that the words named referred to the time when the act was to speak and operate as a law, and that the year given for filing accrued claims was to be reckoned from that time. In other words, the meaning was the same as if the proviso had said, "claims accrued heretofore may be presented within one year hereafter;" or "claims accrued before this act becomes effective may be presented within one year thereafter." It was not an instance where words referring to the date of passage were chosen to distinguish it from the effective date of the act, for the act was to take effect and be in force upon its passage, and therefore there was no occasion for such a distinction. And, coming to the joint resolution, we think it did not affect the sense of the words in the proviso. That was to be determined in the light of the situation in which they were used, and not by what subsequently happened. Not only so, but the purpose of the joint resolution was to cause the act to speak and operate at the end of the sixty days as if that were the time of its passage. In the meantime the act laid no duty upon this or any other claimant, and when the sixty days expired it gave a full year for presenting accrued claims, and not a year less sixty days. See Re Howe, 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 513; Harding v. People, 10 Colo. 387, 392, 15 Pac. 727; State ex rel. Churchill v. Bemis, 45 Neb. 724, 739, 64 N. W. 348; Patrick v. Perryman, 52 Ill. App. 514, 518; Schneider v. Hussey, 2 Idaho, 8, 1 Pac. 343; Charless v. Lamberson, 1 Iowa, 435, 443, 63 Am. Dec. 457. It is not a question of notice, as in Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 615, 616, 47 L. ed. 328, 332, 333, 23 Sup. Ct. Rep.

[3] The Judicial Code, § 291, [36 Stat. at L. 1167, chap. 231, Comp. Stat. 1913, § 1033], which became effective January 1, 1912, requires that the words "circuit court" read "district court."

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full investigation of the matters and [421] things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

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Although duly served with a copy of this order, the railroad company refused to comply with it; and, on September 3, 1912, after the time allotted for compliance had expired, the plaintiff, conformably to § 16 of the act, filed in the district court his petition setting forth briefly the causes for which he claimed damages and the reports and orders of the Commission, and praying judgment against the railroad company for the amounts claimed and awarded and for interest and costs, including a reasonable attorney's fee. The defendant answered denying the claims set forth in the petition, and asserting that they were barred by the applicable statute of limitations, that the Commission was without jurisdiction "to make the findings and order of reparation" relied upon, and that "there was before the Commission no substantial evidence to sustain said findings and said order." A trial resulted in a verdict for the plaintiff assessing the damages at $109,280.17, the total amount awarded by the Commission with interest, and judgment was entered for this sum with costs, including an attorney's fee.

At the trial the plaintiff produced no evidence tending to show unjust discrimination, exaction of unreasonable rates, injury to Meeker & Company, or what damages were sustained by them, other than the evidence afforded by the reports and orders of the Commission; and the defendant produced no evidence whatever, save some computations intended to be helpful in determining how much of the claims was barred according to each of several views advanced respecting the applicable statute of limitations.

Whether the claims were barred in whole or in part by some applicable statute is one of the questions which the record presents, and to dispose of it we must notice three statutes upon which the defendant relies.

[423] One of these is Rev. Stat. § 1047, Comp. Stat. 1913, § 1712, which places a limitation of five years upon any "suit or prosecution for a penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States.'" The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such. Here the liability sought to be enforced was not punitive, but strictly remedial, as is shown by §§ 8, 9, 14, and 16 of the act to regulate commerce. So § 1047 was not applicable. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 397, 51 L. ed. 241, 244, 27 Sup. Ct. Rep. 65; O'Sullivan v. Felix, 233 U. S. 318, 58 L. ed. 980, 34 Sup. Ct. Rep. 596; Huntington v. Attrill, 146 U. S. 657, 666-669, 36 L. ed. 1123, 1127, 1128, 13 Sup. Ct. Rep. 224; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62.

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Haverhill, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; McClaine v. Rankin, 197 U. S. 154, 158, 49 L. ed. 702, 704, 25 Sup. Ct. Rep. 410, 3 Ann. Cas. 500; O'Sullivan v. Felix, 233 U. S. 318, 58 L. ed. 980, 34 Sup. Ct. Rep. 596. Such a statute was adopted and put in force before any part of either claim fell within the bar of the local limitation. By the act of June 29, 1906, 34 Stat. at L. 584, 590, chap. 3591, Comp. Stat. 1913, §§ 8563, 8584, Congress amended § 16 of the act to regulate commerce by incorporating therein the following limitations: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court[2] within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this act may be presented [424] within one year." The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several states and subject them to limitations of its own creation which would operate alike in all the states.

This amendment is the third statute upon which the defendant relies, the contentions advanced thereunder being (a) that it prevented the Commission from considering any claim accrued more than two years prior to the amendment, and (b) that the year granted for filing claims which accrued before the amendment expired June 28, 1907. Either contention, if sound, would defeat all of the first claim in suit and the major part of the second.

The first contention is plainly not tenable. The amendment contained a general provision limiting the time for invoking action by the Commission upon complaints for damages to two years from the accrual of the claim, and also a proviso saying that "claims accrued prior to the passage of this act may be presented within one year." The proviso was in the nature of a saving clause, and, while, as before observed, it probably was not intended to revive claims which were then barred by applicable local laws, we think there is no warrant for saying that it was not intended to include claims accrued more than two years before the amendment. The plain import of the words is to the contrary. The Commission has uniformly construed it as permitting all accrued claims, not already barred, to be presented within the year named, and we think they reasonably could not have done otherwise.

The other contention turns upon the sense in which the words "the passage of this act" were used in the proviso. The act contained a concluding section saying, [425] "this act shall take effect and be in force from and after its passage;" but, on the day following its approval, its effective date was postponed by a joint resolution for sixty days; that is, from June 29 to August 28, 1906. 34 Stat. at L. 838. If the act be separately considered and the proviso read in connection with the concluding section, we think it is apparent that the words named referred to the time when the act was to speak and operate as a law, and that the year given for filing accrued claims was to be reckoned from that time. In other words, the meaning was the same as if the proviso had said, "claims accrued heretofore may be presented within one year hereafter;" or "claims accrued before this act becomes effective may be presented within one year thereafter." It was not an instance where words referring to the date of passage were chosen to distinguish it from the effective date of the act, for the act was to take effect and be in force upon its passage, and therefore there was no occasion for such a distinction. And, coming to the joint resolution, we think it did not affect the sense of the words in the proviso. That was to be determined in the light of the situation in which they were used, and not by what subsequently happened. Not only so, but the purpose of the joint resolution was to cause the act to speak and operate at the end of the sixty days as if that were the time of its passage. In the meantime the act laid no duty upon this or any other claimant, and when the sixty days expired it gave a full year for presenting accrued claims, and not a year less sixty days. See Re Howe, 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 513; Harding v. People, 10 Colo. 387, 392, 15 Pac. 727; State ex rel. Churchill v. Bemis, 45 Neb. 724, 739, 64 N. W. 348; Patrick v. Perryman, 52 Ill. App. 514, 518; Schneider v. Hussey, 2 Idaho, 8, 1 Pac. 343; Charless v. Lamberson, 1 Iowa, 435, 443, 63 Am. Dec. 457. It is not a question of notice, as in Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 615, 616, 47 L. ed. 328, 332, 333, 23 Sup. Ct. Rep.

[2] The Judicial Code, § 291, [36 Stat. at L. 1167, chap. 231, Comp. Stat. 1913, § 1268], which became effective January 1, 1912, requires that the words "circuit court" be read "district court."

206, but of the meaning and operation of the statute.

[426] It follows from these views that the complaint, which was filed with the Commission July 17, 1907, was seasonably presented, and that no part of either claim was barred at that time. And, as the action in the district court was begun within a year after the date of the order for reparation, the defense predicated upon the statute of limitations must fail.

With a single exception, the other questions pressed upon our attention center about the use and effect of the reports and orders of the Commission as evidence,—a subject concerning which the courts below differed.

The pertinent provisions of the act to regulate commerce are these: Section 14 requires the Commission, upon investigating a complaint, to make a written report thereon "which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," and, if damages be awarded, "shall include the findings of fact on which the award is made." Section 16 requires the Commission, upon awarding damages to a complaining party, to make an order directing that "the sum to which he is entitled" be paid within a fixed time; and then, after authorizing a suit to enforce payment, if the order be not obeyed, provides: "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated."

At the trial the plaintiff offered in evidence the reports and orders of the Commission and asked that the facts stated in the findings and orders be taken as prima facie true.

An objection was interposed to the admission of the reports upon the ground that they contained various statements which it was claimed were not findings of fact, and therefore were not admissible. A colloquy ensued [427] between court and counsel in which counsel for the plaintiff conceded that portions of the reports should be eliminated, and suggested that this could be done in the charge to the jury. As a result of the colloquy the reports were received in evidence, the court observing that it would indicate to the jury what portions were to be considered. The reports were not read at the time, but, when the evidence was concluded, counsel for the plaintiff, as the record recites, "read to the jury what he stated to be material portions" of them. The record does not more definitely identify what was read; nor does it show that complaint was then made that anything was read that should have been omitted, or that the court's attention was drawn to the subject at the time of charging the jury, either by a request for a particular instruction thereon, or by excepting to the absence of such an instruction. The court's charge apparently proceeded upon the theory that the portions of the reports which had been read to the jury were properly before them. In these circumstances the objection cannot now be considered. If it was not obviated by excluding the supposedly objectionable portions of the reports from what was read to the jury, it was waived by the failure to direct the court's attention to the subject when the jury was charged.

Another objection which was directed against the orders as well as the reports is that they contain no findings of fact, or, at least, not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts; that is to say, the primary facts from which, through a process of reasoning and inference, the ultimate facts may be determined. We think this is not the right view of the statute, and that what it requires is a finding of the ultimate facts,—a finding which, as applied to the present case, would disclose (1) the relation of the parties [428] as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practised against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute, and that the facts stated in the findings, if taken as prima facie true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter, and are not expressed in the terms which courts generally employ in special

findings of fact, but there is no difficulty in separating the findings from the other matter, or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say "should be" because both were made in the same proceeding, and the later one affirmatively shows that it was made to supplement and give effect to the original.

But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, "upon consideration of the evidence adduced upon the hearing upon the question of reparation" found (a) that by reason of the unjust discrimination resulting from [429] giving the rebate to the Lehigh Valley Coal Company Meeker & Company were "damaged to the extent of the difference" between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were "damaged to the extent of the difference" between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized and required by § 8 of the act to regulate commerce to award "the full amount of damages sustained," and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to § 8, said (p. 203): "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were they could be recovered." There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the [430] findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.

It is also urged, as it was in the courts below, that the provision in § 16 that, in actions like this, "the findings and order of the Commission shall be prima facie evidence of the facts therein stated" is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained. Pillow v. Roberts, 13 How. 472, 476, 14 L. ed. 228, 230; Marx v. Hanthorn, 148 U. S. 172, 182, 37 L. ed. 410, 413, 13 Sup. Ct. Rep. 508; Turpin v. Lemon, 187 U. S. 51, 59, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Cooley, Const. Lim. 7th ed. 525, as have many other state and Federal enactments establishing other rebuttable presumptions. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 42, 55 L. ed. 78, 80, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Reitler v. Harris, 223 U. S. 437, 56 L. ed. 497, 32 Sup. Ct. Rep. 248; Luria v. United States, 231 U. S. 9, 25, 58 L. ed. 101, 106, 34 Sup. Ct. Rep. 10. An instructive case upon the subject is Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in nowise inconsistent with the constitutional right of trial by jury. And in Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 382, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247, a like ruling was [431] made in respect

of a statutory provision similar to that now before us.

Complaint is made because the court refused to direct a verdict for the defendant, but of this it suffices to say that the ruling was undoubtedly right, because the plaintiff's evidence, including the findings and orders of the Commission, tended to show every fact essential to a recovery upon both claims, and there was no opposing evidence.

The district court made an allowance of $20,000 as a fee for the plaintiff's attorneys, and directed that it be taxed and collected as part of the costs, the allowance being expressly apportioned in equal amounts between the services in the proceeding before the Commission and the services in the action in court. Complaint is made of this on the grounds (a) that the allowance is, in any view, excessive, (b) that the act does not authorize an allowance for services before the Commission, and (c) that the provision authorizing an allowance for services in the action is invalid as being purely arbitrary, and as imposing a penalty merely for failing to pay a debt.

Without considering whether the mere amount of an allowance under the statute can ever be re-examined here (see Rev. Stat. § 1011, Comp. Stat. § 1672; Martinton v. Fairbanks, 112 U. S. 670, 672, 28 L. ed. 862, 863, 5 Sup. Ct. Rep. 321; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48, 48 L. ed. 608, 612, 24 Sup. Ct. Rep. 307; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 31, 25 L. ed. 531, 534; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. ed. 71, 80, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690), we are clear that it cannot be in this instance. The record discloses that the allowance was predicated upon an exhibition of a transcript of the proceedings before the Commission and upon a statement made in open court, in the presence of counsel for the defendant, of the services rendered before the Commission and in the action. But the transcript and statement have not been made part of this record, and so we cannot know what was shown by them, and cannot judge of their bearing upon the amount of the allowance. Besides, it does not appear that the defendant offered any evidence tending [432] to show what would be a reasonable allowance, or that it in any way objected or excepted to the amount of the allowance when it was made. The only exception reserved was addressed to the allowance of any fee for the services before the Commission or for those in the action. In this situation the defendant is not now *in a position to* claim that, as matter of fact, the allowance is excessive. Whether, as matter of law, it is objectionable, is another question.

Section 8 provides that a carrier violating the act shall be liable to any person injured for the damages he sustains, "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." And § 16, relating to actions to enforce claims for damages after the Commission has acted thereon, provides: "If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

In our opinion the services for which an attorney's fee is to be taxed and collected are those incident to the action in which the recovery is had, and not those before the Commission. This is not only implied in the words of the two provisions just quoted, but is suggested by the absence of any reference to proceedings anterior to the action. And that nothing more is intended becomes plain when we consider another provision in § 16, which requires the Commission, upon awarding damages, to make an order directing the carrier to pay the sum awarded "on or before a day named," and then declares that, if the carrier does not comply with the order "within the time limit," the claimant may proceed to collect the damages by suit. The Commission is not to allow a fee, but only to find the amount of the damages and fix a time for payment; and, if the carrier pays the award within the time named, no right to an attorney's fee arises. It is only when the [433] damages are recovered by suit that a fee is to be allowed, and this is as true of the provision in § 8 as of that in § 16. The evident purpose is to charge the carrier with the costs and expenses entailed by a failure to pay without suit,—if the claimant finally prevails,—and to that end to tax as part of the costs in the suit wherein the recovery is had a reasonable fee for the services of the claimant's attorney in instituting and prosecuting that suit. It follows that the district court erred in matter of law in allowing a fee for services before the Commission.

The contention that the provision for an attorney's fee for services in the suit is invalid as being purely arbitrary, and as imposing a penalty for merely failing to pay a debt, is without merit. The provision is leveled against common carriers engaged in interstate commerce, a quasi public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed

in the public interest by the act to regulate commerce. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 208, 55 L. ed. 167, 183, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands, does not militate against its validity. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 651, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678, and cases cited. It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful, but certain.

It results from what has been said that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court must be modified by eliminating the allowance of $10,000 as an attorney's fee for services before the Commission, and affirmed as so modified.

It is so ordered.

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[434] HENRY E. MEEKER, Petitioner,
v.
LEHIGH VALLEY RAILROAD COMPANY.

(See S. C. Reporter's ed. 434-439.)

Appeal — reversible error — admission of evidence.

1. The admission in evidence, in a reparation suit brought by a shipper against a carrier under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 16, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8584), of an order of the Interstate Commerce Commission finding the rate charged and paid by the shipper to be excessive and unreasonable, and determining what would have been a reasonable rate, over the objection that the order was made in another and separate proceeding, is not reversible error where one complaint was made by a partnership and the other by the surviving partner, and the Commission in effect permitted the latter to intervene in respect to his individual claim in a proceeding begun by the partnership, or to consolidate his complaint with theirs without objection by, or prejudice to, the carrier,—especially where such reparation order recites that it was made after a full hearing and submission of the issues presented by the complaint and answer relating to the claim, and there was no evidence tending to contradict such recital.

[For other cases, see Appeal and Error, 5020-5050, in Digest Sup. Ct. 1908.]

Appeal — harmless error — admission of irrelevant evidence.

2. The presence of irrelevant matter in the report of the Interstate Commerce Commission admitted in evidence in a reparation suit brought under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), by a shipper against a carrier, is harmless error where the case made by the evidence rightly admitted was such as, in the absence of any opposing evidence,—and there was none,—clearly entitled the shipper to a verdict for the amount claimed.

[For other cases, see Appeal and Error, 5020-5050, in Digest Sup. Ct. 1908.]

[No. 435.]

Argued October 13 and 14, 1914. Decided February 23, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of Pennsylvania in favor of plaintiff in an action to recover from a carrier the damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the carrier's overcharges and unjust discrimination. Judgment of Circuit Court of Appeals reversed; judgment of District Court modified by eliminating an allowance of attorneys' fees for services before the Commission, and, as modified, affirmed.

See same case below, 211 Fed. 785.

The facts are stated in the opinion.

Messrs. **John A. Garver** and **William A. Glasgow, Jr.**, argued the cause and filed a brief for petitioner.

Messrs. Joseph W. Folk and Charles W. Needham filed a brief for the Interstate Commerce Commission.

Mr. **John G. Johnson** argued the cause, and, with Messrs. Edgar H. Boles, Frank H. Platt, and George W. Field, filed a brief for respondent.

For contentions of counsel, see their briefs as reported in Meeker v. Lehigh Valley R. Co. ante, 644.

[435] Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a companion case to that just decided, and involves a claim for reparation similar to the second claim in that case, and arising out of the same rate.

In this instance the shipper was Henry E. Meeker, who had succeeded to the business of Meeker & Company, the shippers

in the other case, and the shipments in respect of which reparation is sought were made between April 13, 1908, and April 13, 1910. Otherwise the two claims differ only in amount. A complaint covering this claim was filed with the Interstate Commerce Commission April 13, 1910, before it passed upon the complaint covering the other. In its report of June 8, 1911, upon the earlier complaint, the Commission referred to the later one and said (21 Inters. Com. Rep. 129, 137): "As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case." In that report it found that the rate in question was excessive and unreasonable, and what would have been a reasonable rate, and directed a further hearing upon the matter of reparation. Such a hearing was had on both complaints, and, on May 7, 1912, the Commission made a supplemental report, entitled in both cases, in which it referred to its original report and the findings therein, and, after dealing with the reparation sought in the first complaint (Commission's No. 1180), said of the present claim (23 Inters. Com. Rep. 480, 482):

"On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, [436] New Jersey, during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of $1.40 per gross ton on prepared sizes, $1.30 on pea, and $1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of prepared sizes, 26,972.06 tons of pea coal, and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to $136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and $125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of $10,813.60, with interest amounting to $1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of $10,813.60 from the 1st day of September, 1911.

"The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved."

Thereupon the Commission made and entered the following order:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

[437] "It is ordered, that defendant Lehigh Valley Railroad Company be, and it is hereby, authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of $10,813.60, with interest at the rate of 6 per cent per annum, amounting to $1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's exhibit 1, together with interest at the rate of 6 per cent per annum on said sum of $10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, New Jersey, which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

The railroad company was duly served with a copy of the order, but refused to comply with it, and, on September 3, 1912, after the expiration of the period allowed for compliance, the claimant brought the present action in the district court. The railroad company answered as in the other case. At the trial the plaintiff relied in the main upon the findings and order of the Commission as prima facie evidence of the facts therein stated, and no opposing evidence was presented. The plaintiff had a verdict and judgment for $13,161.78, the amount of damages awarded by the Commission, with interest. The court also allowed an attorney's fee of $5,000, to be taxed and collected as part of the costs, one half of the allowance being expressly attributed to services before the Commission and the other half to the services in the

section. The case was taken to the circuit court of appeals, where the judgment was reversed, with that in the other case. 211 Fed. 785. This case was then brought here in the same way as the other. 234 U. S. 749, 58 L. ed. 1576, 34 Sup. Ct. Rep. 674.

[438] Save that the statute of limitations is not relied upon, the questions here presented are almost all identical with those in the other case, and in so far as they are the same, they are sufficiently disposed of by what is there said. There are but two points of difference, and they require only brief mention.

The Commission's report of June 8, 1911, finding the rate in question excessive and unreasonable, and what would have been a reasonable rate, was admitted in evidence over the defendant's objection that it was made in another and separate proceeding; that is, upon the complaint of Meeker & Company, and therefore was not admissible in this case for any purpose. The objection was rightly overruled. Without any doubt it was within the discretion of the Commission to permit Henry E. Mecker to intervene in respect of his individual claim in the proceeding begun by Meeker & Company, or to consolidate his complaint with theirs. This, in effect, is what was done. The supplemental report so shows, and it does not appear that the railroad company objected to that course, or was in any way prejudiced by it. Besides, the reparation order recites that it was made after a full hearing and submission of the issues presented by the complaint and answer relating to this claim, and there was no evidence tending to contradict the recital.

The further objection was made to the admission of the same report that it contained much that was not relevant to the case on trial, but the objection was overruled, and it is fairly inferable from the record that the entire report was placed before the jury. It hardly could be said that the presence of some irrelevant matter rendered the whole report inadmissible, and yet the objection seems to have been made in that view. The objection would have been better founded had it been confined to what was deemed irrelevant. Of course, all that should have gone before the jury was the relevant findings [439] in the report, and counsel for the plaintiff ought not to have asked more. But we need not fix the responsibility for what occurred, for it is certain that the defendant was not harmed by it. The case made by the evidence rightly admitted was such as, in the absence of any opposing evidence, and there was none, clearly entitled the plaintiff to a verdict for the amount claimed. Every fact essential to a recovery, save the service of the reparation order and the refusal to comply with it, was prima facie established by the findings and order of the Commission, and these could not be rejected by the jury in the absence of any countervailing evidence. Kelly v. Jackson, 6 Pet. 622, 632, 8 L. ed. 523, 526. The service of the order was expressly admitted, and the refusal to comply with it was fully proved and practically conceded. Of course, harmless error constitutes no ground for reversal.

We conclude, therefore, that the judgment of the Circuit Court of Appeals must be reversed, and that of the District Court must be modified by eliminating the allowance of an attorney's fee of $2,500 for services before the Commission, and affirmed as so modified.

It is so ordered.

SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
RAILROAD COMMISSION OF INDIANA.

(See S. C. Reporter's ed. 439-448.)

Commerce — state regulation of railway safety appliances — congressional action.

Congress has so far occupied the field of legislation relating to the equipment with safety appliances of cars moving on interstate railways by the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8608), as to invalidate, as applied to freight cars moving between points within the state on a railway engaged in interstate commerce, the provisions of Burns's (Ind.) Rev. Stat. 1908, § 5280, requiring railway companies to place secure grab irons or hand holds on the sides or ends of every railway car.

[For other cases, see Commerce, I. c; III., in Digest Sup. Ct. 1908.]

[No. 107.]

Argued December 9, 1914. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment

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NOTE.—On state regulation of equipment of railroad rolling stock as interference with interstate commerce—see note to Atlantic Coast Line R. Co. v. Georgia, 32 L.R.A. (N.S.) 20.

On duty and liability under Federal and state railway safety appliance acts—see notes to Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A. (N.S.) 49, and Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A. (N.S.) 473.

which affirmed a judgment of the Superior Court of Vanderburg County, in that state, enforcing a penalty against a railway company for not equipping its freight cars with grab irons and hand holds, as required by a state statute. Reversed and remanded for further proceedings.

See same case below, 179 Ind. 23, 100 N. E. 337.

The facts are stated in the opinion.

Mr. John D. Welman argued the cause, and, with Messrs. Edward P. Humphrey and Alexander P. Humphrey, filed a brief for plaintiff in error:

The car in question, moving intrastate traffic on a railroad engaged in interstate commerce, is included in and comprehended by the provisions of the Federal safety appliance act of March 2, 1893, as amended by the act of March 2, 1903.

Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822.

The Federal act here involved is a regulation of interstate commerce, and Congress has the power to cover every phase of such commerce, even as to the machinery and appliances involved in its conduct.

Hall v. DeCuir, 95 U. S. 485, 488, 24 L. ed. 547, 548; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 201, 55 L. ed. 167, 180, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164.

The safety appliance act of the state of Indiana is unenforceable and void under the commerce clause of the Federal Constitution, because Congress, by its previous legislation, has occupied the field of regulation of the same subject-matter, to the exclusion of state regulation.

Reid v. Colorado, 187 U. S. 146, 47 L. ed. 113, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; The Roanoke, 189 U. S. 198, 47 L. ed. 774, 23 Sup. Ct. Rep. 491; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 54, 56 L. ed. 327, 347, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Southern R. Co. v. Reid, 222 U. S. 444, 447, 56 L. ed. 263, 264, 32 Sup. Ct. Rep. 145; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 65–67, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co. 226 U. S. 426, 435, 57 L. ed. 284, 287, 46 L.R.A. (N.S.) 203, 33 Sup. Ct. Rep. 174; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 499, 503, 58 L. ed. 1062, 1068, 1069, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635; St. Louis, I. M. & S. R. Co. v. Hesterly, 98 Ark. 240, 135 S. W. 874; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 293, 294, 58 L. ed. 1312, 1318, 1319, 34 Sup. Ct. Rep. 829; Erie R. Co. v. Welsh, 89 Ohio St. 81, 105 N. E. 189; Wabash R. Co. v. Priddy, 179 Ind. 483, 101 N. E. 724; Southern R. Co. v. Howerton, — Ind. —, 105 N. E. 1025.

Mr. Frank H. Hatfield argued the cause, and, with Messrs. Thomas P. Littlepage, John R. Brill, and John W. Brady, filed a brief for defendant in error:

Plaintiff in error was engaged in both interstate commerce and commerce within the state.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Luken v. Lake Shore & M. S. R. Co. 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82.

If the state statute in question is not a regulation of interstate commerce, then it is not in contravention of or opposed to the right of Congress, and therefore not in violation of the commerce clause.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Gibbons v. Ogden, 9 Wheat. 9, 6 L. ed. 25; People ex rel. Stead v. Chicago, I. & L. R. Co. 223 Ill. 581, 79 N. E. 144, 7 Ann. Cas. 1.

In conferring upon Congress the regulation of commerce between the states, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country; this right being reserved to the states in the exercise of their police powers.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

A statute of a state and an act of Congress on the same subject may be enforced in pursuance of a common purpose to afford a remedy.

Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; Detroit, T. & I. R. Co. v. State, 82 Ohio St. 60, 137 Am. St. Rep. 758, 91 N. E. 869; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522.

If a railroad company is engaged in both interstate and intrastate commerce, this does not prevent the state from adopting such regulations as it may deem proper to provide for the safety of its citizens.

People ex rel. Stead v. Chicago, I. & L. R. Co. 223 Ill. 581, 79 N. E. 144, 7 Ann. Cas. 1; People v. Erie R. Co. 198 N. Y. 369, 22

L.R.A.(N.S.) 240, 139 Am. St. Rep. 828, 91 N. E. 849, 19 Ann. Cas. 811; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; 2 Elliott, Railroads, 690; 4 Elliott, Railroads, 1671; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The state statute in question has not been superseded.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Compagnie Francaise de Navigation a Vapeur Co. v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Railroad companies doing an interstate business take their charters subject, necessarily, to the condition that they will conform to such reasonable regulations as the state may, from time to time, establish that are not in violation of the supreme law of the land.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

The police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of railroad companies or other common carriers engaged in interstate commerce, and this is especially true in respect to laws enacted by the state for the safety of persons and property, such regulations being regarded as in aid of commerce, and are generally considered with special favor by the courts.

Pittsburgh, C. C. & St. L. R. Co. v. State, 172 Ind. 147, 87 N. E. 1034; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

In order to prevent a state statute from being enforced on account of a regulation by Congress, the state statute must be in conflict with the Federal act, and its enforcement must be an interference with the enforcement of the Federal act.

Pittsburgh, C. C. & St. L. R. Co. v. State, 172 Ind. 147, 87 N. E. 1034.

A state statute is not invalid because of a Federal statute on the same subject, unless the state statute is repugnant to the Federal statute.

People v. Erie R. Co. 198 N. Y. 369, 29 L.R.A.(N.S.) 240, 139 Am. St. Rep. 828, 91 N. E. 849, 19 Ann. Cas. 811; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870.

The attachment and garnishment laws of the state can be enforced against an interstate carrier doing an interstate business, and against the cars engaged in interstate commerce, and this is not a regulation of, nor an interference with, interstate commerce, and is therefore not repugnant to the Federal statutes.

Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

So long as the action of the state is not repugnant to, or does not interfere with, or place burdens upon, or undertake to regulate, interstate commerce, or is a mere police regulation, its action, though in aid of interstate commerce, is not invalid, unless it is a direct interference.

Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

It is not enough to render the state law invalid that it is similar to the Federal statute upon the same subject; it must in operation interfere directly or substantially with interstate commerce, and not be an incidental or casual interference or remotely affect it hurtfully.

United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep.

95; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

Both the state and Federal statutes may be enforced.

Dashing v. State, 78 Ind. 357; Snoddy v. Howard, 51 Ind. 411, 19 Am. Rep. 738; Fox v. Ohio, 5 How. 410, 12 L. ed. 213; Moore v. Illinois, 14 How. 13, 14 L. ed. 306; 11 Cyc. 311; Ambrose v. State, 6 Ind. 351; State v. Gapen, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; Ex parte Siebold, 100 U. S. 371–389, 25 L. ed. 717–723; Cross v. North Carolina, 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Detroit, T. & I. R. Co. v. State, 82 Ohio St. 60, 137 Am. St. Rep. 758, 91 N. E. 869; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; Southern R. Co. v. Railroad Commission, 179 Ind. 23, 100 N. E. 337; Re Loney, 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; State v. Kirkpatrick, 32 Ark. 117; People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190, 8 Am. Crim. Rep. 147; United States v. Amy, Fed. Cas. No. 14,445; State v. Oleson, 26 Minn. 507, 5 N. W. 959; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; People v. Welch, 141 N. Y. 266, 24 L.R.A. 117, 38 Am. St. Rep. 793, 36 N. E. 328; Territory v. Coleman, 1 Or. 191, 75 Am. Dec. 554; State v. Norman, 16 Utah, 457, 52 Pac. 986; Smith v. United States, 1 Wash. Terr. 262; People v. White, 34 Cal. 183; Martin v. State, 18 Tex. App. 225; State v. Bardwell, 72 Miss. 541, 18 So. 377, 10 Am. Crim. Rep. 71; Bohannon v. State, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390, 6 Am. Crim. Rep. 487; Re Truman, 44 Mo. 183; Smith v. Maryland, 18 How. 71, 15 L. ed. 269; Com. v. Ellis, 158 Mass. 555, 33 N. E. 651; People v. Miller, 38 Hun, 82.

The state statute in question is in aid of the Federal act.

Charles v. Atlantic Coast Line R. Co. 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E 927; Seegers Bros. v. Seaboard Air Line R. Co. 73 S. C. 71, 121 Am. St. Rep. 921, 52 S. E. 797; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

State statutes have been enforced in this court and held valid, which indirectly affect interstate commerce, in the following cases:

State "full crew" law.

Pittsburgh, C. C. & St. L. R. Co. v. State, 223 U. S. 713, 56 L. ed. 626, 32 Sup. Ct. Rep. 520.

State attachment law.

Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

State statute requiring locomotive engineers to be examined and licensed.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

State statutes making it unlawful to run freight trains on Sunday.

Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

Heating car statutes.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

Automatic couplers required.

Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

Statutes governing transfer of cars.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

Transmitting messages.

Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934.

Adjusting freight rates under state statutes.

Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378.

Enforced separation of whites and blacks.

Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.

Requiring fences and cattle guards.

Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870.

Shipping diseased meats into states.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

State headlight law.

Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829.

There is a presumption in favor of the state statute.

Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

There is no presumption that Congress intended to supersede the state statute.

Savage v. Jones, 225 U. S. 501–533, 56 L. ed. 1182–1194, 32 Sup. Ct. Rep. 715; Reid v. Colorado, 187 U. S. 137–148, 47 L. ed. 108–114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

Mr. Justice Lamar delivered the opinion of the court:

The Indiana statute requires railway companies to place secure grab irons and hand holds on the sides or ends of every railroad car, under a penalty of $100 fine, to be recovered in a civil action.

In March, 1910, the railroad commission of the state brought such a suit against the Southern Railway Company, alleging that the company on February 24, 1910, had transported from Boonsville, Indiana, to Milltown, [445] Indiana, a car which did not have the required equipment. The defendant filed an answer in which it denied liability under the state law inasmuch as on February 24, 1910, the Federal safety appliance act imposed penalties for failing to equip cars with hand holds, and also designated the court in which they might be recovered. The commission's demurrer to the answer was sustained. The defendant refusing to plead further, judgment was entered against the company. That judgment was affirmed by the state court, and the case was brought here by writ of error.

The car alleged to have been without the required equipment, though transporting freight between points wholly within the state of Indiana, was moving on a railroad engaged in interstate commerce, and the company was, therefore, subject to the provisions and penalties of the safety appliance act. 27 Stat. at L. 531, § 4, chap. 196, Comp. Stat. 1913, § 8608. Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

The defendant in error insists, however, that the railroad company was also liable for the penalty imposed by the Indiana statute. In support of this position numerous cases are cited which, like Cross v. North Carolina, 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and Federal regulation, and thus violates the laws of both; or where there is this double effect in a matter of which one can exercise control, but an authoritative declaration that the paramount jurisdiction of one shall not [446] exclude that of the other. Compare, Rev. Stat. § 711, 37 Stat. at L. 670, chap. 50, Comp. Stat. 1913, § 8603.

But the principle that the offender may, for one act, be prosecuted in two jurisdictions, has no application where one of the governments has exclusive jurisdiction of the subject-matter, and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field, the states could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. But Congress could pass the safety appliance act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and *ipso facto* supersedes existing state legislation on the same subject. Congress, of course, could have "circumscribed its regulations" so as to occupy a limited field. Savage v. Jones, 225 U. S. 502, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 293, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 829. But so far as it did legislate, the exclusive effect of the safety appliance act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. For, as said in Prigg v. Com. 16 Pet. 618, 10 L. ed. 1090: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as [447] it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is

as the direct provisions made by it. . . . the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

Without, therefore, discussing the many cases sustaining the right of the states to legislate on subjects which, while not burdening, may yet incidentally affect interstate commerce, it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument. Its application may be seen in rulings in the closely analogous cases relating to state penalties for failing to furnish cars, and to state penalties for retaining employees at work on cars beyond the time allowed by the hours-of-service law.

In St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 267, 57 L. ed. 506, 33 Sup. Ct. Rep. 262, it was held that the Arkansas statute imposing a penalty for failing to deliver cars had been superseded by the provisions of the Hepburn act, although the provisions of the two statutes were not identical. In Northern P. R. Co. v. Washington, 222 U. S. 371, 56 L. ed. 237, 32 Sup. Ct. Rep. 160, it was held that congressional legislation as to hours of service so completely occupied the field as to prevent state legislation on that subject. In Erie R. Co. v. New York, 233 U. S. 671, 58 L. ed. 1149, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 756, a like ruling was made in a case where the New York law punished a railroad company for allowing an employee to work more than eight hours when the Federal statute [448] punished the company for employing him for more than nine hours—even though it was argued that the state legislation was not in conflict with the Federal act, but rather in aid of it. The same contention is made here, inasmuch as the Indiana law requires hand holds on sides *or* ends of cars, while the Federal statute requires hand holds to be placed both on the sides *and* ends of cars.

The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control. The safety appliance act having superseded the Indiana statute, the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

LEHMAN, STERN, & COMPANY, Limited, Plff. in Err.,
v.
S. GUMBEL & COMPANY, Limited.

(See S. C. Reporter's ed. 448–454.)

Bankruptcy — ouster of state jurisdiction — foreclosure of vendor's lien.

The jurisdiction of the state courts to foreclose a vendor's lien, claimed, under La. Acts 1890, No. 63, upon agricultural products in the hands of a third person, but not enforced by the seizure of the property otherwise than by garnishment process under a writ of attachment, was lost upon the dissolution of the attachment, under the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9651), § 67f, when bankruptcy proceedings were begun within four months of the attachment, where the state court holds that such vendor's lien can only be enforced against property in the possession of the court, and that such possession is not acquired by means of the service of the summons of garnishment.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 146.]

Argued January 22, 1915. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment granting a writ of prohibition to forbid the judge of the Civil District Court of the Parish of Orleans from proceeding further in a suit to foreclose a vendor's lien. Affirmed.

See same case below, 132 La. 231, 61 So. 212.

The facts are stated in the opinion.

Mr. Henry C. Chaffe argued the cause, and, with Messrs. George Denegre and Victor Leovy, filed a brief for plaintiff in error:

This court has jurisdiction.

McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Straus v. American Publishers' Asso. 231 U. S. 222, 233, 58 L. ed. 192, 198, L.R.A. 1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 275, 57 L. ed. 1179, 1185, 33 Sup. Ct. Rep. 858; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Graham v. Gill, 223 U. S. 643, 56 L. ed. 586, 32 Sup. Ct. Rep. 396; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 532, 51 L. ed. 596, 603, 27 Sup. Ct. Rep. 391; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; California Nat. Bank

v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576.

Section 67f of the bankruptcy act is not directed at the writ of attachment itself, but only at the lien obtained thereby.

Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665; Henderson v. Mayer, 225 U. S. 631, 56 L. ed. 1233, 32 Sup. Ct. Rep. 699; Metcalf Bros. v. Barker, 187 U. S. 175, 47 L. ed. 127, 23 Sup. Ct. Rep. 67.

Through an unbroken line of authorities, under the law of Louisiana the court, by means of the notice of seizure and service of interrogatories in attachment by garnishment process, comes into the legal possession and control of the property of the defendant caught in the hands of third persons. In other words, it is actually seized, and the garnishee becomes the custodian for the court, even though he be not its officer. If he disposes of the property seized pending final judgment and execution, like every other custodian, he is responsible for its value.

Scholefield v. Bradlee, 8 Mart. (La.) 510; Dennistoun v. New York Croton & Steam Faucet Co. 6 La. Ann. 782; Grieff v. Betterton, 18 La. Ann. 349; Golsan v. Powell, 32 La. Ann. 522; Buddig v. Simpson, 33 La. Ann. 375; Gomila v. Milliken, 41 La. Ann. 123, 5 So. 548; Lehmann v. Rivers, 110 La. 1079, 35 So. 296.

Now, in order to give the court jurisdiction over property, it is not necessary that it be in the possession of one of its officers bearing the title of sheriff, constable, receiver, or the like; it is merely necessary that the property be under its control and subject to its order.

Cooper v. Reynolds, 10 Wall. 308, 317, 19 L. ed. 931, 932; Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 301, 28 L. ed. 731, 5 Sup. Ct. Rep. 135; Pennoyer v. Neff, 95 U. S. 724, 24 L. ed. 569.

The supreme court of Louisiana erred in holding that, as the seizure was only constructive, the jurisdiction of the state court was divested by the adjudication in bankruptcy of the defendants.

Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Re Seebold, 45 C. C. A. 117, 105 Fed. 910; Carling v. Seymour Lumber Co. 51 C. C. A. 1, 113 Fed. 490; Re Kane, 152 Fed. 587.

From a consideration of the two decisions of the supreme court in this case, it will become apparent that that court seemed to be of the opinion that the moment a man was adjudged a bankrupt, the state court lost all and every character of jurisdiction over his assets and property, no matter how or where situated. This court has on several occasions taken the opposite view.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693.

While it is true that no personal judgment can be rendered against defendants, it is also true that a judgment can be rendered in this case as in any other case which is in the nature of a proceeding *in rem;* that is, limiting its effect to the extent of the proceeds of the cotton seized. The judgment involved in Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67, was of necessity so limited in its effect; and in the case of Carling v. Seymour Lumber Co. 51 C. C. A. 1, 113 Fed. 490, where a plaintiff had, prior to bankruptcy, seized in a state court property on only part of which it had an enforceable lien, after bankruptcy, the court held that the trustee could take from the state court only that part of the property not subject to the lien thereon sought to be enforced.

Mr. Monte M. Lemann argued the cause, and, with Mr. J. Blanc Monroe, filed a brief for defendant in error:

This court has no jurisdiction.

Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; Fulton v. M'Affee, 16 Pet. 149, 10 L. ed. 918; Gordon v. Caldeleugh, 3 Cranch, 268, 2 L. ed. 436; Hale v. Gaines, 22 How. 144, 16 L. ed. 264; Roosevelt v. Meyer, 1 Wall. 512, 17 L. ed. 500; Montgomery v. Hernandez, 12 Wheat. 129, 6 L. ed. 575; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Commonwealth Bank v. Griffith, 14 Pet. 56, 10 L. ed. 352; Lynde v. Lynde, 181 U. S. 183, 186, 45 L. ed. 810, 812, 21 Sup. Ct. Rep. 555; Johnson v. New York L. Ins. Co. 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; Dakota, W. & M. River R. Co. v. Crouch, 203 U. S. 582, 51 L. ed. 327, 27 Sup. Ct. Rep. 780; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 528, 44 L. ed. 872, 874, 20 Sup. Ct. Rep. 715; Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct Rep. 100; Menard v. Aspasia, 5 Pet. 505, 8 L. ed. 207; Cramer v.

Wilson, 195 U. S. 410, 49 L. ed. 257, 25 Sup. Ct. Rep. 94; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; Wabash R. Co. v. Adelbert College, 208 U. S. 611, 52 L. ed. 643, 28 Sup. Ct. Rep. 425.

A garnishment upon an attachment issued against an insolvent defendant within six days of an adjudication in bankruptcy is annulled and avoided by the adjudication in bankruptcy, and the state court loses jurisdiction to proceed with it.

Wooldridge v. Rickert, 33 La. Ann. 234; Wright-Dalton-Bell-Anchor Store Co. v. St. Louis, I. M. & S. R. Co. 142 Mo. App. 50, 125 S. W. 517; Cavanaugh v. Fenley, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711; Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865; Nugent v. Opdyke, 9 Rob. (La.) 453; Randell v. McLain, 40 Ga. 162; Howe v. Union Ins. Co. 42 Cal. 528; Kellogg-Mackay-Cameron Co. v. William Schmidt Baking Co. 101 Ill. App. 209; Longley v. McCann, 90 Ark. 252, 119 S. W. 268; Janes v. Beach, 1 Mich. N. P. 94; Re Tune, 115 Fed. 906; Re Beals, 116 Fed. 530; Re Ransford, 115 C. C. A. 560, 194 Fed. 658; Klipstein v. Allen-Miles Co. 69 C. C. A. 229, 136 Fed. 386; Re McCartney, 109 Fed. 621; Re Lesser, 108 Fed. 201; Re Forbes, 108 C. C. A. 191, 186 Fed. 79; Re Monroe Lumber Co. 186 Fed. 252.

Under Louisiana practice, as elsewhere, attachments and statutory liens have nothing at all to do with each other.

Hanna v. Loring, 11 Mart. (La.) 276; Gumbel v. Beer, 36 La. Ann. 496; Harvey v. Grymes, 8 Mart. (La.) 395; Hunt v. Norris, 4 Mart. (La.) 528; Cross, Practice, p. 277, § 356; Waples, Attachm. & Garnishment, p. 22; Gates v. Bennett, 33 Ark. 475; Mendelsohn v. Smith, 27 Mich. 2; 4 Cyc. 401.

It is even more obviously true that no question of a lien can arise upon a garnishment.

Rood, Garnishment, § 46; Bean v. Mississippi Union Bank, 5 Rob. (La.) 336; Oakey v. Mississippi & A. R. Co. 13 La. 567; Davis v. Bastos, 9 La. Ann. 359; Peet v. Whitmore, 16 La. Ann. 48; North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 597, 38 L. ed. 565, 567, 14 Sup. Ct. Rep. 710; Schuler v. Israel, 120 U. S. 507, 510, 30 L. ed. 707, 708, 7 Sup. Ct. Rep. 648.

No pre-existing lien can be enforced by garnishment proceedings.

Johnson v. Brant, 38 Kan. 754, 17 Pac. 794.

The plaintiff in error did not, and could *not, under* the Louisiana practice, attempt to attach its own property or equities or liens. It merely attempted to attach property belonging to its debtor generally; and that attempt necessarily fell because of the bankruptcy, which vested the right to such general property of the debtor in the trustee in bankruptcy.

Karp v. Citizens' Nat. Bank, 76 Mich. 679, 43 N. W. 680; Holker v. Hennessey, 141 Mo. 527, 39 L.R.A. 165, 64 Am. St. Rep. 524, 42 S. W. 1090; Kimball v. Moody, 97 Ga. 549, 25 S. E. 338; Rischert v. Kunz, 9 Mo. App. 283; Weston v. Beverly, 10 Ga. App. 261, 73 S. E. 404; Continental Distributing Co. v. Swanson, 79 Wash. 128, 139 Pac. 865; Lane v. Brinson, 12 Ga. App. 760, 78 S. E. 725; Rice Stix Dry Goods Co. v. Saunders, 130 La. 627, 58 So. 413; Liminet v. Fourchy, 51 La. Ann. 1299, 26 So. 87; Ivens v. Ivens, 30 La. Ann. 249; Cross, Practice, §§ 440, 445, pp. 335, 342; Hanna v. Loring, 11 Mart. (La.) 276; Ansley v. Stuart, 119 La. 1, 43 So. 892.

Since the supreme court of Louisiana decided (and properly) that no question of the enforcement of a pre-existing lien can arise upon an attachment or garnishment, this case must be decided like every other case of attachment; the lien of the attachment being completely annulled and avoided by the bankruptcy act, and the property affected thereby being released, there is in this case nothing left to support the jurisdiction of the state court so far as the attachment and garnishment are concerned. The only right of possession by the state court in this case was based upon the attachment lien; for no other lien, it was held, could be before the court in an attachment or garnishment proceeding. The attachment lien having been dissolved by the adjudication of the defendant in bankruptcy within six days, as said in Re Tune, 115 Fed. 906, the state court's jurisdiction was dissolved with it.

The effect of § 67f of the bankruptcy act is to annul attachments and release the property affected thereby, even though that property will not pass to the trustee, as a result of the annulment of the attachments.

Thompson v. Fairbanks, 196 U. S. 516, 528, 49 L. ed. 577, 587, 25 Sup. Ct. Rep. 306; Chicago, B. & Q. R. Co. v. Hall, 229 U. S. 511, 57 L. ed. 1306, 33 Sup. Ct. Rep. 885.

The filing of the petition in bankruptcy puts the property of the defendant in *custodia legis.*

Re Watts, 190 U. S. 1, 47 L. ed. 933, 23 Sup. Ct. Rep. 718, 14 Am. Crim. Rep. 48; Murphy v. John Hofman Co. 211 U. S. 562, 53 L. ed. 327, 29 Sup. Ct. Rep. 154; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 307, 56 L. ed. 213, 32 Sup. Ct. Rep. 96.

Where, at the time of the filing of the petition in bankruptcy, the state court is in

the actual possession of property upon which it is entertaining proceedings to enforce a pre-existing lien, it has been held that, under the doctrine of comity, the possession of the state court should not be disputed.

Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028.

There are, indeed, a number of Federal authorities declaring that even in cases where the state court is in actual possession, it may, by virtue of the superior right of the bankruptcy court, be required to surrender its possession. This is notably true in the case of property in the hands of receivers in the state court, where the appointment of a receiver is thereafter made the basis of a bankruptcy petition; and there are decisions in a number of the Federal courts that even in other cases it is the controlling right and purpose of courts of bankruptcy to marshal and determine conflicting claims against the bankrupt's property (such as were here presented), and that to facilitate the proper distribution and administration of the bankrupt's estate it is proper to require even a state court in possession to surrender that possession to the bankruptcy court.

Re Hymes Buggy & Implement Co. 130 Fed. 977; Re Dana, 93 C. C. A. 238, 167 Fed. 529; New River Coal Land Co. v. Ruffner Bros. 91 C. C. A. 559, 165 Fed. 881; Orr v. Tribble, 158 Fed. 897; Re Oxley, 182 Fed. 1019; Virginia Iron, Coal & Coke Co. v. Olcott, 117 C. C. A. 124, 197 Fed. 730.

Where, however, the state court is not in possession of any property, there can be no question but that the bankruptcy court alone is vested with administration of all of the bankrupt's property, and with the right to pass upon and determine all claims or liens asserted against him. In this case, the supreme court of Louisiana put its decision finally upon the ground that it was not in possession of any property.

Lehman v. Martin, 132 La. 231, 61 So. 212; Cross, Practice, p. 344.

This court could not reverse the supreme court of Louisiana without in effect declaring that a state court has jurisdiction to proceed with claims against a bankrupt, and with the determination of liens asserted against his property, even in the face of an adjudication in bankruptcy, in every case, including specifically cases where no property is in the possession or control of the state court. But such a doctrine would destroy the exclusive functions of the bankruptcy court and would be squarely opposed to the rule announced in Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96, and Murphy v. John Hofman Co. 211 U. S. 562, 53 L. ed. 327, 29 Sup. Ct. Rep. 154. See also Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269; Re Schow, 213 Fed. 514.

When properly analyzed in its last essence, the decision of the Louisiana supreme court rested upon two questions of state practice—namely:

1. Whether the writ of garnishment upon an attachment can be employed to enforce a pre-existing lien.

2. Whether the operation of a writ of garnishment under attachment is sufficient to bring any property within the possession and custody of the state court.

The decision of the Louisiana supreme court upon these points of state practice is conclusive; and when these questions are answered in the negative, as the Louisiana supreme court did answer them, the case is disposed of without there being, from any standpoint, any infringement upon any Federal right.

Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 58 L. ed. 204, 34 Sup. Ct. Rep. 90; Waters-Pierce Oil Co. v. Texas, 212 U. S. 116, 53 L. ed. 433, 29 Sup. Ct. Rep. 227; Cramer v. Wilson, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Wabash R. Co. v. Adelbert College, 208 U. S. 611, 52 L. ed. 643, 28 Sup. Ct. Rep. 425; De Bearn v. Safe Deposit & T. Co. 233 U. S. 24, 58 L. ed. 833, 34 Sup. Ct. Rep. 584; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359.

If this court has juisdiction in this case, then it has jurisdiction in every case where a Federal right is set up by one party alone and the decision of the state court is in favor of that right, because in every such case the decision is necessarily against the contrary contention of the other party.

Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; Fulton v. M'Affee, 16 Pet. 149, 10 L. ed. 918; Lytle v. Arkansas, 22 How. 194, 16 L. ed. 306; Moore v. American Transp. Co. 24 How. 20, 16 L. ed. 677; Ryan v. Thomas, 4 Wall. 603, 18 L. ed. 460; Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Ayres v. Polsdorfer, 187 U. S. 587, 47 L. ed. 314, 23 Sup. Ct. Rep. 196.

Mr. Justice Lamar delivered the opinion of the court:

On March 12, 1912, Lehman, Stern, & Company sold to Martin & Company 392 bales of cotton for the sum of $19,238. The

checks given in payment were not honored when presented to the bank, and, on the day after the sale, the Lehman Company brought suit in a state court to obtain a general judgment against Martin & Company, and to foreclose the lien, given by the Louisiana statute, on agricultural products "to secure the payment of the purchase money for and during the space of five days only after the day of delivery; within which time the vendor shall be entitled to seize the same in whatsoever hands or place it may be found, and his claim for the purchase money shall have preference over all others."

Writs of sequestration and of attachment issued, requiring the sheriff to seize the cotton in whatsoever place it might be found, and to attach other property of Martin & Company and the individual members thereof, and hold the same subject to the further judgment and order of the court. The New Orleans Railway Company, Gumbel & Company, and the Hibernia Bank were served with summons of garnishment.

On March 19th the defendants, Martin & Company, were adjudged voluntary bankrupts. On the next day Thompson was appointed receiver of the bankrupts' estate. Shortly afterwards the New Orleans Railway Company, garnishee in the state suit, answered that it had in its [452] possession 83 bales of the cotton mentioned in the pleadings; stating, however, that the cotton was claimed by Thompson, receiver of Martin & Company, bankrupts, and that he had notified the railroad company not to surrender the same.

By virtue of an order of the bankrupt court Thompson, receiver, thereafter intervened in the suit pending in the state court. Calling attention to the fact that the attachment proceedings had been commenced within four months prior to the petition in bankruptcy, and averring that the action did not involve property within the possession of the court, the receiver filed a motion "to dismiss the proceedings herein, relegating the parties to the proper court of bankruptcy to determine their conflicting claims." Gumbel & Company, garnishees, also excepted to the jurisdiction of the court on the ground that Martin & Company had been adjudicated bankrupts. Both of these motions were overruled by the judge presiding in the state court, who held that the bankruptcy act did not dissolve the vendor's lien; nor did it prevent the court from enforcing that lien against the cotton which had been brought into the custody of the court by means of garnishments served before the bankruptcy proceedings were filed.

Thereupon Gumbel & Company applied to the supreme court of Louisiana for a writ of prohibition forbidding the judge of the civil district court of the parish of New Orleans from proceeding further in the cause. The petition set out the history of the litigation, and averred that although § 67f [30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9651] dissolved the attachment, the court below had retained jurisdiction; that the receiver had given notice that he claimed title to any property of Martin & Company in the hands of Gumbel & Company, and would proceed to enforce the same by proceedings in the bankrupt court. By reason of these facts, and to avoid conflicts of jurisdiction between the courts, Gumbel & Company claimed to be entitled to the benefit of the writ of prohibition forbidding the [453] judge of the parish court from proceeding further in the case as against them, garnishees, and claimants of the cotton under bills of lading issued by the railway company. A rule nisi issued and was served upon the judge of the civil district court. He answered, and after argument the supreme court of Louisiana ordered that the peremptory writ be issued "on the ground that, as § 67f dissolved the attachment, the state court had no jurisdiction to enforce the garnishment process under the writ of attachment for the purpose of subjecting the property to the vendor's lien claimed by the plaintiff."

A petition for a rehearing having been granted, the court, one judge dissenting, held that unless the state court had possession of the *res*, its jurisdiction was destroyed by the bankruptcy proceedings; and as the summons of garnishment did not operate to transfer the cotton from the possession of the garnishee into the possession of the court, there was no jurisdiction to foreclose the vendor's lien. It also held that the state court was without power to afford relief to the attaching creditors, who would therefore be obliged to have their rights adjudicated in the bankrupt court.

The case having been brought here by writ of error, the plaintiffs cited Louisiana cases in support of the contention that, in their suit for the recovery of the purchase price of agricultural products, they were entitled to an attachment, not only to secure a fund out of which to satisfy a general judgment, but also as a means by which to bring the cotton into court so as to have the vendor's lien foreclosed. In the light of those cases the plaintiffs further insisted that the garnishment operated as a seizure of the cotton; and that while § 67f may have dissolved the lien created by the attachment, it did not affect the lien given by statute on the cotton which the garnishment had brought into the legal possession,

custody, and control of the civil district court of the parish of Orleans.

[454] But this court cannot entertain an argument based on the theory that the decision of the supreme court of Louisiana was in conflict with the law of the state. Its opinion in this case is to be taken as conclusively establishing that, in Louisiana, the vendor's lien can only be enforced against property in the possession of the court, and also that such possession was not acquired by means of the service of the summons of garnishment.

From this ruling,—on a matter of state law, not subject to review here,—it follows that the proceedings in the civil district court to foreclose the vendor's lien failed for want of possession of the cotton. That, then, left the case an ordinary suit for purchase money against Martin & Company, in which an attachment had been levied on property in the hands of the certain garnishees. But the lien thus created by attachment and garnishment was dissolved by the express provisions of § 67f of the bankruptcy act. The judgment granting the peremptory writ of prohibition, and relegating the parties to the bankruptcy court, is therefore affirmed.

TOLEDO, ST. LOUIS, & WESTERN RAILROAD COMPANY, Plff. in Err.,
v.
OTTO E. SLAVIN.

(See S. C. Reporter's ed. 454–458.)

Error to state court — decision of Federal question — employers' liability.

1. A controlling Federal question is necessarily involved in a judgment of a state court refusing to measure the liability of the defendant interstate railway carrier in an action by an employee to recover damages for personal injuries, by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), where, although the pleadings contained no reference to that act, evidence was admitted over the plaintiff's objection which showed that the train on which he was riding at the time of the injury was engaged in interstate commerce, whereupon the defendant carrier insisted that the case was governed by that statute, and that its application and enforcement would defeat any recovery.

[For other cases, see Appeal and Error, 1436–1445, in Digest Sup. Ct. 1908.]

Commerce — employers' liability — conflicting legislation.

2. The employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), governs an action by an injured employee against an interstate railway carrier to the exclusion of any applicable state statutes, although the pleadings contained no reference to the Federal act, where the evidence on the trial shows that the train on which the plaintiff was riding at the time of the injury was engaged in interstate commerce.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

[No. 147.]

Submitted January 20, 1915. Decided February 23, 1915.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which reversed a judgment of the Circuit Court of Lucas County, in that state, reversing a judgment of the Court of Common Pleas for such County in favor of plaintiff in a personal-injury action by a railway employee against the railway company. Reversed and remanded for further proceedings.

See same case below, 88 Ohio St. 536, 106 N. E. 1077.

The facts are stated in the opinion.

Mr. Clarence Brown submitted the cause for plaintiff in error. Mr. Charles A. Schmettau was on the brief:

When Congress has exercised a power over a particular subject, given to it by the Constitution, its will upon the whole subject is as clearly established by what it has not declared as by what it has expressed.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Fulgham v. Midland Valley R. Co. 167 Fed. 660; Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 527; Dewberry v. Southern R. Co. 175 Fed. 307; Smith v. Detroit & T. Short

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 98.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38.

Line R. Co. 175 Fed. 506; Whittaker v. Illinois C. R. Co. 176 Fed. 130; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192.

Section 4 of the Federal act, in eliminating the defense of assumed risk in the specific cases mentioned therein, plainly evidences the legislative intent of Congress that in all other cases such assumption shall have its former effect as a complete bar to the action.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635.

It was the duty of the court of common pleas to charge the provisions of the Federal act.

Erie R. Co. v. Welsh, 89 Ohio St. 81, 105 N. E. 189; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156.

Mr. Walter G. Kirkbride submitted the cause for defendant in error. Mr. C. H. Masters was on the brief:

The presumption obtains that the law of the forum controls the rights of the parties to the litigation, and where, in an action in a state court, it is claimed that the case is ruled by a Federal law, the facts bringing the case within the operation of the Federal act must be pleaded.

Erie R. Co. v. Welsh, 89 Ohio St. 81, 105 N. E. 189.

If the proofs go to matters not set up in the pleadings, the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation.

Garrett v. Louisville & N. R. Co. 235 U. S. 308, ante, 242, 35 Sup. Ct. Rep. 32.

Even a Federal constitutional objection may be waived so far as having the right of review of a judgment of a state court is concerned, where the question is not made in the state court by proper procedure.

Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546.

Without any doubt, it rests with each state to prescribe its rules of practice.

John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178.

Mr. Justice Lamar delivered the opinion of the court:

In the court of common pleas of Lucas county, Ohio, Otto Slavin brought suit against the railroad company for injuries received by him on the night of August 19, 1910, while he was at work on a train in the company's yard at Toledo. His declaration alleged that in the performance of his duty, and in pursuance of a custom known to the defendant, he was riding on the side of a gondola car with his foot in the "stirrup" and his hands holding the grab irons. He averred that while in that position, and without fault on his part, he was struck by another car standing on the adjoining track which he did not and could not see in time to avoid the injury. He alleged that [456] the company was guilty of negligence in laying and maintaining the yard tracks in close and dangerous proximity to each other; and that it was further negligent in failing to give him notice that the freight car was standing on the adjoining track. The defendant denied the charge of negligence. It contended that Slavin's duty did not require him to ride on the side of the car, but that, with a safe place in which to work, he voluntarily and unnecessarily rode, in a dangerous position, on the outside of a car passing through a railroad yard where he knew, or ought to have known, that trains and cars would be standing.

There was evidence that the plaintiff had been employed by the company for about ten years,—for much of that time being in charge of the switching engine which operated over every part of the yard,—and that he was thoroughly familiar with the condition, situation, and location of the tracks at the point where the injury occurred. Neither the plaintiff's complaint nor the defendant's answer contained any reference to the employers' liability act. But, over plaintiff's objection, evidence was admitted which showed that the train on which the plaintiff was riding, at the time of the injury, was engaged in interstate commerce. Thereupon the railroad company insisted that the case was governed by the provisions of the employers' liability act, and moved the court to direct a verdict in its favor. That motion having been overruled, the defendant asked the court to give in charge to the jury several applicable extracts from that Federal statute.

All these requests were refused, the trial judge being of the opinion that the proximity of the tracks constituted a defect in "rail, track, or machinery" within the meaning of the Ohio statute; and that, although the plaintiff had notice of such defect, he was not debarred of the right to recover, in view of §§ 9017 and 9018 of the Ohio Code, [457] changing the common-law rule as to contributory negligence and assumption of risks. There was a verdict for the plaintiff. The defendant's motion for a new trial was overruled. On writ of error the circuit court of Lucas county held that inasmuch as the plaintiff was injured while engaged in interstate commerce, the case was governed by the Federal statute, which did not repeal the common-law rule of assumption of risks under circumstances like those set out in the record, and that the defendant's

motion for a directed verdict should have been granted. This judgment was reversed and that of the court of common pleas affirmed, without opinion, by the supreme court of Ohio.

The case having been brought here by writ of error, counsel for the plaintiff, Slavin, insists that the judgment of reversal, without opinion, should not be construed as meaning that the state court decided the Federal question adversely to the company's claim; but rather as holding that the defendant's failure to plead the employers' liability act made it improper to consider evidence that the plaintiff had been engaged in interstate commerce, and, hence, that there was nothing properly in this record to support the contention that the defendant had been deprived of a Federal right.

But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute, the defendant was entitled to disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.

In this respect the case is much like St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 161, 57 L. ed 1129, 1134, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, where the suit was brought [458] under the Texas statute, but the testimony showed that the plaintiff was injured while engaged in interstate commerce. The court said: "When the evidence was adduced it developed that the real case was not controlled by the state statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state court erred in overruling it." The principle of that decision and others like it is not based upon any technical rule of pleading, but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars. Here the Ohio statute abolished the rule of the common law as to the assumption of risks in injuries occasioned by defects in tracks, while the Federal statute left that common-law rule in force, except in those instances where the injury was due to the defendant's violation of Federal statutes, which—like the hours-of-labor law and the safety-appliance act—were passed for the protection of interstate employees. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 503, 58 L. ed. 1062, 1069, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635.

In all other respects this case is exactly within the ruling in the case last cited, where the employee's knowledge of the existence of the defect and the terms of the state statute relied on were substantially the same as those in the present case. There the judgment of the state court—applying the state statute—was reversed because it appeared, as it does here, that the plaintiff had been injured while engaged in interstate commerce, and, consequently, the case should have been tried and determined according to the Federal employers' liability act.

The judgment of the Supreme Court of Ohio is reversed and the case remanded for further proceedings not inconsistent with this opinion.

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[459] UNITED STATES v. MIDWEST OIL COMPANY et al.

(See S. C. Reporter's ed. 459–512.)

Public lands — withdrawals — powers of President.

The long-continued practice of the President, with the acquiescence of Congress, to withdraw, in the public interest, from entry or location, public land that otherwise would have been open to private acquisition, operated as a grant of implied power to the President to make the temporary withdrawal order of September 27, 1909, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain," by which there was withdrawn from entry or location by private parties oil lands which Congress had affirmatively declared should be free and open to occupation and purchase by citizens; and the existence of such power is not negatived by the provision of the subsequent act of June 25, 1910 (36 Stat. at L. 847, chap. 421, Comp. Stat. 1913, § 4523), authorizing the President to make withdrawals of public lands, and requiring a list of the same to be filed with Congress, that such act shall not "be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands, made prior to the passage of this act."

[For other cases, see Public Lands, I. e, 3, in Digest Sup. Ct. 1908.]

[No. 278.]

Argued January 9 and 12, 1914. Ordered for reargument before full bench April 20, 1914. Reargued May 7, 1914. Decided February 23, 1915.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting the following questions:

1. Prior to the act of June 25, 1910 (36 Stat. at L. 847, 848, chap. 421, Comp. Stat. 1913, §§ 4523, 4525), did the President (or the Secretary of the Interior) have the lawful power, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain," to withdraw public lands containing petroleum, and chiefly valuable therefor, from all forms of location, selection, filing, entry, or disposal under the public mineral-land laws?

2. Did petroleum withdrawal No. 5, of date September 27, 1909, have the effect of preventing the lawful location or acquisition of lands (described in said withdrawal order No. 5), which contained petroleum or other mineral oils, and were chiefly valuable therefor, by persons authorized to enter lands under the mining laws of the United States, under the provisions of the act of Congress entitled, "An Act to Authorize the Entry and Patenting of Lands Containing Petroleum and Other Mineral Oils under the Placer-Mining Laws of the United States," approved February 11, 1897 (29 Stat. at L. 526, chap. 216, Comp. Stat. 1913, § 4635).

3. Must the efficacy of the order of September 27, 1909, to reserve the land in controversy from the subsequent initiation and acquisition of rights under the act of February 11, 1897, supra, be held to depend upon the nature of the purpose or purposes for which it was made?

4. If question No. 3 be answered in the affirmative, then was it essential to the validity of the reservation or withdrawal that the purpose or purposes be expressed in the order itself?

5. If there were specific purposes actuating the order of September 27, 1909, sufficient in law to sustain it, and consistent with, but not appearing in, its language, was it incumbent on the plaintiff to allege such specific purposes in its bill in order to have the advantage of them as against the defendant's motion to dismiss?

6. Assuming that the general purposes expressed in the order of September 27, 1909, do not suffice alone to determine its validity or invalidity, and that there might have been another consistent purpose sufficient to sustain it, should the order be presumed to be valid in the absence of any allegation or proof that such other purpose did not exist?

This suit originated in a bill in equity filed by the United States in the District Court of the United States for the District of Wyoming, seeking to recover certain tracts of petroleum lands and to obtain an accounting for petroleum alleged to have been illegally extracted therefrom. The court sustained the defendant's demurrer and dismissed the bill, whereupon the government took the case to the Circuit Court of Appeals, which rendered no decision, but certified the above questions to the Supreme Court. Case remanded to the District Court, with directions to reverse the decree dismissing the bill.

The facts are stated in the opinion.

Solicitor General Davis and Assistant Attorney General Knaebel argued the cause and filed a brief for the United States:

The authority of the President is sustained by the consent of Congress, presumed from uniform acquiescence in and repeated approvals of the executive practice of making reservations for public purposes.

1. The authority may be readily implied independently of user and express recognition by Congress.

Butte City Water Co. v. Baker, 196 U. S. 119, 126, 49 L. ed. 409, 412, 25 Sup. Ct. Rep. 211; Wilcox v. Jackson, 13 Pet. 498, 514, 10 L. ed. 264, 272; Knight v. United Land Asso. 142 U. S. 161, 181, 35 L. ed. 974, 981, 12 Sup. Ct. Rep. 258; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 688, 18 L. ed. 689, 691.

2. The authorities sustain the implied power.

(a) Sustaining military reservations.

Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; Scott v. Carew, 196 U. S. 100, 49 L. ed. 403, 25 Sup. Ct. Rep. 193; Behrends v. Goldsteen, 1 Alaska, 518; 17 Ops. Atty. Gen. 160, 230; 13 Land Dec. 426; 29 Land Dec. 32.

(b) Sustaining Indian reservations.

United States v. Leathers, 6 Sawy. 17, Fed. Cas. No. 15,581; United States v. Payne, 2 McCrary, 289, 8 Fed. 883; United States v. Sturgeon, 6 Sawy. 29, Fed. Cas. No. 16,413; United States v. Martin, 8 Sawy. 473, 14 Fed. 817; McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 670; Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 39; United States v. Grand Rapids & I. R. Co. 154 Fed. 131; 16 Ops. Atty. Gen. 121; 17 Ops. Atty. Gen. 258; 19 Ops. Atty. Gen. 370; Re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870; Spalding v. Chandler, 160 U. S. 394, 403, 40 L. ed. 469, 472, 16 Sup. Ct. Rep. 360; Donnelly v. United States, 228 U. S. 243,

708, 57 L. ed. 820, 1035, 33 Sup. Ct. Rep. 449, 1024, Ann. Cas. 1913E, 710.

(c) Sustaining reservations made in aid of proposed legislation.

Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; Riley v. Welles, 154 U. S. 578, 19 L. ed. 648, 14 Sup. Ct. Rep. 1166; Williams v. Baker (Cedar River & M. River R. Co. v. Martindale) 17 Wall. 144, 21 L. ed. 561; Iowa Homestead Co. v. Valley R. Co. (Iowa Homestead Co. v. Des Moines Nav. & R. Co.) 17 Wall. 153, 21 L. ed. 622; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915; Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; Dubuque & S. C. R. Co. v. Des Moines Valley R. Co. 109 U. S. 329, 27 L. ed. 952, 3 Sup. Ct. Rep. 188; Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 167, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1149; United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; United States v. Grand Rapids & I. R. Co. 154 Fed. 131.

The practice of reserving lands for public purposes without antecedent statutory authority, originating at an early day, has been constantly and increasingly exercised, has been perfectly well known to Congress from the beginning, has never been objected to, but has been recognized by Congress again and again as a practice wholesome and necessary to the welfare of the government, and not a practice of usurpation.

Legislative consent may be inferred from the indirect approval or even the mere acquiescence of Congress.

United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; Robertson v. Downing, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; Bank of United States v. Dandridge, 12 Wheat. 64, 70, 6 L. ed. 552, 554; Colorado Springs Co. v. American Pub. Co. 38 C. C. A. 433, 97 Fed. 843; Wells v. Nickles, 104 U. S. 444, 447, 26 L. ed. 825, 826; United States v. Macdaniel, 7 Pet. 1, 8 L. ed. 587.

In the absence of any congressional inhibition, the President, of national necessity and by the very nature of his functions under the Constitution, is impliedly authorized to reserve public land for public purposes.

Story, Const. Law, §§ 1491, 1500, 1511; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 435, 14 L. ed. 997, 1005; 22 Ops. Atty. Gen. 25; 29 Ops. Atty. Gen. 579, 583; United States v. La Compagnie Francaise Des Cables Telegraphiques, 77 Fed. 495; Re Debs, 158 U. S. 564, 582, 39 L. ed. 1092, 1101, 15 Sup. Ct. Rep. 900; Re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; 1 Watson, Const. 854; The Federalist, No. 70 (69); The Laura (Pollock v. Bridgeport S. B. Co.) 114 U. S. 411, 29 L. ed. 147, 5 Sup. Ct. Rep. 881.

The mining law is in no way inconsistent with the implied power of reservation.

Barker v. Harvey, 181 U. S. 481, 490, 45 L. ed. 963, 968, 21 Sup. Ct. Rep. 690; Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. ed. 264, 271; Scott v. Carew, 196 U. S. 100, 111, 49 L. ed. 403, 406, 25 Sup. Ct. Rep. 193; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 745, 23 L. ed. 634, 639; Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 614; McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 670; Behrends v. Goldsteen, 1 Alaska, 518; Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 39; 17 Ops. Atty. Gen. 230.

The reservation has been criticized because it was large, an argument which assumes that the national interests in small things may be protected, but denies them protection in great emergencies. The fact that Congress, in effect, approved the reservation, ought to suffice to settle this objection.

Spencer v. McDougal, 159 U. S. 62, 64, 40 L. ed. 76, 77, 15 Sup. Ct. Rep. 1026.

Our inquiry concerns not what might be done, but what actually was done in the case before the court.

United States v. Lee, 106 U. S. 196, 217, 27 L. ed. 171, 180, 1 Sup. Ct. Rep. 240; United States v. San Jacinto Tin Co. 125 U. S. 284, 31 L. ed. 751, 8 Sup. Ct. Rep. 850.

Valuable rights and privileges in the public lands, which, without the consent of Congress, could not exist, have been held by this court to have passed to private individuals as the result of the notorious exercise thereof without congressional interference.

Buford v. Houtz, 133 U. S. 320, 326, 33 L. ed. 618, 620, 10 Sup. Ct. Rep. 305; Atchison v. Peterson, 20 Wall. 507, 512, 22 L. ed. 414, 416; Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, 1 Mor. Min. Rep. 683; Broder v. Natoma Water & Min. Co. 101 U. S. 274, 25 L. ed. 790, 5 Mor. Min. Rep. 33.

The "exigencies of the public service," referred to by this court in Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863, are not necessarily to be satisfied by such acts as the executive is authorized to perform at the time when the exigencies arise. Some exigencies may be met by executive action alone, some by legislative action alone, and some only by a combination of both. If the exigency justifies the executive action as far as that action goes, the action will stand to that extent without regard to whether it could have gone further. If the military reservation considered in the Grisar Case, instead of being made for immediate and permanent use, had been made tentatively, subject to the future action of Congress, it would have been none the less effective.

All of the writers on mining law who touch upon the subject have conceded, either expressly or impliedly, the authority of the President to reserve mineral land for Indian and military purposes.

1 Snyder, Mines & Mining, §§ 189–192; Morrison, Min. Rights, 14th ed. p. 388; Martin, Min. Law & Land Office Proc. 1908, §§ 44, 46; Costigan, Min. Law, §§ 23, 24; 1 Barringer & A. Mines & Mining, pp. 545, 547; 2 Barringer & A. Mines & Mining, pp. 568, 569; 1 Lindley, Mines, §§ 181, 190 et seq.

Mr. Joel F. Vaile argued the cause, and, with Messrs. Henry McAllister, Jr., William N. Vaile, Karl C. Schuyler, Walter F. Schuyler, A. M. Stevenson, and Lee Champion, filed a brief for the Midwest Oil Company et al.:

The President has no power to change, or to suspend the operation of, a law of the United States.

Kendall v. United States, 12 Pet. 524, 612, 613, 9 L. ed. 1181, 1216; Marbury v. Madison, 1 Cranch, 137, 166, 2 L. ed. 60, 70; United States v. Nicoll, 1 Paine, 646, Fed. Cas. No. 15,879; Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487; Deffeback v. Hawke, 115 U. S. 392, 406, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95; Shaw v. Kellogg, 170 U. S. 312, 337, 42 L. ed. 1050, 1059, 18 Sup. Ct. Rep. 632; United States v. United Verde Copper Co. 196 U. S. 207, 215, 49 L. ed. 449, 452, 25 Sup. Ct. Rep. 222; Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; Williamson v. United States, 207 U. S. 425, 462, 52 L. ed. 278, 297, 28 Sup. Ct. Rep. 163; United States v. George, 228 U. S. 14, 20, 57 L. ed. 712, 715, 33 Sup. Ct. Rep. 412.

The government of the United States is one of delegated and limited authority; it derives its existence and authority from the Constitution, and neither of its branches—executive, legislative, or judicial—can exercise any of the powers of government beyond those specified and granted.

Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487.

Our government speaks to its agents through its laws, and it is to them only that we are to look for the authority of such agents.

United States v. Nicoll, 1 Paine, 646, Fed. Cas. No. 15,879.

The executive power is dependent on Congressional authority.

United States v. Gratiot, 14 Pet. 526, 536, 537, 10 L. ed. 573, 578; United States v. Fitzgerald, 15 Pet. 407, 421, 10 L. ed. 785, 790; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 168, 29 L. ed. 845, 851, 6 Sup. Ct. Rep. 670; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534, 536.

The view of executive officers has been that the power to withdraw public lands from the operation of existing laws depended upon some authority of Congress.

Northern P. R. Co. v. Davis, 19 Land. Dec. 87; Re Atlantic & P. R. Co. 6 Land Dec. 84; Northern P. R. Co. v. Miller, 7 Land Dec. 100; 23 Ops. Atty. Gen. p. 590; President's Special Message, of Jan. 14, 1910, p. 4.

Judicial decisions are adverse to the independent executive power asserted by appellant.

Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; Southern P. R. Co. v. Bell, 183 U. S. 675, 685, 686, 46 L. ed. 383, 388, 389, 22 Sup. Ct. Rep. 232; Brandon v. Ard, 211 U. S. 11, 21, 53 L. ed. 68, 72, 29 Sup. Ct. Rep. 1; Lockhart v. Johnson, 181 U. S. 516, 520, 45 L. ed. 979, 982, 21 Sup. Ct. Rep. 665; Leecy v. United States, 111 C. C. A. 254, 190 Fed. 289; Nelson v. Northern P. R. Co. 188 U. S. 108, 133, 47 L. ed. 406, 416, 23 Sup. Ct. Rep. 302; Sjoli v. Dreschel, 199 U. S. 564, 566, 50 L. ed. 311, 312, 26 Sup. Ct. Rep. 154; Osborn v. Froyseth, 216 U. S. 571, 574, 54 L. ed. 619, 621, 30 Sup. Ct. Rep. 420; Hoyt v. Weyerhaeuser, 88 C. C. A. 404, 161 Fed. 324, 219 U. S. 380, 386, 388, 55 L. ed. 258, 261, 262, 31 Sup. Ct. Rep. 300.

When properly considered, the Des Moines River cases are not in conflict with the principles more recently laid down by this court in the authorities already cited.

Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; Williams v. Baker (Cedar Rapids & M. River R. Co. v. Martindale) 17 Wall. 144, 147, 21 L. ed. 561, 562; Wolsey v. Chapman, 101 U. S. 755, 769, 25 L. ed. 915, 920; Iowa Homestead Co. v. Valley R. Co. (Iowa Homestead Co. v. Des Moines Nav. & R. Co.) 17 Wall. 153, 159, 160, 21 L. ed. 622; Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 167, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1149.

The President's power to reserve public lands for public uses finds its sanction in acts of Congress; even where no specific statute directly authorizes the executive act, it nevertheless derives its authority from an assumed grant by Congress, manifested by frequent enactments of statutes giving like authority in like cases; and its extent is limited to the setting apart of particular tracts of land for specified public uses, as the exigencies of the public service may require.

Wilcox v. Jackson, 13 Pet. 498, 10 L. ed.

264; McConnell v. Wilcox, 2 Ill. 344; Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; United States v. Tichenor, 8 Sawy. 142, 12 Fed. 415; Florida Town Improv. Co. v. Bigalsky, 44 Fla. 771, 33 So. 450; 17 Ops. Atty. Gen. 163, 260; 29 Land Dec. 32; United States v. Payne, 2 McCrary, 289, 8 Fed. 883; Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 39; Covington v. Kentucky, 173 U. S. 231, 242, 43 L. ed. 679, 683, 19 Sup. Ct. Rep. 383; Williams v. Lash, 8 Minn. 496, Gil. 441; Orr v. Quimby, 54 N. H. 590; Scott v. Carew, 196 U. S. 100, 109, 49 L. ed. 403, 405, 25 Sup. Ct. Rep. 193; United States v. Leathers, 6 Sawy. 17, Fed. Cas. No. 15,581; United States v. Martin, 8 Sawy. 473, 14 Fed. 817; McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 670; United States v. Grand Rapids & I. R. Co. 154 Fed. 131; Re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870; Spalding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; Donnelly v. United States, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710.

The opinions of the attorney general are not conclusive upon anyone. They are advisory only, even as to heads of departments.

Dubuque & P. R. Co. v. Litchfield, 23 How. 85, 16 L. ed. 508; Northern P. R. Co. v. Miller, 7 Land Dec. 100.

Any executive duty to protect the property of the United States will not warrant an order withdrawing the entire mineral-oil domain from the operation of laws which Congress has enacted, and which remain in full force.

Kendall v. United States, 12 Pet. 524, 613, 9 L. ed. 1181, 1216.

The words contained in certain acts providing for agricultural entries or making grants of land, which except therefrom lands reserved "by proclamation of the President," or "by order of the President," or "by competent authority," will not sustain an order which withdraws the public mineral domain from the operation of existing statutes.

Grisar v. McDowell, 6 Wall. 381, 18 L. ed. 868; Black, Interpretation of Laws, p. 191; The Paulina v. United States, 7 Cranch, 52, 60, 3 L. ed. 266, 268; Cantwell v. Owens, 14 Md. 215; Rich v. Keyser, 54 Pa. 86; Dickenson v. Fletcher, L. R. 9 C. P. 8, 43 L. J. Mag. Cas. N. S. 25, 29 L. T. N. S. 540; Edrich's Case, 5 Coke, 118; Moser v. Newman, 6 Bing. 556; Johnson v. United States, 225 U. S. 405, 415, 416, 56 L. ed. 1142, 1145, 1146, 32 Sup. Ct. Rep. 748; United States v. Perry, 1 C. C. A. 648, 4 U. S. App. 386, 50 Fed. 743.

Prior to 1866 Congress itself had reserved all mineral lands from sale, and this congressional reservation left no opportunity during that period for any withdrawal of mineral lands by executive authority.

United States v. Gratiot, 14 Pet. 526, 537, 10 L. ed. 573, 578; United States v. Gear, 3 How. 120, 130, 11 L. ed. 523, 527; Deffeback v. Hawke, 115 U. S. 392, 400, 29 L. ed. 423, 425, 6 Sup. Ct. Rep. 95; Barringer & A. Mines & Mining, p. 194; Lindley, Mines, 2d ed. § 47; Newhall v. Sanger, 92 U. S. 761, 763, 23 L. ed. 769, 770.

Since July, 1866, the mining laws have contained complete and exclusive provisions as to the control and disposition of public mineral lands.

Deffeback v. Hawke, 115 U. S. 392, 404, 29 L. ed. 423, 426, 6 Sup. Ct. Rep. 95; United States v. Gear, 3 How. 120, 131, 11 L. ed. 523, 528; Re Ft. Boise Hay Reservation, 6 Land Dec. 16; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 84, 46 L. ed. 92, 99, 22 Sup. Ct. Rep. 30; Marbury v. Madison, 1 Cranch, 166, 2 L. ed. 70; The Floyd Acceptances (Pierce v. United States) 7 Wall. 666, 676, 677, 19 L. ed. 169, 173, 174.

The act of June 25, 1910, did not validate, or authorize the validation of, any previous withdrawals.

Murray v. Gibson, 15 How. 421, 423, 14 L. ed. 755, 756; McEwen v. Den, 24 How. 242, 244, 16 L. ed. 672, 673; Harvey v. Tyler, 2 Wall. 328, 347, 17 L. ed. 871, 875; Sohn v. Waterson, 17 Wall. 596, 599, 21 L. ed. 737, 738; Twenty Per Cent Cases, 20 Wall. 179, 187, 22 L. ed. 339, 341; Chew Heong v. United States, 112 U. S. 536, 559, 28 L. ed. 770, 778, 5 Sup. Ct. Rep. 255

Prior to the approval of the act of June 25, 1910, appellees' grantors had acquired vested rights in the property in controversy, and on June 25, 1910, these rights could not be affected even by act of Congress, much less by an executive order.

Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 737, 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; Noyes v. Mantle, 127 U. S. 348, 353, 32 L. ed. 168, 170, 8 Sup. Ct. Rep. 1132, 15 Mor. Min. Rep. 611; Manuel v. Wulff, 152 U. S. 505, 510, 511, 38 L. ed. 532, 534, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85; 1 Lindley, Mines, §§ 169, 539; 1 Snyder, Mines, §§ 451, 466; 25 Land Dec. 51.

Messrs. Karl C. Schuyler, Henry McAllister, Jr., and Joel F. Vaile filed a separate brief for the Midwest Oil Company et al.:

The well-established public policy of the United States is opposed to appellant's contention.

1 Lindley, Mines, 3d ed. pp. 437, 439, 440; Hartford F. Ins. Co. v. Chicago, M. & St.

P. R. Co. 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201.

The power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding.

Knight v. United Land Asso. 142 U. S. 161, 176, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258.

The "continuing general offers" made to the private citizen by the mining statutes apply to all public mineral lands, unless some particular lands have been withdrawn from sale by congressional authority, or by an executive withdrawal under such authority, either express or implied.

Lockhart v. Johnson, 181 U. S. 516, 520, 45 L. ed. 979, 982, 21 Sup. Ct. Rep. 665.

Under the pre-emption and homestead laws a settler's claim is valid against a previous executive withdrawal not authorized by statute.

Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; Southern P. R. Co. v. Bell, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232; Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154; Brandon v. Ard, 211 U. S. 11, 53 L. ed. 68, 29 Sup. Ct. Rep. 1; Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420.

Messrs. Francis W. Clements, Evans Browne, Alexander Britton, Aldis B. Browne, Oscar Sutro, and E. S. Pillsbury filed a brief as *amici curiæ:*

Congressional authority, express or implied, or at least congressional acquiescence, must lie back of every executive order of withdrawal.

17 Ops. Atty. Gen. 160, 258; 29 Land Dec. 32.

The history of the act and disposition of the amendments which were offered to it are all matters germane to the intent of Congress, and of judicial cognizance.

United States v. Alexander (United States v. Mayes) 12 Wall. 177, 20 L. ed. 381; United States v. Burr, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240, 4 Mor. Min. Rep. 504; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

Messrs. Frederic R. Kellogg, Francis W. Clements, Evans Browne, Alexander Britton, and Aldis B. Browne also filed a brief as *amici curiæ:*

Congressional authority, or at least congressional acquiescence, must be found to support any executive withdrawal or withholding of public lands from disposal in the manner provided therefor by Congress.

United States v. Tichenor, 8 Sawy. 142, 12 Fed. 422; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; Re Ft. Boise Hay Reservation, 6 Land Dec. 16; Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; 17 Ops. Atty. Gen. 160, 258; 29 Land Dec. 32.

Mr. Frank H. Short also filed a brief as *amicus curiæ.*

Mr. Justice Lamar delivered the opinion of the court:

All public lands containing petroleum or other mineral oils, and chiefly valuable therefor, have been declared by Congress to be "free and open to occupation, exploration, and purchase by citizens of the United States . . . under regulations prescribed by law." Act of February 11, 1897, 29 Stat. at L. 526, chap. 216, Comp. Stat. 1913, § 4635; Rev. Stat. §§ 2319, 2329, Comp. Stat. 1913, §§ 4614, 4628.

As these regulations permitted exploration and location without the payment of any sum, and as title could be obtained for a merely nominal amount, many persons availed themselves of the provisions of the statute. Large areas in California were explored; and petroleum having been found, locations were made, not only by the discoverer, but by others on adjoining land. And, as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible, so as to share what would otherwise be taken by the owners of nearby wells.

The result was that oil was so rapidly extracted that on September 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with inclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific coast, and the value of oil as a fuel had been fully demonstrated, yet, at the rate at which oil lands in California were being patented by private parties, it would "be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the [467] government will be obliged to repurchase the very oil that it has practically given away. . . . " "In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the government's own use. . . . " and "pending the enactment of adequate legislation on this subject, the filing of

claims to oil lands in the state of California should be suspended."

This recommendation was approved by the Secretary of the Interior. Shortly afterwards he brought the matter to the attention of the President, who, on September 27, 1909, issued the following proclamation:

Temporary Petroleum Withdrawal No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation, and examination.

The list attached described an area aggregating 3,041,000 acres in California and Wyoming—though, of course, the order only applied to the public lands therein, the acreage of which is not shown.

On March 27, 1910, six months after the publication of the proclamation, William T. Henshaw and others entered upon a quarter section of this public land in Wyoming, so withdrawn. They made explorations, bored a well, discovered oil, and thereafter assigned their interest to the appellees, who took possession and extracted large quantities of oil. On May 4, 1910, they filed a location certificate.

As the explorations by the original claimants, and the [468] subsequent operation of the well, were both long after the date of the President's proclamation, the government filed, in the district court of the United States for the district of Wyoming, a bill in equity against the Midwest Oil Company and the other appellees, seeking to recover the land and to obtain an accounting for 50,000 barrels of oil alleged to have been illegally extracted. The court sustained the defendant's demurrer and dismissed the bill. Thereupon the government took the case to the circuit court of appeals of the eighth circuit, which rendered no decision, but certified certain questions to this court, where an order was subsequently passed, directing the entire record to be sent up for consideration.

The case has twice been fully argued. Both parties, as well as other persons interested in oil lands similarly affected, have submitted lengthy and elaborate briefs on the single and controlling question as to the validity of the withdrawal order. On the part of the government it is urged that the President, as Commander in Chief of the Army and Navy, had power to make the order for the purpose of retaining and preserving a source of supply of fuel for the Navy, instead of allowing the oil land to be taken up for a nominal sum, the government being then obliged to purchase at a great cost what it had previously owned. It is argued that the President, charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution (art. 2, § 1), and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties.

The appellees, on the other hand, insist that there is no dispensing power in the Executive, and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States. They further insist that the withdrawal [469] order is absolutely void, since it appears on its face to be a mere attempt to suspend a statute—supposed to be unwise—in order to allow Congress to pass another more in accordance with what the Executive thought to be in the public interest.

1. We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long-continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn lands which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government." Grisar v. McDowell, 6 Wall. 381, 18 L. ed. 868. Scores and hundreds of these orders have been made; and treating them as they must be (Wolsey v. Chapman, 101 U. S. 769, 25 L. ed. 920), as the act of the President, an examination of official publications will show that (excluding those made by virtue of special congressional action, Donnelly v. United States, 228 U. S. 255, 57 L. ed. 825, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710), he has, during the past eighty years, without express statutory,—but under the claim of power so to do,—made a multitude of Executive orders which operated to withdraw public land that would otherwise have been open to private acquisition. They affected every kind of land—mineral and nonmineral. The size of the tracts varied

from a few square rods to many square miles, and the amount withdrawn has aggregated millions of acres. The number of such instances cannot, of course, be accurately given, but the extent of the practice can best be appreciated by a consideration of what is believed [470] to be a correct enumeration of such Executive orders mentioned in public documents.[1]

They show that prior to the year 1910 there had been issued

99 Executive orders establishing or enlarging Indian reservations;

109 Executive orders establishing or enlarging military reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges, and rights of way for use in connection with military reservations;

44 Executive orders establishing bird reserves.

In the sense that these lands may have been intended for public use, they were reserved for a public purpose. But they were not reserved in pursuance of law, or by virtue of any general or special statutory authority. For it is to be specially noted that there was no act of Congress providing for bird reserves or for these Indian reservations. There was no law for the establishment of these [471] military reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement, or to reserve them for any of the purposes indicated.

But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For, prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least 252 Executive orders making reservations for useful, though nonstatutory, purposes.

This right of the President to make reservations—and thus withdraw land from private acquisition—was expressly recognized in Grisar v. McDowell, 6 Wall. 364 (9), 381, 18 L. ed. 863, 868, where (1867) it was said that "from an early period in the history of the government it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States, to be reserved from sale and set apart for public uses."

But, notwithstanding this decision and the continuity of this practice, the absence of express statutory authority was the occasion of doubt being expressed as to the power [472] of the President to make these orders. The matter was therefore several times referred to the law officers of the government for an opinion on the subject. One of them stated (1889) (19 Ops. Atty. Gen. 370) that the validity of such orders rested on "a long-established and long-recognized power in the President to withhold from sale or settlement at discretion, portions of the public domain." Another reported that "the power of the President was recognized by Congress, and that such recognition was equivalent to a grant" (17 Ops. Atty. Gen. 163) (1881). Again, when the claim was made that the power to withdraw did not extend to mineral land, the Attorney General gave the opinion that the power must be "regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated." (17 Ops. Atty. Gen. 232) (1881).

Similar views were expressed by officers

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[1] Departmental ruling as to the existence of the power.

Report, Commissioner of the Land Office, February 28, 1902, p. 3. 17 Senate Doc. 57th Cong.

Appendix to Call's "Military Reservations," 495.

Decisions of Department of the Interior relating to public lands.

1 Land Dec. 702, 31, 552; 13 Land Dec. 426, 607, 628; 1 Land Dec. 553; 29 Land Dec. 33; 31 Land Dec. 195; 34 Land Dec. 145; 6 Land Dec. 317.

Indian reservations:

"Executive Orders Relating to Indian Reservations" (1912).

Public domain, 243.

Report of Commissioner of Indian Affairs, 70-87 (1913).

Military reservations:

Public domain, 247.

14 House Doc. 217 (1898-99).

18 House Doc. 387 (1905-6).

Call's "Military Reservations" (1910).

Bird reservations:

42 House Doc. 93 (1908).

43 House Doc. 44 (1909).

in the Land Department. Indeed, one of the strongest assertions of the existence of the power is the frequently quoted statement of Secretary Teller, made in 1881:

"That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but, on the contrary, has been recognized. It constitutes in fact a part of the Land Office law, exists *ex necessitate rei*, as indispensable to the public weal, and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed. 1 Land Dec. 702 (1881-3)."

2. It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so [473] often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation.

This principle, recognized in every jurisdiction, was first applied by this court in the often-cited case of Stuart v. Laird, 1 Cranch, 299, 309, 2 L. ed. 115, 118. There, answering the objection that the act of 1789 [1 Stat. at L. 73, chap. 20] was unconstitutional in so far as it gave circuit powers to judges of the Supreme Court, it was said (1803) that, "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

Again, in McPherson v. Blacker, 146 U. S. 1 (4), 36 L. ed. 869, 13 Sup. Ct. Rep. 3, where the question was as to the validity of a state law providing for the appointment of Presidential electors, it was held that, if the terms of the provision of the Constitution of the United States left the question of the power in doubt, the "contemporaneous and continuous subsequent practical construction would be treated as decisive" (36). Fairbank v. United States, 181 U. S. 307, 45 L. ed. 872, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Cooley v. Port Wardens, 12 How. 315, 13 L. ed. 1003. See also Grisar v. McDowell, 6 Wall. 364, 381, 18 L. ed. 863, 868, where, in 1867, the practice of the Executive Department was referred to as evidence of the validity of these orders making reservations of public land, even when the practice was by no means so general and extensive as it has since become.

3. These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land grant act. Southern P. R. Co. v. Bell, 183 U. S. 685, 46 L. ed. 388, 22 Sup. Ct. Rep. 232; [474] Brandon v. Ard, 211 U. S. 21, 53 L. ed. 72, 29 Sup. Ct. Rep. 1. Nor do these decisions mean that the Executive can, by his course of action, create a power. But they do clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands. This is particularly true in view of the fact that the land is property of the United States, and that the land laws are not of a legislative character in the highest sense of the term (art. 4, § 3), "but savor somewhat of mere rules prescribed by an owner of property for its disposal." Butte City Water Co. v. Baker, 196 U. S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211.

These rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale; and while no such express authority has been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. The power of the Executive, as agent in charge, to retain that property from sale, need not necessarily be expressed in writing. Lockhart v. Johnson, 181 U. S. 520, 45 L. ed. 982, 21 Sup. Ct. Rep. 665; Bronson v. Chappell, 12 Wall. 686, 20 L. ed. 438; Campbell v. Kenosha, 5 Wall. 194 (2), 18 L. ed. 610.

For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress "may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale." Camfield v. United States, 167 U. S. 524, 42 L. ed. 262, 17 Sup. Ct. Rep. 864; Light v. United States, 220 U. S. 536, 55 L. ed. 574, 31 Sup. Ct. Rep. 485. Like any other owner it may provide when, how,

and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights, [475] as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an "implied license growing out of the custom of nearly a hundred years." Buford v. Houtz, 133 U. S. 326, 33 L. ed. 620, 10 Sup. Ct. Rep. 305. So, too, in the early days, the "government, by its silent acquiescence, assented to the general occupation of the public lands for mining." Atchison v. Peterson, 20 Wall. 512, 22 L. ed. 416. If private persons could acquire a privilege in public land by virtue of an implied congressional consent, then, for a much stronger reason, an implied grant of power to preserve the public interest would arise out of like congressional acquiescence.

The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.

4. The appellees, however, argue that the practice thus approved related to reservations,—to cases where the land had been reserved for military or other special public purposes,—and they contend that even if the President could reserve land for a public purpose or naval uses, it does not follow that he can withdraw land in aid of legislation.

When analyzed, this proposition, in effect, seeks to make a distinction between a reservation and a withdrawal,—between a reservation for a purpose not provided for by existing legislation, and a withdrawal made in aid of future legislation. It would mean that a permanent reservation for a purpose designated by the President, but not provided for by a statute, would be valid, while a merely temporary withdrawal to enable Congress to [476] legislate in the public interest would be invalid. It is only necessary to point out that, as the greater includes the less, the power to make permanent reservations includes power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest, and in both the effect on the intending settler or miner is the same.

But the question need not be left solely to inference, since the validity of withdrawal orders, in aid of legislation, has been expressly recognized in a series of cases involving a number of such orders, made between 1850 and 1862. Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915; Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 167, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1149.

It appears from these decisions, and others cited therein, that in 1846 Congress made to the territory of Iowa, a grant of land on both sides of the Des Moines, for the purpose of improving the navigation from the mouth of the river to Raccoon Fork (5 Wall. 681). There was from the outset a difference of opinion as to whether the grant extended throughout the entire course of the river, or was limited to the land opposite that portion of the stream which was to be improved. In Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500, decided in 1860, it was held that the grant only included the land between the mouth of the river and Raccoon Fork. But for eleven years prior to that decision there had been various and conflicting rulings by the Land Department. It was first held that the grant included land *above* the Fork, and certificates were issued to the territory as the work progressed. That ruling was shortly followed by another, that the grant extended only *up to* the Fork.

"On April 6, 1850, Secretary Ewing, while concurring with Attorney General Crittenden in his opinion that the [477] grant of 1846 did not extend beyond the Raccoon Fork, issued an order withholding all the lands then in controversy from market 'until the close of the then session of Congress,' which order has been continued ever since" (we italicize) "*in order to give the state the opportunity of petitioning for an extension of the grant by Congress.*" Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 170, 30 L. ed. 1124, 7 Sup. Ct. Rep. 1149.

The withdrawal was made in 1851. The hoped-for legislation was not passed until several years later. Between those dates various private citizens made settlements by which, under various statutes, they initiated rights and acquired an interest in the land—if the withdrawal order was void. But by such settlements they obtained no rights if the withdrawal order was valid. A subsequent ratification could have related back to 1851, but if the withdrawal was original-

ly void, the ratification, of course, could not cut out intervening rights of settlers. Cook v. Tullis, 18 Wall. 338, 21 L. ed. 936.

There was litigation between settlers claiming, as here, under existing land laws, and those whose title depended upon the original validity of the *withdrawals made in aid of legislation*. (Riley v. Welles, 154 U. S. 578, 19 L. ed. 648, 14 Sup. Ct. Rep. 1166; Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 173, 30 L. ed. 1125, 7 Sup. Ct. Rep. 1149; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689.) In those suits, the withdrawal orders were not treated as having derived their validity from the legislation subsequently passed in aid of Iowa and its assignees, but they were treated as having been effective from their dates, regardless of the fact that the land included therein had not originally been granted to Iowa. In one of them it was said that:

"This court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or pre-emption all the lands in controversy." Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 170, 30 L. ed. 1124, 7 Sup. Ct. Rep. 1149.

5. Beginning in 1850 with this order of Secretary [478] Ewing, in aid of legislation on behalf of Iowa, and its continuance even after this court had decided that no land above the Fork passed to the territory (23 How. 66), the practice of making withdrawals continued down to 1910. The reasons for making the withdrawal orders varied, but the power exerted was the same, and was supported by the same implied consent of Congress.

For, if any distinction can be drawn between the principle decided in the Iowa cases and this; or if the power involved in making a reservation could differ from that exercised in making a withdrawal,—then the Executive practice and congressional acquiescence, which operated as a grant of an implied power to make permanent reservations, are also present to operate as a grant of an implied power to make temporary withdrawals. It may be well to refer to some of the public records showing the existence and extent of the practice.

Withdrawals in aid of legislation were made in particular cases (26 Land Dec. 347; 28 Land Dec. 361; 35 Land Dec. 11), and many others more general in their nature and much more extensive in their operation.

For example: The Land Department passed an order suspending the location and settlement of certain islands and all isolated tracts containing less than 40 acres "with a view to submitting to Congress" the question as to whether legislation on the subject was not needed. 34 Land Dec. 245.

Reports to the 56th and 57th Congresses (26 Sen. Doc. 87; 22 House Doc. 108, 445) contained a list of "temporary withdrawals" made to prevent the disposal of land pending the consideration of the question of the advisability of setting the same apart as forest reservations.

Phosphate land was "temporarily withdrawn, pending action by Congress." House Doc. 43, 10, 61st Cong. 2d Sess.

There were also temporary withdrawals of oil land from [479] agricultural entry, in aid of subsequent legislation. 26 Sen. Doc. 75; 43 House Doc. 8, 9, 10, 13 (61st Cong.).

In pursuance of a like practice and power, public land containing coal was withdrawn "pending the enactment of new legislation." 35 Land Dec. 395; 43 H. Doc. 8, 13. In the message of the President to the 2d session of the 59th Congress attention was called to the withdrawal of coal lands in aid of legislation. There was no repudiation of the order or of the practice either at that session, or at any succeeding session of Congress. It was claimed in the argument that the act of 1908 (35 Stat. at L. 424, chap. 211, Comp. Stat. 1913, § 5075) was the legislation contemplated by the Executive when coal lands were temporarily withdrawn by the order of 1906; and reference has already been made to the act of 1861 [12 Stat. at L. 251] concerning the Iowa lands withdrawn in 1849. There were other instances in which there was congressional action at a more or less remote period after the order of temporary withdrawal. The land for the Wind Cave Park was withdrawn in 1900 and the Park was established in 1903 (32 Stat. at L. 765, chap. 63, Comp. Stat. 1913, § 5231); bird reserves were established in 1903, and, in 1906 (34 Stat. at L. 536, chap. 3565, Comp. Stat. 1913, § 10,252), an act was passed making it an offense to interfere with birds on reserves established by law, proclamation, or *Executive order*. See also 35 Land Dec. 11; 34 Stat. at L. 517, chap. 3555. But in the majority of cases there was no subsequent legislation in reference to such lands, although the withdrawal orders prevented the acquisition of any private interest in such land until after the order was revoked.

Whether, in a particular case, Congress acted or not, nothing was done by it which could, in any way, be construed as a denial of the right of the Executive to make temporary withdrawals of public land in the public interest. Considering the size of the tracts affected and the length of time they remained in force, without objection, these

orders by which *islands, isolated tracts, coal, phosphate, and oil lands were withdrawn in aid of legislation,* [480] furnish, in and of themselves, ample proof of congressional recognition of the power to withdraw.

But that the existence of this power was recognized and its exercise by the Executive assented to by Congress is emphasized by the fact that the above-mentioned withdrawals were issued after the report which the Secretary of the Interior made in 1902, in response to a resolution of the Senate calling for information "as to what, if any, of the public lands, have been withdrawn from disposition under the settlement or other laws by order of the Commissioner of the General Land Office, and *what, if any, authority of law exists for such order of withdrawal.*"

The answer to this specific inquiry was returned March 3, 1902 (Senate Doc. 232, 57th Cong. 1st Sess. vol. 17). On that date the Secretary transmitted to the Senate the elaborate and detailed report of the Commissioner of the Land Office, who, in response to the inquiry as to the authority by which withdrawals had been made, answered that:

"The power of the Executive Department of the government to make reservations of land for public use, and to temporarily withdraw lands from appropriation by individuals as exigencies might demand, to prevent fraud, to aid in proper administration, and in aid of pending legislation, is one that has been long recognized both in the acts of Congress and the decisions of the court; . . . that this power has been long exercised by the Commissioner of the General Land Office is shown by reference to the date of some of the withdrawals enumerated. . . . The attached list embraces only such lands as were withdrawn by this office, acting on its own motion, in cases where the emergencies appeared to demand such action in furtherance of public interest, and does not include lands withdrawn under express statutes so directed."

The list, which is attached, refers to withdrawal orders, about 100 in number, issued between 1870 and 1902. [481] Many of them were in aid of the administration of the land laws: to correct boundaries; to prevent fraud; to make a classification of the land; and like good—but nonstatutory—reasons. Some were made to prevent settlements while the question was being considered as to whether the lands might not be included in a forest reservation to be thereafter established. One in 1889 (referred to also in 28 Land Dec. 358) was made in order to afford the state of Nebraska an opportunity to procure legislative relief, as in the *Iowa* cases above cited.

This report refers to *withdrawals,* and not to *reservations.* It is most important in connection with the present inquiry as to whether Congress knew of the practice to make temporary withdrawals and knowingly assented thereto. It will be noted that the resolution called on the Department to state the extent of such withdrawals and the authority by which they were made. The officer of the Land Department, in his answer, shows that there have been a large number of withdrawals made for good, but for nonstatutory, reasons. He shows that these 92 orders had been made by virtue of a long-continued practice and under claim of a right to take such action in the public interest "as exigencies might demand . . ." Congress, with notice of this practice and of this claim of authority, received the report. Neither at that session nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

6. Nor is the position of the appellees strengthened by the act of June 25, 1910, (36 Stat. at L. 847, chap. 421, Comp. Stat. 1913, § 4523), to authorize the President to make withdrawals of public lands, and requiring a list of the same to be filed with Congress.

It was passed after the President's Proclamation of September 27, 1909, and months after the occupation [482] and attempted location by virtue of which the appellees claim to have acquired a right to the land. This statute expressly provided that it should not "be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands, made prior to the passage of this act."

True, as argued, the act provides that it shall not be construed as an "*abridgment* of asserted rights initiated in oil lands after they had been withdrawn." But it likewise provides that it shall not be considered as a "recognition of such rights." There is, however, nothing said indicating the slightest intent to repudiate the withdrawals already made.

The legislative history of the statute shows that there was no such intent and no purpose to make the act retroactive, or to disaffirm what the agent in charge had already done. The proclamation of September 27, 1909, withdrawing oil lands from private acquisition, was of far-reaching consequence both to individuals and to the public. It

gave rise to much discussion, and the old question as to the authority of the President to make these orders was again raised. Various bills were introduced on the subject, and the President himself sent a message to Congress, calling attention to the existence of the doubt, and suggesting the desirability of legislation to expressly grant the power and ratify what had been done. A bill passed the House, containing such ratification and authorizing future withdrawals. When the bill came to the Senate it was referred to a committee, and, as its members did not agree in their view of the law, two reports were made. The majority, after a review of the practice of the Department, the acquiescence of Congress in the practice, and the decisions of the courts, reported that the President already had a general power of withdrawal, and recommended the passage of the pending bill, inasmuch [483] as it operated to restrict the greater power already possessed. Sen. Rep. 171 (61st Cong. 2d Session). But having regard to the fact that private persons, on withdrawn land, had raised a question as to the validity of the order, and that such question presented a matter for judicial determination, Congress was studious to avoid doing anything which would affect either the public or private rights. It therefore used language which showed not only that the statute was not intended to be retrospective, but was not to be construed either as a recognition, enlargement, or repudiation of rights like those asserted by appellees.

In other words, if, notwithstanding the withdrawal, any locator had initiated a right which, however, had not been perfected, Congress did not undertake to take away his rights. On the other hand, if the withdrawal order had been legally made under the existing power, it needed no ratification, and if a location made after the withdrawal gave the appellees no right, Congress, by this statute, did not legislate against the public and validate what was then an invalid location. The act left the rights of parties in the position of these appellees, to be determined by the state of the law when the proclamation was issued. As heretofore pointed out, the long-continued practice, the acquiescence of Congress, as well as the decisions of the courts, all show that the President had the power to make the order. And as was said in Wolsey v. Chapman, 101 U. S. 769, 25 L. ed. 920, the "*withdrawal would be sufficient to defeat a settlement . . . while the order was in force.*"

The case is therefore remanded to the District Court with directions that the decree dismissing the bill be reversed.

Mr. Justice McReynolds took no part in the decision of this case.

[484] Mr. Justice Day, with whom concurred Mr. Justice McKenna and Mr. Justice Van Devanter, dissenting:

This case originated in a bill filed by the United States in the United States district court for the district of Wyoming to restrain trespasses on a certain tract of public petroleum lands in the state of Wyoming, and to obtain an accounting for petroleum claimed to have been wrongfully extracted therefrom. The bill sets up ownership in the United States of the land in question, being a tract of 160 acres, and alleges that the land is chiefly valuable for petroleum; that on September 27, 1909, the tract in controversy, in common with many others, was withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws of the United States; and that this was done by an order promulgated on that day by the Secretary of the Interior, pursuant to the direction of the President. The order listed townships and sections aggregating more than 3,000,000 acres, situated in the states of Wyoming and California. The terms of this order, styled "Temporary petroleum withdrawal No. 5," are:

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

It appears from the averments of the bill that the lands were originally located by certain individuals after the order of withdrawal and on March 27, 1910; that they were entered upon, explored, and a well drilled, thereby [485] rendering subject to ready extraction large deposits of petroleum of great value; and that the original claimants caused to be filed and recorded in the records of Natrona county, Wyoming, a certain location certificate evidencing claim and location by them of the land as a petroleum placer-mining claim under and in pursuance of the mining laws of the United States. These parties subsequently assigned their rights to the defendant, the Midwest Oil Company, and certain other persons named. The bill also avers that after the withdrawal order of September 27, 1909, on July 2, 1910, a further order of withdrawal,

described as "Order of withdrawal. Petroleum reserve No. 8," was made by the President, expressly affirming the order of September 27, 1909.

The law under which the location in question was made (29 Stat. at L. 526, chap. 216, Comp. Stat. 1913, § 4635) reads:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Under Rev. Stat. § 2329, Comp. Stat. 1913, § 4628, provision was made for entering and patenting placer-mining claims in like manner as vein or lode claims; and by Rev. Stat. § 2319, Comp. Stat. 1913, § 4614, "all valuable mineral deposits" were opened to exploration and purchase, and the lands containing them to occupation and purchase under regulations prescribed by law, and according to the local customs or rules of miners.

While the allegations of the bill do not set out all the steps which led up to the President's order of withdrawal of September 27, 1909, we may not only look to its allegations, but read them in the light of public documents embodying the history of the transaction, of which we may take judicial notice. On September 27, 1909, the Secretary of the Interior, by direction of the President, issued the temporary petroleum withdrawal order No. 5, above set forth. [486] The making of this order was preceded by certain correspondence leading up to it. On February 24, 1908, the Director of the Geological Survey addressed a letter to the Secretary of the Interior, setting forth his opinion as to the superiority of liquid fuel for the Navy, the inadequacy of the coal supply on the Pacific coast, and the fact that the demand for oil was greater than the supply, and that but little oil land remained under governmental control, and that this was being rapidly patented, and his recommendation that the filing of claims to oil lands in California be suspended in order that the government might continue the ownership of the valuable supplies of liquid fuel. On the 17th of September, 1909, the Director sent another letter to the Secretary of the Interior, inclosing a copy of his earlier letter, and saying, in substance, that the arguments contained in that letter had been reinforced by the Survey's Conservation Report on the petroleum resources of the United States, which showed that at that time the production exceeded the demand of the trade, and inasmuch as the disposal of the public petroleum lands at *nominal prices* encouraged overproduction, legislation providing for the sane development of such resources should be enacted. He also stated that the conservation of the petroleum supply demanded a law providing for the disposal of the oil remaining in the public lands in terms of barrels of oil rather than in acres of land; and further that, considering the use of lubricating oil and of fuel oil for the Navy, there was an immediate necessity for conserving a proper supply of petroleum for the government's use, and he recommended the suspension of the filing of claims to oil lands in California pending legislation on the subject. He also called attention to the fact that the Commissioner of the General Land Office, acting upon his report classifying certain oil lands in California, had issued instructions withholding such oil lands from agricultural entry pending consideration [487] of legislation. And on the same day the Secretary of the Interior addressed a letter to the President, calling his attention to the subject of conservation of the petroleum resources of the public domain, especially with reference to the requirements of the Navy, repeating the substance of the Director's letter, and stating that other lands than those mentioned in the Director's letter had also been withdrawn from entry in California, and concluding that legislation was needed which would assure conservation of an adequate supply of petroleum for the government's needs, but which, he believed, would not interfere with the private development of the California oil pools, and therefore the necessity for temporary withdrawals of the land from entry. Shortly thereafter, on September 26, 1909, the Secretary of the Interior telegraphed to the Acting Secretary from Salt Lake City, where he had seen the President, as follows:

"Have conferred with President respecting temporary withdrawals covering oil lands. If present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation."

The following day the Acting Secretary telegraphed to the Secretary at Helena, Montana:

"Telegram 26th received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry 2,871,000 acres in California and 170,000 acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land *in statu quo* pending legislation."

And thereupon the withdrawal order of

September 27, 1909, above set forth, was promulgated.

It is to be observed that the lands here in controversy are situated in the state of Wyoming. There was no [488] suggestion that such lands would ever be needed as a basis of oil supply for the Navy. They were withdrawn solely upon the suggestion that a better disposition of them could be made than was found in the existing acts of Congress controlling the subject.

From this statement it is evident that the first question to be decided concerns the validity of the President's withdrawal order of September 27, 1909, and it is necessary to determine whether that order was within the authority of the President, and had the effect to withdraw the land in controversy from location under the mineral land law, or whether, as held in the court below, that order had no force and effect to prevent persons from acquiring rights under the then-existing statutes of the United States concerning the subject.

The Constitution of the United States in article 4, § 3, provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In this section the power to dispose of lands belonging to the United States is broadly conferred upon Congress, and it is under the power therein given that the system of land laws for the disposition of the public domain has been enacted. United States v. Gratiot, 14 Pet. 526, 536, 537, 10 L. ed. 573, 578; United States v. Fitzgerald, 15 Pet. 407, 421, 10 L. ed. 785, 790; Van Brocklin v. Tennessee, (Van Brocklin v. Anderson) 117 U. S. 151, 168, 29 L. ed. 845, 851, 6 Sup. Ct. Rep. 670; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341. In the last case this court said:

"The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."

It is contended on behalf of the government that the power of the President to make such orders as are here in [489] question has grown up from the authorization of Congress in its legislation and because of its long sanction by acquiescence in the exercise of such Executive authority, so that, if it be admitted that the authority of the President to deal with the public lands must come from Congress, the sanction which such action of the Executive has received in the course of many years of legislation and congressional acquiescence is as effective as though the express authority had been conferred by law. In aid of this argument the general course of legislation is pointed to, and the decisions of this court and opinions of Attorneys General in connection with certain acts are cited. Upon the other hand, it is contended that if these acts are to be taken as the general declaration of congressional intent upon the subject, they contain express authorization of the President to make withdrawals when Congress wishes to confer such power. Some of the instances referred to are set out in the margin.[2]

[490] It is thus explicitly recognized, as was already apparent from the terms of the Constitution itself, that the sole authority to dispose of the public lands was vested in [491] the Congress, and in no other branch of the Federal government. The right of the Executive to withdraw lands which Congress has declared shall be open and free to settlement upon terms which Congress has itself prescribed is said to arise from the tacit consent of Congress in long acquiescence in such Executive action, resulting in an implied authority from Congress to make such withdrawals in the public interest as the Executive deems proper and necessary. There is nothing in the Constitution suggesting or authorizing such augmentation of Executive authority, or justifying him in thus acting in aid of a power which the framers of the

[2] The government asserts that reservations by the Executive for Indian purposes, irrespective of the existence of statutory authority, are found collected in The Public Domain, pp. 727, 1252; 1 Kappler, Laws & Treaties, p. 801; and for military purposes in The Public Domain, pp. 748, 1258; 2 Laws of the United States of a Local and Temporary Character, p. 1171. (Whether or not these orders were preceded by Congressional authority does not definitely appear.) It also recites several Executive withdrawals of land for uses related to military purposes, such as lands supplying fuel, water, etc., to military posts, and also a withdrawal to conserve a supply of building stone for harbor improvements. Another instance cited: Where Congress by an appropriation act of June 18, 1878 (20 Stat. at L. 152, chap. 264), had directed the Secretary of War to cause an examination to be made of the sources of the Mississippi river, among others, to determine the practicability and cost of reservoirs for improving its navigation, the Secretary, it is said, made his report and withdrew certain lands in aid of his report, in the hope that they would be "affected in the event of affirmative congressional action upon said report;" and additional lands were withdrawn subsequently for the same purpose, but after appropriations for the construction of the reservoirs had been made by the act of

Constitution saw [492] fit to vest exclusively in the legislative branch of the government.

It is true that many withdrawals have been made by the President and some of them have been sustained by this court, so that it may be fairly said that, within limitations to be hereinafter stated, Executive withdrawals have the sanction of judicial approval; but, as we read the cases, in no instance has this court sustained a withdrawal of public lands for which Congress has provided a system of disposition, except such withdrawal was—(a) in pursuance of a policy already declared by Congress as one for which the public lands might be used, as military and Indian reservations, for which purposes Congress has authorized the use of the public lands from an early day, or (b) in cases where grants of Congress are in such conflict that the purpose of Congress cannot be known, and therefore the Secretary of the Interior has been sustained in withdrawing the lands from entry until Congress had opportunity to relieve the ambiguity of its laws by specifically declaring its policy.

It is undoubtedly true that withdrawals have been made without specific authority of an act of Congress, but those which have been sustained by this court, it is believed, will be found to be in one or the other of the categories above stated. On the other hand, when the Executive authority has been exceeded, this court has not hesitated to so declare, and to sustain the superior and exclusive authority of Congress to deal with the public lands.

The first decision of this court which has come to our attention in which this matter was dealt with is Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264, decided in 1839. That case involved a controversy concerning the lands occupied by the military post called Fort Dearborn, in Cook county, Illinois. The lands had been used for many years as a military post and an Indian agency, and in 1824 were reserved by [493] the Commissioner of the General Land Office at the request of the Secretary of War for military purposes. It also appears that prior to May 1, 1834, the government built a lighthouse on part of the land. When the suit was brought by Jackson to recover them they were in the possession of Wilcox, commander of the post, who claimed the right to hold them as an officer of the United States under the orders of the Secretary of War. The claim asserted by Jackson arose from the preemption allowed to his lessor's predecessor in title under the act of June 19, 1834 (4 Stat. at L. 678, chap. 54), which revived the act of May 29, 1830 (4 Stat. at L. 420, chap. 208), which provided that "no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several states, . . . [or] which is reserved from sale by act of Congress, or by order of the President, or which

June 14, 1880 (21 Stat. at L. 180, chap. 211). Attention is also called to withdrawals for a number of purposes, as to correct surveys; to avoid conflicts with private claims; to prevent frauds; to ascertain character of land, etc., shown by a letter from the Acting Secretary of the Interior, dated March 3, 1902, found at p. 7463 of vol. 45, Congressional Record. The reports of the Secretary of the Interior and the Commissioner of the General Land Office are cited to the effect that supposed oil lands in California were withdrawn from agricultural entry in aid of an investigation of their character and to prevent unlawful application of lieu selections (1900, pp. LI., 75, and 1901, pp. LXIII., 87); that large quantities of coal land were withdrawn to verify the existence of coal deposits because of serious frauds (1907, pp. 13, 251); that temporary reservation was made of the "Petrified Forest" in Arizona for a proposed national park (Commissioner's Report, 1900, p. 87); and that temporary withdrawals were made for state parks in California and Michigan (Commissioner's Report, 1902, p. 319), all of which were reported to Congress. The land including the Wind Cave in South Dakota was reserved (Commissioner's Report, 1900, p. 91) and later made a national park by the act of January 9, 1903 (32 Stat. at L. 765, chap. 63). The President had created certain reservations for the protection of birds (Rep. Sec. Int. 1909, p. 43), and subsequently an act was passed making it an offense to interfere with birds or their eggs "on any lands of the United States which have been set apart or reserved as breeding grounds for birds by any law, proclamation, or Executive order" (34 Stat. at L. 536, chap. 3565, Comp. Stat. 1913, § 10252). The Secretary of the Interior had directed that all applications to purchase certain isolated tracts should be suspended (34 Land Dec. 245), and subsequently an act providing for the disposition of disconnected tracts was approved by Congress (34 Stat. at L. 517, chap. 3554, Comp. Stat. 1913, § 5110). In aid of a bill to authorize Wisconsin to select certain lands, the President withdrew a large area in that state, and the bill was later passed (35 Land Dec. 11; 34 Stat. at L. 517, chap. 3555). Coal lands in Alaska were withdrawn from entry by direction of the President (35 Land Dec. 572), which had been thrown open to entry by Congress (33 Stat. at L. 525, chap. 1772, Comp. Stat. 1913, § 5071), and the propriety of this withdrawal was approved by Congress (35 Stat. at L. 424, chap. 211, Comp. Stat. 1913, § 5075). To support its statement that general recognition of the Executive authority is found in a number

may have been appropriated for any purpose whatsoever." The court, after stating that lands which had been appropriated for any purpose whatsoever were exempt from pre-emption, and that the lands in question had been in fact appropriated, reviewed legislation authorizing the President to erect fortifications and to establish trading houses, and, in concluding that the appropriation had been made by authority of law, said (p. 512):

"We thus see that the establishing [*of*] trading houses with the Indian tribes, and the erection of fortifications in the West, are purposes authorized by law; and that they were to be established and erected by the President. But the place in question is one at which a trading house has been established, and a fortification or military post erected. It would not be doubted, we suppose, by anyone, that if Congress had by law directed the trading house to be established and the military post erected at Fort Dearborn, by name, that this would have been by authority of law. But instead of designating [494] the places themselves, they left it to the discretion of the President, which is precisely the same thing in effect. Here, then, is an appropriation, not only for one, but for two purposes, of the same place by authority of law. But there has been a third appropriation in this case by authority of law. Congress, by law, authorized the erection of a lighthouse at the mouth of Chicago river, which is within the limits of the land in question, and appropriated $5,000 for its erection; and the case agreed states that the lighthouse was built on part of the land in dispute before the 1st of May, 1834. We think, then, that there has been an appropriation, not only in fact, but in law."

The court, after remarking that Congress must have known of the authority which had been given to the President by former laws to establish trading houses and military posts, and that a military post had long been established at Fort Dearborn, said (p. 514): "They seem, therefore, to have been studious to use language of so comprehensive a kind, in the exemption from the right of pre-emption, as to embrace every description of reservation and appropriation which had been previously made for public purposes."

With reference to the reservation of 1824, the court merely said: "We consider this, too, as having been done by authority of law; for amongst other provisions in the act of 1830, all lands are exempted from pre-emption which are reserved from sale by order of the President." (And the court held that the act of the Secretary of War was that of the Executive.) But the court later laid down the rule that when lands have been legally appropriated, they immediately become severed from the mass of public lands, and that no subsequent law or proclamation would embrace them, although no reservation had been made of

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of statutes the government cited: The town-site law of March 2, 1867 (14 Stat. at L. 541, chap. 177, Comp. Stat. 1913, § 4791), which contained a proviso that "the provisions of this act shall not apply to military or other reservations heretofore made by the United States, nor to reservations for lighthouses, customhouses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the Crown of Spain, or otherwise;" and the act of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4195), providing for the allotment of lands in severalty to Indians on the various reservations and for other purposes, the opening paragraph of which read: "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized . . . ."

The government says, however, that there is no publication which can be relied on in determining whether a given Executive order was preceded by statutory authority," and admits that it is possible that in some of the cases cited there was antecedent statutory authority.

The defendant appends to its brief a list of statutes giving discretionary power to the Executive to make withdrawals, those relating to military or analogous purposes being, 1 Stat. at L. 252, note; 1 Stat. at L. 352, chap. 14; 1 Stat. at L. 555, chap. 38; 2 Stat. at L. 453, chap. 7; 2 Stat. at L. 547, chap. 2; 2 Stat. at L. 750, chap. 99; 4 Stat. at L. 687, chap. 76; 9 Stat. at L. 500, chap. 76; 10 Stat. at L. 27, chap. 77; 10 Stat. at L. 608, chap. 106; those for Indian purposes being, 4 Stat. at L. 411, chap. 148; 10 Stat. at L. 238, chap. 104; 11 Stat. at L. 401, chap. 66; 12 Stat. at L. 819, chap. 119; 13 Stat. at L. 40, chap. 48; for a lighthouse, 1 Stat. at L. 54, chap. 9; with reference to salt springs, 2 Stat. at L. 235, chap. 28; 2 Stat. at L. 280, chap. 35; 2 Stat. at L. 394, chap. 39; and lead mines, 2 Stat. at L. 449, chap. 49; for town sites, 3 Stat. at L. 375, chap. 62; 12 Stat. at L. 754, chap. 80, Comp. Stat. 1913, § 4784; for reservoirs, 25 Stat. at L. 526, chap. 1069, Comp. Stat. 1913, § 4696; and irrigation work, 32 Stat. at L. 388, chap. 1093, Comp. Stat. 1913, § 4700; for lands containing timber for naval purposes, 3 Stat. at L. 347, chap. 22; and for forest reserves, 26 Stat. at L. 1103, chap. 561, Comp. Stat. 1913, § 5121, 30 Stat. at L. 36, chap. 2.

them. From that case, therefore, the following propositions are deduced: That where there [495] is a legal appropriation, reservation is unnecessary, but that the reservation in that case has been ratified by a subsequent act of Congress. And that the appropriation of the land in controversy in that case had been by authority of law, *i. e.*, power placed in the President by Congress by acts passed before and after the exertion of such power by the President.

Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863, is another case relied upon. There had been a controversy between the city of San Francisco and the United States with reference to the extent of the pueblo lands belonging to the former, which had been determined by an order of court confirming the title of the city subject to the exception of lands "reserved or dedicated to public uses by the United States" and by the act of Congress of March 8, 1866 (14 Stat. at L. 4, chap. 13), relinquishing the claim of the United States subject to the reservation in the decree. Grisar, claiming title from the city, sought to recover possession of land which had been reserved by order of the President for public purposes, and which was held by the defendant, an officer in the Army of the United States, commanding the military department of California, who had entered upon the premises and held them under the order of the Secretary of War as part of the public property of the United States reserved for military purposes. In dealing with the right of the President to make the reservation the court first held that it made no difference whether or not the President possessed sufficient authority to make the reservation, because, being a part of the public domain, they were excluded from lands affirmed to the state under which the plaintiff claimed. In dealing with the power of the President the court said:

"But, further than this: from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to [496] the United States to be reserved from sale and set apart for public uses."

In this connection the court cited acts of Congress recognizing the authority of the President, among others, the pre-emption act of May 29, 1830, supra, in which it was provided that the right of pre-emption should not extend to lands reserved from sale by act of Congress or by order of the President, and the act of September 4, 1841 (5 Stat. at L. 456, chap. 16), exempting lands reserved by any treaty, law, or proclamation of the President, and of March 3, 1853 (10 Stat. at L. 246, chap. 145), excepting lands appropriated under authority of the act, or reserved by competent authority, and held that this reservation by competent authority meant the authority of the President, and those acting under his direction. Furthermore, the court held that the action of the President in making the reservations had been indirectly approved by Congress by appropriating moneys for the construction of fortifications and other public works upon them, and that the reservations embraced lands upon which public buildings had been erected. The language of Mr. Justice Field, above quoted, as to the authority of the President, has been frequently quoted in subsequent opinions of Attorneys General, and has been made the basis of opinions for broad authority in the President. It is to be observed, however, that in that case the law, recited in the opinion as giving the power of reservation, contained congressional authority directly to the President or competent authority, which it was held meant the President, and the statement was added that the action of the President had been approved by Congress appropriating money for fortifications and other public works.

The government also relied upon a series of cases in this court which may be called the Des Moines River Cases, beginning with Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689, and followed by Riley v. Welles, 154 U. S. 578, and 19 L. ed. 648, 14 Sup. Ct. Rep. 1166; Williams v. [497] Baker (Cedar Rapids & M. R. Co. v. Martindale) 17 Wall. 144, 21 L. ed. 561; Iowa Homestead Co. v. Valley R. Co. 17 Wall. 153, 21 L. ed. 622; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915; Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; Dubuque & S. C. R. Co. v. Des Moines Valley R. Co. 109 U. S. 329, 27 L. ed. 952, 3 Sup. Ct. Rep. 188; Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 167, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1149; United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308. In the original case, 5 Wall. 681, it is shown that the cases grew out of an act of Congress of August 8, 1846 (9 Stat. at L. 77, chap. 103), granting to the then territory of Iowa for the purpose of aiding it in improving the navigation of the Des Moines river from its mouth to the Raccoon Fork, "one equal moiety, in alternate sections, of the public lands in a strip five miles in width on each side of said river." This ambiguous description gave rise to the controversy which appeared from time to time in the cases mentioned, and arose from the doubt whether the grant to Iowa included lands above the Raccoon Fork. Early

in the year 1848 the Commissioner of the General Land Office decided that the grant extended beyond Raccoon Fork, but later in that year the President by proclamation ordered the sale of some of this land above the Fork in the following October. On June 16, 1849, however, the Secretary of the Treasury, having construed the grant to include the lands above the Fork, directed that they should be reserved from the sale. The control of the General Land Office having passed to the Secretary of the Interior, on April 6, 1850, he reversed the decision of the Secretary of the Treasury, but directed that the lands embraced within the state's selections should be reserved from sale. The matter was before two Presidents and their cabinets, with different results, and finally, on October 29, 1851, the Secretary of the Interior held that, in view of the great conflict among executive officers of the government, and in view of the opinion of eminent jurists which had been presented to him in favor of the construction contended for by the state, he was willing to recognize the claim of the [498] state and approve the selections, without prejudice to the rights, if any there be, of other parties. The history of subsequent legislation, not necessary to now recite, is given in the opinion, and then the act of May 15, 1856 (11 Stat. at L. 9, chap. 28), upon which the plaintiff relied, was considered, in which was found the provision that "any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever," were reserved from the operation of the act. This was a grant made to the railroads which it was admitted covered the tract in controversy, unless excluded by the proviso. It was held that the lands had been reserved by competent authority, the court saying (p. 688):

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river —first, by the Secretary of the Treasury, when the Land Department was under his supervision and control, and again by the Secretary of the Interior after the establishment of this Department, to which the duties were assigned, and afterwards continued by this Department under the instructions from the President and Cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of these public purposes to a state, notice is given by the Commissioner of the Land Office to the registers and receivers to [499] stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

It is therefore apparent that this reservation was sanctioned, because it had become the duty of the officers, who were by law charged with the administration of the grants and required to give effect to them, to withhold the lands from sale and reserve them because of the doubt of the extent of the grant of 1846. In other words, if the lands had been granted to the state of Iowa, it could not possibly have been the intention of Congress to subject them to selection or grant under other laws, and this court said that the power to reserve them arose by necessary implication from the grant of 1846.

In Riley v. Welles, 154 U. S. 578, and 19 L. ed. 648, 14 Sup. Ct. Rep. 1166, involving a claim of title under the pre-emption section of the act of September 4, 1841, to land covered by the withdrawal under the act of 1846, this court followed Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689, and repeated its decision as to the effect of the reservation.

In Williams v. Baker (Cedar Rapids & M. R. Co. v. Martindale) 17 Wall. 144, 21 L. ed. 561, and Iowa Homestead Co. v. Valley R. Co. 17 Wall. 153, 21 L. ed. 622, both involving title to lands claimed under the grant of 1856, as against titles founded on the 1846 act, as did the Wolcott Case, the court affirmed the validity of the reservation under the act of 1846, for the reason that the proviso in the act of 1856 prevented the railroad from acquiring the land.

In Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915, where the controversy was whether the grant to the territory of Iowa, by the act of September 4, 1841, supra, of the right to select a quantity of lands for internal improvement purposes, [500] excepting such as were or might be "reserved from sale by

any law of Congress or proclamation of the President," permitted the selection of certain lands covered by the reservation in these cases, it was held (pp. 768, 769):

"They were reserved also in consequence of the act of 1846. The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the state above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in Riley v. Welles, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

. . . . . .

"The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or authorized act of the Executive Department of the government."

Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925, involved the question as to whether the title to the lands above the Fork vested in the state by the act of 1846, for purpose of taxation, and, affirming the previous cases, the court held that the action of the Executive Department of the general government reserved the land above the Fork so that it "did not pass to the state when selected as school lands under the act of 1841, or as railroad lands by the grant of 1856, and were not open to pre-emption entry," and the Executive order "simply retained the ownership in the United States."

The case of Dubuque & S. C. R. Co. v. Des Moines Valley R. Co. 109 U. S. 329, 27 L. ed. 952, 3 Sup. Ct. Rep. 188, [501] also involved a controversy as to whether title vested under the river or railroad grant, and the court held that the validity of the reservation was no longer an open question.

The history of the matter was restated in Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 167, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1149, it being made to appear especially that the order withdrawing the land was in effect during all the time up to the passage of the act of July 12, 1862 (12 Stat. at L. 543, chap. 161), and that after the decision in the case of Dubuque & P. R, Co. v. Litchfield, 23 How. 66, 16 L. ed. 500, had determined that Congress had not, by the act of 1846, granted the land above the Fork to Iowa, the Commissioner of the General Land Office, by notice of May 18, 1860, continued the reservation, notwithstanding the decision just referred to. And it was held that the resolution of Congress of March 2, 1861 (12 Stat. at L. 251), did not end the reservation, and that claims inaugurated after that resolution and before the passage of the act of July 12, 1862, were subject to the reservation. The court said (p. 170):

"This court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or pre-emption all the lands in controversy, and unless the case we are about to consider constitutes an exception, it has never been revoked.

. . . . . .

"During all this controversy there remained the order of the Department having control of the matter, withdrawing all the lands in dispute from public sale, settlement, or pre-emption. This withdrawal was held to be effectual against the grant made by Congress to the railroad companies in 1856, because that act contained the following proviso:

" 'That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding [502] in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.' "

The court quoted the notice of the Commissioner of the General Land Office of May 18, 1860, that the land above the Fork "which has been reserved from sale heretofore on account of the claim of the state thereto will continue reserved, for the time being, from sale or from location, by any species of script or warrants, notwithstanding the recent decision of the Supreme Court against the claim. This action is deemed necessary to afford time for Congress to consider upon memorial or otherwise, the case of actual bona fide settlers holding under titles from the state, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper." And the court said (p. 173):

"It will thus be seen that, notwithstanding the decision of the Supreme Court of the United States in the winter of 1860, the Land Office determined that the reservation of these lands should continue for the purpose of securing the very action by Congress which the state of Iowa was solicit-

ag, and it is not disputed by counsel for he appellant in this case that this was a alid continuation of such reservation, and hat during its continuance the pre-emptions nder which the plaintiff claims could not ave been made. . . .

"We do not think the joint resolution had he effect to end the reservation of these nds from public entry. . . .

"This is not the way in which a reserva-on from sale or pre-emption of public lands removed. In almost [503] every instance which such a reservation is terminated, here has been a proclamation by the Presi-ent that the lands are open for entry or ale, and in most instances they have first een offered for sale at public auction. It annot be seen, from anything in the joint esolution, that Congress either considered he controversy ended, or intended to re-ove the reservation instituted by the De-artment. Its immediate procedure at the ext session to the full consideration of he whole subject shows that it had not eased to deal with it; that the reason for his withdrawal or reservation continued as trongly as before, and it cannot be doubted hat the subject was before Congress, as vell as before its committees, and that the ct of July 12, 1862, was, for the first time, conclusion and end of the matter so far s Congress was concerned."

The last of the Des Moines River Cases, Jnited States v. Des Moines Nav. & R. Co. 42 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308, was a suit instituted by the United States to quiet its title to certain of the ands conveyed by the state of Iowa to the Navigation Company and others, claiming hat the trust had not been performed, and, After reviewing the history of the matter nd the previous cases at considerable ength, the court again stated the effect of he reservation (p. 528):

"The validity of this reservation was sus-ained in the case of Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689, decided at December term, 1866. In that ase it was held that, even in the absence of command to that effect in the statute, it vas the duty of the officers of the Land Department, immediately upon a grant be-ng made by Congress, to reserve from set-lement and sale the lands within the grant; nd that, if there was a dispute as to its xtent, it was the duty to reserve all lands hich, upon either construction, might be-ome necessary to make good the purposes of he grant. This ruling as to the power [504] and duty of the officers of the Land epartment has since been followed in many ases. Bullard v. Des Moines & Ft. D. R. o. supra, and cases cited in the opinion."

In the case now before us Congress in the statutes referred to had expressly subjected these lands to the operation of the placer mining law, and had authorized their exploration for oil, and their location, entry, and purchase as mineral lands. Congress had in this way exercised its power and manifested its will, and such was the situation when the withdrawal in question was made. Deriving the aim of the Executive from the various documents to which we have referred, it may be fairly deduced that the prevailing purpose (and that was the sole purpose so far as the lands here involved were concerned) in making the withdrawal was to anticipate that Congress, having the subject-matter brought to its attention, might and would provide a better and more economical system for the disposition of such public lands, and, secondarily, to preserve some of the oil lands in California as a basis of naval supply in the future, the latter purpose not at that time declared or recognized by Congress. For these purposes the President had no express authority from Congress; in fact, such is not claimed. The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legislation or long-continued acquiescence as public purposes for which such withdrawals could be made by the Executive. That the President might, by virtue of his executive authority, take action to preserve public property, or, in aid of the execution of the laws, reserve tracts of land for definitely fixed public purposes, declared by Congress, such as military or Indian reservations, may be conceded; but we are unable to find sanction for the action here taken in withdrawing a large part of the public domain from the operation of the public land laws in the [505] power inherent in this office, as created and defined by the Constitution, or in any way conferred upon him by the legislation of Congress, or in that long acquiescence in the exercise of authority sanctioned by Congress in such manner as to be the equivalent of a grant to the President.

The constitutional authority of the President of the United States (art. 2, §§ 1, 3) includes the executive power of the nation and the duty to see that the laws are faithfully executed. "The President 'shall take care that the laws be faithfully executed.' Under this clause his duty is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" Cooley, Const. Law, p. 121; Re Neagle, 135 U. S. 1, 34 L. ed.

55, 10 Sup. Ct. Rep. 658. The Constitution does not confer upon him any power to enact laws or to suspend or repeal such as the Congress enacts. Kendall v. United States, 12 Pet. 524, 613, 9 L. ed. 1181, 1216. The President's powers are defined by the Constitution of the United States, and the government does not contend that he has any general authority in the disposition of the public land which the Constitution has committed to Congress, and freely concedes the general proposition as to the lack of authority in the President to deal with the laws otherwise than to see that they are faithfully executed.

As we have said, while this court has sustained certain withdrawals made by the Executive, in carrying out a policy for which the use of the public lands had been indicated by congressional legislation, and has sustained the right of withdrawal where conflicting grants had been made by Congress, and additional legislation was needed to expressly declare the purpose of Congress, the court has refused to sustain withdrawals made by the Executive branch of the government when in contravention of the [506] policy for the disposition of the lands declared in acts of Congress. In Southern P. R. Co. v. Bell, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232, it was held that the Secretary of the Interior had no authority to withdraw lands within the indemnity limits of a grant from sale or pre-emption, when Congress had indicated its purpose that such lands might be taken up by settlers before the road had exercised its right of selection. In Brandon v. Ard, 211 U. S. 11, 53 L. ed. 68, 29 Sup. Ct. Rep. 1, the conflict was between an attempted withdrawal in aid of a land grant and a homestead settlement three years later, and this court held that the withdrawal of the lands from sale or settlement prior to the definite location of the road, and before they were selected to supply deficiencies in place or granted limits, was without authority of law, and that the homestead settlement, under existing laws of Congress, must prevail over such attempted withdrawal. The same principle was declared and enforced in Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420.

In Lockhart v. Johnson, 181 U. S. 516, 520, 45 L. ed. 979, 982, 21 Sup. Ct. Rep. 665, Mr. Justice Peckham, speaking for the court, tersely stated the rule:

"Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws unless some particular lands have been withdrawn from *sale by con*gressional authority or by an Executive withdrawal under such authority, either expressed or implied."

We think the rule thus stated is the result of the previous decisions of this court, when properly construed, and is consistent with the authority over the public lands given to Congress under the Constitution, and properly rests Executive power to deal with such lands by way of withdrawal upon the express or implied authority of the Congress. In other words, it may be fairly said that a given withdrawal must have been expressly authorized by Congress, or there must be that clear implication of [507] congressional authority which is equivalent to express authority; and when such authority is wanting there can be no Executive withdrawal of lands from the operation of an act of Congress which would otherwise control.

The message of the President of January 14, 1910, indicates that he doubted his authority to make such withdrawals. In that message, after referring to the lax manner in which the government had been disposing of the public lands under the mining and other acts, and the need of properly classifying lands and revising the mode of disposing of the oil and other deposits in them with greater regard to the public interests, but without hindering development, he said:

The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land the disposition of which under such statutes would be detrimental to the public interest is not clear or satisfactory. This power has been exercised in the interest of the public with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Unfortunately, Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals that have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise. . . .

"I earnestly recommend that all the suggestions which he [the Secretary of the Interior] has made with respect to these lands shall be embodied in statutes, and, especially, that the withdrawals already made shall be validated so far as necessary, and that the authority of the Secretary of the Interior to withdraw lands for the purpose [508] of submitting recommendations as to future dispositions of them where new legis-

lation is needed shall be made complete and unquestioned."

After the receipt of this message, a considerable number of bills being before the Senate and House of Representatives upon the subject, the matter was taken up and in the House of Representatives a bill was passed providing for withdrawals under certain conditions, and providing that "all withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this act." The bill in that form did not pass the Senate. It was, however, adopted in a materially modified form in the act of June 25, 1910 (36 Stat. at L. 847, chap. 421, Comp. Stat. 1913, § 4523), which reads:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time, in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the district of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

"Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That this act shall not be construed as a [509] recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made. And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the states of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

The reports of the Senate Committee show that its members were divided as to the authority of the President to make the withdrawal order in question. The majority report stated that, in any view, the President had the authority without additional legislation; the minority reached the opposite conclusion.

It is to be noted that the act of June 25, 1910, conferred specific authority for the future upon the President, but gave no approval to the withdrawal of September 27, 1909, containing instead an express provision that the act should not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after the withdrawal of such lands, made prior to the passage of the act. While the order of [510] September 27, 1909, withdrew the lands from all form of settlement, location, sale, entry, or disposal under the mineral or nonmineral public land laws, the act of June 25, 1910, excepts from the power of withdrawal conferred upon the President lands embraced in any lawful homestead or desert-land entry theretofore made or upon which any valid settlement had been made and was being maintained and perfected pursuant to law. Furthermore, the act provides that the rights of a bona fide occupant or claimant of oil or gas bearing lands, complying with the provisions of the statute relating thereto, shall not be affected or impaired by a subsequent order of withdrawal. In this statute there certainly is no congressional assent to the Executive withdrawal of September 27, 1909. The validation or ratification asked in the President's message was withheld, and only restricted authority for the future was granted in the act of June 25, 1910; not only so, but the rights of the locators involved in this case were preserved to whatever extent they existed in the absence of a ratification of the withdrawal. When express ratification is thus asked and refused, in our view no power by implication can be fairly inferred. Barden v. Northern P. R. Co. 154 U. S. 288, 317, 38 L. ed. 992, 998, 14 Sup. Ct. Rep. 1030; Durousseau v. United States, 6

Cranch, 307, 318, 3 L. ed. 232, 235; Eyster v. Centennial Bd. of Finance, 94 U. S. 500, 503, 24 L. ed. 188, 189. The act of June 25, 1910, neither ratified the withdrawal of September 27, 1909, nor empowered the President so to do by his order of July 2, 1910.

The government of the United States is one of limited powers. The three co-ordinate branches of the government are vested with certain authority, definite and limited, in the Constitution. This principle has often been enforced in decisions of this court, and the apt words of Mr. Justice Miller, speaking for the court in Kilbourn v. Thompson, 103 U. S. 168, 190, 26 L. ed. 377, 386, have been more than once quoted with approval:

[511] "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department, and no other."

These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.

In our opinion, the action of the Executive Department in this case, originating in the expressed view of a subordinate official of the Interior Department as to the desirability of a different system of public land disposal than that contained in the lawful enactments of Congress, [512] did not justify the President in withdrawing this large body of land from the operation of the law, and virtually suspending, as he necessarily did, the operation of that law, at least until a different view expressed by him could be considered by the Congress. This conclusion is reinforced in this particular instance by the refusal of Congress to ratify the action of the President, and the enactment of a new statute authorizing the disposition of the public lands by a method essentially different from that proposed by the Executive.

For the reasons expressed, we are constrained to dissent from the opinion and judgment in this case.

UNITED STATES, Plff. in Err.,
v.
UNITED STATES FIDELITY & GUARANTY COMPANY, of Baltimore, Maryland, and Augustus W. Boggs.

(See S. C. Reporter's ed. 512-531.)

Principal and surety — liability of surety — change of contract.

1. There is no room for the application of the doctrine exonerating the surety on the bond of a public contractor in case of a change in the contract, where, the contractor having wholly defaulted and in effect abandoned the contract, the government entered into an entirely new contract with a third person which calls for work substantially different from the work that was the subject of the original contract.

[For other cases, see Principal and Surety, III. f, in Digest Sup. Ct. 1908.]

Principal and surety — liability of surety — bond of public contractor — new contract.

2. The surety on the bond of a contractor for the complete construction of a public building for an entire price, payable in instalments as the work progresses, is liable for the actual damages sustained by the government through the contractor's complete default and, in effect, abandonment of the contract, where the government, instead of exercising its right under the contract to complete the work at the contractor's expense, "in which event" the contractor and his sureties were to be "further liable for any damages incurred through such default and any and all other

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NOTE.—On rights and liabilities of sureties—see note to Hall v. Smith, 12 L. ed. U. S. 66

As to penalty as limit of liability on statutory bond—see note to Griffith v. Rundle, 55 L.R.A. 381.

On right, in an action on a bond, to recover interest when the total sum is thereby made to exceed the penalty—see note to American Surety Co. v. Pacific Surety Co. 19 L.R.A.(N.S.) 83.

breaches of this contract," enters into an entirely new contract with a third person which calls for work substantially different from the work that was the subject of the original contract.

[For other cases, see Principal and Surety, II., in Digest Sup. Ct. 1908.]

Appeal — review of findings of fact.

3. The findings of the trial court in a case in which a jury has been waived, under U. S. Rev. Stat. § 649, Comp. Stat. 1913, § 1587, have the same effect as the verdict of a jury, and the Federal Supreme Court does not revise them, but merely determines whether they support the judgment.

[For other cases, see Appeal and Error, 4852–4878, in Digest Sup. Ct. 1908.]

Interest — on claim by government.

4. Interest from the date when, by the terms of the contract, the building should have been completely finished, should be allowed to the government upon the advance payments made to a defaulting contractor for the construction of a public building, where the contract calls for the complete construction of the building at an entire price, payable in instalments as the work progresses, and the contractor not only wilfully and persistently, but fraudulently, departed from the requirements of the contract, and refused to perform its obligations.

[For other cases, see Interest, I. b, 3, in Digest Sup. Ct. 1908.]

Interest — waiver by delay.

5. A delay of several years in pressing the government's claim for the return of advance payments made to a contractor for the erection of a public building, who wilfully, persistently, and fraudulently departed from the requirements of his contract, and refused to perform its obligations, does not amount to a waiver of the right to recover interest from the date when, by the terms of the contract, the work should have been completely finished.

[For other cases, see Interest, 41, 80, in Digest Sup. Ct. 1908.]

Appeal — exceptions — sufficiency.

6. An exception to the court's failure to allow interest on the penalty in a bond from the date of the principal's default does not present the question whether the court erred in overruling a claim for interest from the time of demand made upon the surety, or notice to it of the default.

[For other cases, see Appeal and Error, VI. a, in Digest Sup. Ct. 1908.]

Interest — on penalty in bond.

7. The surety on the bond of a public contractor, if answerable at all for interest beyond the amount of the penalty of the bond given by its principal, can only be held for such an amount as accrued from its own default in unjustly withholding payment after being notified of the default of the principal.

[For other cases, see Interest, 103–110, in Digest Sup. Ct. 1908.]

[No. 125.]

Argued January 15, 1915. Decided February 23, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which, reversing a judgment of the Circuit Court for the Southern District of California, directed the entry of judgment in favor of defendant in an action upon the bond of a public contractor. Reversed, and judgment of the Circuit Court affirmed.

See same case below, 116 C. C. A. 187, 194 Fed. 611.

Statement by Mr. Justice Pitney:

This action was brought by the United States in the circuit court for the southern district of California against Augustus W. Boggs and the United States Fidelity & Guaranty Company of Baltimore, Maryland (which may be called, for convenience, the "Guaranty Company"), to recover damages for the failure of Boggs to perform his contract to construct for plaintiff a stone [514] mess hall and kitchen at the Rice Station Indian School in Arizona, for the performance of which the Guaranty Company was his surety upon a bond in the penal sum of $6,500. Upon plaintiff's complaint and the answer of the Guaranty Company (Boggs having failed to appear, and his default having been entered), the case came on for trial before the circuit court, trial by jury being formally waived under Rev. Stat. § 649, Comp. Stat. 1913, § 1587. Elaborate findings of fact were made, the substance of which is as follows: By the contract, which was in writing and dated February 23, 1905, Boggs agreed to furnish all materials and perform all work required for the construction and completion of the building in strict and full accordance with the requirements of the plans and specifications which were annexed; covenanting that the entire work should be completed and turned over to the United States on or before September 1; and that (art. 4) if he failed to complete the work in accordance with the agreement within that time "the said party of the first part [the United States] may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' notice thereof, in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part, and of all machinery and tools employed thereon, and all materials belonging to the said party of the second part, delivered on the site, and, at the expense of said party of the second part, to

complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and [515] his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract." By article 9 the United States agreed to pay to the contractor, on the presentation of proper receipts or vouchers, the sum of $12,709, "in consideration of the herein recited covenants and agreements made by the party of the second part, as follows: Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part in the event of the nonfulfilment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract." Attached to the contract as a part of the specifications were certain "general conditions" which (*inter alia*) required the contractor to be responsible for all damages to the building, whether from fire or other causes, during the prosecution of the work and until its acceptance, and declared that partial payments were not to be considered as an acceptance of any work or material. On or about April 12, Boggs commenced operations and furnished certain materials and did certain work, but he did not at any time complete the building in accordance with the contract, and, on the contrary, wilfully, intentionally, and [516] fraudulently disregarded the terms of the contract from the beginning of his operations under it. On June 10 plaintiff paid him $4,356.24 on account, and on July 21 the further sum of $3,539.16, both payments being "pursuant to the terms of said contract," and aggregating $7,895.40, no part of which has been repaid to plaintiff. He not only failed to complete the work on or before the 1st of September, but failed after that date to take such action as would remedy his default. On or about October 27 plaintiff rejected the work and materials and the building as offered for acceptance by Boggs. On November 4, while the structure was still in his possession, it was completely destroyed by fire. Thereafter he did not, in accordance with the provisions of the contract, commence the construction or reconstruction of the building. and anything he did thereafter was outside of the contract and without plaintiff's consent. On or about December 28, by reason of his failure and refusal to perform the terms of the contract, or to complete and turn over the building as therein required, or to remedy his default, plaintiff took possession of the site, and notified Boggs and his representatives to vacate the premises and leave the Indian Reservation, which they immediately did. At the same time plaintiff seized and confiscated certain building materials, tools, and implements, of the value of $2,418.58, then upon the premises and belonging to Boggs. It is further found that Boggs wilfully, intentionally, and fraudulently failed, neglected, and refused to erect a structure in accordance with the plans and specifications that were a part of his contract, although plaintiff performed all conditions and obligations on its part; and there are specific findings that plaintiff did not change or abrogate the terms of the contract in any particular, nor extend the time of performance, nor consent to the failure and delay on the part of Boggs. In December, 1906, the United States advertised for the construction [517] of a new mess hall and kitchen upon the same site, and in January, 1907, entered into a written contract with one Owen for the construction of such building for the sum of $16,600, in lieu of the building that had been agreed to be built by Boggs; but the contract with Owen was different in substantial respects from that made between the plaintiff and Boggs, and the building actually erected by Owen was likewise different: $1,200 of the contract price agreed to be paid and actually paid to him had reference to work wholly outside of the work provided for in the Boggs contract, and $500 of the contract price agreed to be paid and actually paid to Owen was for work and materials in excess of what was included in the Boggs contract. Moreover, the cost of labor and building supplies had materially increased between the time of Boggs's default and the time of making the new agreement. Hence, the trial court found that a comparison be-

tween the two contracts furnished no basis for estimating plaintiff's damages.

Upon these findings judgment was rendered in favor of the United States for the amount of the two sums advanced to Boggs during the progress of the work ($7,895.40), from which, however, $2,418.58 was deducted as a set-off and counterclaim in favor of defendants for the value of the materials confiscated. Interest was allowed to plaintiff at 7 per cent upon the amount of the "progress payments" from September 1, 1905, until the date of judgment, and interest at the same rate was allowed to defendants upon the amount of the offset from December 28, 1905, the difference, which plaintiff was held entitled to recover, being $7,403.09; but the recovery against the Guaranty Company was limited to $6,500, besides costs.

Upon cross writs of error this judgment was reviewed by the circuit court of appeals, with the result that it was reversed for error assigned by the Guaranty Company, and the cause remanded, with directions to enter [518] judgment in its favor on the findings. 116 C. C. A. 187, 194 Fed. 611. The present writ of error was then sued out.

Solicitor General **Davis** argued the cause, and, with Mr. W. C. Herron, filed a brief for plaintiff in error:

The present case is distinguishable from United States v. Axman, 234 U. S. 36, 58 L. ed. 1198, 34 Sup. Ct. Rep. 736.

The well-settled rule stated in Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189, and again in United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875, upon which the lower court appears to rely, to the effect that a surety is released by any material change made, without his consent, in the original contract by the parties thereto, clearly has no application whatsoever to changes made in the relet contract. The old rule, starting with the idea that a surety's contract is *strictissimi juris*,—an idea having no application to modern bonding companies,—correctly deduced that where a change was made in the original contract the surety could not be liable; not on the changed contract, because he had never guaranteed that; not on the original, because that was not the one which it was sought to enforce against him. This rule, while technical and harsh, is still easily understood.

The authorities relied upon by the court below in the American Bonding Co. v. United States, 93 C. C. A. 310, 167 Fed. 910, and in the case at bar, have obviously no bearing upon the question of the release of a surety by a change in the relet contract.

United States v. Freel, supra; American Surety Co. v. Woods, 45 C. C. A. 282, 105 Fed. 741; American Bonding & T. Co. v. Gibson County, 62 C. C. A. 397, 127 Fed. 671; Chesapeake Transit Co. v. Walker, 158 Fed. 850; Chesapeake Transit Co. v. Mott, 95 C. C. A. 41, 169 Fed. 543; United States v. Weisberger, 124 C. C. A. 429, 206 Fed. 641; Mundy v. United States, 35 Ct. Cl. 265; George A. Fuller Co. v. Doyle, 87 Fed. 687; United States v. Stone, Sand & Gravel Co. 100 C. C. A. 651, 177 Fed. 321; American Fidelity Co. v. Velie, 196 Fed. 190; United States v. Maloney, 4 App. D. C. 505.

The contractor defaulted, the building was rejected, and while in the possession of the contractor was destroyed. Such loss, of course, fell on the contractor. American Surety Co. v. San Antonio Loan & T. Co. — Tex. Civ. App. —, 98 S. W. 387. It follows that the United States received nothing, and consequently was damaged to the full amount of the payments made to the contractor during the progress of the work. Consequently there can be no doubt that the government has suffered a damage—proximately due to the breach—to the amount of the progress payments with interest.

The defense of a release of the surety by dealings between the owner and the contractor must be specially pleaded. The burden of proof is on the surety to establish such a defense.

Randle v. Barnard, 99 Fed. 348; Hayden v. Cook, 34 Neb. 677, 52 N. W. 165; Howard County v. Baker, 119 Mo. 407, 24 S. W. 200; Patnode v. Deschenes, 15 N. D. 109, 106 N. W. 573; Washington Slate Co. v. Burdick, 60 Minn. 270, 62 N. W. 285; Sachs v. American Surety Co. 72 App. Div. 60, 76 N. Y. Supp. 335; United States Fidelity & G. Co. v. Probst, 30 Ky. L. Rep. 63, 97 S. W. 405; Piercy v. Sabin, 10 Cal. 27, 70 Am. Dec. 692; Michalitschke Bros. v. Wells, F. & Co. 118 Cal. 689, 50 Pac. 847; Bull v. Coe, 77 Cal. 62, 11 Am. St. Rep. 235, 18 Pac. 808.

The rule *strictissimi juris* has been relaxed as to professional bonding companies who make a business of suretyship for a compensation to the extent of requiring them to show damage accruing to them from acts of the owner claimed to release them.

United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 426, 48 L. ed. 242, 246, 24 Sup. Ct. Rep. 142; United States use of Hill v. American Surety Co. 200 U. S. 197, 202, 50 L. ed. 437, 440, 26 Sup. Ct. Rep. 168; Atlantic Trust & D. Co. v. Laurinburg, 90 C. C. A. 274, 163 Fed. 690; Baglin v. Title Guaranty & Surety Co. 166 Fed. 356; United States Fidelity & G. Co. v. United States, 102 C.

C. A. 192, 178 Fed. 692; United States use of Delaware Hardware Co. v. Lynch, 192 Fed. 364.

The contract merely reserves to the United States a right or option to inspect, for its own benefit. The surety, having guaranteed the faithful performance of the contract by Boggs, cannot complain because the obligee did not see to it that Boggs did what the surety had engaged he would do.

United States v. Kirkpatrick, 9 Wheat. 720, 736, 6 L. ed. 199, 203; United States v. Vanzandt, 11 Wheat. 184, 188, 6 L. ed. 448, 450; Dox v. Postmaster-General, 1 Pet. 318, 325, 7 L. ed. 160, 163; Pittsburg Ft. W. & C. R. Co. v. Shaeffer, 59 Pa. 350; Durham v. Fowler, L. R. 22 Q. B. Div. 394, 58 L. J. Q. B. N. S. 246, 60 L. T. N. S. 456, 53 J. P. 374; Kingston-upon-Hull v. Harding [1892] 2 Q. B. 494, 62 L. J. Q. B. N. S. 55, 67 L. T. N. S. 539, 41 Week. Rep. 19.

Interest on the penalty of a bond may be allowed; at least, in the case of liquidated claims, or of claims the amount of which can be ascertained by mere calculation.

Perit v. Wallis, 2 Dall. 252, 1 L. ed. 370; United States v. Arnold, 1 Gall. 360, Fed. Cas. No. 14,469, affirmed in 9 Cranch, 104, 120, 3 L. ed. 671, 676; United States v. Quinn, 58 C. C. A. 401, 122 Fed. 65; Williams v. Willson, 1 Vt. 266; Judge of Probate v. Heydock, 8 N. H. 494; Wyman v. Robinson, 73 Me. 387, 40 Am. Rep. 360; Carter v. Thorn, 18 B. Mon. 619; Mix v. Miller, 57 Cal. 356; Martin v. Ede, 103 Cal. 157, 37 Pac. 199; Ryland v. Heney, 130 Cal. 429, 62 Pac. 616.

Mr. J. Kemp Bartlett argued the cause and filed a brief for defendants in error:

Improper payment by the United States to the contractor released the surety.

Fidelity & D. Co. v. Agnew, 82 C. C. A. 103, 152 Fed. 955; Shelton v. American Surety Co. 66 C. C. A. 94, 131 Fed. 210, 127 Fed. 736; National Surety Co. v. Long, 60 C. C. A. 623, 125 Fed. 887; Morgan County v. Branham, 57 Fed. 179; Glenn County v. Jones, 146 Cal. 518, 80 Pac. 695, 2 Ann. Cas. 764; Kiessig v. Allspaugh, 91 Cal. 231, 13 L.R.A. 418, 27 Pac. 655; Bragg v. Shain, 49 Cal. 131; Queal v. Stradley, 117 Iowa, 748, 90 N. W. 588; Electric Appliance Co. v. United States Fidelity & G. Co. 110 Wis. 434, 53 L.R.A. 609, 85 N. W. 648; Backus v. Archer, 109 Mich. 666, 67 N. W. 913; St. Mary's College v. Meagher, 11 Ky. L. Rep. 112, 11 S. W. 608; First Nat. Bank v. Fidelity & D. Co. 145 Ala. 335, 5 L.R.A.(N.S.) 418, 117 Am. St. Rep. 45, 40 So. 415, 8 Ann. Cas. 241; Gato v. Warrington, 37 Fla. 542, 19 So. 883.

Plaintiff in error is concluded by its payment to the contractor, by the certificates authorizing the same, and by its permitting the completion of the building.

16 Cyc. 722, 771, 772, 805; United States v. Hurley, 105 C. C. A. 208, 182 Fed. 776; Quinn v. New York, 16 App. Div. 408, 45 N. Y. Supp. 7; Katz v. Bedford, 77 Cal. 322, 1 L.R.A. 826, 19 Pac. 523; Toppan v. Cleveland, C. & C. R. Co. 1 Flipp. 74, Fed. Cas. No. 14,099.

Disregard of the provisions relating to the time of payment releases the surety.

Shelton v. American Surety Co. 66 C. C. A. 94, 131 Fed. 210; Coughran v. Bigelow, 164 U. S. 301, 311, 41 L. ed. 442, 447, 17 Sup. Ct. Rep. 117.

Requiring and permitting the contractor to retain possession and reconstruct the building after rejection constituted departure from the contract, abrogated the same, waived the contractor's previous breaches, extended his time for performance, contributed to loss by fire, surrendered a valuable security, enlarged the surety's risk, and discharged the bond.

United States v. De Visser, 10 Fed. 642; Earnshaw v. Boyer, 60 Fed. 528; United States v. Gleason, 175 U. S. 588, 609, 44 L. ed. 284, 292, 20 Sup. Ct. Rep. 228; Mundy v. Stevens, 9 C. C. A. 366, 17 U. S. App. 442, 61 Fed. 77; Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Ætna Ins. Co. v. Fowler, 108 Mich. 557, 66 N. W. 470.

The government prevented the contractor, without notice and without cause, from completing the work; and the bond was thereby discharged.

Mundy v. Stevens, 9 C. C. A. 366, 17 U. S. App. 442, 61 Fed. 77; Fidelity & D. Co. v. United States, 70 C. C. A. 204, 137 Fed. 866; Clark v. Dalziel, 3 Cal. App. 121, 84 Pac. 429; Clark v. United States, 6 Wall. 543, 18 L. ed. 916; United States v. Smith, 94 U. S. 214, 24 L. ed. 115.

The making of a new and materially different contract, after the lapse of more than a year from the date of the ejection of Boggs from the reservation, with changed conditions in the building market, and for a substantially different building, to be constructed according to plans and specifications differing in more than 200 respects from the plans and specifications under the Boggs contract, furnishes no basis for estimating the damages of the plaintiff in error.

United States v. Axman, 234 U. S. 36, 58 L. ed. 1198, 34 Sup. Ct. Rep. 736; 3 Page, Contr. § 1580; Lonergan v. Waldo, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479; American Bonding Co. v. United States, 93 C. C. A. 310, 167 Fed. 910; Chesapeake Transit Co. v. Walker, 158 Fed. 850; United States v. Freel, 92 Fed. 299, 39 C. C. A.

491, 99 Fed. 237, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; Alcatraz Masonic Hall Asso. v. United States Fidelity & G. Co. 3 Cal. App. 341, 85 Pac. 156.

No measure of damage is shown, none can be shown, and no recovery is possible.

United States v. Axman, 234 U. S. 36, 58 L. ed. 1198, 34 Sup. Ct. Rep. 736; American Surety Co. v. Woods, 45 C. C. A. 282, 105 Fed. 741; American Bonding & T. Co. v. Gibson County, 62 C. C. A. 397, 127 Fed. 671; United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; Reese v. United States, 9 Wall. 13, 19 L. ed. 541; United States v. Stone, Sand & Gravel Co. 100 C. C. A. 651, 177 Fed. 321; Chesapeake Transit Co. v. Walker, 158 Fed. 850; United States v. Grosjean, 106 C. C. A. 573, 184 Fed. 593.

Retention by the government of the contractor's materials for more than a year, and surrender of them to the new contractor at less than half price, released the surety.

Montgomery v. Sayre, 100 Cal. 182, 38 Am. St. Rep. 271, 34 Pac. 646.

The government's failure to notify the surety discharged the bond.

United States v. Freel, 186 U. S. 309, 319, 46 L. ed. 1177, 1182, 22 Sup. Ct. Rep. 875; United States use of Schumacker v. McIntyre, 111 Fed. 590; Mundy v. Stevens, 9 C. C. A. 366, 17 U. S. App. 442, 61 Fed. 77; Tuohy v. Woods, 122 Cal. 667, 55 Pac. 683; Alcatraz Masonic Hall. Asso. v. United States Fidelity & G. Co. 3 Cal. App. 338, 85 Pac. 156; Moses v. United States, 116 Fed. 526; United States v. Smith, 94 U. S. 214, 24 L. ed. 115; Clark v. United States, 6 Wall. 543, 18 L. ed. 916; Ætna Ins. Co. v. Fowler, 108 Mich. 557, 66 N. W. 470; Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599.

The contractor's offer to perform released the surety under the California Civil Code.

Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179.

The government's claim for interest is without merit.

Stephens v. Phœnix Bridge Co. 71 C. C. A. 174, 139 Fed. 248; Krasilnikoff v. Dundon, 3 Cal. App. 406, 97 Pac. 172; Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93; Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308; United States v. Quinn, 58 C. C. A. 401, 122 Fed. 35; United States v. Sanborn, 135 U. S. 271, 282, 34 L. ed. 112, 115, 10 Sup. Ct. Rep. 812; Redfield v. Ystalfera Iron Co. 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570; Redfield v. Bartels. 139 U. S. 694, 703, 35 L. ed. 310, 313, 11 Sup. Ct. Rep. 683.

The sureties' defenses were properly pleaded.

United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; Chesapeake Transit Co. v. Mott, 95 C. C. A. 41, 169 Fed. 543; Chesapeake Transit Co. v. Walker, 158 Fed. 850; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; Burke v. Maguire, 154 Cal. 456, 98 Pac. 21; Landis v. Morrissey, 69 Cal. 83, 10 Pac. 258; Bridges v. Paige, 13 Cal. 640; Frank v. Pennie, 117 Cal. 254, 49 Pac. 208; Brooks v. Ardizzone, 9 Cal. App. 215, 98 Pac. 393; Heaton v. Hobson Associated Law Offices v. Arper, 145 Cal. 282, 78 Pac. 721; Meredith v. Santa Clara Mining Asso. 56 Cal. 183; Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744; Sauer v. Eagle Brewing Co. 3 Cal. App. 127, 84 Pac. 425; Gale v. Toulumne Water Co. 14 Cal. 26; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Kimball v. Richardson-Kimball Co. 111 Cal. 386, 43 Pac. 1111; Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Thomas v. Black, 84 Cal. 221, 23 Pac. 1037; Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083; Moore v. Campbell, 72 Cal. 251, 13 Pac. 689; Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The circuit court of appeals held, in substance, that because, after the default of Boggs in the performance of his contract, the government waited more than a year before entering into a new contract, during which time there was a material change in the cost of labor and building supplies, and because the new contract then made between the government and Owen was different in substantial particulars from that upon which the Guaranty Company became surety, the second contract furnished no proper basis for estimating the damages sustained by plaintiff by reason of the breach of the first, and therefore the Guaranty Company was wholly released from liability.

For present purposes we assume the entire correctness of the court's view that because of the substantial differences between the work that was the subject of the Boggs contract and the work that was afterwards let to Owen, the latter contract furnished no proper basis for ascertaining the damages accruing to the government by reason of the default of Boggs. The court rested its decision [523] to this effect upon the language of article 4 of the Boggs agreement and its own previous decision in American Bonding & T. Co. v. United States, 93 C. C.

A. 310, 167 Fed. 910, since affirmed by this court in United States v. Axman, 234 U. S. 36, 58 L. ed. 1198, 34 Sup. Ct. Rep. 736.

But the question whether, by the letting of the Owen contract, or by whatever else was done or omitted by the government about rebuilding after the default of Boggs, the responsibility of his surety was wholly discharged, is a very different question, not concluded by the decision in the case cited. There the government, upon Axman's default, "annulled" his contract pursuant to its 4th paragraph; that is, undertook to complete it in his stead and charge him with the excess cost. As appears from the reports of the case (167 Fed. 915, 234 U. S. 42, 43), it was "not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract;" that is to say, under its 4th paragraph. No other question was considered or decided.

In the present case, Boggs wholly failed to construct the building called for by his contract, either within the time prescribed or at any time. His work and materials, and the building as he offered it for acceptance, were rejected by the government, and thereafter, while remaining in his possession, the structure was completely destroyed by fire. He then took no steps to construct or reconstruct the building in accordance with the contract, but continued to wilfully disregard its obligations, so that after waiting for an additional month and more, the government took possession of the site and required him and his representatives to vacate the premises, which they immediately did. His default was complete, and upon the findings it cannot be deemed to have resulted from anything done or omitted by the government. Nor did the government receive [524] anything of value from him or as a result of his work, except the building materials, tools, and implements that were confiscated, and for which allowance was made in the judgment. Upon this state of facts, the Guaranty Company's liability clearly became fixed upon the occurrence of the default; and it was not released by the failure of the government to have the same work completed in accordance with article 4, unless, by the fair meaning of the agreement, the government was obliged to rebuild, or at least was excluded from recovering damages upon any other basis than a completion of the building, as permitted by that article. For it is plain, we think, that the making of the new contract cannot be regarded as an alteration of the Boggs contract to the *exoneration* of his surety. The very fact that the differences were so material as to exclude the Owen contract from consideration as a thing done by the government under the Boggs contract leaves it without any relation to the rights of the present parties. Their rights and liabilities between themselves, being already fixed by the complete breach of the Boggs agreement, were not to be affected by any subsequent and independent transaction between the government and third parties.

Is the government, then, remediless against the Guaranty Company for the default of its principal? The contract was entire and indivisible; a completed building was the thing bargained for; the partial payments were not to be considered as an acceptance of any work or material; they were to be "80 per centum of the value of the work executed, . . . the amount of each payment to be computed upon the actual amount of labor and materials expended;" the balance was to be "retained until the completion of the entire work," and forfeited in the event of nonfulfilment of the contract, but such forfeiture was not to relieve the contractor from liability for any and all damages by reason of any breach of the contract. Aside [525] from the particular effect of article 4, which will be considered presently, the true intent and meaning are plain: the "progress payments" were not to be treated as payments for parts of a building, but as partial payments advanced on account of a building to be completed thereafter as agreed. The contractor's right to retain them was conditioned upon his subsequent fulfilment of the contract. And when he wholly defaulted, and in effect abandoned the contract, the most direct and immediate loss sustained by the government was the moneys it had paid him on account, and for which he had given nothing in return. Conceding that there was not, technically, a failure of consideration, because his promise, and not its performance, was in strictness the consideration (United & G. Rubber Mfg. Co. v. Conard, 80 N. J. L. 286, 293. 78 Atl. 203, Ann. Cas. 1912A, 412), still the substance of the matter is the same, so far as concerns the measure of the detriment to the promisee.

The general rule, that a contract for the complete construction of a building for an entire price, payable in instalments as the work progresses, is an entire contract, and that a wilful refusal by the contractor to complete the building entitles the owner to a return of the instalments paid, has been declared by the state courts in a number of cases. Public Schools v. Bennett, 27 N. J. L. 513, 517, 72 Am. Dec. 373, 374; Tompkins v. Dudley, 25 N. Y. 272, 82 Am.

Dec. 349; Bartlett v. Bisbey, 27 Tex. Civ. App. 405, 408, 66 S. W. 70, and cases cited. This court, in a case that has been often cited and followed, where a government contractor, without fault of his own, was prevented from performing his contract, owing to the abandonment of the project, held that he was entitled to recover from the United States what he had expended towards performance (less the value of his materials on hand), although he failed to establish that there would have been any profits. United States v. Behan, 110 U. S. 338, 344, 28 L. ed. 168, 170, 4 Sup. Ct. Rep. 81. [526] And see Holt v. United Security Life Ins. & T. Co. 76 N. J. L. 585, 597, 21 L.R.A.(N.S.) 691, 72 Atl. 301.

We do not think article 4 can properly be so construed as to restrict the government to the remedy there indicated in the event of default by the contractor, or to exclude recovery of the actual damages directly attributable to such default if, in the reasonable exercise of its rights, the government determines not to complete the building. In the language of the article, the government is "authorized and empowered"—not "obliged"—to complete the work at the expense of the contractor; "*in which event*" the contractor and his sureties shall be "*further* liable for *any* damages incurred through such default and *any and all other breaches* of this contract." The phraseology indicates a purpose to give to the government a right additional to those it would otherwise have; the stipulation is made for its benefit, and, being optional in form, cannot be construed into a covenant in favor of the defaulting contractor or his surety. Even in case the option is exercised, the language quoted leaves contractor and surety liable for other damages; *a fortiori*, the intent is to preserve their liability in case the option is not exercised.

We have not overlooked the familiar rule that a party suffering loss from breach of contract ought to do what a reasonable man would to mitigate his loss. Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. ed. 752, 753; Warren v. Stoddart, 105 U. S. 224, 229, 26 L. ed. 1117, 1120. But there is nothing in the facts as found to call for the application of this rule; for there is nothing to show that the government acted unreasonably in not exercising its option to rebuild under article 4. Nor does it appear that the loss would probably have been lessened by rebuilding; the "progress payments" would, of course, have remained as a part of the loss, in addition to the cost of new construction.

In our opinion, therefore, the court of appeals erred [527] in holding that, because of the failure of the government to complete Boggs's agreement in accordance with article 4, the surety was released.

The Guaranty Company insists, however, that there are other grounds upon which the decision in its favor may be sustained: that the representatives of the government were grossly negligent in making advance payments to Boggs, in view of the supposed fact that the building contract was then being openly and flagrantly violated, and the defects in the work were conspicuously evident; that the government is concluded by the fact of making these payments, or, if not, then by its alleged disregard of the provisions of the contract relating to the time of making them; and that in these and other respects the government departed from the contract, waived breaches by the contractor, extended his time for performance, surrendered valuable security, and enlarged the surety's risk, thereby releasing it from liability. Assuming these defenses were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment. Rev. Stat. §§ 649, 700, 1011 (amended by act of February 18, 1875, chap. 80, § 1, 18 Stat. at L. 318, Comp. Stat. 1913, §§ 1587, 1668, 1672); Norris v. Jackson, 9 Wall. 125, 128, 19 L. ed. 608, 609; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 428, 20 L. ed. 192, 194; Dickinson v. Planters' Bank, 16 Wall. 250, 257, 21 L. ed. 278, 279; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 237, 248, 21 L. ed. 827, 832; British Queen Min. Co. v. Baker Silver Min. Co. 139 U. S. 222, 35 L. ed. 147, 11 Sup. Ct. Rep. 523.

It results, from what has been said, that the judgment of the circuit court of appeals discharging the Guaranty Company from liability must be reversed. And we next consider what judgment ought to have been rendered by [528] that court upon the record and bill of exceptions brought up from the trial court, in view of the assignments and cross assignments of error. Baker v. Warner, 231 U. S. 588, 593, 58 L. ed. 384, 388, 34 Sup. Ct. Rep. 175; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 490, 58 L. ed. 1055, 1061, 34 Sup. Ct. Rep. 641; Ft. Scott v. Hickman, 112 U. S. 150, 164, 165, 28 L. ed. 636, 641, 5 Sup. Ct. Rep. 56; Allen v. St. Louis Nat. Bank, 120 U. S. 20, 30, 40, 30 L. ed. 573, 575, 578, 7 Sup.

Ct. Rep. 460; Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 264, 30 L. ed. 920, 923, 7 Sup. Ct. Rep. 882.

In addition to the questions already disposed of, it is contended in behalf of the Guaranty Company that the government's claim for interest is without merit and ought to have been overruled. Interest was allowed upon the advance payments, not from the respective dates upon which they were made, but from the date when, by the terms of the contract, the building ought to have been completely finished. In view of the facts, we think there was here no error. The findings make it clear that Boggs not only wilfully and persistently, but fraudulently, departed from the requirements of his contract, and refused to perform its obligations. He therefore accepted the money well knowing that he had no just right to it; and certainly when the time fixed for complete performance expired, without any attempt on his part to perform it, then, if not sooner, his obligation to return the money to the government was clear, and he was not, under the circumstances, entitled to await a demand from the government before repaying it. The suggestion that the government has waived interest by delay in pressing its claim is untenable. The cases cited under this head (Redfield v. Ystalyfera Iron Co. 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570; United States v. Sanborn, 135 U. S. 271, 281, 34 L. ed. 112, 115, 10 Sup. Ct. Rep. 812; Redfield v. Bartels, 139 U. S. 694, 702, 35 L. ed. 310, 313, 11 Sup. Ct. Rep. 683) are plainly distinguishable.

On the other hand, the government insists that it is entitled to recover as against the Guaranty Company, in addition to the penal sum named in the bond, interest thereon from September 1, 1905, the date of Boggs's default, or at least from January 16, 1906, when it is said [529] the surety was notified of the default. We are referred to nothing, and have observed nothing, in the findings to the effect that such notice was given to the surety at or about the date mentioned. The action was commenced more than two years thereafter. But, aside from this, the only exception taken in the trial court to furnish support for the present contention was: "To the failure of said court to . . . decide that plaintiff is entitled to interest on the sum of $6,500 from the 1st day of September, 1905, and to the failure of the court to enter judgment against defendant for such interest." We do not think this is sufficient to attribute error to the trial court as for overruling a claim for interest on the penalty of the bond from the time of demand made upon the surety, or notice to it of the principal's default. No such point was raised. The claim that was made and overruled was for interest from the time of the default, irrespective of notice to the surety; and that presents a very different question of law.

The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. Beaver v. Taylor, 93 U. S. 46, 55, 23 L. ed. 797, 798; Robinson v. Belt, 187 U. S. 41, 50, 47 L. ed. 65, 69, 23 Sup. Ct. Rep. 16; Addis v. Rushmore, 74 N. J. L. 649, 651, 65 Atl. 1036; Holt v. United Security Life Ins. & T. Co. 76 N. J. L. 585, 593, 21 L.R.A.(N.S.) 691, 72 Atl. 301. And the practice respecting exceptions in the Federal courts is unaffected by the conformity act, § 914, Rev. Stat. Comp. Stat. 1913, § 1537. Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 553, 32 L. ed. 508, 511, 9 Sup. Ct. Rep. 150; St. Clair v. United States, 154 U. S. 134, 153, 38 L. ed. 936, 943, 14 Sup. Ct. Rep. 1002.

We merely consider, therefore, whether (where the actual damages exceed the amount of the penalty) the [530] United States is entitled, as against the surety, to interest upon the penal sum from the time of the principal's default, in the absence of notice of the default given to the surety, or any demand made upon it. There has been much contrariety of opinion upon the question whether, in any case, the obligee in a penal bond can recover interest in addition to the penalty. The weight of authority in England is adverse to the recovery. 1 Wms' Saund. 58, note; White v. Sealy, 1 Dougl. K. B. 49; Wilde v. Clarkson, 6 T. R. 303 (disapproving Lonsdale v. Church, 2 T. R. 388); Tew v. Winterton, 3 Bro. Cr. 489, 29 Eng. Reprint, 660, 663, note. In this country the tendency of the decisions in the state courts seems to be in favor of the allowance of such interest. Perit v. Wallis (Pa. Sup. Ct.) 2 Dall. 252, 255, 1 L. ed. 370, 371; Williams v. Willson, 1 Vt. 266, 273; Judge of Probate v. Heydock, 8 N. H. 491, 494; Wyman v. Robinson, 73 Me. 384, 387, 40 Am. Rep. 360; Carter v. Thorn, 18 B. Mon. 613, 619. The bond in suit appears to have been made in California, but the contract was to be performed upon a government reservation within what was then the territory of Arizona. See Scotland County v. Hill, 132

U. S. 107, 117, 33 L. ed. 261, 265, 10 Sup. Ct. Rep. 26. We are referred to nothing in the law of that state or territory indicating a local rule. In this court, although the question seems not to have frequently arisen, the English rule has usually, but not invariably, been followed. M'Gill v. Bank of United States, 12 Wheat. 511, 515, 6 L. ed. 711, 712; Farrar v. United States, 5 Pet. 373, 385, 8 L. ed. 159, 164; Ives v. Merchants' Bank, 12 How. 159, 164, 165, 13 L. ed. 936-938; United States v. Broadhead, 127 U. S. 212, 32 L. ed. 147, 8 Sup. Ct. Rep. 1191.

In the state of the decisions, we may safely apply the rule followed by Mr. Justice Clifford in a case at the circuit, and we need go no further in order to overrule the contention raised by the government at the trial of the present case: "Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as [531] accrued from their own default in unjustly withholding payment after being notified of the default of the principal. United States v. Hills, 4 Cliff. 618, Fed. Cas. No. 15,369. This is, in effect, the same rule followed by this court in Ives v. Merchants Bank, 12 How. 159, 164, 165, 13 L. ed. 936-938. See also United States v. Quinn, 58 C. C. A. 401, 122 Fed. 65.

We find nothing else in the record requiring discussion. The result is that the judgment of the Circuit Court of Appeals should be reversed, and that of the Circuit Court affirmed.

Judgment reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

JOPLIN MERCANTILE COMPANY and Joseph Filler, Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 531-549.)

Indictment — conspiracy — aiding by averments of overt acts.

1. Clauses in an indictment charging a conspiracy to commit an offense against the United States, which set forth the overt acts, cannot be resorted to in aid of the averments of the clause setting forth the conspiracy, where the latter clause does not refer to the other clauses for certainty as to its meaning.

[For other cases, see Indictment, II. e, 3, b, in Digest Sup. Ct. 1908.]

Indictment — conspiracy — introducing liquor into Indian country — intrastate transactions.

2. An indictment charging a conspiracy to commit the offense against the United States of introducing liquor into the Indian country is properly construed as relating to intrastate shipments only, where the clause of the indictment which sets forth the conspiracy does not in terms allege as a part of it that the liquor was to be brought from without the state, and does not refer for light upon its meaning to the clauses which describe the overt acts as interstate transactions.

[For other cases, see Indictment, II. e, 3, b, in Digest Sup. Ct. 1908.]

Indictment — sufficiency to support conviction.

3. The omission of any distinct averment in an indictment charging a conspiracy to commit the offense against the United States of introducing intoxicating liquors into the Indian country, that the conspiracy was to introduce such liquors from without the state, cannot be regarded after verdict as a defect in form, to be ignored under U. S. Rev. Stat. § 1025, Comp. Stat. 1913, § 1691, where the court has before it only the strict record, and therefore cannot say that the trial proceeded upon a different theory from that indicated by the indictment, or that its averments were supplemented by the proofs.

[For other cases, see Indictment, II. g, in Digest Sup. Ct. 1908.]

Indians — Federal regulation — intoxicating liquors — implied repeal — admission of state.

4. Pending the continuance, conformably to the Oklahoma enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), § 3, of the prohibition under state laws, of the manufacture and sale of intoxicating liquors in the former Indian Territory, and the introduction of such liquors from other parts of the state into that territory, the provisions of the act of March 1, 1895 (28 Stat. at L. 693, chap. 145), § 8, against the introduction of liquors into the Indian Territory, are not enforceable so far as they relate to intrastate transactions.

[For other cases, see Indians, II.; States, XI.; Statutes, III. b, in Digest Sup. Ct. 1908.]

Indictment — sufficiency — introducing liquor into Indian country.

5. The destination of intoxicants is sufficiently averred to have been in the Indian country, under an indictment charging a conspiracy to commit the offense against the United States of introducing liquor into the Indian country, contrary to the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), where, among the contemplated destinations set forth, are "other parts and portions of that part of Oklahoma which lies within the Indian country."

[For other cases, see Indictment, II. e, 3, b, in Digest Sup. Ct. 1908.]

[No. 648.]

Argued January 11, 1915. Decided February 23, 1915.

NOTE.—On Federal control of Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a conviction in the District Court for the Southwestern Division of the Western District of Missouri of a conspiracy to commit the offense against the United States of introducing intoxicating liquors into the Indian country. Affirmed.

See same case below, 131 C. C. A. 160, 213 Fed. 926.

The facts are stated in the opinion.

Mr. **Paul A. Ewert** argued the cause, and, with Mr. C. H. Montgomery, filed a brief for petitioners:

If a charge of violating the act of 1895 can be read into the indictment, it is bad, because it fails to allege that the conspiracy was to introduce the intoxicating liquor into Indian Territory from a point without the state of Oklahoma.

Ex parte Webb, 225 U. S. 681, 56 L. ed. 1255, 32 Sup. Ct. Rep. 769; United States v. Wright, 229 U. S. 226–237, 57 L. ed. 1160–1167, 33 Sup. Ct. Rep. 630.

While the general rule is that an indictment which charges a statutory crime in the language of a statute is sufficient when the statute fully, directly, and with certainty sets forth all the elements of the crime (Rupert v. United States, 104 C. C. A. 255, 181 Fed. 87; Ledbetter v. United States, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774), yet it is equally well established that an indictment in the words of a statute is insufficient, where the statute does not fully, directly, and with certainty set forth all the elements necessary to constitute the offense (Morris v. United States, 88 C. C. A. 532, 161 Fed. 672; Keck v. United States, 172 U. S. 434, 43 L. ed. 505, 19 Sup. Ct. Rep. 254); and, furthermore, the material elements of an offense, whether statutory or otherwise, must always be stated clearly and explicitly, and not left to intendment, or reached by way of inference or argument (Kovoloff v. United States, 120 C. C. A. 605, 202 Fed. 475).

In the charge of conspiracy the union for an unlawful purpose constitutes the crime, and the allegations of the overt act do not so aid the allegation of conspiracy as to give the offense charged in the conspiracy section the criminal quality that is absent without the allegations of the overt act.

United States v. Britton, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Dealy v. United States, 152 U. S. 539, 547, 38 L. ed. 545, 548, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; Bannon v. United States, 156 U. S. 464, 468, 469, 39 L. ed. 494, 496, 497, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 328.

The court should have taken judicial notice of the fact that the city of Tulsa is not in the Indian country.

United States Exp. Co. v. Friedman, 112 C. C. A. 219, 191 Fed. 673; Evans v. Victor, 122 C. C. A. 531, 204 Fed. 361.

If the indictment does charge a conspiracy to commit an offense against the act of 1895, and a conspiracy to commit an offense against the act of 1897, then the indictment is bad for duplicity.

John Gund Brewing Co. v. United States, 122 C. C. A. 331, 204 Fed. 17.

Assistant Attorney General **Wallace** argued the cause and filed a brief for respondent:

Petitioners' insistence that the overt acts cannot be looked to as a part of the description of the offense apparently disregards the fact that, under § 37 of the Criminal Code of the United States, the offense there defined is not merely the unlawful agreement, but such agreement plus an overt act.

Hyde v. United States, 225 U. S. 347, 359, 56 L. ed. 1114, 1123, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614.

Nothing but the application of some highly technical rule, having no rightful place in modern criminal pleading, would permit resort to the description of the overt acts for the purpose of showing the venue, and an offense within the period of limitations (Hyde v. United States, 225 U. S. 347, 356, 367, 56 L. ed. 1114, 1121, 1126, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614; and Brown v. Elliott, 225 U. S. 392, 400, 401, 56 L. ed. 1136, 1140, 32 Sup. Ct. Rep. 812), and deny all reference to such acts for the purpose of showing some other necessary averment.

The indictment is one for conspiracy, and, as said by this court in Williamson v. United States, 207 U. S. 425, 447, 52 L. ed. 278, 290, 28 Sup. Ct. Rep. 163, "certainty, to a common intent, sufficient to identify the offense which the defendant conspired to commit, is all that is requisite in stating the object of the conspiracy." The indictment in the case at bar certainly meets this test.

If an indictment charging the whole of the reservation, or the whole of the Indian Territory, to be "Indian country," is good, an indictment charging parts of either, or of Oklahoma, to be "Indian country," should be equally good.

Pronovost v. United States, 232 U. S. 487–489, 58 L. ed. 696, 697, 34 Sup. Ct. Rep. 391; Hall v. United States, 168 U. S. 632, 639, 42 L. ed. 607, 609, 18 Sup. Ct. Rep. 237; Bartell v. United States, 227 U. S. 427, 433, 57 L. ed. 583, 585, 33 Sup. Ct. Rep. 333;

Hendricks v. United States, 223 U. S. 178, 184, 56 L. ed. 394, 396, 32 Sup. Ct. Rep. 313; Dunbar v. United States, 156 U. S. 185, 192, 39 L. ed. 390, 393, 15 Sup. Ct. Rep. 325; Schaap v. United States, 127 C. C. A. 415, 210 Fed. 853.

Reversal cannot now be supported by a showing that the description of the places in the Indian country should have been set forth in the indictment in greater detail. Petitioners should have moved for a bill of particulars if they "desired further specification and identification," but this they did not do, so far as the record shows. Here again the defect, if any, resolves itself into one of form, and for that reason would preclude a reversal.

Rosen v. United States, 161 U. S. 29, 32, 34, 40 L. ed. 606–608, 16 Sup. Ct. Rep. 434, 480; Hendricks v. United States, 223 U. S. 178, 184, 56 L. ed. 394, 396, 32 Sup. Ct. Rep. 313.

Furthermore, the contention of petitioners is opposed to the ruling of this court in Williamson v. United States, 207 U. S. 425, 449, 52 L. ed. 278, 291, 28 Sup. Ct. Rep. 163, to the effect that an indictment charging a conspiracy to commit an offense need not state all the elements of such offense "with technical precision."

See also Thomas v. United States, 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897; Ching v. United States, 55 C. C. A. 304, 118 Fed. 538.

The offense is the conspiracy, and the conspiracy would be single, no matter how many repeated violations of law may have been the object thereof.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Heike v. United States, 227 U. S. 131, 139, 57 L. ed. 450, 453, 33 Sup. Ct. Rep. 226; John Gund Brewing Co. v. United States, 124 C. C. A. 268, 206 Fed. 386; State v. Sterling, 34 Iowa, 443; State v. Wilson, 121 N. C. 655, 28 S. E. 416; Bishop, New Crim. Proc. 2d ed. § 226, p. 1369.

It is not the grounds upon which the circuit court of appeals bedded its judgment that can be made the basis of reversal in this court, but only error in the judgment itself.

M'Clung v. Silliman, 6 Wheat. 598, 5 L. ed. 340; Ex parte Crane, 5 Pet. 190, 204, 8 L. ed. 92, 97.

It is plain that no substantial rights of petitioners have been prejudiced, and as the indictment states an offense under § 37 of the Criminal Code, the judgment of conviction should be affirmed.

Connors v. United States, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951; Williams v. United States, 168 U. S. 382, 389, 42 L. ed. 509, 512, 18 Sup. Ct. Rep. 92.

Messrs. M. K. Cruce, A. C. Cruce, C. B. Stuart, Norman R. Haskell, and E. G. McAdams filed a brief as *amici curiæ*.

Mr. Justice Pitney delivered the opinion of the court:

In the district court of the United States for the southwestern division of the western district of Missouri the petitioners, Joplin Mercantile Company and Joseph Filler, with others, were indicted, under § 37 of the Criminal Code (act of March 4, 1909, 35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, § 10,201), formerly § 5440 Rev. Stat.; the charge being that at Joplin, Missouri, within the jurisdiction of the court, the defendants did unlawfully, feloniously, etc., "conspire together to commit an offense against the United States of America, to wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spirituous, [535] vinous, and other intoxicating liquors into the Indian country which was formerly the Indian Territory, and now is included in a portion of the state of Oklahoma, and into the city of Tulsa, Tulsa county, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into other parts and portions of that part of Oklahoma which lies within the Indian country." Overt acts are alleged, each of which consisted in delivering to an express company in Joplin certain packages of intoxicating liquors, to be transported thence to Tulsa, Oklahoma, alleged to be within the Indian country. A demurrer and a motion to quash having been overruled, petitioners pleaded to the indictment, were tried and found guilty. A motion in arrest of judgment having been denied, they sued out a writ of error from the circuit court of appeals, where the only question raised was whether the indictment charged an offense against the laws of the United States; neither the evidence nor the charge of the trial court being brought up. The judgment of the district court was affirmed (31 C. C. A. 160, 213 Fed. 926), and the present writ of certiorari was applied for, principally upon the ground that the decision of the court of appeals was to some extent in conflict with the views expressed by this court in Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769, and United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630.

That clause of the indictment which sets forth the conspiracy does not in terms allege, as a part of it, that the liquor was to be brought from without the state of Oklahoma; nor does this clause refer, for light upon its meaning, to the clauses [illegible] set forth the overt acts. Hence, we

think the latter clauses can be resorted to in aid of the averments of the former. It is true, as held in Hyde v. Shine, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep 760, and Hyde v. United States, 225 U. S. 347, 359, 56 L. ed. 1114, 1123, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614, that a mere conspiracy, without overt act done to effect its object, is not punishable criminally under § 37 of the Criminal Code. But the averment [536] of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number, and although essential to the completion of the crime, are still, in a sense, something apart from the mere conspiracy, being "an act to effect the object of the conspiracy." For this reason, among others, it seems to us that where, as here, the averment respecting the formation of the conspiracy refers to no other clause for certainty as to its meaning, it should be interpreted as it stands. United States v. Britton, 108 U. S. 199, 205, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531. We therefore think the court of appeals properly treated this indictment as not charging that the liquors were to be introduced from another state, and correctly assumed in favor of the accused (supposing the law makes a distinction) that the design attributed to them looked only to intrastate commerce in intoxicants. The suggestion of the government that the omission of a distinct averment that the conspiracy was to introduce the liquors from without the state did not prejudice petitioners, and should be regarded after verdict as a defect in form, to be ignored under § 1025, Rev. Stat. (Comp. Stat. 1913, § 1691), cannot be accepted, since we have before us only the strict record, and therefore cannot say that the trial proceeded upon a different theory from that indicated by the indictment, or that its averments were supplemented by the proofs.

The offense against the laws of the United States that was the object of the conspiracy must have had reference to one or the other of two distinct prohibitions. The one is that arising from the act of July 23, 1892 (27 Stat. at L. 260, chap. 234), amending § 2139, Rev. Stat., and amended in its turn by the act of January 30, 1897 (29 Stat. at L. 506, chap. 109, Comp. Stat. 1913, § 4137). The other is § 8 of the act of March 1, 1895 (28 Stat. at L. 693, chap. 145). These are set forth in chronological order in 225 U. S. 671. The distinction now pertinent is that under the act of 1897: "Any person who shall introduce [537] or attempt to introduce any malt, spirituous, or vinous liquor . . . or *any ardent or intoxicating* liquor of any kind whatsoever *into the Indian country, which term shall include any Indian allotment* while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished," etc.; while the act of 1895 declares: "That any person, . . . who shall, in said [Indian] Territory, manufacture . . . any vinous, malt, or fermented liquors or any other intoxicating drinks . . . or who shall carry, or in any manner have carried, *into said territory*, any such liquors or drinks . . . shall, upon conviction thereof, be punished," etc. The former has to do with the introduction of liquor into the "Indian country;" the latter relates not to the Indian country as such, but to the Indian Territory as a whole, irrespective of whether it, or any particular part of it, remained "Indian country."

In Ex parte Webb, supra, we dealt with the effect of the Oklahoma enabling act, and the admission of the state thereunder, upon the prohibitions contained in the act of 1895, and held that this act remained in force so far as it prohibited the carrying of liquor from without the new state into that part of it which was formerly the Indian Territory. In United States v. Wright, supra, we held that the prohibition against the introduction of intoxicating liquors into the Indian country, found in the act of 1897, was not repealed with respect to intrastate transactions by the enabling act and the admission of the state. In the present case, the court of appeals held that transportation of intoxicating liquors from the westerly portion of Oklahoma to that part which was formerly Indian Territory was prohibited not only by the act of 1897, but by the act of 1895; holding that this act remained unrepealed as to intrastate commerce in intoxicating liquors, notwithstanding the intimations of [538] this court to the contrary in the Webb and Wright Cases. In behalf of the government it is now insisted that the indictment is clearly sustainable under the act of 1897, and that it is therefore unnecessary to pass upon the question raised about the act of 1895. But, in view of its importance, and the confusion that would probably result if the matter were left in uncertainty, we deemed it proper to allow the writ of certiorari, and now deem it proper to pass upon the merits of the question with respect to both acts.

The court of appeals correctly considered that the question whether the act of 1895 remains in force respecting intrastate transactions was not concluded by our decision in either the Webb or the Wright Cases.

The declaration upon the subject in 225 U. S., at p. 681, was based upon a concession by the government, and was stated in unqualified form in order to emphasize that the concession was fully accepted for the purposes of the decision. In the Wright Case, 229 U. S. at p. 236, we saw no reason to recall it, and so stated; but here again the point was not involved in the question to be decided. It was accepted *arguendo*, rather as an obstacle in the way of reaching the conclusion that the court did reach, upon grounds that held good, as we thought, notwithstanding the point conceded. As was well said by Mr. Chief Justice Marshall, in one of his great opinions, Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." And if this be true with respect to mere *dicta*, it is no less true of concessions made for the purpose of narrowing the range of discussion, or of testing, by assumed obstacles, the validity of the reasoning by which [539] the court reaches its conclusions upon the point submitted for decision.

The court of appeals declared that the effect of holding that the enabling act and the admission of the state repealed the law of 1895 as to importations from parts of Oklahoma not in Indian Territory would be that importations would remain prohibited from the north, south, and east of the territory, while those from the west would be turned over to the state; and that the provision of the enabling act requiring the Constitution of the new state to provide a scheme of liquor prohibition is of no validity if Oklahoma sees fit to repeal the prohibition, as it is said she is at liberty to do, being equal in power with the original states, and entitled to set aside all restrictions placed upon her that are not obligatory under the Constitution. Citing Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688. As indicating that the act was passed in part as an exertion of the power of guardianship over the Indians, and in part under the power to regulate commerce with them, the court pointed to the pledges of the Federal government, contained in repeated treaties, to protect the Indians of the Civilized Tribes against the evils of intercourse with people of the white race, especially with respect to the sale of intoxicating liquors; emphasizing the fact that Indian Territory contains the largest body of Indian population in the United States, from which the inference was drawn that Congress could not turn them over to the protection of the local authorities without running counter to the uniform practice of the Federal government in such matters; that § 1 of the enabling act [34 Stat. at L. 267, chap. 3335] expressly reserves full authority to the national government for the protection of the Indians and their property, and that protection against the liquor traffic has always been their greatest need; and that numerous statutes, passed about the time Oklahoma was admitted, to protect the Indians against the evils of intoxicating liquor, showed that Congress [540] intended to exercise this protection itself, and not to remit it to the state. The conclusion was reached that the liquor prohibition imposed upon the state by § 3 of the enabling act (quoted at large, 225 U. S. 677) was intended to secure the co-operation of the state authorities, and not to remit to the state the whole subject of the guardianship of the Indians so far as approach to them from the west was concerned. That since, even after admission of the state, there was nothing to prevent Congress from prohibiting importation of liquors into the Indian Territory, peopled, as it was, so largely by Indians, there was no reason to believe that the admission of the state was intended to repeal the 1895 law with respect to the western boundary of the Indian Territory; that, under the circumstances of that territory, the acts of 1892 and 1897 were inefficient for the protection of the Indians in this regard, while with the act of 1895 alone in force, prohibiting the carrying of liquor within the Indian Territory, it would not be unlawful to transport liquor from a point within that territory to an allotment therein; hence the necessity of maintaining in force at the same time the provisions of the acts of 1892 and 1897, prohibiting the introduction of liquor into the Indian country.

The argument has much weight. This court, when deciding the Webb and Wright Cases, fully appreciated the force of the considerations referred to, as will be manifest, we think, by reference to the opinions, especially that delivered in the former case. But it seems to us that the views expressed by the court below in the present case merely question the reasonableness of implying a repeal of the act of 1895, and hardly attribute full force to the very clear language of the enabling act. Upon the question of reasonableness, the fact that importations of liquor into the territory from the north, east, and south should remain subject to the interdict of the Federal law, while importations from the west

(unless originating [541] without the state) were remitted to state control, is not an anomalous result, but one rather characteristic of the inter-action of our Federal and state governments.

We pass on to state, in outline, the grounds upon which the judgment is assailed by counsel for petitioners, and in a separate argument by friends of the court. It is insisted that the provision of the enabling act requiring the state to forbid, under penalties, the introduction of intoxicating liquors from other parts of the state into the former Indian Territory can be upheld only by construing it as repealing the provisions of the act of 1895 so far as they deal with such intrastate transactions, because otherwise the enabling act would be repugnant to the commerce clause of the Constitution of the United States as an attempt to authorize concurrent regulation by state and Federal authority of commerce with the Indians, which, it is said, must be exclusively regulated either by state or by nation; that the enabling act may be reasonably construed as relinquishing to the state the exclusive control over commerce in intoxicating liquors between other parts of the state and the former Indian Territory, but not as a regulation of commerce with Indians, because, it is insisted, under the Constitution, Congress cannot delegate to a state the power to regulate commerce with the Indians, any more than the power to regulate interstate commerce; and hence the prohibition clause of the enabling act is to be sustained as a surrender to the state of jurisdiction over its own citizens, thereby declared by Congress to be no longer members of Indian tribes so far as commerce in intoxicating liquors is concerned; the enabling act being thus treated as in effect a determination by Congress that the tribal relations and guardianship of the Indians should cease, at least as to traffic in liquor between them and the citizens of other portions of the state, leaving the state to regulate this by means of the legislation that the enabling act required [542] it to enact on the subject. It is next argued that, the act of 1895 having been superseded as to intrastate transactions by the enabling act, it is beyond the power of Congress to continue it in force as to interstate transactions, and this for two reasons, both based upon the provision of § 9 of article 1 of the Constitution, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another:" (a) that the prohibition cannot be maintained as an exercise of the power to regulate interstate commerce, because in that aspect it *discriminates against* the state of Oklahoma by forbidding transportation of liquor into that state from without, while permitting the unrestricted transportation of liquor into the other states; and (b) that it cannot be sustained as an exercise of the power of Congress to regulate commerce with the Indian tribes because it gives a *preference to* the state of Oklahoma by permitting that state to regulate for itself the commerce in intoxicating liquors between the people of other parts of the state and the former Indian Territory, while denying to the people of all the other states the right to engage in such commerce with the same territory. The result sought to be deduced is that, by reason of the passage of the enabling act and the admission of the state thereunder, the act of 1895 cannot be sustained at all. It is said this does not impute to Congress the purpose to pass an act in excess of its powers under the Constitution; that the act when passed was justified not only as a regulation of commerce with the Indian tribes, but as an exercise of jurisdiction over territory then within the exclusive jurisdiction of the United States; and that it is now unconstitutional as to interstate transactions, not because of the want of power in Congress to originally pass it, but because of the changed conditions growing out of the admission of the state under an enabling act inconsistent with the continuance in force of the act of 1895. [543] And it is said that this question is not foreclosed by the decision in the Webb Case sustaining the act as to interstate transactions, because—and this is true—the question under § 9 of article 1 of the Constitution was not then raised. Citing Boyd v. Alabama, 94 U. S. 645, 648, 24 L. ed. 302, 303.

The reasoning, like the opposed reasoning of the court below, has force; but we think it has also elements of weakness. Thus,—to mention only one or two of these,—it is not easy to see how any practical preference is given to the state of Oklahoma in the way of permitting commerce in intoxicating liquors to be conducted between other portions of the state and the former Indian Territory while denied to the people of other states, when the very clause of the enabling act that operates, if any does, to destroy the former universality of the act of 1895, does not permit, but prohibits, commerce in liquors between the one part of the state and the other; the only difference here important being that, as to internal commerce, the state enforces the prohibition, while as to interstate commerce it is enforced by the United States. Nor is the suggestion convincing that the act of 1895 (if repealed as to intrastate commerce only) remains as a discriminatory

regulation of commerce between the states unfavorable to Oklahoma; for in this aspect it forbids not the introduction of liquors from other states into Oklahoma, but only their introduction into that particular part of it which, because of the larger population of Indians that it contains, and because of the previous treaties and the other circumstances pointed out in the Webb Case, Congress deemed to be properly entitled to that protection. Moreover, supposing that unconstitutional preferences must be deemed to arise from a partial repeal of the act of 1895 by the prohibitory provision of the enabling act, it would, we think, be more logical to avoid the constitutional difficulties by giving less force to that provison of the enabling act than by giving to it a force quite beyond [544] the expressed purpose of Congress. The result would be, if the argument of petitioners as to the impossibility of concurrent regulation of intrastate transactions in liquors with the former Indian Territory by state and nation is sound, that the state prohibition of the liquor traffic in the territory and between the other parts of the state and the territory would have to remain in abeyance until Congress should expressly repeal the act of 1895.

Enough has been said to show the principal grounds of respective contentions. And it is curious to observe that on each side the argument rests largely upon the supposition that the implied repeal of the act of 1895, if deduced from the inconsistent provisions of the enabling act upon the same subject, operated in effect to legalize commerce in intoxicating liquors between the eastern and the western portions of the state. But since the principal inconsistency is that in one case the prohibition of the traffic is to be enforced by the United States, and in the other case by the state, many of the difficulties disappear as soon as clearly stated. We need not further analyze the constitutional argument submitted in behalf of petitioners, and must not be understood as committed respecting it.

Conceding that the question with which we have to deal is by no means easy of solution, we think a right solution may be had by considering the terms of the enabling act in the light of the situation that was presented to Congress, and in view of its constitutional powers. The situation of the Indians and the Indian lands at the time is so familiar that it need not be here rehearsed. In addition to what has been said upon the subject in our recent decisions, reference may be made to the Committee Report that accompanied the bill in the House of Representatives (H. R. Report No. 496, January 23, 1906, 59th Cong. 1st Sess. vol. 1). There was a large population of Indians in the Indian Territory, but a much larger [545] population of whites. Under the provisions of the Curtis act (30 Stat. at L. 495, chap. 517), towns had been organized and were growing rapidly, and much of the land had been allotted. Congress no doubt had in mind the existing agreements with the Five Civilized Tribes, some of them recently made, by which, in one form or another, the United States had agreed to maintain laws against the introduction, sale, etc., of liquors within the territory of the tribes (225 U. S. 684-686). In the 1st section of the enabling act a reservation was made of the authority of the United States "to make any law or regulation respecting such Indians, their lands, property, or other rights, by treaties, agreement, law, or otherwise, which it would have been compétent to make if this act had never been passed." The authority of Congress to preserve in force existing laws or enact new ones after statehood, with reference to traffic or intercourse with the Indians, including the liquor traffic, was well established; the power of Congress over such commerce being plenary, and independent of state boundaries. United States v. Holliday, 3 Wall. 407, 418, 18 L. ed. 182, 186; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 195, 197, 23 L. ed. 846-848, s. c. 108 U. S. 491, 27 L. ed. 803, 2 Sup. Ct. Rep. 906; United States v. Kagama, 118 U. S. 375, 383, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; Dick v. United States, 208 U. S. 340, 353, 52 L. ed. 520, 525, 28 Sup. Ct. Rep. 399; Hallowell v. United States, 221 U. S. 317, 323, 55 L. ed. 750, 753, 31 Sup. Ct. Rep. 587; Ex parte Webb, 225 U. S. 663, 683, 56 L. ed. 1248, 1256, 32 Sup. Ct. Rep. 769; United States v. Wright, 229 U. S. 226, 237, 57 L. ed. 1160, 1166, 33 Sup. Ct. Rep. 630; Perrin v. United States, 232 U. S. 478, 483, 58 L. ed. 691, 694, 34 Sup. Ct. Rep. 387; Johnson v. Gearlds, 234 U. S. 422, 438, 58 L. ed. 1383, 1390, 34 Sup. Ct. Rep. 794.

Still, the territory was to be erected into a state, and the Indians themselves were to have the rights of citizens. As we have already held in the Wright Case, 229 U. S. 226, 237, 57 L. ed. 1160, 1166, 33 Sup. Ct. Rep. 630, it was the purpose to maintain in full force the acts of 1892 and 1897 the same in this state as in other states where Indian country or Indian allotments held in trust by the government, or Indians as wards of the government, were [546] found. And while we intimate no question that Congress could have maintained the more sweeping internal prohibition of the 1895 act, this would have interfered to a greater extent

with the control of the new state over its internal police.

Reading the enabling act as a whole, in the light of this situation, including the declaration in its 1st section of the continued authority of the government of the United States respecting the Indians, the specific requirement in the 3d section that the state Constitution should contain a stringent prohibition of the manufacture, sale, etc., of intoxicating liquors within the Indian Territory and the Reservations for a period of twenty-one years from the date of admission, and thereafter until amendment of the Constitution, and the express provision that any person who should manufacture, etc., or should ship or convey, such liquors from other parts of the state into the Indian Territory or Reservations, should be punished both by fine and imprisonment, we think the inference is irresistible that it was the purpose of Congress that the people of the state should be intrusted with actual power and control over the liquor traffic between the other portions of the state and the territory and reservations, and that, for the time, at least, they should have the same control that is enjoyed by other states, it being, of course, subject to the effect of the acts of 1892 and 1897.

Without deciding that such control must necessarily be exclusive of co-existing Federal jurisdiction over the same subject-matter, it seems to us that concurrent jurisdiction would be productive of such serious inconvenience and confusion, that, in the absence of an express declaration of a purpose to preserve it, we are constrained to hold that the active exercise of the Federal authority was intended to be at least suspended pending the exertion by the state of its authority in the manner prescribed by the enabling act.

[547] Still, the act of 1895 was not expressly repealed; and it must have been in contemplation that the state might amend its Constitution and laws upon the subject, at least, upon the expiration of twenty-one years; and we do not intend to hold, nor even to intimate, that the effect and operation of the act of 1895 upon intrastate commerce in liquors would still remain in abeyance after a repeal or material modification of the state prohibition upon the subject. The subject-matter of this legislation is quite different from that which was under consideration in Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; and it does not follow from what was there decided that the plan of intrastate prohibition proposed to the state by Congress in the enabling act, and accepted by the state, would be subject to repeal by the state within the prescribed period. Nor does it follow from anything we have said that Congress may not, during that period, by re-enacting in substance the act of 1895, or by appropriate affirmative legislation in some other form, resume the Federal control over the liquor traffic in and with what was Indian Territory, by virtue of its general authority over Indian relations. These and kindred questions may be dealt with if and when occasion arises.

Our opinion upon this branch of the case is that, pending the continuance of state prohibition as prescribed by the enabling act, the provisions of the act of 1895 respecting intrastate transactions are not enforceable.

But, as already held in United States v. Wright, supra, the acts of 1892 and 1897 have not been repealed by the enabling act with respect to intrastate commerce in intoxicants, any more than with respect to commerce that crosses state lines. And it remains to be considered whether the indictment sufficiently sets forth a conspiracy to commit an offense against these acts. This turns upon the destination of the liquors as intended by the conspirators. It is averred that three several destinations [548] were in contemplation: (a) the Indian country, which was formerly the Indian Territory, and now is included in a portion of the state of Oklahoma; (b) the city of Tulsa, Tulsa county, Oklahoma, which was formerly within and is now a part of what is known as the Indian country; and (c) other parts and portions of that part of Oklahoma which lies within the Indian country. It is said by petitioners that Tulsa was established as a town under the Curtis act of June 28, 1898, and the Creek Agreement (act of March 1, 1901, 31 Stat. at L. 861, chap. 676), and that we ought to take judicial notice of what is said to appear upon the records of the Department of the Interior, that on February 21, 1901, the exterior limits of the town were approved and the tract thus reserved from allotment, and set aside for town-site purposes; that unrestricted patents have since been issued, and that, at the time of the alleged offense, Tulsa was a city of 30,000 people. For the sake of simplicity we assume the facts to be so, without deciding that we may take judicial notice of them. But we think the third clause, "other parts and portions of that part of Oklahoma which lies within the Indian country," is sufficient to sustain the indictment in this respect. It is objected by petitioners that this is vague and indefinite and does not apprise the defendants with certainty of the offense with which they stand charged so as to enable

them to prepare the defense; that there were more than 100,000 allotments made to Indians of the Five Civilized Tribes alone, and that the courts should take judicial notice of the fact that the restrictions upon three fourths of the allotments of mixed bloods have been removed by direct legislation of Congress, not to speak of the lands taken out of Indian country by being included within established town sites. But upon this record we are bound to assume that the indictment sets forth the agreement as it was made by the convicted defendants. That agreement looked to the introduction of intoxicating [549] liquors into those portions of the state that lie within the Indian country. Presumably the defendants did not, at the time of conspiring, specify the particular points in the Indian country to which the liquor should be shipped; nevertheless, the conspiracy could not be carried out as made without violating the act of 1897.

The indictment is therefore sufficient, and the judgment should be affirmed.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

R. P. WILLIAMS and J. B. Carr, as Partners under the Firm Name of R. P. Williams & Company, Plffs. in Err.,
v.
UNITED STATES FIDELITY & GUARANTY COMPANY.

(See S. C. Reporter's ed. 549–557.)

Bankruptcy — discharge — obligation to surety.

A discharge in bankruptcy acquits an express obligation of the bankrupts to indemnify their surety against loss by reason of their joint bond conditioned to secure their faithful performance of a building contract, broken before the bankruptcy proceedings were begun, although the surety did not pay the consequent damage until thereafter, since within the intendment of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), provable debts, which, under § 17, are released by the discharge, include all liabilities of the bankrupts founded on contract, express or implied, that, at the time of the bankruptcy, were fixed in amount or susceptible of liquidation, and complete protection and an ample remedy is provided in behalf of the surety upon any such obligation.

[Claims discharged in bankruptcy, see Bankruptcy, XI. c, in Digest Sup. Ct. 1908.]

[No. 80.]

Argued January 18, 1915. Decided February 23, 1915.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Atlanta, enforcing the liability of principals to a surety, to which such principals pleaded their discharge in bankruptcy as a bar. Reversed.

See same case below, 11 Ga. App. 635, 75 S. E. 1067.

The facts are stated in the opinion.

Messrs. J. Howell Green and Alexander C. King argued the cause and filed a brief for plaintiffs in error:

The purpose of the bankruptcy act and of all insolvency laws is to distribute the assets of the bankrupt fairly and equitably among his creditors, and at the same time to discharge the bankrupt from his debts and liabilities, and enable him to take a fresh start in life, freed from his burden of debt.

Allen v. Ferguson, 18 Wall. 1, 4, 21 L. ed. 854, 855; Wiswall v. Campbell, 93 U. S. 347, 350, 23 L. ed. 923, 924; Traer v. Clews, 115 U. S. 528, 541, 29 L. ed. 467, 471, 6 Sup. Ct. Rep. 155; Wetmore v. Markoe, 196 U. S. 68, 77, 49 L. ed. 390, 394, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; Re Gerson, 6 Am. Bankr. Rep. 12.

Bankruptcy acts should be liberally construed in favor of honest debtors.

Mims v. Lockett, 20 Ga. 474; Black, Interpretation of Laws, p. 302.

The claim sued upon was a valid, existing claim, subject to proof in bankruptcy at the time that the petition in bankruptcy was filed.

1 Remington, Bankr. §§ 644, 645; Lewis v. Crockett, 3 Bibb, 197; Ramsay v. Gervais, 2 Bay, 145, 1 Am. Dec. 635; Rockefeller v. Donnely, 8 Cow. 629; Garrett v. Logan, 19 Ala. 346; Banfield v. Marks, 56 Cal. 185; Loeser v. Alexander, 24 Am. Bankr. Rep. 80; 1 Loveland, Bankr. p. 627.

If the claim in question falls within § 63a (4), though unliquidated at the time the petition in bankruptcy was filed, it could have been liquidated under § 63b, and proven, all facts necessary to the liquidation having then transpired and being ascertainable; that is, default having been made by Williams & Company, the trustees having completed the building, and the amount expended by them in excess of the contract price being ascertained. The loss had been

NOTE.—As to when discharge of principal in bankruptcy will release surety on a bond given by the principal in an action at law—see notes to Crook-Horner Co. v. Gilpin, 28 L.R.A.(N.S.) 233, and Stull v. Beddeo, 14 L.R.A.(N.S.) 507.

suffered by the trustees, and therefore incurred by the surety, and when incurred by the surety, though not paid, under the express contract of R. P. Williams & Company, they became liable to the surety, and the claim against them and in favor of the surety was provable in bankruptcy.

1 Remington, Bankr. §§ 641-644; Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 447, 448, 53 L. ed. 591, 593, 594, 29 Sup. Ct. Rep. 332; Mace v. Wells, 7 How. 272, 12 L. ed. 698; Dunbar v. Dunbar, 190 U. S. 340, 345, 47 L. ed. 1084, 1090, 23 Sup. Ct. Rep. 757; Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232; Crawford v. Burke, 195 U. S. 176, 193, 49 L. ed. 147, 153, 25 Sup. Ct. Rep. 9.

Under § 63b the surety could have liquidated this claim in the bankruptcy court as well as in the circuit court in Florida

1 Remington, Bankr. §§ 712-714; 1 Loveland, Bankr. pp. 600-602.

The expression "unliquidated claims" is used in the act of 1898 in the same sense as "contingent claims" under the act of 1841. While the previous act expressly provided for the proof of contingent claims, it was held by this court that certain contingent claims could not be proved, because it was wholly uncertain at the time of bankruptcy whether a duty or liability would ever arise under them.

Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232.

If the facts necessary to fix liability had transpired, though the amount of the liability had not been determined, the claim was provable. The same is true under the present act.

Mace v. Wells, 7 How. 272, 12 L. ed. 698; Re Gerson, 6 Am. Bankr. Rep. 11; Re Smith, 17 Am. Bankr. Rep. 112; Re James Dunlap Carpet Co. 20 Am. Bankr. Rep. 882; Re Caloris Mfg. Co. 24 Am. Bankr. Rep. 609; 1 Loveland, Bankr. pp. 598, 609, §§ 295, 310; Re Sterm, 8 Am. Bankr. Rep. 569.

No claim could have arisen in favor of defendant in error under the application without there first having been a breach of the bond by Williams & Company, and the law raised the liability of Williams & Company the instant the breach occurred, regardless of the contract contained in the application for the bond. This contract only expressed what the law already implied.

27 Am. & Eng. Enc. Law, 2d ed. 468; 1 Remington, Bankr. § 644; Wood v. United States Fidelity & G. Co. 16 Am. Bankr. Rep. 21.

"Incur" means to become "liable for," and "loss, costs, damages, charges, and expenses" are "incurred" whenever one becomes liable therefor, and not when paid.

Smith v. Howell, 6 Exch. 739, 20 L. J. Exch. N. S. 377, 86 Revised Rep. 458; Flanagan v. Baltimore & O. R. Co. 83 Iowa, 643, 50 N. W. 60; Webster's Dict.; Beekman v. Van Dolsen, 70 Hun, 294, 24 N. Y. Supp. 414; Jarvis v. Sewall, 40 Barb. 449; Mewburn v. Mackelcan, 19 Ont. App. Rep. 738; Boyd v. Robinson, 20 Ont. Rep. 407; Mayne, Damages, 4th ed. 307; Bank of Indian Territory v. Eckles, 19 Okla. 163, 91 Pac. 695; Cousins v. Paxton & G. Co. 122 Iowa, 468, 98 N. W. 277; Jones v. Childs, 8 Nev. 124; Chace v. Hinman, 8 Wend. 452, 24 Am. Dec. 39; McBeth v. McIntyre, 57 Cal. 50; Ham v. Hill, 29 Mo. 278; McNeal v. Waco, 89 Tex. 86, 33 S. W. 322; Wood v. United States, 16 Am. Bankr. Rep. 23; Smith v. Teer, 21 U. C. Q. B. 412.

Equitable claims, as well as legal claims, are subject to proof in bankruptcy. A surety always has an equitable claim against his principal, and can always go into equity to enforce it.

Sanford v. United States Fidelity & G. Co. 116 Ga. 693, 43 S. E. 61; Howell v. Cobb, 2 Coldw. 104, 88 Am. Dec. 591; 1 Remington, Bankr. § 611; I Loveland, Bankr. §§ 603, 625, 626, pp. 86, 87; 32 Cyc. 248.

When a claim is provable in bankruptcy, a discharge in bankruptcy is a bar to such claim in all cases where the claim is scheduled, or where the creditor has notice of the proceeding.

Collier, Bankr. 8th ed. p. 308; 2 Loveland, Bankr. pp. 1369, 1370.

This is true, whether the claim be liquidated or unliquidated, and whether it be proved or not proved.

2 Remington, Bankr. §§ 2732, 2734, 1 Remington, Bankr. § 704.

Where it appears that a discharge has been granted a bankrupt, and this discharge is pleaded in bar to a suit, the burden is always on the creditor setting up a claim to attack the discharge, and show want of notice or any other defect that will prevent the bar.

2 Remington, Bankr. § 2685; Broadway Trust Co. v. Manheim, 14 Am. Bankr. Rep. 123.

Mr. Alexander W. Smith, Jr., argued the cause, and, with Mr. Alexander Smith, filed a brief for defendant in error:

A "provable debt" means an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in § 63(a) as "provable debts."

1 Remington, Bankr. § 628, p. 373.

And the question whether or not a debt is provable turns upon its status at the time of the filing of the petition.

1 Remington, Bankr. § 629, p. 374; Za-

velo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664.

Section 63b adds nothing to the class of debts prescribed under § 63a. It merely permits the liquidation of an unliquidated claim provable under the latter provision.

Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; Colman Co. v. Withoft, 115 C. C. A. 222, 195 Fed. 250; Re Roth, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 673.

Also § 63a (4) is subject to the limitation contained in § 63a (1) that debts, to be provable, must be "absolutely owing at the time of the filing of the petition."

Re Swift, 50 C. C. A. 264, 112 Fed. 316; Re Adams, 130 Fed. 381; Re Roth, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 673.

Contingent claims are not provable under the act of 1898.

1 Remington Bankr. § 640, p. 381; Re Roth, supra; Colman Co. v. Withoft, 115 C. C. A. 222, 195 Fed. 250.

A "contingent claim" is one which has not accrued, and which is dependent upon the happening of some future event.

2 Words & Phrases, p. 1498.

Sureties and indorsers on commercial paper and others similarly situated have a provable claim against their bankrupt principal even though at that time there has been no default on the part of the bankrupt.

1 Remington, Bankr. §§ 642, 644, 645, pp. 383, 384, 386.

But there is a very clear distinction between this class of cases and the case at bar, involving a surety for the "faithful performance" of a contract or duty by the bankrupt.

1 Remington, Bankr. § 647, p. 389.

Such claims are contingent:

First, on a breach by the bankrupt of the contract or duty.

Second, on actual pecuniary loss suffered by the surety as a consequence of said breach by the bankrupt.

And the existence of either or both of said contingencies at the time of the filing of the petition in bankruptcy renders the claim of the surety nonprovable, and therefore unaffected by the bankrupt's discharge.

Goding v. Roscenthal, 180 Mass. 43, 61 N. E. 222, 6 Am. Bankr. Rep. 641, note; Clemmons v. Brinn, 36 Misc. 157, 72 N. Y. Supp. 1066, 7 Am. Bankr. Rep. 714; Insley v. Garside, 58 C. C. A. 119, 121 Fed. 699.

The distinction which reconciles the positions of both sides of this case and the authorities cited by them respectively, is that which exists between a contract assuming liability, and one indemnifying against loss. The terms of such contracts fix the law applicable to them respectively.

The distinction is clearly pointed out in the following cases:

Contracts assuming liability.

Fenton v. Fidelity & C. Co. 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096; Anoka Lumber Co. v. Fidelity & C. Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 354; Tucker v. Murphey, 114 Ga. 662, 40 S. E. 836; Thomas v. Richards, 124 Ga. 942, 53 S. E. 400; Mills v. Dow (Mills v. Allen) 133 U. S. 423, 432, 33 L. ed. 717, 720, 10 Sup. Ct. Rep. 413; Johnson v. Risk, 137 U. S. 300, 308, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111.

Contracts indemnifying against loss.

Carter v. Ætna L. Ins. Co. 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178; Allen v. Ætna L. Ins. Co. 7 L.R.A.(N.S.) 958, and note, 76 C. C. A. 265, 145 Fed. 881; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; Harvey v. Daniel, 36 Ga. 562; Wicker v. Hoppock, 6 Wall. 94, 18 L. ed. 752; Insley v. Garside, 58 C. C. A. 119, 121 Fed. 699; National Bank v. Bigler, 83 N. Y. 62.

The contract recovered on in the case at bar is a contract of indemnity and falls within the latter class, in all of which it is well nigh universally held that to recover for a breach, loss or damage must be sustained by actual payment of money, or its equivalent under the law.

16 Am. & Eng. Enc. Law, 2d ed. 178 (a) and notes; 22 Cyc. 79, 87, 90–92.

Mr. Justice McReynolds delivered the opinion of the court:

This cause presents the following question: Does a discharge in bankruptcy acquit an express obligation of the principal to indemnify his surety against loss by reason of their joint bond, conditioned to secure his faithful performance of a building contract broken prior to the bankruptcy, when the surety paid the consequent damage thereafter?

R. P. Williams and J. B. Carr, as partners, entered into a contract with certain school trustees—April, 1900—to construct a building in Florida; and, with defendant in error company as surety, gave a bond guarantying its [553] faithful performance. Contemporaneously with the execution of the bond, and as a condition thereto, the partners made a written application to the company, in which they obligated themselves "to indemnify the said United States Fidelity & Guaranty Company against all loss, costs, damages, charges, and expenses whatever, resulting from any act, default, or neglect of ours, that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof."

November 9, 1900, the partners abandoned the contract; the trustees took pos-

session and completed the structure April 13, 1901, and on May 14th following they made adequate demands for payment of the amount expended beyond the contract price. This being refused, they brought suit and recovered a judgment against the company July 1, 1904, which it satisfied February 20, 1905, by paying $5,475.36.

Voluntary petitions were filed by partnership and members May 28, 1901, and all were immediately adjudged bankrupt. The schedules specified the building contract, its breach and the bond, and their adequacy is not now questioned. In due time the school trustees proved their claim and it was allowed. October 5, 1901, the petitioners received their discharges. No dividend was declared, all the assets being required for administration expenses.

Defendant in error brought suit in the city court of Atlanta against the firm and its members—August, 1911,—setting up the written promise made to it when the bond was executed, and asking judgment for the amount paid in satisfaction of the recovery thereon, together with attorneys' fees. The matter was submitted upon an agreed statement of facts, and judgment went in favor of the company; this was affirmed by the court of appeals of Georgia (11 Ga. App. 635, 75 S. E. 1067), and the cause is here upon writ of error.

[554] The state court treated the written contract of indemnity between the bankrupts and the surety company as the expression of what would have been implied, and declared: "The bankrupts owed the surety nothing at the time the petition in bankruptcy was filed, because the surety had paid nothing for their benefit, and the relation of debtor and creditor did not exist between them until after actual payment by the surety. . . . The surety had no claim against the bankrupts which it could file in its own name. . . . The liability to the surety by the bankrupts was altogether contingent and might never have arisen. Indeed, we hold that at the time the petition in bankruptcy was filed the surety had no claim or debt against the bankrupt which could have been proved in the bankrupt court under § 63 of the bankrupt act."

Counsel for the company "contend that the claim at bar was subject to two contingencies, one of which, to wit, the sustaining or incurring of actual pecuniary loss, resultant to the principal's act, had not arisen at the time of the filing of the petition. Therefore said claim was not an unliquidated claim upon an express contract absolutely owing at the time. It was a contingent claim, and as such not provable, and therefore not affected by the bankrupt principal's discharge."

If the doctrine announced by the court below and maintained here by counsel is correct, a discharge in bankruptcy may have very small value for the luckless debtor who has faithfully tried to secure his creditors against loss; and, in effect, a demand against him may be kept alive indefinitely, according to the interest or caprice of his surety.

It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to [555] start afresh free from the obligations and responsibilities consequent upon business misfortunes. Wetmore v. Markoe, 196 U. S. 68, 77, 49 L. ed. 390, 394, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; Zavelo v. Reeves, 227 U. S. 625, 629, 57 L. ed. 676, 678, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; Burlingham v. Crouse, 228 U. S. 459, 473, 57 L. ed. 920, 926, 46 L.R.A.(N.S.) 148, 33 Sup. Ct. Rep. 564. And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent. Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Re Chapman, 166 U. S. 661, 667, 41 L. ed. 1154, 1158, 17 Sup. Ct. Rep. 677.

The statute (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), as amended in 1903 (32 Stat. at L. 797, chap. 487, Comp. Stat. 1913, § 9586), provides: Sec. 17. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations." Sec. 63. "Debts of the bankrupt may be proved and allowed against his estate which are . . . (4) founded upon an open account, or upon a contract, express or implied; . . . Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." Sec. 1. (11) "'Debt' shall include any debt, demand, or claim provable in bankruptcy." Sec. 2. Courts of bankruptcy have jurisdiction to "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." Sec. 57i. "Whenever a creditor whose claim against a bank-

rupt estate is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." General Order 21.—4. [556] "The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt." Sec. 16. "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt."

Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which, at the time of the bankruptcy, were fixed in amount or susceptible of liquidation. Dunbar v. Dunbar, 190 U. S. 340, 350, 47 L. ed. 1084, 1092, 23 Sup. Ct. Rep. 757; Crawford v. Burke, 195 U. S. 176, 187, 49 L. ed. 147, 151, 25 Sup. Ct. Rep. 9; Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 448, 53 L. ed. 591, 593, 29 Sup. Ct. Rep. 332; Zavelo v. Reeves, 227 U. S. 625, 631, 57 L. ed. 676, 678, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664. It provides complete protection and an ample remedy in behalf of the surety upon any such obligation. He may pay it off and be subrogated to the rights of the creditor; if the creditor fails to present the claim for allowance against the estate, he may prove it; and in any event he has abundant power, by resort to the court or otherwise, to require application of its full *pro rata* part of the bankrupt's estate to the principal debt. To the extent of such distribution the obligation of the bankrupt to the surety will be satisfied. Although, unlike the act of 1867, the present one contains no express provision permitting proof of contingent claims, it does in substance afford the surety on a liability susceptible of liquidation the same relief possible under the earlier act, *i. e.*, application to the principal debt of all dividends declared out of the estate (act of 1867, §§ 19, 27 [14 Stat. at L. 525, 529, chap. 176]). And as the surety thus either shares or enjoys an opportunity to share in the principal's estate, we think the discharge of the latter [557] acquits the obligation between them incident to the relationship. Mace v. Wells, 7 How. 272, 276, 12 L. ed. 698, 699; Fairbanks v. Lambert, 137 Mass. 373, 374; Hayer v. Comstock, 115 Iowa, 187, 191, 88 N. W. 351; Post v. Losey, 111 Ind. 74, 80, 60 Am. Rep. 677, 12 N. E. 121; Smith v. Wheeler, 55 App. Div. 170, 171, 66 N. Y. Supp. 780.

It would be contrary to the basal spirit of the bankrupt law to permit a surety, by simply postponing compliance with his own promise in respect of a liability until after bankruptcy, to preserve a right of recovery over against his principal, notwithstanding the discharge would have extinguished this if the surety had promptly performed as he agreed. Such an interpretation would effectually defeat a fundamental purpose of the enactment.

The written indemnity agreement embodied in the bankrupt's application to the surety company for execution of the bond, so far as its terms are important here, but expressed what otherwise would have been implied from the relationship assumed by the parties. At the time of the bankruptcy, the obligation under this agreement was ancillary to a liability arising out of a contract, estimation of which was easy of establishment by proof. There was no uncertainty which could prevent the surety from obtaining all benefits to which it was justly entitled from the bankrupt estate.

Upon the facts presented we are of opinion that the discharge pleaded by the plaintiffs in error constituted a good defense, and the court below erred in holding otherwise. The judgment is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[558] JOHN B. GLEASON, Petitioner,
v.
HARRY K. THAW.

(See S. C. Reporter's ed. 558-562.)

Bankruptcy — discharge — obtaining property by false representation — professional services.

The professional services of an attorney and counselor at law are not "property" within the meaning of the provision of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541), § 17, ¶ 2, as amended by the act of February 5, 1903 (32 Stat. at L. 797, chap. 487, Comp. Stat. 1913, § 9586), which excepts from the general release of a discharge "liabilities for

NOTE.—On effect of discharge in bankrutpcy on claim for services procured by bankrupt's fraud—see note to Gleason v. Thaw, 34 L.R.A.(N.S.) 894.

obtaining property by false pretenses or false representations."

[Claims discharged in bankruptcy, see Bankruptcy, XI. c, in Digest Sup. Ct. 1908.]

[No. 143.]

Submitted January 19, 1915. Decided February 23, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, dismissing the complaint in an action for professional services in which a discharge in bankruptcy was set up as a defense. Affirmed.

See same case below, 116 C. C. A. 179, 196 Fed. 359.

The facts are stated in the opinion.

Mr. John B. Gleason, *in propria persona*, submitted the cause for petitioner:

Labor is property.

Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Jacobs, 33 Hun, 374, affirmed in 98 N. Y. 99, 50 Am. Rep. 636; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

Property is *nomen generalissimum* for every valuable right or interest.

Caro v. Metropolitan Elev. R. Co. 14 Jones & S. 140; Anderson's Law Dict.

The definition of the Roman law is, *Dominium est jus utendi*. Following this, it is often said that property is not any tangible thing, but is the right of user.

Lewis, Em. Dom. § 54; Dixon v. People, 168 Ill. 179, 39 L.R.A. 116, 48 N. E. 108; Wynehamer v. People, 13 N. Y. 433; Jackson ex dem. Pearson v. Housel, 17 Johns. 283; Sherman v. Elder, 24 N. Y. 384.

Within the meaning of the bankruptcy act property is "anything of value—anything of debt-paying or debt-producing power."

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

"Property" comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed.

Bryan v. Kennett, 113 U. S. 179, 28 L. ed. 908, 5 Sup. Ct. Rep. 407.

Did not Congress, by the comprehensive term "property," intend to include both tangible and intangible property?

Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; Re Gilpin, 160 Fed. 171.

The forbearance or giving time for the payment of a debt is in the nature of a loan.

Diercks v. Kennedy, 16 N. J. Eq. 210.

An injury to intangible property may be punished criminally in a proper and strict interpretation of the criminal law.

People v. Barondess, 61 Hun, 581, 16 N. Y. Supp. 436, affirmed in this opinion in 133 N. Y. 649, 31 N. E. 240; People v. Hughes, 137 N. Y. 29, 32 N. E. 1105.

Mr. William A. Stone submitted the cause for respondent:

While labor may be, and probably is, a species of property which the laborer owns, yet labor performed is not property transferred to another.

Gleason v. Thaw, 34 L.R.A.(N.S.) 894, 107 C. C. A. 463, 185 Fed. 347.

Mr. Justice McReynolds delivered the opinion of the court:

The question for determination is whether the professional services of an attorney and counselor at law are property within the meaning of ¶ 2, § 17, of the bankrupt act (30 Stat. at L. 544, 550, chap. 541), as amended in 1903 (32 Stat. at L. 797, 798, chap. 487, Comp. Stat. 1913, §§ 9586, 9601), which excepts from the general release of a discharge "liabilities for obtaining property by false pretenses or false representations." The essential facts, in the words of the circuit court of appeals, are these:

[559] "On June 28, 1906, the defendant, Harry K. Thaw, was indicted for murder committed in the city of New York. Briefly stated, the complaint alleges that, in order to secure the services of the plaintiff as chief counsel, the defendant represented that he was the owner of an interest of at least $500,000 in the estate of his father, and had an annual income of $30,000 in his own right. That relying upon these and other representations, the plaintiff consented to act as counsel for the defendant, and performed services for him in that capacity which were worth the sum of $60,000 over and above all payments. The complaint charges that all of these representations were false and made with fraudulent intent. The defendant, among other defenses, pleaded in a supplementary answer, his discharge in bankruptcy by the district court of Pennsylvania, dated December 29, 1910. To this the plaintiff demurs, insisting that the discharge is insufficient in law, the plaintiff's cause of action being liabilities for obtaining property by false representations."

The trial court, following Gleason v. Thaw, 34 L.R.A.(N.S.) 894, 107 C. C. A. 463, 185 Fed. 345, overruled the demurrer and dismissed the complaint; the appellate court, upon the same authority, affirmed the judgment (116 C. C. A. 179, 196 Fed. 359).

Gleason v. Thaw, supra, came before the

circuit court of appeals for the third circuit upon a petition to review the final order of the district court staying an action brought by Gleason on the same indebtedness here involved, and presented the identical question of law now before us. The court answered it in the negative, and among other things, in an opinion by Judge Gray, said:

"The very ingenious and forceful argument presented to this court by the petitioner for review is founded mainly upon the proposition that 'the right to command services of the value of $80,000 is property; the services also are property; the test is value—not degree of intangibility.' . . . [560] That the word 'property' is *nomen generalissimum*, as asserted by the petitioner, is not to be denied, but no more is it to be denied that its meaning may be restricted, not only by the application of the maxim, *nosoitur a sociis*, but by the purpose for which it is used, or by its evident use as a word of art, or by its use in a technical sense. The very generality of the word requires restriction. . . . There are, however, well-considered decisions of the highest authority, in which, from the view point of the particular case, personal rights and liberties are to be included within the meaning of the word 'property.' . . . Such cases, however, are far from saying that services actually rendered under a supposed contract are themselves property, which have been taken fraudulently from the possession of the one who has rendered the service, within the meaning of that word as used in the section of the bankruptcy act now under consideration."

The accurate delimitation of the concept "property" would afford a theme especially apposite for amplificative philosophic disquisition; but the bankrupt law is a prosy thing, intended for ready application to the everyday affairs of practical business, and when construing its terms we are constrained by their usual acceptation in that field of endeavor. The word "property," without restriction, occurs more than seventy times in the act. Not once does it plainly refer to professional services, and, except in very few instances, to include them within its intendment would produce a patent absurdity. Reference to the following provisions will suffice to indicate the sense of the word therein. Section 1 (15) declares one shall be deemed insolvent "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed . . . shall not, at a fair valuation, be sufficient in amount to pay his debts." Section 3a provides that "acts of bankruptcy by a person [561] shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder . . . or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer," etc. Section 50 provides, in respect of trustees' bonds, "(d) the court shall require evidence as to the actual value of the property of sureties; . . . (f) the actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond, shall equal at least the amount of such bond." And § 60d brings the two things into sharp contrast—"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee," etc.

Congress, we think, never intended that property in the paragraph under consideration should include professional services. At most it denotes something subject to ownership, transfer, or exclusive possession and enjoyment, which may be brought within the dominion and control of a court through some recognized process. This is certainly the full extent of the word's meaning as employed in ordinary speech and business, and the same significance attaches to it in many carefully prepared writings. The constitutions of many states provide that *all property* shall be taxed, but it has never been supposed that this applies to professional services.

We do not overlook, nor do we intend to qualify, what this court has said in other cases. Our sole present concern is with the interpretation of a particular statute; the scope and purpose of constitutional limitations are in no way involved —they depend upon considerations of a wholly different character.

[562] In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed; and while much might be said in favor of extending these to liabilities incurred for services obtained by fraud, the language of the act does not go so far.

The court below reached a proper conclusion and its judgment is affirmed.

WILLIAM McCOACH, Collector, etc., Petitioner,
v.
DUNDAS F. PRATT et al., Executors, etc.

(See S. C. Reporter's ed. 562–568.)

Federal succession tax — vested or contingent interests — legacies — refunding.

Legacies under a will had not, on July 1, 1902, become absolutely vested in possession or enjoyment in the sense of the provision of the act of June 27, 1902 (32 Stat. at L. 406, chap. 1160), for the refunding of succession taxes collected on contingent beneficial interests not vested prior to July 1, 1902, where at that date less than two months of the year allowed by the state laws for filing claims against the estate had elapsed, and it was then still undetermined whether there would be a residue for the payment of the legacies.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

[No. 149.]

Argued January 25, 1915. Decided March 1, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania, directing the refunding of a succession tax. Affirmed.

See same case below, 119 C. C. A. 666, 201 Fed. 1021.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause and filed a brief for petitioner.

Assistant Attorney General Wallace and Solicitor General Davis also filed a supplemental brief for petitioner.

Mr. Walter C. Noyes argued the cause, and, with Messrs. E. Hunn and H. T. Newcomb, filed a brief for respondents.

[565] Mr. Justice Van Devanter delivered the opinion of the court:

Whether a succession tax collected under §§ 29 and 30 of the act of June 13, 1898 (30 Stat. at L. 448, 464, chap. 448, Comp. Stat. 1913, § 6144), shall be refunded, is the matter here in controversy. The facts bearing upon its solution are these: Ferdinand J. Dreer, a resident of Philadelphia, Pennsylvania, died May 24, 1902, leaving a will directing that certain legacies be paid out of his personal estate to two sons and two grandchildren. The executors took charge of the property and proceeded to administer it under the supervision of the orphans' court, as the local law required, first for the benefit of the creditors and next for the benefit of the legatees. The former had a year within which to file their claims, and the latter were not entitled to demand payment of the legacies until that time expired, and then only in the event there was a residue available for the purpose. Jones's Appeal, 99 Pa. 124, 130; Rastaetter's Estate, 15 Pa. Super. Ct. 549, 553–555. On July 1, 1902, a date the importance of which will be seen presently, less than two months of the prescribed year had passed, and whether there would be a residue for the payment of legacies was as yet undetermined. In July, 1903, the collector of internal revenue demanded of the executors a succession tax of $1,692.75 on account of the legacies, and the tax was paid under protest. Shortly thereafter the executors sought, in the appropriate way, to have the tax refunded, but the request was denied, and they then sued the collector to recover back the amount. In the circuit court the executors prevailed, and the judgment was affirmed by the circuit court of appeals. 119 C. C. A. 666, 201 Fed. 1021.

By § 29 of the act of 1898 an executor, administrator, or trustee having in charge a legacy or distributive share, exceeding $10,000 in actual value, arising from personal [566] property, and passing from decedent to another by will or intestate laws, was subjected to a tax graduated according to the value of the legacy or distributive share; but that section was repealed by the act of April 12, 1902 (32 Stat. at L. 96, chap. 500, Comp. Stat. 1913, § 6144), with a qualification that the repeal should not be effective until July 1 following, and should not prevent the collection of any tax imposed prior to the latter date. Next came the act of June 27, 1902 (32 Stat. at L. 406, chap. 1160), the 3d section of which reads as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled, 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treas-

NOTE.—As to taxes on succession and collateral inheritances, generally,—see notes to Re Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; and Magoun v. Illinois Trust & Sav. Bank, 42 L. U. S. 1037.

ury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in the possession or enjoyment prior to said July first, nineteen hundred and two."

As the context shows, the word "vested" in the first sentence has the same meaning as "absolutely vested in possession or enjoyment" in the second (Vanderbilt v. Eidman, 196 U. S. 480, 500, 49 L. ed. 563, 570, 25 Sup. Ct. Rep. 331; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59); and the words "contingent" and "absolutely vested in possession or enjoyment" are used [567] antithetically and applied to both legacies and distributive shares. What is meant by "contingent" is indicated by the phrase with which it is contrasted and by its application to distributive shares as well as to legacies. The only sense in which the former are contingent—and it is practical rather than technical—is that they come into being only where, in due course of administration, the debts of the deceased are ascertained and it is found that a surplus remains for distribution. It is in this sense that the word is applied to distributive shares, and, of course, it is applied to legacies in the same way. In speaking of this section, we said in United States v. Jones, 236 U. S. 106, ante, 488, 35 Sup. Ct. Rep. 261: "It deals with legacies and distributive shares upon the same plane, treats both as 'contingent' interests until they 'become absolutely vested in possession or enjoyment,' directs that the tax collected upon contingent interests not so vested prior to July 1, 1902, shall be refunded, and forbids any further enforcement of the tax as respects interests remaining contingent up to that date." That case related to a tax collected upon distributive shares in an estate in Pennsylvania. The intestate had died before July 1, 1902, but the time for presenting claims against the estate had not expired prior to that date, and therefore what, if any, surplus would remain, was still uncertain, and the heirs were not, as yet, entitled to a distribution. It was accordingly held that the distributive shares did not become "absolutely vested in possession or enjoyment" before July 1, 1902, but remained contingent in the sense of the statute, and consequently that the tax should be refunded. The present case differs from that only in the fact that here the tax was collected upon legacies. This difference is not material. The refunding act deals with both in the same way, and the local law subordinates the rights of legatees to those of creditors in like manner as it does the rights of distributees. It follows that the tax here in question must be refunded.

[568] The case of Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621, is relied upon by the government, as it was in United States v. Jones, supra, but for reasons there given we think it is not in point here.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

M. KIRMEYER, Plff. in Err.,
v.
STATE OF KANSAS.

(See S. C. Reporter's ed. 568-573.)

Commerce — state regulation — intoxicating liquors.

The business carried on within the state of Kansas by a liquor dealer who maintains an office and warehouse in a small town on the Missouri side of the Missouri river, connected by a bridge with Leavenworth, Kansas, and who fills all orders for liquors from Kansas customers by deliveries from such warehouse in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depots for transportation to other Kansas points, all mail orders from Kansas customers being carried across the river before being opened, and all liquor received by him at the railway depots in Leavenworth, though destined for Kansas customers, being first hauled by him to his warehouse across the river,—is none the less interstate commerce, and, as such, protected from state interference, because such dealer is a citizen of Kansas, who, having

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NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

As to validity of state regulation of sales of intoxicating liquors—see note to Rhodes v. Iowa, 42 L. ed. U. S. 1089.

As to what is sufficient to terminate interstate transportation of intoxicating liquors—see note to State v. Intoxicating Liquors, 11 L.R.A.(N.S.) 550.

On commerce in intoxicating liquors, generally,—see notes to State v. Creeden, 7 L.R.A. 296, and State ex rel. Cochran v. Winters, 10 L.R.A. 616.

long carried on an illegal liquor trade in Leavenworth, moved his business across the river to evade the Kansas prohibitory laws, without changing his residence, or removing from Leavenworth the wagons and teams used by him in conducting the business.

[For other cases, see Commerce, IV. b, 2, in Digest Sup. Ct. 1908.]

[No. 145.]

Argued and submitted January 22, 1915. Decided March 1, 1915.

IN ERROR to the Supreme Court of the State of Kansas to review a decree which, reversing a decree of the District Court for the County of Leavenworth, in that state, directed the entry of a decree in favor of the state, enjoining the carrying on of a liquor business within the state as being a nuisance. Reversed and remanded for further proceedings.

See same case below, 88 Kan. 589, 128 Pac. 1114.

The facts are stated in the opinion.

Mr. A. E. Dempsey argued the cause, and, with Mr. Frank Doster, filed a brief for plaintiff in error:

State laws dealing with the importation and sale of intoxicating liquors are not classed with quarantine and inspection laws, but deal with a recognized article of interstate commerce, which is not subject to the concurrent jurisdiction of the states.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

The power of Congress is exclusive and the states have no right to interfere.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Vance v. W. A. Vandercook Co. supra; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Adams Exp. Co. v. Kentucky, 206 U. S. 138, 51 L. ed. 992, 27 Sup. Ct. Rep. 608; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633.

In this case plaintiff in error at his place of business in Stillings, Missouri, receives and accepts orders from customers in Missouri, Kansas, and Oklahoma. Under the law of Missouri he has an undoubted right to do this, and the contracts are valid in that state. These customers have an undoubted right to order and receive beer for their own use, and a state law which would deny this right is void.

Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Vance v. W. A. Vandercook Co. 170 U. S. 452, 42 L. ed. 1105, 18 Sup. Ct. Rep. 674.

The plaintiff in error here was either engaged or was not engaged in interstate commerce. If he was so engaged, he had a right to be, or he had not. If he had a right to be so engaged, his motives in the premises are immaterial, and cannot vitiate an otherwise valid business or transaction.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; O'Neil v. Vermont, 144 U. S. 347, 36 L. ed. 461, 12 Sup. Ct. Rep. 693.

The power of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on, and the full control of Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729.

Commerce among the states does not depend on the residence of the parties, but on the interchange of property between different states.

People ex rel. Hatch v. Reardon, 184 N. Y. 452, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515.

The Kansas supreme court enjoins, among other things, the use of telephone communication with a place of business in Missouri and the receipt of mail orders in Kansas. One of these is a Federal service and both of them are interstate agencies.

Re Pennsylvania Teleph. Co. 48 N. J. Eq. 91, 27 Am. St. Rep. 462, 20 Atl. 846.

In view of the undoubted constitutional right of plaintiff in error to engage in the wholesale liquor business in Missouri as he has done, and to enter into contracts there for shipments of beer into Kansas, the language of this court in the case of Rhodes v. Iowa, 170 U. S. 424, 42 L. ed. 1095, 18 Sup. Ct. Rep. 664, seems to be particularly pertinent.

Under the rule contended for by the supreme court of Kansas the police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.

Peirce v. New Hampshire, 5 How. 597, 12 L. ed. 298.

The right of the parties thereto to make a contract, valid in the state where made, for the sale and purchase of merchandise, and in so doing, to fix the time when, and the conditions on which, complete title shall pass, is beyond question.

American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182.

Mr. John S. Dawson, Attorney General of Kansas, submitted the cause for defendant in error:

Where the seller undertakes the delivery of the commodity sold by him, the place of delivery is the place of sale, the contract of sale being executory until the sale is made.

17 Am. & Eng. Enc. Law, 2d ed. 301, 302; State v. Kind, 80 N. J. L. 176, 75 Atl. 438; Anglin v. State, 96 Miss. 215, 50 So. 492, 728; F. W. Cook Brewing Co. v. Com. 30 Ky. L. Rep. 598, 99 S. W. 354; Bagby v. State, 82 Ga. 786, 9 S. E. 721; Spring Valley v. Henning, 42 Ill. App. 159; Com. v. Greenfield, 121 Mass. 40; Com. v. Burgett, 136 Mass. 450; Com. v. Hugo, 164 Mass. 157, 41 N. E. 123; State v. Houts, 36 Mo. App. 265; People v. Capen, 26 Hun, 377; Com. v. Holstine, 132 Pa. 357, 19 Atl. 273; Northcutt v. State, 35 Tex. Crim. Rep. 584, 34 S. W. 946; State v. O'Neil, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, 6 Am. Crim. Rep. 319, s. c. 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; State v. Shuster, 63 N. J. L. 355, 46 Atl. 1101; Swift v. State, 108 Tenn. 610, 69 S. W. 326.

The purpose of the Wilson act, as a regulation by Congress of interstate commerce, was to allow the states, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute.

Delamater v. South Dakota, 205 U. S. 93, 98, 51 L. ed. 724, 728, 27 Sup Ct. Rep. 447, 10 Ann. Cas. 733.

The plaintiff in error, being a citizen of Kansas, was engaged in transacting business with other citizens of Kansas, and we do not think that the fact that he had removed his warehouses from Leavenworth to Stillings, to escape the activity of the Kansas officers, changed his business from intrastate to interstate. It is hard to define just what is meant by "interstate commerce." This court has intimated at least in many cases that it must involve commerce between the citizens of different states.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Trade-Mark Cases, 100 U. S. 82, 96, 25 L. ed. 550, 552; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 270, 23 L. ed. 543, 548; O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; Bacon v. Illinois, 227 U. S. 504, 516, 57 L. ed. 615, 620, 33 Sup. Ct. Rep. 299.

Mr. Justice McReynolds delivered the opinion of the court:

The state of Kansas instituted this cause in a local court, September 29th, 1910. Kirmeyer was charged with carrying on a liquor business at Leavenworth in open and persistent violation of law, and thereby committing a nuisance. The relief sought was "that he be enjoined from conducting said unlawful business; that he be enjoined from maintaining, using, and employing said wagons, vehicles, conveyances, horses, mules, telephones, and any other property in the said unlawful manner herein alleged; that upon the final determination of this action said injunction be made permanent; that said wagons, vehicles, conveyances, horses, mules, telephones, and other property used in said unlawful business be declared common nuisances, and that the same be abated."

In the opinion of the trial court the transactions disclosed constituted a part of interstate commerce within the protection of the Constitution of the United States; and judgment was rendered for Kirmeyer. Upon appeal the supreme court of the state declared: "The broad question here is whether the defendant was really engaged in commerce between the states of Missouri and Kansas, or was he only seeking by tricks and devices to evade the laws of his state,—doing by indirection that which could not lawfully be done by ordinary and direct methods?" Referring to numerous opinions of this court it further said they "do not preclude a fair inquiry into methods and practices in order to determine whether transactions [570] under investigation constitute legitimate interstate commerce or are colorable merely, and intended to evade and defeat the just operation of the Constitution and law of the state." And the conclusion was: "It is true that a citizen of Kansas who finds that his business is prohibited by our laws may in good faith engage in the same business in another state where the legal obstacle does not exist. But he may not, under the guise of moving across the state line, and other shifts or devices to evade the statutes of the state, continue in the prohibited business here and be immune from the penalties of our law. From the facts found by the court and from the testimony of the defendant, it appears that his business was not legitimate interstate commerce, but was carried on in violation of the statutes of this state, and is subject to abatement and injunction." Accordingly the action of the district court was reversed, with instructions to grant the relief prayed for (88 Kan. 589, 128 Pac. 1114). Thereupon this writ of error was sued out.

The essential facts disclosed by the record are summarized in paragraphs (a) and (b) following.

(a) Rigorous statutes have long prohibited the sale of intoxicating liquors within the state of Kansas. The city of Leavenworth lies on the Missouri river; on the opposite bank in Missouri is Stillings, a village with one store, roundhouse, a few residences, eight or ten beer warehouses, and a freight depot without a regular agent, but no postoffice. For a long time plaintiff in error has resided in Leavenworth, and prior to 1907 he carried on there an illicit beer trade; for use in the same he there maintained a business place and warehouse and kept wagons and teams. In that year, alarmed by the activities of officials, he discontinued this office and warehouse and immediately opened others in Stillings, and connected them with the Leavenworth telephone exchange. He did not change his residence nor remove his wagons and teams [571] from Leavenworth, but kept them in quarters connected by telephone with the local exchange, and continued to use them for hauling to and from the new warehouse and making deliveries. Thereafter he received at Stillings barrels, cases, and casks of beer in carload lots from Kansas City and other points; sometimes he received like merchandise at the railroad depot in Leavenworth, which was then hauled across the river. At the Stillings office he received and accepted orders for beer to be delivered in Leavenworth and other points in Kansas. Eighty-five per cent came by telephone; the remainder through the Leavenworth postoffice, but these were carried to his place of business before being opened.

(b) Accepted orders for delivery in Leavenworth were filled by setting aside the cases, kegs, or casks in the warehouse, tagging them with the names of the purchasers, and then sending them daily—sometimes oftener—over the bridge in his wagons to the residences of purchasers. For such deliveries no charges were made. If the goods were intended for other points in Kansas they were hauled to the railroad station at Leavenworth, and there turned over to the carrier. The business for the most part was "family trade" for private use only, and amounted to some $500 per month. A license tax was paid to the Federal government; also merchant's and ad valorem taxes to Missouri; he had no Kansas license. The empty cases were gathered by up the drivers throughout Leavenworth, loaded in cars there, and shipped to some other state. Advertisements in two Leavenworth papers announced his business and location at Stillings, and likewise gave the telephone number at the horse barn. When parties desiring beer called over this telephone they were advised to call the Stillings office. Collections were usually made by the plaintiff in error or by collectors; sometimes by mail. Drivers received no orders from purchasers.

The instant cause arose before passage of the act of [572] Congress, approved March 1, 1913, chap. 90 (37 Stat. at L. 699, Comp. Stat. 1913, § 8739) known as the Webb-Kenyon bill; consequently neither its construction nor application is now involved; and what is said herein of course has reference to conditions existing prior to that enactment.

Former opinions of this court preclude further discussion of these propositions: Beer is a recognized article of commerce. The right to send it from one state to another and the act of doing so are interstate commerce the regulation whereof has been committed to Congress; and a state law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States. Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor; and prior thereto the provisions of the act of Congress, approved August 8, 1890, chap. 728 (26 Stat. at L. 313, Comp. Stat. 1913, § 8738),—the Wilson act,—have no application. License Cases, 5 How. 504, 527, 12 L. ed. 256, 266; Leisy v. Hardin, 135 U. S. 100, 110, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Rhodes v. Iowa, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; American Exp. Co. v. Iowa, 196 U. S. 133, 142, 143, 49 L. ed. 417, 421, 422, 25 Sup. Ct. Rep. 182; Heyman v. Southern R. Co. 203 U. S. 270, 276, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 135, 51 L. ed. 987, 991, 27 Sup. Ct. Rep. 606; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 222, 53 L. ed. 972, 973, 29 Sup. Ct. Rep. 633.

The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error within the state of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate,—that must be tested by the actual transactions.

The supreme court of the state gave much weight to the dealer's past conduct and animating purpose, and relied [573] upon lan-

guage quoted from Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, and Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233.

Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicil in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the state, suffice to change the nature of the transactions. Otherwise one of two persons located side by side in the same state, and doing the same business in identical ways, might be engaged in interstate commerce while the other was not.

Improper application was given to what was said in Austin v. Tennessee and Cook v. Marshall County, supra. The point for decision in them was whether the packages containing cigarettes shipped into the state were "original" ones within the constitutional import of the term, as theretofore defined. Looking at all the circumstances this court concluded they were not. The general use of like packages was unknown and impracticable in transactions between manufacturers and wholesale dealers residing in different states, and the plan pursued was plainly a mere device designed to defeat the policy of the state where the goods were received,—not a bona fide commercial arrangement. Here, no such question is presented.

A long line of opinions have discussed the legal principles involved; reiteration would be fruitless. The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent herewith.

Reversed.

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[574] LINN & LANE TIMBER COMPANY and Charles A. Smith, Appts.,

v.

UNITED STATES. (No. 46.)

SAME v. SAME.

(No. 159.)

(See S. C. Reporter's ed. 574–579.)

Limitation of actions — when statute runs — suit to cancel patents.

1. A suit by the United States to cancel patents to public lands on the ground that the entries were fraudulent is not barred because the statutory period of limitation elapsed after the dates of the patents before any steps were taken to implead a corporation which was the real owner of the land, where the supposed owner, who was served in time, secretly transferred the property to the corporation of which he was practically the sole owner for the purpose of keeping the title concealed until the statute of limitations should run; nor does it matter that before the bill was filed some shares of the stock of the corporation had been pledged as collateral security.

[For other cases, see Limitation of Actions, II., in Digest Sup. Ct. 1908.]

Limitation of actions — interruption — filing bill.

2. The running of the limitation prescribed by the act of March 3, 1891 (26 Stat. at L. 1095, chap. 561, Comp. Stat. 1913, § 5116), § 8, for suits by the United States to annul patents to public lands, was interrupted by the filing of the bill, and the taking out and delivery of subpœnas to the marshal for service before the statute had run, although actual service was not made until afterwards, if reasonable diligence in obtaining service was shown.

[For other cases, see Limitation of Actions, IV. b, in Digest Sup. Ct. 1908.]

Courts — conclusiveness of decision of Land Department — fraud.

3. The decision of the Secretary of the Interior that patents to public lands should issue is not conclusive against the government when it sues to cancel such patents on the ground that the entries were fraudulent.

[For other cases, see Courts, 260a–267a, in Digest Sup. Ct. 1908.]

[Nos. 46 and 159.]

Argued January 27 and 28, 1915. Decided March 8, 1915.

TWO APPEALS from the United States Circuit Court of Appeals for the Ninth Circuit to review decrees which affirmed decrees of the Circuit Court for the District of Oregon in favor of the United States in suits to cancel patents to public lands. Affirmed.

See same case below, 116 C. C. A. 267, 196 Fed. 593; on rehearing, 121 C. C. A. 498, 203 Fed. 394.

The facts are stated in the opinion.

Mr. John Lind argued the cause, and, with Messrs. A. Ueland and W. M. Jerome, filed a brief for appellants:

The arrangement to mortgage the land for the purchase money and expenses connected with the entry is not forbidden.

NOTE.—As to running of statute of limitations in cases of concealed fraud—see notes to Carrier v. Chicago, R. I. & P. R. Co. 6 L.R.A. 799; Peck v. Bank of America, 7 L.R.A. 826; Amaker v. New, 8 L.R.A. 687; Shellenberger v. Ransom, 25 L.R.A. 566; and Sanborn v. Gale, 26 L.R.A. 864.

On setting aside land patents for fraud—see note to Miller v. Kerr, 5 L. ed. U. S. 381.

Hafemann v. Gross, 199 U. S. 342, 50 L. ed. 220, 26 Sup. Ct. Rep. 80.

All that is denounced is a prior agreement, —the acting for another in the purchase.

United States v. Budd, 144 U. S. 154, 163, 36 L. ed. 384, 387, 12 Sup. Ct. Rep. 575.

The evidence of fraud in cases of this kind must be clear, unequivocal, and convincing, and not a bare preponderance of evidence that leaves the issue in doubt.

Maxwell Land-Grant Case, 121 U. S. 325, 380, 30 L. ed. 949, 958, 7 Sup. Ct. Rep. 1015; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 321, 31 L. ed. 182, 188, 8 Sup. Ct. Rep. 131; United States v. San Jacinto Tin Co. 125 U. S. 273, 299, 31 L. ed. 747, 756, 8 Sup. Ct. Rep. 850; United States v. Budd, 144 U. S. 154, 161, 36 L. ed. 384, 386, 12 Sup. Ct. Rep. 575; United States v. Stimson, 197 U. S. 200, 204, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426.

The question of fraud in the entries was conclusively decided by the Secretary of the Interior.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Johnson v. Drew, 171 U. S. 93, 99, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800; Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345; United States v. White, 17 Fed. 561; Vance v. Burbank, 101 U. S. 514–519, 25 L. ed. 929–931; United States v. San Jacinto Tin Co. 125 U. S. 273, 299, 31 L. ed. 747, 756, 8 Sup. Ct. Rep. 850.

The rule that notice to the agent is notice to the principal has no application when the transaction is of such character that the interest of the agent conflicts with that of the principal. The agent is not presumed to impart information which it is for his own interest to conceal.

Pine Mountain Iron & Coal Co. v. Bailey, 35 C. C. A. 229, 94 Fed. 258; American Surety Co. v. Pauly, 170 U. S. 156, 42 L. ed. 985, 18 Sup. Ct. Rep. 552.

The saving clause in the timber and stone act in behalf of "bona fide purchasers' should receive the same construction that has been given to similar language used in all other acts of Congress designed for the protection of purchasers.

United States v. Winona & St. P. R. Co. 165 U. S. 477, 41 L. ed. 795, 17 Sup. Ct. Rep. 368; United States v. Southern P. R. Co. 184 U. S. 49, 46 L. cd. 425, 22 Sup. Ct. Rep. 285; Fee v. Brown. 162 U. S. 602. 40 L. ed. 1086, 16 Sup. Ct. Rep. 875; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282.

The act of March 3, 1891, commences to run from the date of the patents, not from the time when the fraud affecting their validity is discovered by the government.

United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579.

Even contrivances to avoid suit until the period of limitation shall have passed will not stop their running, because, should courts treat this as an exception, it would not be interpretation, but judicial legislation.

Amy v. Watertown, 22 Fed. 418, 130 U. S. 320, 325, 32 L. ed. 953, 955, 9 Sup. Ct. Rep. 537; Chemical Nat. Bank v. Kissane, 32 Fed. 429; United States v. Maillard, 4 Ben. 459, Fed. Cas. No. 15,709; Engel v. Fischer, 102 N. Y. 400, 55 Am. Rep. 818, 7 N. E. 300.

There can be no action commenced and pending so as to toll the statute of limitations unless there be at all times valid process in the hands of an officer for service, or in process of issuance.

Baskins v. Wilson, 6 Cow. 471; Johnson v. Mead, 58 Mich. 67, 24 N. W. 665.

Assistant Attorney General Knaebel argued the cause, and, with Mr. Henry C. Lewis, Special Assistant to the Attorney General, filed a brief for appellee:

Two lower courts have concurred in the findings of fact.

Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, 58 L. ed. 630, 34 Sup. Ct. Rep. 488; Dun v. Lumbermen's Credit Asso. 209 U. S. 20, 52 L. ed. 663, 28 Sup. Ct. Rep. 335, 14 Ann. Cas. 501; Towson v. Moore, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; Brainard v. Buck, 184 U. S. 99, 46 L. ed. 449, 22 Sup. Ct. Rep. 458; Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259; Washington Securities Co. v. United States, 234 U. S. 76, 58 L. ed. 1220, 34 Sup. Ct. Rep. 725; Gilson v. United States, 234 U. S. 380, 58 L. ed. 1361, 34 Sup. Ct. Rep. 778.

The courts below have found that at least one purpose of Smith and the company in withholding the deeds from the record was to obtain the cover of the statute fraudulently through the concealment. The evidence abundantly justifies the finding. Keeping a deed from the record in that way constitutes such a fraudulent concealment as will stay the running of the statute of limitations.

McAlpine v. Hedges, 21 Fed. 689; Rosenthal v. Walker, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382.

Even if there had been no new affirmative acts of fraud, the original fraud was such as to conceal itself, and the statute would have been tolled until the discovery.

Quimby v. Blackey, 63 N. H. 77; Jackson v. Jackson, 149 Ind. 238, 47 N. E. 963; Cook

v. Sherman, 4 McCrary, 20, 20 Fed. 167; McAlpine v. Hedges, 21 Fed. 689.

A statute of limitations, however sweeping and positive its terms, shall not be held to run against a cause of action concealed by fraud, or arising out of a fraud which conceals itself, until the fraud has been, or at least until, in the exercise of reasonable diligence, it should have been, discovered by the party affected.

Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636; Rosenthal v. Walker, 111 U. S. 185, 191, 28 L. ed. 395, 397, 4 Sup. Ct. Rep. 382; Wood v. Bailey, 21 Wall. 640, 22 L. ed. 689; Wiswall v. Campbell, 93 U. S. 347, 23 L. ed. 923; Gifford v. Helms, 98 U. S. 248, 25 L. ed. 57; Upton v. McLaughlin, 105 U. S. 640, 642, 26 L. ed. 1197, 1198; Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430; Sherwood v. Sutton, 5 Mason, 143, Fed. Cas. No. 12,782; Carr v. Hilton, 1 Curt. C. C. 390, Fed. Cas. No. 2,436; Mitchell v. Thompson, 1 McLean, 96, Fed. Cas. No. 9,669; Tyler v. Angevine, 15 Blatchf. 536, Fed. Cas. No. 14,306; Johnston v. Roe, 1 McCrary, 162, 1 Fed. 692; Duff v. First Nat. Bank, 13 Fed. 65; Bartles v. Gibson, 17 Fed. 293; Cook v. Sherman, 4 McCrary, 20, 20 Fed. 167; McAlpine v. Hedges, 21 Fed. 689; Farrar v. Bernheim, 20 C. C. A. 496, 21 C. C. A. 264, 41 U. S. App. 172, 75 Fed. 136; Lent v. Manley, 21 C. C. A. 457, 43 U. S. App. 623, 75 Fed. 627; Moore v. Greene, 19 How. 69, 72, 15 L. ed. 533, 534; Hanger v. Abbott, 6 Wall. 532, 18 L. ed. 939; Meader v. Norton, 11 Wall. 442, 458, 20 L. ed. 184, 188; Braun v. Sauerwein, 10 Wall. 218, 223, 19 L. ed. 895, 897; Amy v. Watertown, 130 U. S. 325, 326, 32 L. ed. 955, 956, 9 Sup. Ct. Rep. 537; United States v. Exploration Co. 121 C. C. A. 491, 203 Fed. 387; United States v. American Smelting & Ref. Co. 121 C. C. A. 497, 203 Fed. 393; Snodgrass v. Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; McKneely v. Terry, 61 Ark. 527, 33 S. W. 953; Currey v. Allen, 34 Cal. 254; Sparks v. Farmers' Bank, 3 Del. Ch. 275; Stocks v. Van Leonard, 8 Ga. 511; Greenman v. Greenman, 107 Ill. 404; Donnelly v. Donnelly, 8 B. Mon. 113; Wear v. Skinner, 46 Md. 257, 24 Am. Rep. 517; Stebbins v. Patterson, 108 Mich. 537, 66 N. W. 484; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; Edwards v. Gibbs, 39 Miss. 166; Blake v. Chambers, 4 Neb. 90; Douglas v. Elkins, 28 N. H. 26; Lincoln v. Judd, 49 N. J. Eq. 387, 24 Atl. 318; Sears v. Shafer, 6 N. Y. 268; Longworth v. Hunt, 11 Ohio St. 194; Peck v. Bank of America, 16 R. I. 710, 7 L.R.A. 826, 19 Atl. 369; Garvin v. Garvin, 40 S. C. 435, 19 S. E. 79; Haywood v. Marsh, 6 Yerg. 69; McDonald v. McGuire, 8 Tex. 361; Wickham v. Sprague, 18 Wash. 466, 51 Pac. 1055; Quimby v. Blackey, 63 N. H. 77; Jackson v. Jackson, 149 Ind. 238, 47 N. E. 963; Deake's Appeal, 80 Me. 50, 12 Atl. 790; Cotterell v. Purchase, Cas. t. Talb. 61; Alden v. Gregory, 2 Eden, 280; Booth v. Warrington, 4 Bro. P. C. 163; South-Sea Co. v. Wymondsell, 3 P. Wms. 143; Hovenden v. Annesley, 2 Sch. & Lef. 630, 9 Revised Rep. 119; Bree v. Holbech, 2 Dougl. K. B. 656; Granger v. George, 5 Barn. & C. 149, 7 Dowl. & R. 729, 29 Revised Rep. 196, 16 Eng. Rul. Cas. 205; Angell, Limitations, 6th ed. §§ 30, 183, 186, 470; 13 Enc. Pl. & Pr. 243; 19 Am. & Eng. Enc. Law, 2d ed. 242–245, 288.

The rule does not depend upon the interpretation of particular terms employed by the legislature. It affords a conspicuous exemplification of the principle of construction which withdraws from the letter that which is plainly not within the spirit of a statute.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Braum v. Sauerwein, 10 Wall. 221, 222, 19 L. ed. 896, 897; Cotterell v. Purchase, Cas. t. Talb. 63; Alden v. Gregory, 2 Eden, 285; Prevost v. Gratz, 6 Wheat. 481, 5 L. ed. 311; Sherwood v. Sutton, 5 Mason, 154, Fed. Cas. No. 12,782; First Massachusetts Turnp. Corp. v. Field, 3 Mass. 201, 3 Am. Dec. 124.

The exception is in no way dependent upon the supposed independence of the chancery courts.

Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636; Sherwood v. Sutton, 5 Mason, 145, Fed. Cas. No. 12,782.

The reasons underlying the rule apply to a suit to annul a patent for fraud.

United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836.

The statute forms an exception to the general rule that time does not run against the government. Therefore (and for the reasons upon which that immunity rests) it should not be strictly construed against the government.

Angell, Limitations, 6th ed. ¶ 36; United States v. Nashville, C. & St. L. R. Co. 118 U. S. 120, 125, 30 L. ed. 81, 83, 6 Sup. Ct. Rep. 1006; United States v. Insley, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. Rep. 485; United States v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083.

The conclusion of the Secretary of the Interior that the patents should be issued is not a bar to this suit.

United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; United States v. Hughes, 11 How. 552, 13 L. ed. 809; Hughes v. United States, 4 Wall. 232, 18 L. ed. 303; United States v. Atherton, 102 U. S. 372, 26 L. ed. 213; Moffat v. United

States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; Washington Securities Co. v. United States, 234 U. S. 76, 58 L. ed. 1220, 34 Sup. Ct. Rep. 725.

The general rule in Federal equity courts as to the duty resting upon the complainant in order to avoid the plea of limitation is that he must file his bill within the period of limitation, take out the subpœna without delay, and see that a bona fide attempt is made to serve it. After service is made, he must diligently bring his suit to a hearing If these acts are performed, the complainant is clear of the bar of limitation.

Angell, Limitations, 6th ed. § 346; United States v. American Lumber Co. 80 Fed. 309, 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827; United States v. Miller, 164 Fed. 444.

The rule of continuity of service does not apply to suits in equity.

Angell, Limitations, 6th ed. § 318.

Messrs. Joel F. Vaile and Henry McAllister, Jr., filed a brief as *amici curiæ* in No. 46:

Congress and those executive officials charged with the duty of observing the requirements of this statute understood at the time of its enactment that, regardless of the illegalities or irregularities, whether arising from fraud or otherwise, attending the securing of the patent, the same could not be challenged after the expiration of the period whose only prescribed commencement was the date of its issuance. It is a matter of common knowledge that such was the construction placed upon the act by the executive officers of the government for a period of nearly twenty years and until the present theory was evolved. Such long-continued construction is an important factor for a court's consideration of an ambiguous law, to say nothing of one which is couched in such plain terms as the statute now before us.

United States v. Union P. R. Co. 148 U. S. 562, 572, 37 L. ed. 560, 563, 13 Sup. Ct. Rep. 724; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 34, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; United States v. Healey, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247.

The statute means what it, in plain terms, says. Construing it, this court has held that the lapse of six years from "the date of the issuance" of the patent, without suit, takes away the right as well as the remedy; even void patents are thereby forever validated; *a fortiori*, patents merely voidable because of fraud of any character can never thereafter be challenged. The only open question is whether the land was public land of the United States and open to sale and conveyance through the Land Department at the time the patent issued.

Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; United States v. Goldenberg, 168 U. S. 95, 103, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 36, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508; Den ex dem. Scott v. Reid, 10 Pet. 524, 527, 9 L. ed. 519, 520; United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Louisiana v. Garfield, 211 U. S. 70, 53 L. ed. 92, 29 Sup. Ct. Rep. 31.

The principle of Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636, and kindred cases, that, where the statute of limitations prescribes a limit after "the cause of action accrues" for the institution of suit, time does not begin to run until the discovery of the fraud, particularly concealed fraud, is based on the theory that until such discovery the cause of action does not accrue. This has been so held by this and the lower Federal courts, and is evidenced by statutory enactments. That principle does not apply to a statute such as the one in question, as various national courts have determined.

(1) The English cases are predicated upon the fact that the statute of 21 James I. applied solely to actions at law, and therefore the chancery courts might ingraft exceptions in equity cases.

Bond v. Hopkins, 1 Sch. & Lef. 413; Hovenden v. Annesley, 2 Sch. & Lef. 630, 9 Revised Rep. 119; Ecclesiastical Comrs. v. Northeastern R. Co. L. R. 4 Ch. Div. 859, 36 L. T. N. S. 174, 12 Mor. Min. Rep. 609.

(2) The "cause of action does not accrue until the discovery of the fraud" is the principle upon which the Federal courts predicate their construction of the ordinary statute of limitations.

Bailey v. Glover, 21 Wall. 342, 22 L. ed 636; Sherwood v. Sutton, 5 Mason, 143, Fed. Cas. No. 12,782; Carr v. Hilton, 1 Curt. C. C. 230, Fed. Cas. No. 2,436; Norris v. Haggin, 12 Sawy. 53, 28 Fed. 275; Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430; Goodridge v. Union P. R. Co. 35 Fed. 35.

(3) The same principle is fortified by many statutes, which, adopting it, have provided that in the case of fraud the cause of action shall not be deemed to have accrued until the discovery thereof.

2 Wood, Limitations, 2d ed. p. 972, Appx.

(4) The principle does not apply to a statute such as the one in question.

Re Brown, 19 Nat. Bankr. Rep. 312,

Fed. Cas. No. 1,983; Pickett v. McGavick, 14 Nat. Bankr. Rep. 236, Fed. Cas. No. 11,126; Re Herzig, 15 Abb. N. C. 179; Alexander H. Mall & Co. v. Ullrich, 37 Fed. 653; Kinder v. Scharff, 231 U. S. 517, 58 L. ed. 343, 34 Sup. Ct. Rep. 164.

(5) Congress was presumptively aware of the rulings that the "cause of action" does not accrue until the discovery of the fraud; and, in selecting another and inflexible date from which to measure the period of limitation, intended to depart from this principle.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 448, 45 L. ed. 1171, 1177, 21 Sup. Ct. Rep. 906.

Messrs. Joseph Paxton Blair and Charles R. Lewers filed a brief as *amici curiæ* in No. 159:

No doubt is suggested by the language of the statute, and there is no room for construction.

United States v. American Lumber Co. 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827.

The burden of proof must rest heavily on those who seek to qualify the literal meaning and effect of the words of these acts.

United States v. Winona & St. P. R. Co. 165 U. S. 463, 476, 41 L. ed. 789, 795, 17 Sup. Ct. Rep. 368.

It is not one of the rules governing either public or private suits that courts of equity may suspend the operation of a binding statute of limitation.

Stearns v. Page, 7 How. 819, 828, 12 L. ed. 928, 932.

The occasional failure to recognize the historical fact that equity courts were not governed by the law statutes of limitation has caused much, if not all, of the confusion we find in some of the later decisions in this country. On account of the numerous instances where the equity courts have refused to apply the statute by analogy, because of fraud or concealment, we sometimes find judges falling into the error of supposing that courts of equity may refuse to follow the limitations of statutes passed for the purpose of directly governing their proceedings.

2 Wood, Limitations, 2d ed. 963; Piatt v. Vattier, 9 Pet. 405, 416, 9 L. ed. 173, 177; Stearns v. Page, 7 How. 819, 828, 12 L. ed. 928, 932; Kane v. Bloodgood, 7 John. Ch. 90, 11 Am. Dec. 417; Bond v. Hopkins, 1 Sch. & Lef. 413; Street, Fed. Eq. Pr. § 212.

The statutes we are now considering are directly binding on the equity courts instead of being applicable merely by analogy. The courts, therefore, have no authority to disobey the limitations created by these statutes. It is true that the courts that decided the present case and the Exploration Company Case disclaim any intention to deviate from the law. But they have done that very thing under the authority of a line of cases decided under statutes barring recovery a certain number of years after the "cause of action accrued." Whether these cases are right or not, they are explainable on the interpretation made of the word "accrued," and do not justify the use made of them in the present controversy.

Sherwood v. Sutton, 5 Mason, 143, Fed. Cas. No. 12,782; Carr v. Hilton, 1 Curt. C. C. 230, Fed. Cas. No. 2,436; Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636; Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430; Pickett v. McGavick, 14 Nat. Bankr. Rep. 236, Fed. Cas. No. 11,126; Re Brown, 19 Nat. Bankr. Rep. 312, Fed. Cas. No. 1,983.

Equitable rules qualifying the application of statutes of limitation in private suits are an inseparable part of the general doctrine of laches.

Kennedy v. Green, 3 Myl. & K. 722, 21 Eng. Rul. Cas. 820; Stearns v. Page, 7 How. 819, 829, 12 L. ed. 928, 932; Wood v. Carpenter, 101 U. S. 135, 143, 25 L. ed. 807, 809; Bailey v. Glover, 21 Wall. 342, 347, 22 L. ed. 636, 638; Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 99, 36 L. ed. 899, 903, 13 Sup. Ct. Rep. 28; Pearsall v. Smith, 149 U. S. 231, 236, 37 L. ed. 713, 717, 13 Sup. Ct. Rep. 833; Beaubien v. Beaubien, 23 How. 190, 16 L. ed. 484; Kirby v. Lake Shore & M. S. R. Co. 120 U. S. 130, 138, 30 L. ed. 569, 572, 7 Sup. Ct. Rep. 430; Norris v. Haggin, 136 U. S. 386, 392, 34 L. ed. 424, 427, 10 Sup. Ct. Rep. 942; Felix v. Patrick, 145 U. S. 317, 332, 36 L. ed. 719, 726, 12 Sup. Ct. Rep. 862; Hardt v. Heidweyer, 152 U. S. 547, 558, 38 L. ed. 548, 552, 14 Sup. Ct. Rep. 671; Wetzel v. Minnesota R. Transfer Co. 169 U. S. 237, 241, 42 L. ed. 730, 732, 18 Sup. Ct. Rep. 307.

The equitable doctrine of laches is not historically or practically applicable to suits by the government.

United States v. Puget Sound Traction, Light & P. Co. 215 Fed. 436.

Mr. Justice Holmes delivered the opinion of the court:

These are suits in equity brought by the United States against the appellants to annul patents issued under the timber and stone act of June 3, 1878, chap. 151, 20 Stat. at L. 89, Comp. Stat. 1913, § 4671, on the ground that the entries were fraudulent. Both of the courts below have found that the entries were fraudulent, that the defendant Smith was either a party to the fraud or chargeable with notice of it, and that the Linn & Lane Timber Company

stood in no better position than Smith. The circuit court of appeals made decrees for the United States in respect of all the lands concerned. 181 Fed. 545, 116 C. C. A. 267, 196 Fed. 593, 121 C. C. A. 498, 203 Fed. 394. The main question here concerns the statute of limitations: "Suits to vacate [576] and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." Act of March 3, 1891, chap. 561, § 8, 26 Stat. at L. 1095, 1099, Comp. Stat. 1913, §§ 5116, 5114. See act of March 3, 1891, chap. 559, 26 Stat. at L. 1093, Comp. Stat. 1913, § 4992. In No. 46 the twenty-eight patents in controversy were issued on August 12, 1902. In No. 159, nine of the patents were issued on August 12, 1902, and eight on July 9, 1902. The bills were filed and subpœnas were taken out and delivered to the marshal on May 25, 1908. On July 20 the marshal returned *non est inventus* as to Smith. An order of notice was applied for on the same day, suggesting that he was residing in Minneapolis, and was granted on July 27. Smith was served with process on August 11, 1908, and the corporation was made a party on November 16, and was served on November 18, 1908; so that it will be seen that the corporation was not brought into the suit until more than six years had run after the issue of all the patents, and that Smith was served more than six years after the issue of eight of the patents involved in No. 159. On the other hand, the bills were filed within six years.

The patented lands had been conveyed to various persons in trust for Smith in 1900, shortly after the making of final proof. In May, 1906, Smith, still having the equitable or legal title, organized a Minnesota corporation, the appellant, with 1,000 shares of $100 each, for the purpose of receiving and holding the title to these and other lands. He took 998 shares, his wife 1, and his attorney 1. He then offered to pay for the stock with the land, and subsequently caused to be executed deeds purporting to convey the lands to the corporation, but he retained the deeds and did not have them recorded until September 9, 1908, after the beginning of these suits, and more than six years after the issue of the patents. It is found, it would seem reasonably, that one purpose of Smith was to keep the titles concealed until the statute of [577] limitations should have run. The United States was ignorant of the transaction. But a month from the recording of the conveyances to the corporation Smith and other defendants pleaded it in abatement, and in November, as we have said, the United States filed amended bills.

Upon the facts as found by the two courts below we must take it that the corporation was the mere tool of Smith, that his knowledge was its knowledge (J. J. McCaskill Co. v. United States, 216 U. S. 504, 54 L. ed. 590, 30 Sup. Ct. Rep. 386), and that it was party to an effort to keep the title concealed until it was too late for the United States to complain. It even is open to some doubt whether the deeds ever were delivered until they were recorded, and it seems open to none that, as was said by the circuit court of appeals, recording the deeds was the first business the corporation did. This being so, the difference in legal personality between Smith and the corporation gives the corporation no greater rights than Smith. It cannot be privy to a fraud, and on the ground of its success set up a title of which, if that be material, Smith is to have substantially the whole advantage, and thus defeat the adjudication against Smith that otherwise would undo the fraud. There is no question of creditors' rights, and the only ground for hesitation is that before the bill was filed some of the shares had been pledged by Smith, and 15 shares had been transferred to one Johnson and also pledged for Smith's debt. But we are of opinion with the findings that the position was not changed as between the United States, Smith, and the corporation in such a way as to give the last a better standing in this case. Those who took the stock as security did not deal with the corporation as outsiders, but became a part of it while it still was under the manifest domination of Smith, and charged with participation in Smith's fraud. The corporation cannot derive any new right from them. Wilson Coal Co. v. United [578] States, 110 C. C. A. 343, 188 Fed. 545. Whether they have a remedy is not a question here.

We now are not considering the effect of a fraudulent concealment of a cause of action. We are considering whether a man who knows that his title is bad and will be attacked can call into being a corporation which he owns, in order to save the property, make a deed to it, put the deed into his pocket, leave it unrecorded, and, without the need of trusting even an accomplice, can keep it with perfect security until the statute has run, and then set up that his creature owns the land. We are deciding that if a secret transfer of wrongfully held land is made in this way for the purpose of busying the United States with the wrong person until the title shall be made good by time, service on the man thus put forward is sufficient to avoid the statute and the trick must fail.

The bills were filed and subpœnas were taken out and delivered to the marshal for service before the statute had run, reasona-

ble diligence was shown in getting service, and therefore the rights of the United States against all the patents were saved. For when so followed up, the rule is pretty well established that the statute is interrupted by the filing of the bill. Coppin v. Gray, 1 Young & C. Ch. Cas. 205, 207, 11 L. J. Ch. N. S. 105, 6 Jur. 512; Purcell v. Blennerhassett, 3 Jones & L. 24, 45, 9 Ir. Eq. Rep. 108; Forster v. Thompson, 4 Drury & War. 303, 318, 2 Connor & L. 568, 6 Ir. Eq. Rep. 168; Hele v. Bexley, 20 Beav. 127; Hayden v. Bucklin, 9 Paige, 512; Aston v. Galloway, 38 N. C. (3 Ired. Eq.) 126; Dilworth v. Mayfield, 36 Miss. 40, 52; United States v. American Lumber Co. 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827, 830; United States v. Miller, 164 Fed. 444.

There was an attempt made in argument to reopen the questions of fact upon which the two courts below agreed, but we see no reason to depart from the common rule, and therefore we do not advert to any of those matters. It also was argued that the decision of the Secretary of the Interior that the patents should be issued is conclusive. [579] But the decision was obtained by such frauds that the matter was open for reconsideration by the courts. Washington Securities Co. v. United States, 234 U. S. 76, 58 L. ed. 1220, 34 Sup. Ct. Rep. 725.

Decrees affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

RAMAPO WATER COMPANY, Appt.,
v.
CITY OF NEW YORK and Charles Strauss, Charles N. Chadwick, and John F. Galvin, Individually and as Members of the Board of Water Supply of the City of New York.

(See S. C. Reporter's ed. 579–585.)

Federal courts — jurisdiction — substantial Federal question.

The groundlessness of the claim that the provisions of N. Y. Laws 1895, chap. 985, empowering a water company to acquire title to land and water for its corporate purposes in the manner specified by the general railroad act (Laws 1850, chap. 140), gave such company, as the result of filing a map without notice to landowners or other preliminaries, a vested right to exclude the rest of the world from a drainage area or watershed covering a thousand square miles. —is so obvious as to require the dismissal for lack of jurisdiction of a suit in a Federal district court to enjoin municipal interference with such alleged right on the ground that due process of law is denied and contract obligations impaired by the laws under which the municipality is acting.

[For other cases, see Courts, 489–504, in Digest Sup. Ct. 1908.]

[No. 715.]

Argued February 24, 1915. Decided March 8, 1915.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing for lack of jurisdiction a suit to enjoin municipal interference with the alleged rights of a water company. Affirmed.

The facts are stated in the opinion.

Mr. Carroll G. Walter argued the cause, and, with Mr. Walter C. Noyes, filed a brief for appellant:

The Underground Railroad Case, Underground R. Co. v. New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494, is contrary to the principles of the numerous cases in which this court has said that whether or not there is a contract is a question which this court will determine for itself independent of the decisions of the state court (Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Russell v. Sebastian, 233 U. S. 195, 202, 58 L. ed. 912, 920, L.R.A.—, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 170, ante, 175, 180, 35 Sup. Ct. Rep. 62; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 186, ante, 184, 189, L.R.A.1915—, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 900), for the controlling principle of those cases is that such question is essentially and inherently of a Federal character. Indeed, if the doctrine of the Underground Railroad Case were consistently followed, this court could not entertain jurisdiction of a writ of error to a state court in any case in which the state court had held that no contract or property right existed, and yet this court has repeatedly taken and exercised jurisdiction in just such cases, sometimes holding with the state court and sometimes reversing it (Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, ante, 175, 35 Sup. Ct. Rep. 62; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, ante, 184, L.R.A.1915—, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.—, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428).

In addition, however, to these analogous cases, the Underground Railroad Case stands

impugned by several other cases originating in the lower Federal courts and presenting situations almost identical with those presented in the Underground Railroad Case and in the case at bar.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Defiance Water Co. v. Defiance, 191 U. S. 184, 195, 48 L. ed. 140, 145, 24 Sup. Ct. Rep. 63; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 458, 50 L. ed. 1102, 1106, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 57 L. ed. 716, 33 Sup. Ct. Rep. 410.

A general legislative authority to exercise a special right or privilege, such as the right to supply cities with water, is an offer by the state which is converted by an acceptance by some particular corporation into a binding contract and a vested property right; and such an offer is accepted when some individual or corporation, by an investment of money and a change of position upon the faith of the offer, undertakes to perform the described service.

Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.—, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572, Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 85, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, ante, 184, L.R.A.1915—, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906; Suburban Rapid Tranit Co. v. New York, 128 N. Y. 510, 28 N. E. 525.

There is, also, in this court, another line of cases which, by analogy, are of exact application here, and which fully establish the doctrine that the statutes here involved constitute what is appropriately termed a "floating grant" of the right to ultilize whatever sources of supply the plaintiff might select, which grant became vested and attached to particular sources when the plaintiff selected the particular sources it proposed to ultilize, although actual title and ownership of the land involved had not been acquired.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 634, 28 L. ed. 1122, 1123, 5 Sup. Ct. Rep. 566; Walden v. Knevals, 114 U. S. 373, 29 L. ed. 167, 5 Sup. Ct. Rep. 898.

In the state courts, too, it has been uniformly held that where railroad and other corporations, acting pursuant to statutory authority, locate their routes or otherwise select the particular lands which they propose to utilize in the performance of their public functions, they obtain a vested right and franchise to utilize such lands, and that such lands are then subject to this franchise although not yet actually acquired from the owners by purchase or condemnation.

Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co. 141 Pa. 407, 12 L.R.A. 220, 21 Atl. 645; Nicomen Boom Co. v. North Shore Boom & Driving Co. 40 Wash. 325, 82 Pac. 412; Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323; Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co. 44 Hun, 206, 110 N. Y. 128, 17 N. E. 680; Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 28 N. E. 525.

To permit subsequent decisions to impair the rights acquired by the plaintiff would be unjust, and under such circumstances the Federal courts are not bound to follow the decisions of the state courts, but, on the contrary, are bound to disregard them.

Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Douglass v. Pike County, 101 U. S. 677, 686, 25 L. ed. 968, 971; Burgess v. Seligman, 107 U. S. 20, 23, 27 L. ed. 359, 361, 2 Sup. Ct. Rep. 10; McCullough v. Virginia, 172 U. S. 102, 109, 43 L. ed. 382, 384, 19 Sup. Ct. Rep. 134; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 575, 44 L. ed. 886, 894, 20 Sup. Ct. Rep. 736; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 360, 54 L. ed. 228, 234, 30 Sup. Ct. Rep. 140; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

The franchise so acquired by the plaintiff constitutes a contract and a vested property right protected by the Federal Constitution, and was not destroyed by the repealing acts mentioned in the bill.

Sinking Fund Cases, 99 U. S. 700, 25 L. ed 496; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 408, 409, 43 L. ed. 746, 748, 749, 19 Sup. Ct. Rep. 419; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 213, 48 L. ed. 406, 413, 24 Sup. Ct. Rep. 241; Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 388, 51 L. ed. 237, 240, 27 Sup. Ct. Rep. 74; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 552, 57 L. ed. 633, 639, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255,

7 Am. St. Rep. 684, 18 N. E. 692; Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.—, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 191, 193, ante, 184, 191, L.R.A.1915—, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906; Lord v. Equitable Life Assur. Soc. 194 N. Y. 227, 22 L.R.A.(N.S.) 420, 87 N. E. 443; Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117; Ingersoll v. Nassau Electric R. Co. 157 N. Y. 453, 43 L.R.A. 236, 52 N. E. 545; Roddy v. Brooklyn City & N. R. Co. 32 App. Div. 311, 52 N. Y. Supp. 1025; Brinkerhoff v. Newark & H. Traction Co. 66 N. J. L. 478, 49 Atl. 812; Chicago & W. I. R. Co. v. Dunbar, 95 Ill. 579.

The acts and proceedings of the defendants, done and carried on under color of authority of state laws, constitute an impairment of the plaintiff's contracts and a taking of its property without due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064; McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 160, ante 169, 173, 35 Sup. Ct. Rep. 69; United States v. Reynolds, 235 U. S. 133, 149, ante, 162, 168, 35 Sup. Ct. Rep. 86; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; Rothschild v. Interborough Rapid Transit Co. 162 App. Div. 532, 147 N. Y. Supp. 1040.

Mr. Louis C. White argued the cause, and, with Mr. Frank L. Polk, filed a brief for appellees:

All parties to the suit are citizens of the state of New York, and unless the bill of complaint shows on its face some question arising under the Constitution or laws of the United States, the court below was without jurisdiction and the bill was properly dismissed.

Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Underground R. Co. v. New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep 494; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783.

The bill of complaint shows on its face that the plaintiff had no contract the obligation of which was impaired, nor any property of which it was deprived, by the legislation and acts complained of.

Re Long Island R. Co. 45 N. Y. 365; New York & A. R. Co. v. New York, W. S. & B. R. Co. 11 Abb. N. C. 386; Greenwich & J. R. Co. v. Greenwich & S. Electric R. Co. 75 App. Div. 220, 78 N. Y. Supp. 24, affirmed in 172 N. Y. 462, 65 N. E. 278; People v. Adirondack R. Co. 160 N. Y. 225, 54 N. E. 689; 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; Underground R. Co. v. New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity to restrain the city of New York and the board of water supply from proceeding further with the enterprise upon which they already had spent over one hundred and twenty-nine millions of dollars in order to provide the city with a supply of water. The ground is as follows:

The plaintiff (appellant) originally was incorporated under a general act, in 1887, for the purpose of storing and supplying water for mining, domestic, manufacturing, municipal, and agricultural purposes, to cities, other corporations, and persons. By virtue of other statutes it had the right to acquire title to land and water for its [582] corporate purposes in the manner specified by the general railroad act, chap. 140, Laws of 1850; and it spent money, had surveys made, filed some maps, and acquired options for the purchase of real estate in pursuance of the ends for which it was formed.

In 1890 the laws under which the plaintiff was incorporated were repealed, but thereafter chap. 985 of the Laws of 1895 reiterated the grant of the powers specified in the charter, and authorized the corporation to acquire "in the same manner specified and required in" the above-mentioned railroad act "such lands and waters along the watershed of the Ramapo, and along such other watersheds and their tributaries, as may be suitable for the purpose of accumulating and storing the waters thereof." The corporation is to make a map of the route adopted and the land to be taken, and file the same in the office of the clerk of the county through which the route runs or in which the land is situate. It is to give written notice to all occupants of lands so designated, and the occupants and owners are given time to apply for the appointment of commissioners, by a petition stating the objections to the route designated and the route to which it is proposed to alter the same, with elaborate provisions for notice and hearing and appeal

to the supreme court, which "may affirm the route proposed by the corporation, or may adopt that proposed by the petitioner." Under this act the corporation filed maps covering substantially the whole of the drainage areas or watersheds of the Esopus, Catskill, Schoharie, and Rondout creeks about a thousand square miles (being the same lands that the city now has taken), acquired options for purchase of land, and spent large sums.

Before this time, it is alleged, the courts of New York had declared that the filing of maps under the railroad law of New York gave to the corporation filing them a vested right to the exclusive use of the lands covered by [583] the maps. The plaintiff, in 1898, made an offer to the city of New York to furnish it with water from the region in question, but, pending investigation by the city, in 1901 the act of 1895, giving the plaintiff its rights, was repealed by an act alleged to be unconstitutional and void. In 1905 the city was empowered itself to acquire new water supplies, machinery was provided to that end, and the city has gone ahead as we have stated, without regard to the plaintiff's alleged rights. The plaintiff sets up that the laws under which the city acts impair the obligation of contracts between it and the state, and take its property without due process of law, contrary to article I., § 10, and the 14th Amendment of the Constitution of the United States. An answer was filed, but the defendants also moved to dismiss for want of jurisdiction on the ground that all the parties were citizens of New York, and that the case involved no question under the Constitution. The district court, being of opinion that the bill disclosed no such rights as the plaintiff claimed, and therefore showed no real constitutional ground, dismissed the bill.

The plaintiff's argument, while admitting that it must appear that there is a substantial question under the Constitution, and that the formal averment of such a question is not enough, makes a rather useless attack upon the application of that principle in Underground R. Co. v. New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494. If it is apparent that the bill is groundless, it does not matter very much whether the dismissal purports to be for want of jurisdiction or on the merits. But we are of opinion that the groundlessness of the bill is so obvious that it fairly may be said that no substantial constitutional question appears.

The charter of the company, of course, could be repealed without impairing the obligation of a contract, as the right was reserved, as usual, in the Constitution of the state. Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122. The only matter deserving [584] a word is the claim that by filing the maps the corporation gained rights that survive. As to that, in the first place it would require stronger language than any that is found in the act of 1895 to lead us to believe that the legislature meant that the rights conferred with regard to routes should be extended over any or all of the watersheds in the state of which the plaintiff might see fit to file a map. The direction to file a map of the route adopted and the land to be taken, coupled with the other provisions that we have recited, appears to us to have in view the route and the land needed for the route, and only that, not the thousand square miles that the plaintiff claims. In the next place the plaintiff had given no notice to anybody, and notice to occupants of the land is a condition to the existence of any right. And finally, it is held in New York and affirmed by this court, that no such right, even for the route of a railroad, is created as against the state by the filing of a map. People v. Adirondack R. Co. 160 N. Y. 225, 242–247, 54 N. E. 689, 176 U. S. 335, 346, 44 L. ed. 492, 498, 20 Sup. Ct. Rep. 460. Underground R. Co. v. New York, 193 U. S. 416, 428, 48 L. ed. 733, 736, 24 Sup. Ct. Rep. 494.

We appreciate the argument that although the corporation may have had no lien on the land, or right as against the sovereign power, it had a right as against all subordinate bodies to exclude them from the lands of its choice, that the decisions had declared this right to be vested and indestructible except by legitimate exercise of the power of eminent domain, that it had spent money and taken action on the faith of them, and that a later decision cannot take away the right. But the cases relied upon are too remote for the confident application of that doctrine if there were no other objections to it. They concern the effect of filing a map of a railroad route, and only when coupled with notice to the landowners concerned. We should be more inclined to follow Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 626, 58 L. ed. 1503, 1506, 34 Sup. Ct. Rep. 941; Willoughby [585] v. Chicago, 235 U. S. 45, ante, 123, 35 Sup. Ct. Rep. 23. But, as we have said, nothing short of a specific decision of the court of appeals would make us believe that the act of 1895 gave to the plaintiff, without notice to landowners or other preliminary, a vested right, seemingly unlimited in time, to exclude the rest of the

world from whatever watersheds it chose, simply by filing a map.

Decree affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF NORTH DAKOTA ON RELATION OF T. F. McCUE, Attorney General. (No. 420.)

MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF NORTH DAKOTA EX REL. T. F. McCUE, Attorney General. (No. 421.)

(See S. C. Reporter's ed. 585–605.)

Error to state court — review of facts.

1. The Federal Supreme Court, on writ of error to a state court, will review the findings of fact by the latter court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

Carriers — rate regulation — reasonableness — cost of transportation.

2. The cost of the transportation of a particular commodity which must be considered when determining whether the maximum intrastate rates fixed by the state for the carriage of such commodity are adequate or confiscatory includes all the outlays which pertain to such transportation, there being no basis for distinguishing in this respect between so-called "out-of-pocket costs," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

Carriers — rate regulation — reasonableness — public policy.

3. A state may not compel a carrier to establish a rate upon a particular commodity which is less than reasonable, in order to build up a local enterprise.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — state regulation of railway rates — confiscation.

4. The maximum intrastate rates fixed by N. D. Laws 1907, chap. 51, for the transportation of coal in carload lots, are confiscatory and deny the carrier the due process of law guaranteed by U. S. Const., 14th Amend., where, taking into account the entire traffic to which such rates are applied, they compel the carrier to transport the commodity for less than cost, or without substantial compensation in addition to cost, although the return to the carrier from its entire intrastate operations may be adequate.

[For other cases, see Constitutional Law, 616–622; Carriers, III. d, in Digest Sup. Ct. 1908.]

[Nos. 420 and 421.]

Argued October 19 and 20, 1914. Decided March 8, 1915.

TWO WRITS of error to the Supreme Court of the State of North Dakota to review judgments commanding railway carriers to keep in force the maximum intrastate rates fixed by the state laws for the transportation of coal in carload lots. Reversed and remanded for further proceedings.

See same case below, 26 N. D. 438, 145 N. W. 135.

The facts are stated in the opinion.

Mr. Charles W. Bunn argued the cause, and, with Mr. Charles Donnelly, filed a brief for plaintiffs in error:

Besides impingement upon Federal power, the supremacy of which has been affirmed in the Minnesota Rate Case (Simpson v. Shepard) 230 U. S. 458, 57 L. ed. 1565, 48 L.R.A.

NOTE.—On the general subjects of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

As to reasonableness of state regulation of railway rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Co. v. Croxton, 33 L.R.A. 177.

On elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic—see notes to State ex rel. McCue v. Northern P. R. Co. 25 L.R.A.(N.S.) 1001, and Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 108.

As to what constitutes due process of law, generally,—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

(N.S.) 1151, 33 Sup. Ct. Rep. 729, and the more recent case of Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, the divisions and apportionments of valuation required by the decision below necessitate a showing impossible for any carrier to make, —at least, until the determining principles shall be settled by Federal authority. And, moreover, these divisions and apportionments each state might settle for itself upon principles quite antagonistic to those adopted in every other state.

Again, if the doctrine held below is correct, it follows, as was pointed out in Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 52, that to sustain an attack on a legislative rate affecting one commodity or one class of business a carrier, in addition to showing that its whole business is unprofitable, must prove this want of profit to be caused by the rate attacked.

The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 698, 43 L. ed. 864, 19 Sup. Ct. Rep. 565.

While it has been said that the taxing power acknowledges no limitations (and in certain senses this may be true), it has never been laid down that the police power acknowledges no limitations. On the contrary, this power is confessedly subject to the limitation that property, by the exercise thereof, may not be taken without just compensation.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622.

The authorities settle the question against the doctrine held by the lower court.

Smyth v. Ames, 169 U. S. 540–543, 42 L. ed. 847, 848, 18 Sup. Ct. Rep. 418; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 23, 25, 51 L. ed. 933, 943, 944, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 277–279, 54 L. ed. 472, 478–480, 30 Sup. Ct. Rep. 330; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A.(N.S.) 108, 68 Atl. 676.

Mr. John I. Dille also argued the cause, and, with Messrs. A. H. Bright and John L. Erdall, filed a brief for plaintiff in error in No. 421:

The value of the property devoted to the transportation of coal sufficiently appears.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 40, 53 L. ed. 382, 395, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 470, 57 L. ed. 1511, 1570, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

The business of common carriers and the property devoted to public use by them are protected by the Constitution in the same way and to the same extent as the business and property of individuals engaged in purely private callings.

The power of the state to regulate and control the business of common carriers does not exist because they are created by or are allowed to do business with the state's consent, but arises from the public character of the functions performed by such common carriers.

The power of the state to regulate and control the business of common carriers is limited by the Constitution, broadly speaking, to the securing of adequate and efficient service at reasonable rates to all alike.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 567, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Munn v. Illinois, 94 U. S. 113, 127, 24 L. ed. 77, 85; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 161, 24 L. ed. 94, 95; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 329, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 181, 24 L. ed. 99, 102; Dow v. Beidelman, 125 U. S. 681, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep.

259; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

The common carrier's function is to perform specific service for individual shippers at a compensation to be paid by such shippers. The limitation is that the rate shall be reasonable and without discrimination. A rate is unreasonable from the carrier's point of view if it affords no net return for the service rendered; and it is unreasonable from the shipper's point of view if it furnishes more than a reasonable net return for the service rendered. Our view is that the carrier cannot be compelled to carry for less than such net return, and the shipper cannot be compelled to pay more than enough to afford such net return.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 346, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Northern P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

Mr. Andrew Miller, Attorney General of North Dakota, and Mr. C. L. Young, argued the cause, and, with Messrs. John Carmody and Alfred Zuger, filed a brief for defendant in error:

A public service corporation may not, as a matter of right, lay absolute claim to a profit from the conduct of its business. A profit is guaranteed only when its return is consistent with justice to the public. Whether it is a property right depends upon the facts in each case. If a reasonable rate does not secure an adequate return upon the investment, that is a "misfortune" which the Constitution does not require to be remedied by imposing unjust burdens upon the public. This means, that though rates under which a carrier is operating are not compensatory, it does not follow inevitably that they are confiscatory. If reasonable in the light of all considerations bearing upon them, they may then be reasonable, though not remunerative.

Smyth v. Ames, 169 U. S. 466, 525, 544, 42 L. ed. 819, 842, 848, 18 Sup. Ct. Rep. 418; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 268, 46 L. ed. 1158, 22 Sup. Ct. Rep. 900; Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 578, 596, 597, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 412, 38 L. ed. 1014, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804.

A carrier may, under certain conditions, be compelled to carry a commodity though it derive little or no profit from so doing.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, affirming 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18; State ex rel. McCue v. Northern P. R. Co. 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

A carrier is not entitled to a uniform rate of return or profit from each commodity carried or services rendered. If, in view of the return from the entire business, the profit from one item may be reduced below the rate of return deemed adequate as a whole, logically all profit upon such item may be entirely eliminated.

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 85, 52 L. ed. 111, 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Willcox v. Consolidated Gas Co. 212 U. S. 19, 52, 53 L. ed. 382, 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Matthews v. Corporation Comrs. 106 Fed. 7; Southern R. Co. v. McNeill, 155 Fed. 756; Re Arkansas R. Rates, 168 Fed. 730, 187 Fed. 307; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Southern R. Co. v. Atlanta Stove Works, 128 Ga. 223, 57 S. E. 429; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 519, 49 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; State ex rel. McCue v. Northern P. R. Co. 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869; Re Louisville & N. R. Coal & Coke Rates, 26 Inters. Com. Rep. 20; Wyman, Public Service Corp. § 1201; Freund, Pol. Power, § 551; 3 Enc. U. S. Sup. Ct. Rep. 632.

The commodity affected is one of the lowest classes of freight, and allowance should be made for that fact.

F. Schumacher Mill. Co. v. Chicago, R. I. & P. R. Co. 6 Inters. Com. Rep. 66; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Kansas City Southern R. Co. v. Carl, 227 U. S. 638, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; 2 Wyman, Public Service Corp. §§ 1232, 1348; Beale & W. R. Rate Regulation, § 554; Tift v. Southern R. Co.

138 Fed. 753; Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; Trades League v. Philadelphia, W. & B. R. Co. 8 Inters. Com. Rep. 368; American Cent. Ins. Co. v. Chicago & A. R. Co. 74 Mo. App. 89; Hays v. Pennsylvania Co. 12 Fed. 309; Denison Light & P. Co. v. Missouri, K. & T. R. Co. 10 Inters. Com. Rep. 337; Tift v. Southern R. Co. 10 Inters. Com. Rep. 548; Coxe Bros. & Co. v. Lehigh Valley R. Co. 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460; Colorado Fuel & Iron Co. v. Southern P. Co. 6 Inters. Com. Rep. 489; Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1015; Re Chesapeake & O. R. Co. 22 Inters. Com. Rep. 604.

Because of the extreme difficulty of determining with particularity the cost apportionable to a single commodity, it is only just that the return of the expenses incurred in handling the commodity be accepted as representative of a reasonable minimum within which "the flexible limit of judgment which belongs to the power to fix rates" may be exercised; otherwise, important considerations will be entirely ignored.

Re Louisville & N. Coal & Coke Rates, 26 Inters. Com. Rep. 20.

The argument that a commodity rate is unreasonable because loss is shown when the commodity is charged with the average cost for all freight is the converse of the argument that a rate is unreasonable because, if applied to all classes of freight, it would result in confiscation. This was expressly condemned in Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 268, 46 L. ed. 1158, 22 Sup. Ct. Rep. 900.

The enactment of the statute was a declaration of public policy by the state, in favor of a domestic industry and the general welfare.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 596, 41 L. ed. 566, 17 Sup. Ct. Rep. 198; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 533, 36 L. ed. 247, 252, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 682, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 292, 294, 43 L. ed. 704, 706, 19 Sup. Ct. Rep. 465; Noble State Bank v. Haskell, 219 U. S. 109, 112, 55 L. ed. 116, 117, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186; Gladson v. Minnesota, 166 U. S. 427–430, 41 L. ed. 1065, 1066, 17 Sup. Ct. Rep. 627; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. *Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 85, 52 L. ed. 111, 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Quong Wing v. Kirkendall, 223 U. S. 62, 56 L. ed. 351, 32 Sup. Ct. Rep. 192; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 434; Cobb v. Northern P. R. Co. 20 Inters. Com. Rep. 100; Chamber of Commerce v. Chicago, M. & St. P. R. Co. 5 I. C. C. Rep. 571, 4 Inters. Com. Rep. 230; Re Chesapeake & O. R. Co. 22 Inters. Com. Rep. 604; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

In determining whether the right of a carrier to receive just compensation for the service given to the public has been infringed, the basis of calculation is the fair value of the property used for the convenience of the public.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 434, 57 L. ed. 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Smyth v. Ames, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The value of the property used in the intrastate business was not established.

Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 499, 57 L. ed. 1591, 33 Sup. Ct. Rep. 975; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 454, 459, 57 L. ed. 1563, 1565, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Smyth v. Ames, 169 U. S. 466, 525, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The coal business is in itself negligible.

Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35.

There are certain conditions peculiar to the Soo road which contribute to the unfavorable operation of the rates.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 665, 39 L. ed. 573, 15 Sup. Ct. Rep. 484; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Re Arkansas R. Rates, 168 Fed. 732; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571.

In testing the validity of rates the carrier complaining of their unreasonableness is burdened with showing the cost of the business affected by them. For failure to make

such a showing carriers have been repeatedly turned from this court without relief.

Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1151, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

It is a single commodity rate only which is involved.

Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 537; Thurber v. New York C. & H. R. R. Co. 3 I. C. C. Rep. 473, 2 Inters. Com. Rep. 742.

In view of all proper considerations, confiscation has not been established.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Arkansas Rate Cases, 187 Fed. 290; Louisville & N. R. Co. v. Commission, 208 Fed. 35; San Diego Land & Town Co. v. National City, 174 U. S. 754, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804.

Mr. Justice Hughes delivered the opinion of the court:

By chapter 51 of the Laws of 1907, the legislature of North Dakota fixed maximum intrastate rates, graduated according to distance, for the transportation of coal in carload lots. It was further provided that in case the transportation was over two or more lines of railroad it should be considered as one haul, the compensation for which should be divided among the carriers according to their agreement, or, if they could not agree, as the railroad [589] commissioners should decide, subject to appeal to the courts. While the statutory rates governed all coal shipments, their practical application was almost solely to lignite coal.

The carriers refused to put the rates into effect, and in August, 1907, the attorney general of the state began proceedings in its supreme court to obtain a mandatory injunction against the Northern Pacific Railway Company, the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, and the Great Northern Railway Company. The companies answered that the statute violated the commerce clause of the Federal Constitution, and also that it infringed the 14th Amendment by fixing rates that were "unremunerative," "unreasonable," and "confiscatory." The supreme court of the state, overruling these contentions, granted the injunction. 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869. It was held that the evidence was not sufficient to overcome the presumption in favor of the rates. On writ of error from this court, the decree was affirmed without prejudice to the right of the railroad companies to reopen the case after an adequate trial of the rates. 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

This decision was rendered in the early part of the year 1910, and thereupon the rates were put into effect. After a trial for over a year, the case was reopened, voluminous testimony was taken, and the supreme court of the state, making its separate findings of fact as to the effect of the rates in the intrastate business of each carrier, and stating its conclusions of law, entered judgment commanding the carriers to keep the rates in force. 26 N. D. 433, 145 N. W. 135. The Northern Pacific Railway Company and the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company have sued out these writs of error.

The period to which the testimony relates is the fiscal year ending June 30, 1911. The facts may be thus summarized:

[590] Northern Pacific Railway Company.

The total revenue received by this company for the intrastate carriage of lignite coal for the fiscal year was $58,953.07. It was also deemed to be practicable to ascertain the amount of expense properly chargeable to this traffic. Upon this point, the court said: "As a result of the painstaking work of the accounting department of this railway company, and its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in the accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the state, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity," Id. p. 446.

With respect to the division of some of the items of expense (maintenance of way and structures, and taxes) there was no dispute, and, as to the others, the range of controversy was narrow. The company contended that the traffic in question produced at the statutory rates a loss of $2,253.65; the state insisted that it yielded a profit of $2,391.63. After a detailed analysis, the state court found the charges against the revenue received from the lignite traffic to be: (1) For train operation expense, $30,850.12; (2) switching, $4,971; (3) station service, $4,182.58; (4) freight car repairs, renewals, and depreciation, $7,121.54; (5) traffic and general expenses

(no loss and damage allowed), $1,456.14; (6) maintenance of way and structures, $7,119.93; (7) taxes, $2,424.15; making the total expenses, $58,125.46, and the surplus income, $827.61. Id. pp. 460, 461. The summary of the findings of fact is as follows:

"That, as to the Northern Pacific Railway Company, out of total freight receipts for lignite coal, amounting to $58,953, [591] the total cost of transportation, or out-of-pocket costs, together with all fixed or overhead expenses apportionable to said lignite traffic, consumed all of said receipts excepting $847, its net profit in the handling of the lignite business for the twelve months in question. That such rate is slightly remunerative, but in fact noncompensatory, considering the volume of freight carried and the property of the railroad devoted thereto." Id. p. 439.

Minneapolis, St. Paul, & Sault Ste. Marie Railway Company.

The state court regarded the statistics furnished by this company as being in the main estimates without satisfactory bases. Still, on making an elaborate examination of the facts disclosed by the record,—all the testimony adduced in the three cases being available in each one, so far as pertinent,—and on taking judicial notice of certain local conditions, the court was able to find sufficient proof to justify it in determining that under the statutory rates the intrastate transportation of lignite coal was conducted by this company at a loss. Id. pp. 461-472. A large part of the traffic, after a short haul, was delivered to connecting carriers,—the Northern Pacific and Great Northern lines,—and the prorating of the statutory compensation for the entire haul operated injuriously. As to this part, said to be "nearly half the lignite business," this road was "virtually a branch line of the other two railroads in accumulating for them their lignite traffic." It was found, further, that the value of the railway property within the state had not been established, nor had the portion of value attributable to the intrastate business been determined; and, also, that the carriage of lignite coal increased "the railroad expenses but 60 per cent of the usual statutory rate for the lignite haul;" that is, that this percentage of the rate covered the "out-of-pocket cost" of the traffic, the remaining expenses in this view being such as [592] would have been incurred had no lignite coal been transported.

The gross receipts from the intrastate traffic in question during the fiscal year were $83,670. The final results of the court's analysis in the case of this company are thus epitomized:

"*Its total receipts* amount to more than its actual out-of-pocket costs, or actual costs of transportation, but are from $9,000 to $12,000 less than the total costs, including fixed and overhead expenses, properly chargeable to the carriage of this commodity and against the earnings therefrom. That the carriage of lignite coal by the Soo line within this state during said fiscal year was not only nonprofitable, but occasioned a loss to it when its fixed expenses apportionable to all traffic are in proper proportion and amount assigned to and charged against the earnings from this commodity." Id. p. 439.

In answer to the contention of the state that the company could not be heard to complain with respect to the disadvantage of the prorating with connecting carriers, inasmuch as the basis was agreed upon without an appeal to the board of railroad commissioners, the court said that it was difficult to see what other basis could have been taken, and, further, that the result, in substance, would have been the same. The amount which could thus have been gained, it was said, would have been taken "from the net revenues of the Northern Pacific carrier principally," and would have been insufficient to have given to the Minneapolis, St. Paul, & Sault Ste. Marie company a net profit, so that "all the difference in fact would have been that both Soo and Northern Pacific would be then hauling this freight at less than the gross cost, including, of course, out-of-pocket and all fixed charges." Id. p. 483.

We understand that all the "fixed charges" to which the findings refer are actual expenses which, while including taxes, do not include any return whatever upon the investment [593] in the property, whether by way of interest or otherwise.

The facts thus found must be taken to be established. This court will review the finding of facts by a state court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Wood v. Chesborough, 228 U. S. 672, 678, 57 L. ed. 1018, 1021, 33 Sup. Ct. Rep. 706. But the present case is not within either branch of the rule. Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 412, 57 L. ed. 1248, 1258, 33 Sup. Ct. Rep. 820;

Miedreich v. Lauenstein, 232 U. S. 236, 243, 244, 58 L. ed. 584, 589, 590, 34 Sup. Ct. Rep. 309. It cannot be said that the findings of fact made by the state court are unsupported by evidence, and it is apparent that the substantial question raised by the assignments of error and submitted in argument arises upon the facts found. True, the Northern Pacific Company insists that on a critical examination of the evidence it would be ascertained that, instead of a net profit of about $800, it received no profit at all from the traffic in question under the statutory rate, but the remuneration as found is so slight as not to be more than nominal in view of the extent of the traffic, and in this aspect the finding is that the rate as to this company is noncompensatory. So, while the contention of the Minneapolis, St. Paul, & Sault Ste. Marie Company that it proved the value of the property used by it in the intrastate business is clearly inadmissible under the decisions of this court (Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729), still in the present case the determination of that value is not necessary, inasmuch as no complaint is made with respect to the company's return upon its entire intrastate business, and, so far as the attempted showing of the value [594] of the property devoted to the traffic in question is concerned, that also is unimportant, as whatever that value might be, it is found that no net return upon it was secured.

As to the law, the state court held:

"(a) The statutory freight rate is presumed to be reasonable which presumption continues until the contrary appears and the rate is shown beyond a reasonable doubt to be confiscatory.

"(b) Proof that a rate is noncompensatory—that is, while producing more revenue than sufficient to pay the actual expenses occasioned by the transportation of the commodity, but insufficient to also reimburse for that proportion of the railroad's fixed or overhead costs properly apportionable to such commodity carried—is not sufficient to establish that the rate is confiscatory in law.

"(c) In order to establish such a noncompensatory rate to be confiscatory, it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit on the amount of the value of the railroad property within the state contributing to produce such net earnings."

Accordingly, it was further held that, after establishing the value of the property employed in the production of the net intrastate freight earnings, it must appear, in order to show confiscation, either (1) that such earnings are insufficient to yield a fair return upon that value, and that the commodity in question is carried for less than what is sufficient to meet all expenses, including "out-of-pocket costs" and fixed charges, or (2) that the loss on the commodity under the rate attacked "reduces the balance of the net intrastate freight earnings" to a point where, including the loss on the commodity rate, they fail to yield such return. Id. p. 440.

And it was because their case failed to meet these tests [595] that the plaintiffs in error were commended to observe the rate.

The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination These duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them. The state may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order, and convenience.

But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the car-

rier [596] obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty, and the requirement went beyond the reasonable exercise of the state's protective power.

We have, then, to apply these familiar principles to a case where the state has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost, or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called "out-of-pocket costs," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The state cannot estimate the cost of carrying [597] coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost, the entire cost must be taken into account.

It should be said, further, that we find nothing in the record before us, and nothing in the facts which have been set forth with the most careful elaboration by the state court, that can be taken to indicate the existence of any standard whatever by reference to which the rate in question may be considered to be reasonable. It does not appear that there has been any practice of the carriers in North Dakota which affords any semblance of support to a rate so low. Whatever inference may be deduced from coal rates in other states, as disclosed by the record, is decidedly against the reasonableness of the rate. And it may be added that, while the rate was found to be compensatory in the case of the Great Northern Railway Company, this was distinctly shown to be due to the peculiar conditions of the traffic over that road, the differences with respect to which were fully detailed by the state court. 26 N. D. pp. 439, 472–480, 145 N. W. 135. Nearly 90 per cent of the total intrastate traffic in lignite coal upon the three roads was over the lines of the plaintiffs in error. It is urged by the state that the commodity in question is one of the lowest classes of freight. This may be assumed, and it may be a good reason for a lower rate than that charged for carrying articles of a different sort, but the mere grade of the commodity cannot be regarded as furnishing a sufficient [598] ground for compelling the carrier to transport it for less than cost, or without substantial reward.

The state insists that the enactment of the statute may be justified as "a declaration of public policy." In substance, the argument is that the rate was imposed to aid in the development of a local industry, and thus to confer a benefit upon the people of the state. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the state, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to

which the carrier had in no way agreed. It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.

The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all [599] commodities, or to secure the same percentage of profit on every sort of business. There are many factors to be considered, —differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 313, 58 L. ed. 229, 242, 34 Sup. Ct. Rep. 48. The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved.

But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the state's requirements. But the decisions in this class of [600] cases (which we have cited in the margin[1]) furnish no ground for saying that the state may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate. In St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, a statute fixing a maximum rate for passengers in the state of Arkansas was challenged, but the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division, of the railroad, and not to the result of all the traffic to which the rate in question applied. The holding that this was insufficient was in entire accord

[1] Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 690, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 341, 36 L. ed. 176, 177, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, s. c. 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 888; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; San Diego Land & Town Co. v. Jasper, supra; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 665, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Louisville v. Cumberland Teleph. & Teleg. Co. 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 433, 57 L. ed. 1511, 1555, 33 Sup. Ct. Rep. 729; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 497, 57 L. ed. 1571, 1590, 33 Sup. Ct. Rep. 975; Southern P. Co. v. Campbell, 230 U. S. 537, 57 L. ed. 1610, 33 Sup. Ct. Rep. 1027; Allen v. St. Louis, I. M. & S. R. Co. 230 U. S. 553, 556, 57 L. ed. 1625, 1628, 33 Sup. Ct. Rep. 1030.

with the above-stated principle,—that the rate-making power may be exercised in a practical way, and that the legislature is not bound to assure a net profit from "every mile, section, or other part into which the road might be divided." Id. p. 665. A passenger rate may apply generally throughout the state, and the effect of the rate must be considered with respect to the whole business governed by the rate. In Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, a schedule of freight rates was involved, and, while the entire schedule was under consideration, it was recognized that in order to determine its adequacy the [601] intrastate freight business might be segregated. Id. pp. 535, 550. The case of Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the court observed, was intended to show that "if the rate fixed by the commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses." It was said that it was "quite evident" that this testimony had "but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried" (id. p. 266); and this conclusion effectually distinguishes the case from the one at bar. In Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 84, 52 L. ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555, the decision rested upon the ground that the charter of the company was accepted subject to the obligations imposed by the statute there in question. In Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, in addition to the rate for gas supplied for general consumption in the city of New York, there was a lower rate fixed for that furnished to the city itself. It was said by the court that the criticism of the "wholesale" rate to the city was met by the fact that the total returns from the sale of gas were adequate. It was not established in that case that this "wholesale" rate required a service without substantial compensation in addition to cost.

It has repeatedly been assumed in the *decision* of this court, that the state has no arbitrary power over the carrier's rates, and may not select a particular commodity or class of traffic for carriage without reasonable reward. [602] In Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 260, 51 L. ed. 174, 175, 27 Sup. Ct. Rep. 108, and in Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 270, 51 L. ed. 175, 178, 27 Sup. Ct. Rep. 109, there was an attack upon a rate on a single article, to wit, on phosphates, but the proof as to the effect of the rate and the cost of the transportation was found to be insufficient. The case of Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, involved the validity of an order of the state commission requiring the railroad company so to arrange its schedule of transportation between two points as to make connections with through trains. It was held that the order merely compelled the carrier to perform a duty which fell within the scope of the obligations it had assumed. So far from the case being an authority for the conclusion that the validity of a particular rate cannot in any case be challenged if the returns from the entire intrastate operations are deemed to be adequate, the court, in the course of its opinion, expressly conceded the contrary. The court said (id. pp. 25, 26):

"Let it be conceded that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the 14th Amendment. Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or [603] classes selected for legislative favor even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power,

but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience."

In Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108, in speaking of the carriers' concession that they were unable to determine the cost of the particular traffic in question, and that a former rate had not been "less than cost," the court said: "This concession . . . establishes an important fact in dealing with the difficult question of determining what is a reasonable rate on a particular article. Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article." See also Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 301, 53 L. ed. 1004, 1006, 29 Sup. Ct. Rep. 678. In Wood v. Vandalia R. Co. 231 U. S. 1, 58 L. ed. 97, 34 Sup. Ct. Rep. 7, the rate order of the state commission related to a particular sort of traffic, and it appeared that the proof was insufficient to show the cost of transportation. This was also the case in Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48, which related to rates on particular commodities, [604] and the order of the state commission was sustained, not because the state was at liberty to fix such rates as it might see fit upon the ground of local policy, regardless of reasonable compensation, and thus to require the carrier to transport the commodities in question for less than cost, but because the evidence not only failed to show that the rates were not reasonably adequate, but rather tended to establish that they were (id. p. 314). The same conclusion, with respect to the same rates, was reached on further hearing in Louisville & N. R. Co. v. Finn, 235 U. S. 601, 607, ante, 379, 383, 35 Sup. Ct. Rep. 146.

To repeat and conclude: It is presumed—but the presumption is a rebuttable one—that the rates which the state fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority.

[605] The judgments, respectively, are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Pitney dissents.

NORFOLK & WESTERN RAILWAY COMPANY, Plff. in Err.,
v.
W. G. CONLEY, Attorney General of the State of West Virginia, et al.

(See S. C. Reporter's ed. 605-614.)

Constitutional law — due process of law — rate regulation — confiscation.

1. The rate of 2 cents a mile, fixed for railway passenger traffic by W. Va. Acts 1907, chap. 41, offends against the due process of law clause of U. S. Const., 14th Amend., as being confiscatory, where, as

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NOTE.—As to what constitutes due process of law, generally—see notes to People v O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436 and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39

applied to the entire intrastate passenger business of a carrier, separately considered, such rate yields at most a very narrow margin above the cost of such traffic.

[For other cases, see Constitutional Law, 616–622, in Digest Sup. Ct. 1908.]

Error to state court — review of facts.

2. The Federal Supreme Court, on writ of error to a state court, may analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the Federal question as to be in substance a decision of such question.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

[No. 197.]

Argued October 13, 1914. Decided March 8, 1915.

IN ERROR to the Circuit Court of Kanawha County in the State of West Virginia to review a decree refusing to restrain the enforcement of a state statute fixing a rate of 2 cents a mile for railway passenger traffic. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. Lucien H. Cocke and John H. Holt argued the cause, and, with Messrs. Theodore W. Reath and Joseph I. Doran, filed a brief for plaintiff in error:

The earnings from intrastate passenger business must be separated from all other earnings to determine whether the act is confiscatory.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A.(N.S.) 108, 68 Atl. 676.

If governmental authority regulate a particular rate, then that rate may be separately examined, and the courts will annul the governmental regulation if unlawful.

Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678.

If the government, state or Federal, select a larger section or division of the carrier's business for regulation, then lawfulness may always be determined by considering that section separately from all the rest of the carrier's business.

Re Five Per Cent Case, 31 Inters. Com. Rep. 351; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

In Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, this court declared that a gas company having a monopoly was "entitled to 6 per cent on the fair value of its property devoted to the public use."

In addition to reasonable return upon investment, the railway is also entitled to sufficient income to provide for obsolescence of its property.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

The railroad does properly show the capital invested in its intrastate passenger service used and useful in that service.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 459, 57 L. ed. 1511, 1565, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975.

Reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The state cannot justify the confiscation of property devoted to the intrastate passenger service merely because some other branch of the company's business, state or interstate, is reasonably profitable.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 435, 57 L. ed. 1556, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729.

Not only should segregation of intrastate and interstate earnings be allowed, but it will be required as a condition of relief.

Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 35; South & North Ala. R. Co. v. Railroad Commission, 210 Fed. 465.

Mr. A. A. Lilly, Attorney General of West Virginia, argued the cause and filed a brief for defendants in error:

Does the railroad properly show the capital invested in its intrastate passenger service, used and useful in that service?

New York ex rel. Metropolitan Street R.

L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to review of questions of fact on writ of error to a state court— see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

As to reasonableness of state regulation of railway rates, see note to Chi St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

On legislative power to fix tolls, rates, or prices,—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic,—see notes to State ex rel. McCue v. Northern P. R. Co. 25 L.R.A.(N.S.) 1001, and Pennsylvania R. Co. v. Philadelphia, 15 L.R.A.(N.S.) 108.

Co. v. New York State Tax Com'rs, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 49 L. ed. 669, 25 Sup. Ct. Rep. 384; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Allen v. St. Louis, I. M. & S. R. Co. 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

Does the railroad company properly show the earnings and expenses derived from and chargeable to its intrastate passenger business?

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 460, 57 L. ed. 1566, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729.

Should the railroad company be allowed to segregate its intrastate passenger earnings from all other earnings in the state in its attempt to show confiscation?

Norfolk & W. R. Co. v. Pinnacle Coal Co. 44 W. Va. 574, 41 L.R.A. 414, 30 S. E. 196; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 460, 57 L. ed. 1511, 1566, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Union P. R. Co. v. United States, 99 U. S. 402, 420, 25 L. ed. 274, 282; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585. 11 Ann. Cas. 398; Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 122, 15 L.R.A. (N.S.) 108, 68 Atl. 676.

Mr. Justice Hughes delivered the opinion of the court:

In 1907, the legislature of West Virginia passed an act fixing the maximum fare for passengers on railroads, as described in the statute, at 2 cents a mile. Acts 1907, chap. 41, p. 226. After the rate had been tested by operating under it for two years, the plaintiff in error brought this suit to restrain its enforcement as being in violation of the [608] Constitution of the state, and also upon the ground that it was repugnant to the 14th Amendment by reason of (1) its provision for penalties, (2) its classification of railroads, and (3) its alleged confiscatory requirements, through the reduction of the revenue from the traffic to less than a reasonable compensation. The validity of the statute, as construed by the state court, with respect to penalties and classification, was upheld in Chesapeake & O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. Rep. 985. In the case of Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613, while the statute was sustained against the other objections above mentioned, it was adjudged to be confiscatory in its operation with respect to the plaintiff in that case. In the present suit the circuit court of Kanawha county, by its decree entered in March, 1913, held that the rate was not confiscatory in fact as to the plaintiff in error. No opinion appears in the record and there were no special findings. An application was made to the supreme court of appeals of West Virginia for the allowance of an appeal to that court, and it was refused. This writ of error was then sued out.

1. The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in Northern P. R. Co. v. North Dakota, decided this day (236 U. S. 585, ante, 735, 35 Sup. Ct. Rep. 429), makes an extended discussion of this question unnecessary. It was recognized that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification of the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the state has no arbitrary power over rates; that the devotion of the property of [609] the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal.

These considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and, of necessity, its own rates. In making a reasonable adjustment of the carrier's charges, the state is under no obligation to secure the

same rate of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the state should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost. That fact, satisfactorily proved, would be sufficient to rebut the presumption of reasonableness; and if in any case it could be said that there existed other criteria by reference to which the rate could still be supported as a reasonable one for the transportation in question, it would be necessary to cause this to appear. Northern P. R. Co. v. North Dakota, supra, and cases there cited.

2. So far as findings are concerned, we have in the present case simply a general, or ultimate, conclusion of [610] fact, which is set forth in the decree of the state court; and it is necessary for us, in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 668, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Wood v. Chesborough, 228 U. S. 672, 678, 57 L. ed. 1018, 1021, 33 Sup. Ct. Rep. 706.

3. The passenger rate in question went into effect in May, 1907, and was observed by the company until about September, 1909, when, under the terms of the interlocutory injunction in this suit, the charge was increased to 2½ cents a mile. There were, therefore, two fiscal years, June 30, 1907, to June 30, 1909, during which the company operated its road in West Virginia under the statutory rate. Evidence was introduced on behalf of the company, showing the results according to its calculations. It was testified that the intrastate passenger receipts had been carefully ascertained. With respect to the operating expenses, it was said that for many years accounts had been kept for the purpose of separating the expenses incident to the freight and passenger traffic, respectively; that about 65 per cent of these expenses could be directly assigned, and that the remaining 35 per cent, consisting of items common to both sorts of transportation, were divided between the passenger and freight traffic on the basis of engine miles, —this being deemed to be more equitable than the train-mile basis originally used, inasmuch as most of the freight was hauled by two engines. In practice, this method was assumed—in accordance with an early computation—to mean that 20 per cent of such items should be assigned to the passenger [611] traffic; this, it was insisted, was a close approximation. Where a division of the road was partly in one state and partly in another, the passenger expenses were apportioned according to track mileage. These expenses within the state having thus been ascertained, they were divided between the interstate and intrastate traffic upon the basis of the gross passenger earnings; that is, it was assumed that the cost of the interstate and intrastate passenger traffic was the same in relation to revenue. It was also testified that betterments were not included in expenses, and that the abovementioned apportionment covered all the operating expenses, except taxes, the latter being apportioned to each class of business according to its share of the gross receipts.

It was stated that the intrastate passenger receipts which had been $362,997.74 in the fiscal year 1906–07[1] had fallen, notwithstanding a considerable increase in the number of passengers and passenger mileage, to $289,943.22 in the fiscal year 1907–08. The passenger expenses for the latter year, estimated according to the method above set forth, together with taxes, amounted to $275,519.79, leaving a net surplus of $14,423.43. In the following fiscal year, 1908–09, the intrastate passenger receipts were $281,864.50. This showed a reduction of $81,133.24, as compared with the fiscal year 1906–07, although there was a gain over that year of 1,567,374 in the passenger mileage. The expenses attributed by the company to the intrastate passenger traffic, including taxes, for the year 1908–09,

[1] Approximately eleven months of the fiscal year 1906–07 were under the former maximum fare of 3 cents a mile.

amounted to $283,416.62, thus leaving a deficit in the passenger operations of $1-552.12.

In the receipts, as thus stated, there was omitted the revenue derived from the mail, express, news privileges, and other items of passenger train earnings. Including this miscellaneous income, it appeared from the company's [612] statement that the net return of the intrastate passenger business for the year 1907-08 was $18,354.62; in the year 1908-09, the inclusion of these items still left a deficit amounting to $616.11.

Criticizing the methods of apportionment adopted by the company, the state presented on its part elaborate calculations for the purpose of showing the effect of the rate. These calculations were based upon a painstaking analysis made by the state's expert accountant of the receipts and expenses disclosed by the company's records and accounts. For this critical study there were selected the months of November, 1909, and May, 1910, which the state's witness testified were typical with respect to the passenger business of the fiscal year ending June 30, 1910. The examination was made of the traffic on the Pocahontas and Kenova divisions of the road, which contained over 90 per cent of the total track mileage of the company in West Virginia, and the passenger traffic on which—according to passenger mileage—was stated to be over 97 per cent of the whole. The testimony was that the results of the analysis of the traffic on these divisions could be deemed to be fairly representative of the entire passenger business. The receipts of the intrastate traffic were adjusted to the 2-cent fare basis; that is, according to the statutory rate as applied to the actual travel over the road. The state suggests that neither in its own calculations nor in those of the company was any account taken of the receipts from interstate passengers in West Virginia, but these were properly excluded. Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418. The company had kept on its books separate accounts of the expenses of the freight and passenger business on the divisions above-mentioned, but the state's expert did not accept the company's distribution. For example, on the Pocahontas division, the books showed passenger expenses in November, 1909, amounting to $48,895.22; the witness for the state by his computations [613] made these expenses $37,100.72. On the same division in May, 1910, the company's figures for passenger expenses were $51,885.72; the state's, $40,643.36. There were also similar reductions of considerable amounts on the Kenova division. It is not necessary to review in detail the methods thus used on the part of the state to apportion the various common items of expense,—that is, after all items capable of direct assignment had been charged to the business to which they related. It is sufficient to say that instead of employing a general factor for the distribution of the outlays common to both kinds of traffic, freight and passenger, the state's witness divided each particular common item according to its character so as to make what was deemed to be a fair apportionment of that item. In this way, a variety of methods were employed which the witness described at length. After ascertaining the amount of the total expense considered to be attributable to the passenger traffic within the state, it was divided between the intrastate and interstate business; and for the most part—aside from the expenses of passenger stations—the division was made on the basis of passenger miles, and without charging extra cost to the intrastate traffic.

By combining the results of the selected periods, it was shown that in the intrastate passenger business, according to the classification and apportionment adopted, the operating expenses and taxes consumed 97.4203 per cent of the total income.

This, in brief, was the result of the elaborate analysis presented by the state. There is no reason to suppose that either the periods chosen or the methods used were unfavorable to the rate. Included in the passenger business were the items of mail, express, excess baggage, etc.; the state did not present calculations as to the net return upon these items separately considered. When the state's expert, who testified that he had undertaken to [614] separate the cost of the express business, was asked on cross-examination whether, with these items omitted, the actual cost of carrying intrastate passengers was not in excess of 2 cents a mile, he said that it would be difficult to answer without a separate analysis of the mail item, but added that "in rough computation" that cost was very close to 2 cents.

It is apparent, from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in the intrastate business. It is clear that by the reduction in rates the company is forced to carry passengers, if not at or below cost, with merely a nominal reward, considering the volume of the traffic affected. We find no basis whatever upon

which the rate can be supported, and it must be concluded, in the light of the principles governing the regulation of rates, that the state exceeded its power in imposing it.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Pitney dissents.

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[615] MICHIGAN CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

MICHIGAN RAILROAD COMMISSION.

(See S. C. Reporter's ed. 615–635.)

Error to state court — scope of review — statutory construction.

1. Whether distinctions had previously been recognized under the Michigan laws between "railroads" and "street railways;" whether these distinctions were preserved or disregarded by Mich. Pub. Acts 1907, act No. 312, Pub. Acts 1909, act No. 300, and whether the provisions of § 7 of these acts, relating to interchange of traffic, were intended to apply to both kinds of roads or to "railroads" only, are questions which the Federal Supreme Court may not consider on writ of error to the highest court of the state, but are conclusively foreclosed by the decisions of the state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — statutory construction.

2. The Federal Supreme Court, when reviewing the judgment of a state court, cannot go behind the ruling of the latter court that the state Railroad Commission, in making an order for the interchange of traffic between a steam railroad and an interurban electric railway, acted in the authorized exercise of the state's power of regulation, and that the two companies are legally competent to perform the duties thereby respectively imposed upon them.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compelling interchange of railway traffic.

3. A state, acting within its jurisdiction, and not in hostility to any Federal regulation of interstate commerce, may, without denying the due process of law guaranteed by U. S. Const., 14th Amend., make a reasonable order requiring a carrier to permit empty or loaded cars owned by it to be hauled from its line upon a connecting line for purposes of loading or delivery of intrastate freight, and to permit the cars of other carriers, loaded with such freight, consigned to points on the connecting line, to be hauled from its line upon the connecting line for purposes of delivery.

[For other cases, see Constitutional Law, 458–466, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law —compelling interchange of railway traffic.

4. The property of a steam railway carrier is not taken without due process of law, contrary to U. S. Const., 14th Amend., by an order of the Michigan Railroad Commission, made under the authority of Mich. Pub. Acts 1907, act No. 312, § 7, requiring such railway company to interchange with an interurban electric railway, at the point of physical connection in a specified town, cars, carload and less than carload shipments, and passenger traffic, where such order does not require the steam railway company to haul cars to points on the electric railway, but only to permit them to be hauled by the electric railway company, and does not exclude the ordinary remedies for delay in returning the cars, or for loss or damage to them, and does not contemplate that the steam railway company shall be required to permit the use of its cars (or of the cars of other carriers for which it is responsible) beyond its line without compensation.

[For other cases, see Constitutional Law, 458–466, in Digest Sup. Ct. 1908.]

Commerce — state regulation — interchange of railway traffic.

5. The Federal Supreme Court will assume, until the contrary is made to appear, that no disregard of the needs of interstate commerce is involved in an order of a state Railroad Commission, which intrinsically applies only to intrastate traffic, requiring a steam railway carrier and an interurban

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 256; Kuntz v. Sumption, 2 L.R.A. 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Requiring connection or joint use of properties of railway companies as a taking for which compensation must be made—see note to Pacific Teleph. & Teleg. Co. v. Eshleman, 50 L.R.A.(N.S.) 652.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

electric railway company to interchange cars, carload and less than carload shipments, and passenger traffic, at the point of physical connection in a specified town, in accordance with the provisions of Mich. Pub. Acts 1907, act. No. 312, § 7, i. e., "in the same manner and under the same general conditions, except as to motive power, as belt line railroads and terminal railroads are now or may be used for like purposes."

[For other cases, see Commerce, III. 1; Statutes, 145–147, in Digest Sup. Ct. 1908.]

[No. 91.]

Submitted December 1, 1914. Decided March 8, 1915.

IN ERROR to the Supreme Court of the state of Michigan to review a judgment awarding a peremptory writ of mandamus to compel compliance with an order of the state Railroad Commission, requiring a steam railway company and an interurban electric railway company to interchange traffic. Affirmed.

See same case below, 168 Mich. 230, 132 N. W. 1068.

The facts are stated in the opinion.

Mr. Frank E. Robson submitted the cause for plaintiff in error. Mr. Henry Russel was on the brief:

The Michigan Railroad Commission and the supreme court have construed the statute as a command that, notwithstanding plaintiff in error has and maintains adequate facilities for the purposes of making delivery at Oxford, the point of destination in any transportation movement, it must nevertheless at such point turn the property over for delivery to the street railway. We submit that this is a taking of property in a most effective sense, and such a construction of the act is in direct conflict with the rules laid down by this and other courts.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, 192 U. S. 568, 570, 571, 48 L. ed. 565, 569, 570, 24 Sup. Ct. Rep. 339; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465, 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 679, 680, 28 L. ed. 291, 296, 4 Sup. Ct. Rep. 185; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 73 Fed. 438; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 2 Inters. Com. Rep. 763, 41 Fed. 559; Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. 4 Inters. Com. Rep. 261, 47 Fed. 771; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 4 Inters. Com. Rep. 537, 59 Fed. 400, affirmed in 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; St. Louis Drayage Co. v. Louisville & N. R. Co. 5 Inters. Com. Rep. 137, 65 Fed. 39; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co. 5 Inters. Com. Rep. 627, 57 Fed. 673; Express Cases, 117 U. S. 1, 29, 29 L. ed. 791, 803, 6 Sup. Ct. Rep. 542, 628; Mann v. Pere Marquette R. Co. 135 Mich. 219, 97 N. W. 721; McNeill v. Southern R. Co. 202 U. S. 543, 561, 50 L. ed. 1142, 1148, 26 Sup. Ct. Rep. 722; Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113.

While the forms of law may have been complied with, the judgment reached is without foundation, and, as a compliance with its order requires the expenditure of money and the uses of property, it operates as a taking of property without due process of law.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 523, 524, 530–532, 56 L. ed. 863, 868, 870, 871, 32 Sup. Ct. Rep. 535; United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, 20, 57 L. ed. 104, 107, 33 Sup. Ct. Rep. 5.

The use of property is a taking in a constitutional sense.

Grand Rapids Boom. Co. v. Jarvis, 30 Mich. 320.

It is not enough that plaintiff in error be turned over to its action at law for its remedy to obtain compensation, nor can it be required to accept anything other than a present adequate fund which is placed under its control and demand at substantially the time of the taking of the property.

2 Lewis, Em. Dom. 3d ed. § 680; Waterbury v. Platt Bros. & Co. 76 Conn. 435, 56 Atl. 856; Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 18, 31 Am. Dec. 313; Atty. Gen. v. Old Colony R. Co. 160 Mass. 90, 22 L.R.A. 112, 35 N. E. 252.

The statute and the proceeding under it are invalid on two grounds: (a) requiring a delivery of cars off of the line of the Michigan Central Company; (b) a delivery of such cars under all circumstances and without excuse, and without reference to the demands of interstate commerce.

McNeill v. Southern R. Co. 202 U. S. 543, 561, 50 L. ed. 1142, 1148, 26 Sup. Ct. Rep. 722; Chicago, R. I. & P. R. Co. v. Hardwick

Farmers Elevator Co. 226 U. S. 426, 433–435, 57 L. ed. 284, 286, 287, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 149, 150, 54 L. ed. 698, 704, 705, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 328–331, 50 L. ed. 772, 775, 776, 26 Sup. Ct. Rep. 491.

Mr. Grant Fellows, Attorney General of Michigan, submitted the cause for defendant in error:

The considerations that must prevail here in the determination of the instant case have been thoroughly covered in recent decisions of this court.

Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 469, 58 L. ed. 317, 34 Sup. Ct. Rep. 152; Southern P. Co. v. Campbell, 230 U. S. 537, 57 L. ed. 1610, 33 Sup. Ct. Rep. 1027.

While the decisions of this court seem to cover every phase of the proposition involved in the instant case, and constitute a complete refutation of the arguments urged against the Michigan statute, we desire to call attention to the decisions of the courts of last resort of several states in which the question here in issue has been involved. These decisions are practically uniform, and indicate unmistakably the trend of judicial opinion throughout the country.

Stillwater & M. Street R. Co. v. Boston & M. R. Co. 171 N. Y. 589, 59 L.R.A. 489, 64 N. E. 511; Pittsburgh, C. C. & St. L. R. Co. v. Railroad Commission, 171 Ind. 189, 86 N. E. 328; Vandalia R. Co. v. Railroad Commission, — Ind. —, 101 N. E. 85; Railroad Commission v. Alabama Northern R. Co. 182 Ala. 357, 62 So. 749; State ex rel. Great Northern R. Co. v. Public Service Commission, 76 Wash. 625, 137 Pac. 132; State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission, 77 Wash. 529, L.R.A.—, —, 137 Pac. 1057; Emporia v. Atchison, T. & S. F. R. Co. 88 Kan. 611, 129 Pac. 161; Colorado & S. R. Co. v. State Railroad Commission, 54 Colo. 64, 129 Pac. 506.

Mr. Justice Pitney delivered the opinion of the court:

This writ of error brings under review a judgment of the supreme court of Michigan (168 Mich. 230, 132 N. W. 1068), awarding a peremptory writ of mandamus directing plaintiff in error, with respect to intrastate traffic, to interchange cars, carload shipments, less than carload shipments, and passenger traffic with the Detroit United Railway at the point of physical connection between the tracks [621] of the two companies in the village of Oxford in that state.

The Michigan Railway Commission, defendant in error, is a public administrative body, continued and existing under act No. 300 of the Public Acts of 1909 as the successor of a similar commission established by act No. 312 of the Public Acts of 1907. It has ample regulative powers, originally conferred by the 1907 act, and continued by the 1909 act without modification material to the present controversy.[1] The manda-

[1] Michigan Public Acts 1907, No. 312.

"Sec. 7. . . . (b) Where it is practicable and the same may be accomplished without endangering the equipment, tracks or appliances of either party, the Commission may, upon application, require steam railroads and interurban and suburban railroads to interchange cars, carload shipments, less than carload shipments, and passenger traffic, and for that purpose may require the construction of physical connections upon such terms as it may determine: Provided, that nothing in this act shall be construed to require through billing of freight as between steam and electric, suburban or interurban railroads, but such suburban and interurban railroads may be used for the handling of freight in carload lots in steam railroad freight cars between shippers or consignees and the steam railroads, in the same manner and under the same general conditions, except as to motive power, as belt line railroads and terminal railroads are now or may hereafter be used for like purposes.

"(c) Every corporation owning a railroad in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation or individual having connecting tracks: Provided, such cars are of the proper gauge, are in good running order and equipped as required by law and otherwise safe for transportation and properly loaded: Provided further, if the corporations cannot agree upon the times at which the cars shall be drawn, or the compensation to be paid, the said Commission shall, upon petition of either party and notice to the other, after hearing the parties interested, determine the rate of compensation and fix such other periods, having reference to the convenience and interests of the corporation or corporations, and the public to be accommodated thereby, and the award of the Commission shall be binding upon the respective corporations interested therein until the same shall have been revised. . . .

"Sec. 24. . . . (b) The Commission may at any time, upon application of any person or any railroad, and upon notice to the parties interested, including the railroad, and after opportunity to be heard as provided in § 22, rescind, alter or amend any order fixing any rate or rates, fares, charges or classifications, or any other or-

mus proceeding was based [622] upon an order made by the former Commission in the year 1908, which, it is admitted, was preserved by § 49 of the 1909 act.

[623] The Michigan Central Railroad Company is a corporation existing under the general railroad law of the state (Comp. Laws 1897, chap. 164, §§ 6223 et seq.), and as lessee operates a line of railroad extending from Detroit to Bay City and passing through the village of Oxford, all in [624] the state of Michigan; this line being part of a railroad system extending through that state and into adjoining states and the Dominion of Canada, and over which the company transports passengers and property in interstate and foreign, as well as in intrastate commerce. The Detroit United Railway Company is a corporation organized and existing under the street railway act (Comp. Laws 1897, chap. 168, §§ 6434 et seq.), and operates an interurban electric railway extending from Detroit to the city of Flint, and likewise passing through the village of Oxford. Between Oxford and Flint, which are 28 miles apart, the line passes through the villages of Ortonville, Goodrich, and Atlas, distant respectively 10, 16, and 18 miles from Oxford.

In the early part of the year 1908 peti-

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der made by the Commission, and certified copies shall be served and take effect as herein provided for original orders.

"Sec. 25. All rates, fares, charges, classification and joint rates fixed by the Commission and all regulations, practices and services prescribed by the Commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of § 26 of this act, or until changed or modified by the Commission as provided for in paragraph (b), § 24 of this act.

"Sec. 26. (a) Any railroad or other party in interest, being dissatisfied with any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within sixty days commence an action in the circuit court in chancery against the Commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed is unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable; in which suit the Commission shall be served with a subpœna. The Commission shall file its answer, and on leave of court any interested party may file an answer to said complaint, whereupon said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the circuit court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said Commission, and the circuit courts in chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the Commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law.

. . . . . .

"(c) If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence the Commission shall consider the same, and may alter, modify, amend and rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"(d) If the Commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

"(e) Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal to the supreme court, which appeal shall be governed by the statutes governing chancery appeals. When the appeal is taken the case shall, on the return of the papers to the supreme court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or, if no term is then pending, shall take precedence of a different nature (*sic*), except criminal cases at the next term of the supreme court.

"(f) In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be."

The foregoing provisions were substantially re-enacted in Public Acts 1909, No. 300, as §§ 7 b and c, 24, 25, 26, a, c, d, and e, respectively.

tions were filed before the commission by certain merchants resident in Ortonville and Goodrich, asking that a physical connection be established between the tracks of the Michigan Central and Detroit United at Oxford for the interchange of cars, carload shipments, less than carload shipments, and passenger traffic. The Michigan Central answered denying that it would be practicable to construct and maintain such a physical connection, and denying the authority of the Commission to order any such connection for the purposes mentioned in the complaint. The Detroit United answered denying the practicability of interchanging carload shipments (supposing a physical connection to have been established), without unreasonable expenditure of money in changing its road and equipment. There was a full hearing, at which both companies were represented. The questions before the Commission were three: (a) Is a physical connection between the tracks at Oxford practicable? (b) Can the interchange of business be accomplished without endangering the equipment, tracks, or appliances of either party? and (c) Are the facts and circumstances such as to reasonably justify [625] the Commission in requiring such connection and interchange? The question of through billing was not involved. The Commission held that the statute in terms conferred upon it the authority which it was asked to exercise, and declined to pass upon the question of its validity, deeming that to be a judicial question and not within its province. It found the construction and maintenance of the connection between the tracks to be feasible and practicable, and the expense of construction approximately $500. Upon the evidence introduced and a personal inspection of the line of the Detroit United, the Commission found that line to be of standard gauge, with rails of the same pattern and weight as those used on many steam roads, and without heavy grades offering resistance to freight traffic, and that the handling of freight in steam railroad cars over that line was practicable and might be accomplished without endangering the equipment, tracks, or appliances of either company, and without involving either in unreasonable expense. Whether steam or electricity should be used as a motive power was declared to be a question to be solved by the Detroit United Company in the light of its own experience. The Commission also found the proposed interchange to be reasonable from the standpoint of the Michigan Central, and that it entailed small sacrifice to that company, which would have to expend its proportion of the amount necessary to install the connection, but would not be involved in further expenditure; and that the business to be derived from Ortonville, Goodrich, and the surrounding country *via* the Detroit United Railway and the proposed connection promised to be considerable in amount, making the Michigan Central a beneficiary by the connection; and held that under its charter it owed a duty as common carrier to the entire state, so that while required to give greatest consideration to those most accessible to its operations, it must further give as great consideration to those not immediately [626] upon its lines as was consistent with the other operations of the road. The result was an order, dated June 5, 1908, made under the provisions of § 7b of the 1907 act, requiring the Michigan Central and Detroit United Companies on or before August 15 in the same year to connect their tracks at such point in the village of Oxford as they should between themselves agree upon as most desirable, and thereafter to interchange cars, carload shipments, less than carload shipments, and passenger traffic at that point, in accordance with the provisions of § 7; and declaring that if they should be unable to agree as to the point of connection, the Commission would make a supplemental order determining its location. Such a supplemental order was afterwards made. These orders were duly served upon both companies, and neither instituted any proceeding to test their validity in the manner permitted by §§ 25 and 26 of the 1907 act. The physical connection between the tracks was installed and is still maintained by the companies, and no question is now made respecting this. But the Michigan Central complied, to the extent of installing the physical connection, under protest, particularly with respect to so much of the order as required the interchange of cars, carload and less than carload shipments, and passenger traffic at that point. The Detroit United is willing and able to accept cars and carloads of freight from the Michigan Central, to be delivered along the line of the Detroit United under a service similar to that offered by belt lines and terminal railroads in the same state, but the Michigan Central has hitherto refused and still refuses to deliver cars and carloads or less than carload shipments of freight in cars to the Detroit United for transportation to points upon its line. There is no controversy about the other parts of the order.

The issuance of the mandamus was opposed upon the ground (among others) that the Commission's order and the statutes purporting to authorize it were repugnant to [627] the 14th Amendment, in that enforcement of the order would deprive the

Michigan Central of its property without due process of law, and also upon the ground that the order amounted to an attempt to regulate and impose a burden upon interstate commerce, contrary to § 8 of article 1 of the Constitution of the United States. The supreme court of Michigan held that the statute authorized the making of such an order by the Commission, and that since plaintiff in error had failed to institute proceedings to review it under §§ 25 and 26 of the act, the questions of the practicability of the physical connection and of the interchange of traffic, as well as the reasonableness of the service required, were not open in the mandamus proceeding. It also held that the jurisdiction of the Commission was limited to intrastate traffic, and that its order in the present case must be deemed to be so limited.

The act establishing the Michigan Railroad Commission, as it stood after amendment by Public Acts 1911, No. 139, was under consideration in Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152, which dealt with the compulsory interchange of intrastate traffic at Detroit. With respect to judicial review, it will be observed that by § 25 (set forth in the margin, supra) the regulations prescribed by the Commission are to be treated as lawful and reasonable until found otherwise in an action brought for the purpose pursuant to the provisions of § 26, or until modified by the Commission, as provided in § 24. Section 26 permits the railroad company or other party in interest, being dissatisfied with the Commission's order, to commence an action in the circuit court in chancery to set it aside on the ground of unreasonableness, with opportunity to introduce original evidence in addition to that which was submitted to the Commission. If new evidence is offered, the court may refer it to the Commission for its consideration, and that body may thereupon [628] rescind or modify the original order. The court passes upon either the original or the modified order, and may affirm or set it aside in whole or in part, and make such other order as may be in accordance with the facts and the law. From its judgment there is an appeal to the supreme court. The respective functions of the Commission and the courts under this legislation were considered, in a rate case, by the state supreme court in Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 335, 346, 137 N. W. 329, and by this court in a subsequent case between the same parties in 235 U. S. 402, ante, 288, 35 Sup. Ct. Rep. 126, affirming 203 Fed. 864.

The argument submitted here in behalf of plaintiff in error has taken a wide range, many of the contentions being matters purely of local law, and these so interwoven with the discussion of Federal questions that it is somewhat difficult to distinguish them. It ought to be unnecessary to say that whether distinctions have heretofore been recognized, under the laws of Michigan, between "railroads" and "street railways," whether the Acts of 1907 and 1909 preserve or disregard these distinctions, and whether § 7 was intended to apply to both kinds of roads or to "railroads" only,—are questions with which this court has no proper concern, they being conclusively disposed of by the decision of the state court of last resort in the present case. So, also, it is, for all purposes of our jurisdiction, established not only that the Commission, in making the order, acted in the authorized exercise of the state's power of regulation, but that the two companies are legally competent to perform the duties thereby imposed upon them respectively.

That a state, in virtue of its authority to regulate railroads as public highways, may, in a proper case, require two companies to make a connection between their tracks so as to facilitate the interchange of traffic, without thereby violating rights secured by the Constitution of the United [629] States, is settled by the decisions of this court in Wisconsin, M. & P. R. Co v. Jacobson, 179 U. S. 287, 296, 301, 45 L. ed. 194, 199, 201, 21 Sup. Ct. Rep. 115; and Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535.

That a state, acting within its jurisdiction, and not in hostility to any Federal regulation of interstate commerce, may compel the carrier to accept loaded cars from another line and transport them over its own, such requirement being reasonable in itself, is settled by Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 344, 58 L. ed. 988, 993, 34 Sup. Ct. Rep. 592. In that case it was held there was no essential difference, so far as concerned the power of the state, between such an order and one requiring the carrier to make track connections and receive cars from connecting roads in order that reasonably adequate facilities for traffic might be provided.

It seems to us that the principle of these decisions sustains also the state's power to make a reasonable order requiring a carrier to permit empty or loaded cars owned by it to be hauled from its line upon the connecting line for purposes of loading or delivery of intrastate freight, and to permit the cars of other carriers loaded with such freight consigned to points on the connecting line to be hauled from its line upon

the connecting line for purposes of delivery. This question was left undetermined in McNeill v. Southern R. Co. 202 U. S. 543, 563, 50 L. ed. 1142, 1149, 26 Sup. Ct. Rep. 722, which had to do with a state regulation operating directly upon interstate commerce.

The contentions of plaintiff in error to the contrary will be briefly considered.

It is said that § 7b of the 1907 act, as re-enacted in 1909, under which the commission's order was made, permits the use of suburban and interurban railroads for the handling of freight in carload lots in steam railroad freight cars only "in the same manner and under the same general conditions, except as to motive power, as belt line railroads and terminal railroads are now or may hereafter be used for like purposes." And it is insisted that the [630] terms "belt line railroads" and "terminal railroads" have not been judicially construed by the Michigan courts, and, there being no finding by the Commission or the court upon the question, the order and judgment are in this respect indefinite. But the Commission in its petition for mandamus averred: "That belt line and terminal railroads within this state vary in length from a fraction of a mile to 15 miles or more; that cars and carloads of freight are transported to and from industries located along the line of such belt or terminal railroads to the tracks of railroad companies with which said belt lines and terminal railroads are connected, under a local switching charge or tariff, and that through billing of freight as between other railroads and belt and terminal railroads is not customary or usual." And in the answer of the railroad company this was admitted as matter of fact, it being at the same time insisted "that said Detroit United Railway Company is not in fact or in law a belt line or terminal railroad corporation, nor authorized by law to act as such; nor are the line or lines of railway operated by it, extending from the village of Oxford to the city of Flint, and within the boundaries of said municipalities, belt or terminal railroads; nor can they in fact or in law be used as belt or terminal railroads may be or are now used; nor has said relator any power or authority to require this respondent to give the use of its tracks or terminal facilities for the purposes mentioned in said orders or otherwise." There is no question, therefore, as to the mode in which belt line and terminal railroads are in fact used, and so the statute and order are relieved from the charge of indefiniteness in this respect. As already shown, the decision of the state court of last resort is a conclusive response to the legal objections taken in the clause quoted from the answer.

It is said the statute as construed and enforced by the Commission and the supreme court is repugnant to the "due process" clause because it in effect requires a delivery [631] by the Michigan Central at points off its own lines. By its terms, however, the order does not require the Michigan Central to haul the cars to points on the Detroit United, but only to permit them to be hauled by the latter company. At common law a carrier was not bound to carry except on its own line, and probably not required to permit its equipment to be hauled off the line by other carriers. Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 680, 28 L. ed. 291, 296, 4 Sup. Ct. Rep. 185; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567, 620; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465, 472, 475, affirmed in 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158. But in this, as in other respects, the common law is subject to change by legislation; and, so long as the reasonable bounds of regulation in the public interest are not thereby transcended, the carrier's property cannot be deemed to be "taken" in the constitutional sense. Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 63, 48 L. ed. 614, 618, 24 Sup. Ct. Rep. 396; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 51 L. ed. 933, 941, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 470, 58 L. ed. 310, 318, 34 Sup. Ct. Rep. 152; Wisconsin, M. & P. R. Co. v. Jacobson and Chicago, M. & St. P. R. Co. v. Iowa, supra.

The insistence that the property of plaintiff in error in its cars is taken by the order requiring it to deliver them to the Detroit United Railway involves, as we think, a fundamental error, in that it overlooks the fact that the vehicles of transportation, like the railroad upon which they run, although acquired through the expenditure of private capital, are devoted to a public use, and thereby are subjected to the reasonable exercise of the power of the state to regulate that use, so far, at least, as intrastate commerce is concerned. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. That it is not, as a rule, unreasonable to require such interchange of cars, sufficiently appears from the universality of the practice, which became prevalent before it was made compulsory, and may be considered as matter of common knowledge, inasmuch as a freight train made up wholly [632] of the cars of

a single railroad is, in these days, a rarity. In Michigan, car interchange has long been a statutory duty. Mich. Gen. Acts 1873, No. 79, § 15, p. 99; No. 198, § 28, p. 521; Michigan C. R. Co. v. Smithson, 45 Mich. 212, 221, 7 N. W. 791. And see Peoria & P. Union R. Co. v. Chicago, R. I. & P. R. Co. 109 Ill. 135, 139, 50 Am. Rep. 605; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 335, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; State v. Chicago, M. & St. P. R. Co. 152 Iowa, 317, 322, 130 N. W. 802, affirmed in 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Pittsburgh, C. C. & St. L. R. Co. v. Railroad Commission, 171 Ind. 189, 201, 86 N. E. 328; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 519, 531, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893, affirmed in 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

To speak of the order as requiring the cars of plaintiff in error to be delivered to the Detroit United "for the use of that company" involves a fallacy. The order is designed for the benefit of the public having occasion to employ the connecting lines in through transportation. The Detroit United, like the Michigan Central, acts in the matter as a public agency.

The contention that no provision is made for the paramount needs of plaintiff in error for the use of its own equipment, nor for the prompt return or adjustment for loss or damage to such equipment, nor for compensation for the use thereof, is not substantial. The order is to receive a reasonable interpretation, and according to its own recitals is to be read in the light of the opinion of the Commission, which shows that it is not intended to have an effect inconsistent with the other operations of the company. It was expressly found that there was no special ground for apprehending loss or damage to the equipment. Certainly the order does not exclude the ordinary remedies for delay in returning cars or for loss or damage to them. Nor does it contemplate that plaintiff in error shall be required to permit the use of its cars (or of the cars of other carriers for which it is responsible) off its line without compensation. The state court expressly held that § 7c provides for reasonable compensation to the [633] carrier whose cars are used in the interchange. The finding of the Commission, approved by the court, was that the Michigan Central would merely have to expend its proportion of the amount necessary to install the connection between the two roads, and would be called upon for no further expenditure in the premises, and that the business to be derived by it from Ortonville, Goodrich, and the surrounding country *via* the Detroit United Railway, promised to be considerable in amount, and thereby the Michigan Central would be a beneficiary from the proposed connection and interchange. It was, we think, permissible for the court to find, as in effect it did find, that the benefits thus derived would include compensation for the use of the cars of the Michigan Central for purposes of loading and delivery along the line of the Detroit United. We are unable to see that any question as to the adequacy of the compensation was raised in the state court.

Plaintiff in error relies upon Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339, and Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246. The former of these was an action in the Federal court, and came here by appeal from the circuit court of appeals. This court held as a matter of construction that the Constitution of Kentucky did not require that the railroad company should deliver its own cars to another road. The second case was a review of the judgment of the court of last resort of the state. That court having held that the state Constitution did require the carrier to deliver its own cars to the connecting road, it was contended that this requirement was void under the 14th Amendment as an unlawful taking of property. This court said (212 U. S. 143): "In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transhipment or breaking bulk, in case of an [634] unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal, undiscriminating requirement, with no adequate provisions such as we have described. . . . We do not mean, however, that the silence of the Constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state Constitution by the state court." The case now before us is

plainly distinguishable, as appears from what we have said. And, upon the whole, we see no sufficient ground for denouncing the regulation in question as either arbitrary or unreasonable.

There remains the contention that the statute and the order made in pursuance of it operate as a burden upon and interference with interstate commerce. That the order intrinsically applies only to intrastate traffic was held by the state court in this case, upon the ground that the jurisdiction of the Commission is thus limited; and in this the court did but follow its previous ruling in Ann Arbor R. Co. v. Michigan R. Commission, 163 Mich. 49, 127 N. W. 746. Therefore, the contention under the commerce clause is narrowed to the single point that the order requires the cars of the Michigan Central to be turned over to the connecting carrier "at all times and under all circumstances and without reference to the needs and demands of interstate commerce." But it seems to us that this is an unreasonable construction of the order. By its terms, as thus far construed by the state court, it merely requires the two companies to interchange cars, carload shipments, [635] less than carload shipments, and passenger traffic, in accordance with the provisions of § 7 of the act; that is to say, "in the same manner and under the same general conditions except as to motive power as belt line railroads and terminal railroads are now or may be used for like purposes." Manifestly, this involves no disregard of the needs of interstate commerce, and we must indulge the presumption, until the contrary is made to appear, that the state will not so construe or enforce the order as to interfere with or obstruct such commerce. Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 369, ante, 265, 274, 35 Sup. Ct. Rep. 99. The recent decisions of this court, cited in support of the contention that the order interferes with interstate commerce (Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 329, 50 L. ed. 772, 775, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 543, 561, 50 L. ed. 1142, 1148, 26 Sup. Ct. Rep. 722; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 149, 54 L. ed. 698, 704, 29 L.R.A.(N.S.) 602, 30 Sup. Ct. Rep. 476; Chicago R. I. & P. R. Co. v. Hardwick Farmers Elevator Co. 226 U. S. 426, 433, 57 L. ed. 284, 286, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174), are so plainly distinguishable that no time need be spent in discussing them.

Judgment affirmed.

WILSON CYPRESS COMPANY, Appt.,
v.
ENRIQUE DEL POZO Y MARCOS et al.

(See S. C. Reporter's ed. 635–657.)

Appeal — from circuit court of appeals — diverse citizenship case.

1. The jurisdiction of a Federal circuit court over a suit to quiet title was not wholly dependent upon the citizenship or alienage of the parties, so as to make the decree of the circuit court of appeals final, where the bill sought to quiet complainants' title to a tract of land commencing in a grant from Spain, depending for its completeness on a treaty with Spain and certain laws of the United States, and the action under those laws by the officers of the Land Department, and especial reliance was placed upon those laws to defeat defendant's claim of title, and to have it removed as a cloud upon that asserted by complainants.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

Taxes — public lands — private land claims — segregation from public domain.

2. The land embraced by a Spanish grant of 5,500 acres which was reported as valid by the board of land commissioners, and recommended by that board for confirmation, and was confirmed by the act of May 23, 1828 (4 Stat. at L. 284, chap. 70), to the extent of 1 league square, "to be located by the claimants," needed only a survey to identify it, and it was segregated from the public domain so as to be subject to the taxing jurisdiction of the state, upon the making, in 1851, of a survey under a contract with the surveyor general of Florida, which survey, though not approved by the Commissioner of the General Land Office, was made the foundation of the patent subsequently issued.

[For other cases, see Taxes, I. c, 2, b; Private Land Claims, III. f, in Digest Sup. Ct. 1908.]

[No. 135.]

Argued January 19, 1915. Decided March 15, 1915.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Generally, as to diverse citizenship as ground of Federal jurisdiction—see notes to Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Roberts v. Lewis, 36 L. ed. U. S. 579; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; and McDonald v. Smalley, 7 L. ed. U. S. 287.

of the Circuit Court for the Southern District of Florida in favor of complainants in a suit to quiet title. Reversed and remanded for further proceedings.

See same case below, 121 C. C. A. 578, 202 Fed. 742.

Statement by Mr. Justice McKenna:

Suit to quiet title, brought in the circuit court for the southern district of Florida by appellees, whom we shall call throughout complainants and the appellant defendant.

The bill alleges that the complainants are the heirs at law of Miguel Marcos, a lieutenant in the Spanish Army; that he was granted by the lawful authorities of the King of Spain on the 18th of October, 1815, 5,500 acres of land in the then province of East Florida, on two banks of a creek which empties into the St. John's river about 2 miles north of Long Lake; that the grant was confirmed to his widow, Teresa Rodriguez, in her own right and for and on behalf of her children by the United States to the extent of a league square; that the grant was an inchoate right to said tract, under the laws of Spain called a first title or permit to occupy the land, and, after occupancy and proof thereof, to secure a complete or Royal title; but before such title issued Spain ceded East Florida to the United States, who, by the 8th article of the treaty between the United States and Spain [8 Stat. at L. 258], occupied the position of Spain with regard to this and like grants of land, and were pledged to confirm title thereto; that the lands were neither surveyed nor segregated from the public domain during the sovereignty of Spain; that the same were wild and uncultivated, were never in the actual occupancy [637] of the grantee or of his widow and children, and the title thereto at the time of the cession of the Floridas passed to the United States, subject to the equitable claim of the complainants.

The succession of complainants to the original grant is traced by the bill, and it is alleged that soon after the cession of the Floridas to the United States, Teresa Rodriguez applied to the board of land commissioners appointed to examine and report on claims to lands in East Florida for the confirmation of the grant, and it was reported by the board to Congress as a valid grant, and its confirmation recommended. That thereafter Congress, by an act approved May 23d, 1828 (4 Stat. at L. page 284, chap. 70), confirmed it to the extent of a league square, to be located within the limits of the original claim and bounded by sectional lines, and to be in quantities of not less than one section. That under the 8th section of the act of Congress confirmation of the grant was required to be accepted as a final settlement of the claim, or the claim to be brought before the judge of the superior court for the district of East Florida within one year from the passage of the act; that the latter proceeding was not had, and that, by the act of Congress, the title to the land was confirmed to the extent of one league, to be located within the bounds of the original grant.

That it was held by the judicial and executive branches of the government that a league square was 4,438.68 acres. That by the laws then in force in the territory of Florida it was the duty of the surveyor general of the territory to make the survey of the lands confirmed to complainants' ancestor, and make certificate thereof, and file the same in the land office of the United States in said territory. That among the acts of Congress extending to said territory was the act of March 3, 1807 [2 Stat. at L. 445, chap. 46], by the terms of which it was made unlawful to take possession of, survey, or cause to be surveyed or settle upon, any lands ceded or secured to the United States by any treaty with a foreign [638] nation, or any land, claim to which had not been recognized and confirmed by the United States, under a penalty of forfeiture of the right, title, and claim to such lands. That the ancestors of complainants were residing in Cuba on the 23d of May, 1828, and they and their descendants have since that date resided there, and none of them have resided or been in the United States since the passage of the act of May 23, 1828, confirming the grant to the extent of a league square. That the United States never surveyed and segregated the lands as confirmed, as held by the Land Department of the United States, and the confirmees had no power to cause such survey to be made. That the lands embraced in the grant were surveyed as public lands by the United States in 1847, and such survey was approved May 15, 1848. A certified copy of the official plat of survey is attached to the bill, and it is alleged that the lands were held by the Land Department of the United States to be public lands, and were so treated from 1831 to February 12, 1894, upon which date the grant described in the bill was, by the Land Department of the United States, declared to be a valid, confirmed private grant to Teresa Rodriguez, and ordered to be patented, and thereafter it was so patented to her, her heirs, assigns, and legal representatives, and the lands described as section 37, township 19, south of range 28, and section 41, township 19, south of range 29, according to the plat of the public surveys made by the United States, and for the aggregate of 5,486.46

acres. That until such recognition of the title of complainants and those under whom they claim from and after May 23d, 1828, complainants were excluded from the possession of the lands, and the United States had both the legal title and possession and right of possession of them, and any occupancy of them by any other than the United States was a mere trespass; that before February 12, 1894, complainants and those under whom they take title were not able to take possession of [639] the lands because the United States claimed the entire grant as public lands.

The bill then sets out the asserted title of the defendant to have been derived from a sale to one John Starke on the 5th of July, 1852, by the sheriff and ex-officio tax collector of Orange county, Florida, based upon a pretended execution for certain unpaid taxes alleged to have been assessed "upon the 'lands supposed to belong to Teresa Rodriguez,'" and the said sheriff attempted to deed to said Starke "all the right, title, and interest of Teresa Rodriguez and others" in and to said tracts of land. That the said sale and deed are absolutely null and void because (1) it was alleged to be an assessment upon the single tract containing 5,480 acres, and to be payable for the years 1845 to 1851, both inclusive, during which time the legal title and possession were in the United States; that the lands were expressly exempt from taxation by the statute of the state of Florida during those years, which declared that the act for the assessment and collection of taxes should not be construed to embrace lands belonging to the United States. (2) That the amount of taxes assessed was in excess of what could have been lawfully levied. (3) That proper notice of the sale was not given; (4) nor was the land sold in the parcels required. (5) That the deed was not properly executed, it having no subscribing witness and its record being wholly unauthorized.

Like invalidity is asserted against the tax and sale of the land for the years 1867, 1868, and 1869, assessed to John Starke, and conveyed by the sheriff to one William Mills. In addition it is alleged that no statute in Florida authorized a tax collector to make a tax deed upon a sale for the nonpayment of taxes, such being the duty of the county clerk of the county wherein lay the lands. That the assessment and tax sale and deed to William Mills were made in execution of a conspiracy by him and Robert [640] C. Patten and one George C. Powell to deprive complainants of their title; that Mills never took possession of the lands, but attempted to convey them to Powell, that Powell entered only upon section 9 (a part of section 37, above named) of said township 19, range 28, and made some improvements to complainants unknown, and cut some timber thereon. That he exercised no other acts of ownership, and those were continued but for a short time, and "were not uninterrupted by continued occupancy for seven years," and were subsequently abandoned by him; that the possession was not sufficient, either in character or duration, to enable him to claim the benefit of the statute of limitations against any action brought by complainants; that complainants were precluded from bringing any action because the lands were held and claimed adversely by the United States, and held to be public lands of the United States. Other tax assessments and sales are alleged and conveyance and title traced through them to the defendant, the Wilson Cypress Company, but the latter has never had such possession as would bar a right of entry by complainants. It is alleged that complainants tried to get a recognition of their title, but only succeeded on June 18, 1894.

There are many other allegations which assert the validity of complainants' title and the invalidity of that of defendant, and that on June 26, 1895, the United States quitclaimed and patented to the legal representatives of Teresa Rodriguez the lands granted to Marcos, and which had been surveyed as section 37, township 19, range 28, and section 41 of the same township, range 29, containing 5,486.46 acres. That the patent was duly recorded in the records of the United States and in the public records of Lake county, Florida, and the grantor of defendant and defendant had knowledge of it when the conveyance was made. That after the issue of the patent complainants were for the first time entitled to the possession of the [641] lands, and from such date they became subject to taxation, and thereafter complainants sent their agent to Florida and took possession of the lands and have continued ever since to claim and have exercised acts of ownership over them.

It is alleged that the tax deeds referred to in the bill are fair upon their faces and are clouds upon the title of complainants, and hinder them in the full enjoyment of their property, and should be canceled and discharged from the public records.

It is further alleged that defendant will aver that no patent was necessary to evidence complainants' title, and that by the confirmation of the grant title vested in the grantee and his legal representatives, but complainants allege that, under the facts set out, the United States did not relinquish title until the 26th of June, 1895, and

before the approval of the survey of the lands granted the legal title was in the United States, and the claim of complainants attached to no particular land.

There are other allegations of what the defendant will aver as to possession and right, and it is then alleged that there never has been such possession by defendant as would establish an adverse holding.

An injunction was prayed against the defendant, enjoining it and its officers from exercising acts of ownership over the land, or from disturbing the possession of complainants; that the tax deeds and other deeds set out in the bill be held to have been executed without authority of law, and that they be annulled and canceled.

The answer is as voluminous as the bill. It negatives many of the allegations of the bill, either by denials or opposing allegations, and asserts that the grant from Spain and its confirmation by the United States passed a complete title to the land. It also asserts the validity of the title acquired through the tax deed; alleges the insufficiency of the bill in equity; sets up the statute of limitations, [642] and charges laches and estoppel, the complainants in the bill having permitted large expenditures for care and improvement of the property by defendant. And it also puts in issue the relationship of complainants to Marcos and Teresa Rodriguez, and denies that they are entitled to maintain the bill.

Upon proof being submitted, and after hearing, it was decreed that complainants were descendants and heirs at law of Teresa Rodriguez, the grantee in the patent of the United States hereinbefore referred to, were entitled to "an undivided interest in and to the lands" in controversy (which were specifically described), "and for themselves and as representatives of all persons claiming title to said lands through the said Teresa Rodriguez, her heirs and legal representatives," were "entitled to maintain this bill to remove cloud from" the lands.

The decree recited the tax deeds and the lands which they purported to convey, and adjudged that the deeds, having been based upon assessments made prior to the issue of the patent, and while the validity of the grant to Marcos was denied by the United States, were absolutely null and void and a cloud upon the title of Teresa Rodriguez and her legal representatives and heirs at law, and set aside.

And it was further decreed that defendant had no title or interest in the patented lands, and that it and all persons claiming under it were enjoined from setting up any title under the tax deeds, or from entering upon or holding possession of the lands or any part thereof.

The decree was affirmed by the circuit court of appeals. The opinion of the court was as follows: "The lands in controversy were not segregated from the public domain, and the title thereto remained in the United States until the issuance of the patents; therefore they were not taxable by the state of [643] Florida at the several times they were listed for taxes and sold for nonpayment thereof." [121 C. C. A. 578, 202 Fed. 743.]

Mr. **John C. Cooper** argued the cause and filed a brief for appellant:

Federal questions are involved in this suit.

Hussman v. Durham, 165 U. S. 145, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728; Doolan v. Carr, 125 U. S. 620, 31 L. ed. 845, 8 Sup. Ct. Rep. 1228; Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; Cousin v. Labatut, 19 How. 202, 15 L. ed. 601; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 214, 56 L. ed. 1055, 1061, 32 Sup. Ct. Rep. 620; Howard v. United States, 184 U. S. 676, 681, 46 L. ed. 754, 757, 22 Sup. Ct. Rep. 543; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 405, 48 L. ed. 496, 498, 24 Sup. Ct. Rep. 376; Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Chicago Junction R. Co. v. King, 222 U. S. 223, 56 L. ed. 174, 32 Sup. Ct. Rep. 79; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 404, 405, 43 L. ed. 492, 494, 19 Sup. Ct. Rep. 233; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365.

The grant was a perfect grant of complete title, and no survey was necessary to segregate it from the public domain. The grant itself segregated the land from the public domain.

United States v. Arredondo, 13 Pet. 133, 10 L. ed. 93; United States v. Moreno, 1 Wall. 400, 17 L. ed. 633; Fremont v. United States, 17 How. 542, 15 L. ed. 241; United States v. Vaca, 18 How. 556, 15 L. ed. 485; Cousin v. Labatut, 19 How. 202, 15 L. ed. 601; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; United States v. Kingsley,

12 Pet. 476, 9 L. ed. 1163; United States v. Clarke, 16 Pet. 228, 10 L. ed. 946.

These Spanish grants and concessions in Florida, where they have been confirmed, have always been recognized as sufficient proof of title without the issue of a patent, and they are sufficient showing of title under which to sustain adverse possession.

Doe ex dem. Magruder v. Roe, 13 Fla. 603; McGee v. Doe, 9 Fla. 392.

Where the grantee claiming title to public lands has complied with the conditions entitling him to a title, his title is subject to taxation.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Northern P. R. Co. v. Patterson, 154 U. S. 130, 38 L. ed. 934, 14 Sup. Ct. Rep. 977; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; Maish v. Arizona, 164 U. S. 599, 41 L. ed. 567, 17 Sup. Ct. Rep. 193.

Appellees and their ancestors, after the confirmation of the grant, May 23, 1828, were entitled to take possession of these lands, and the act of Congress of March 3, 1807, prohibiting the taking of possession of unconfirmed grants, does not apply.

United States v. Percheman, 7 Pet. 82, 8 L. ed. 616.

Mr. William W. Dewhurst argued the cause, and, with Messrs. Joseph H. Jones and John C. Jones, filed a brief for appellees:

For this court to hold that jurisdiction of the district court depended also on other grounds than the citizenship of the parties it must distinctly appear by the legal and logical allegations set forth in the bill.

Macfadden v. United States, 213 U. S. 288, 294, 53 L. ed. 801, 802, 29 Sup. Ct. Rep. 490; Ayres v. Polsdorfer, 187 U. S. 590, 47 L. ed. 315, 23 Sup. Ct. Rep. 196; Florida C. & P. R. Co. v. Bell, 176 U. S. 325, 44 L. ed. 488, 20 Sup. Ct. Rep. 399; Hanford v. Davies, 163 U. S. 280, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051.

If appellees in their bill had alleged that their cause of action arose under the treaty or a Federal statute, such averments would have been ineffectual.

Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 242, 44 L. ed. 1054, 20 Sup. Ct. Rep. 867; Filhiol v. Maurice, 185 U. S. 111, 46 L. ed. 829, 22 Sup. Ct. Rep. 560; Joy v. St. Louis, 201 U. S. 332, 341, 342, 50 L. ed. 776, 781, 26 Sup. Ct. Rep. 478; Empire State-Idaho Min. & Developing Co. v. Hanley, 198 U. S. 297, 298, 49 L. ed. 1058, 1059, 25 Sup. Ct. Rep. 691; Bonin v. Gulf Co. 198 U. S. 117, 49 L. ed. 972, 25 Sup. Ct. Rep. 608.

A suit does not so arise simply because, in the progress of the cause, it may become necessary to give a construction to the Constitution or laws of the United States.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 201, 24 L. ed. 658.

A case arises under the Constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such laws, which the party defendant denies to him, and the correct decision of the case depends upon the construction of such laws.

Re Lennon, 166 U. S. 553, 554, 41 L. ed. 1112, 1113, 17 Sup. Ct. Rep. 658.

A case does not arise under the laws of the United States unless it appears from the questions involved that some title, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction.

Starin v. New York, 115 U. S. 256, 29 L. ed. 390, 6 Sup. Ct. Rep. 28.

The questions of fact alleged were determinable by the laws and ordinances of Spain.

United States v. Kingsley, 12 Pet. 484, 9 L. ed. 1166; Fremont v. United States, 17 How. 542, 554, 15 L. ed. 241, 244; McMicken v. United States, 97 U. S. 209, 24 L. ed. 949.

The act of 1828 was not presented to the court by the statements of the bill (nor even by the denials and averments of the answer, if that could be looked to) for construction with the contingency that appellees' case would be sustained by one construction of such statute and defeated by another.

Cooke v. Avery, 147 U. S. 384, 385, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; Banker's Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 382, 386, 48 L. ed. 484, 489, 490, 24 Sup. Ct. Rep. 325.

It was the settled construction of the act of 1828 that all claims confirmed thereunder were required to be patented by the United States.

United States v. Wiggins, 14 Pet. 350, 10 L. ed. 489.

It had also been settled by this court that the act applied to complete titles as well as inchoate titles.

Mitchell v. Furman, 180 U. S. 438, 45 L. ed. 612, 21 Sup. Ct. Rep. 430.

The jurisdiction of the Federal court of first instance is dependent entirely upon citizenship.

Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Lovell v. Newman, 227 U. S. 421, 57 L. ed. 581, 33

Sup. Ct. Rep. 375; Loeb v. Columbia Twp. 179 U. S. 479, 45 L. ed. 286, 21 Sup. Ct. Rep. 174.

No question respecting any treaty or Federal statute was submitted by appellees' statement of their case.

Osborn v. Bank of United States, 9 Wheat. 819, 6 L. ed. 223; Devine v. Los Angeles, 202 U. S. 334, 50 L. ed. 1053, 26 Sup. Ct. Rep. 652.

In a bill to remove cloud on title under the practice in Florida an allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee, is sufficient without setting out matters of evidence, or what have been sometimes called probative facts, which go to establish that ultimate fact.

Ely v. New Mexico & A. R. Co. 129 U. S. 292, 32 L. ed. 689, 9 Sup. Ct. Rep. 293.

Whether the patent ran to appellees or to appellant because the land was duly and regularly sold for nonpayment of taxes prior to the issuance of the patent was the ultimate issue to be determined in the suit, and this was to be determined not by Federal law, or any Federal statute, but by the character of the title made to appellees' ancestor before the cession.

Gill v. Oliver, 11 How. 546, 13 L. ed. 807; Devine v. Los Angeles, 202 U. S. 333, 334, 50 L. ed. 1053, 1054, 26 Sup. Ct. Rep. 652.

The question whether appellees claimed a right under the treaty or the laws of the United States must be ascertained by the legal construction of the proper and necessary allegations of their bill, and not by the effect attributed to those allegations by appellant.

Central R. Co. v. Mills, 113 U. S. 257, 28 L. ed. 952, 5 Sup. Ct. Rep. 456.

The rule is inflexible that, in the exercise of its appellate powers, this court will deny jurisdiction of all cases where such jurisdiction does not affirmatively appear in the record on which it is called upon to act.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 143, 37 L. ed. 1032, 14 Sup. Ct. Rep. 35.

Where the contest is about the facts only, the law being undisputed, as in the case at bar, the cause is not one that arises under the laws of the United States, though the title to the land in controversy is traced to a United States land patent.

Theurkauf v. Ireland, 27 Fed. 769; McFadden v. Robinson, 10 Sawy. 398, 22 Fed. 10; Austin v. Gagan, 5 L.R.A. 476, 39 Fed. 626; Murray v. Bluebird Min. Co. 45 Fed. 385.

The bill does not invoke jurisdiction for determination of a Federal right.

Denver v. New York Trust Co. 229 U. S. 133, 57 L. ed. 1120, 33 Sup. Ct. Rep. 657; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

What the bill set out as to the source of title in the United States is alleged as historical facts merely to avoid a demurrer.

Starin v. New York, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28; Burgess v. Gray, 16 How. 48, 62, 14 L. ed. 839, 845; Badger v. Badger, 2 Wall. 94, 17 L. ed. 838; West Coast Lumber Co. v. Griffin, 54 Fla. 624, 45 So. 514; Houston v. McKinney, 54 Fla. 600, 45 So. 480.

Historical recitals are not jurisdictional averments.

California Oil & Gas Co. v. Miller, 96 Fed. 21.

The controversy between appellees and appellant was, first, whether the state did, in fact, assess appellees' lands for taxes in A. D. 1846 to A. D. 1851; second, if it did, whether such assessment, or the assessment made in A. D. 1867–1869, is of any validity, the equitable and legal title to the lands being then in the United States. This is wholly a question of general law.

Gauthier v. Morrison, 232 U. S. 452, 58 L. ed. 680, 34 Sup. Ct. Rep. 384; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 506–511, 44 L. ed. 864–867, 20 Sup. Ct. Rep. 726.

That the statement of the bill restricted the parties to those competent to sue in the Federal court is persuasive, if not controlling, upon this motion to dismiss.

Strawbridge v. Curtiss, 3 Cranch, 267, 2 L. ed. 435.

Appellant's claim is based upon a title from a sovereign independent of the sovereign under which appellees claim. The tax deed, if valid, is a new and independent and hostile title, which the bill prays to have canceled of record, because of a perfect and superior title derived from the United States.

Hefner v. Northern Mut. L. Ins. Co. 123 U. S. 749, 31 L. ed. 311, 8 Sup. Ct. Rep. 337; Northern P. R. Co. v. Traill County (Northern P. R. Co. v. Rockne) 115 U. S. 600, 610, 29 L. ed. 477, 480, 6 Sup. Ct. Rep. 201.

Whether the lands were subject to taxation was determinable wholly by general law.

Hooker v. Los Angeles, 188 U. S. 314, 318, 47 L. ed. 487, 491, 63 L. R. A. 471, 23 Sup. Ct. Rep. 395.

Appellant had or could claim no treaty rights. The statement that appellant would claim that appellees took a complete title under Spain did not make the suit one arising under the treaty.

Tennessee v. Union & Planters Bank, 152 U. S. 454, 464, 38 L. ed. 511, 515, 14 Sup. Ct. Rep. 654; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 638, 639, 47 L. ed. 626, 631,

Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183.

That the facts by which the determination of the issue in the case at bar was reached were of Federal origin did not make the questions for decision of Federal or treaty character.

Miller v. Swann, 150 U. S. 132, 136, 37 L. ed. 1028, 1029, 14 Sup. Ct. Rep. 52; King v. Lawson, 84 Fed. 209.

It has been the policy of Congress, not only in respect to the Florida claims, but also in respect to the Louisiana claims, to require, in addition to the first concession, an official survey and formal grant made under the former sovereign, to invest the claimant with a title as against the United States.

United States v. Acosta, 1 How. 24, 11 L. ed. 33; United States v. Lawton, 5 How. 27, 12 L. ed. 35; United States v. Forbes, 15 Pet. 182, 10 L. ed. 705; United States v. Miranda, 16 Pet. 158, 161, 10 L. ed. 922, 923; United States v. Delespine, 15 Pet. 335, 10 L. ed. 758; Fremont v. United States, 17 How. 554, 15 L. ed. 245; De la Croix v. Chamberlain, 12 Wheat. 599, 6 L. ed. 742; United States v. King, 3 How. 773–787, 11 L. ed. 824–830; Menard v. Massey, 8 How. 304, 12 L. ed. 1090; Maguire v. Tyler, 8 Wall. 650, 19 L. ed. 320; Dauterive v. United States, 101 U. S. 704, 25 L. ed. 871; United States v. Wiggins, 14 Pet. 349, 10 L. ed. 488.

Even if it should be conceded that the act of 1828 confirmed the grant to Marcos, appellant would not be helped, for no particular lands were granted.

McDonogh v. Millaudon, 3 How. 693, 706, 11 L. ed. 787, 793; Slidell v. Grandjean, 111 U. S. 437, 28 L. ed. 330, 4 Sup. Ct. Rep. 475; Slack v. Orillion, 11 La. 587, 30 Am. Dec. 726.

Under the act of July 4, 1836, U. S. Rev. Stat. § 453, Comp. Stat. 1913, § 699, the Commissioner of the General Land Office is vested with plenary powers as to private land claims, and his determination of the rights of the United States is conclusive.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 643, 657, 26 L. ed. 875, 878, 882, 11 Mor. Min. Rep. 673; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Knight v. United Land Asso. 142 U. S. 199, 35 L. ed. 988, 12 Sup. Ct. Rep. 258; Catholic Bishop v. Gibbon, 158 U. S. 165, 39 L. ed. 936, 15 Sup. Ct. Rep. 779.

Under this act the Commissioner exercises control over the acts of the subordinate officers charged with making surveys.

Castro v. Hendricks, 23 How. 441, 16 L. ed. 577.

Until the Commissioner of the Land Office approved the survey, Marcos's rights were only what appeared on the face of his concession.

Snyder v. Sickles, 98 U. S. 213, 25 L. ed. 102; West v. Cochran, 17 How. 403, 416, 15 L. ed. 110, 115; LeRoy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271; Wilcox v. Jackson, 13 Pet. 515, 10 L. ed. 272.

The Commissioner of the Land Office is not a subordinate official. Upon him devolve the determination and settlement of private land claims.

Maguire v. Tyler, 8 Wall. 650, 19 L. ed. 320; United States v. Lawton, 5 How. 28, 12 L. ed. 35; Knight v. United Land Asso. 142 U. S. 191, 194, 199, 35 L. ed. 985, 986, 988, 12 Sup. Ct. Rep. 258; United States v. Marvin, 3 How. 620, 11 L. ed. 753; Catholic Bishop v. Gibbon, 158 U. S. 155, 156, 165, 39 L. ed. 931, 932, 936, 15 Sup. Ct. Rep. 779; Carr v. United States, 98 U. S. 433, 25 L. ed. 209; Teschemacher v. Thompson, 18 Cal. 11, 79 Am. Dec. 157.

The law as construed by the Land Department until A. D. 1894 (as also by this court) restored these lands to the public domain even if all of the contentions of appellant as to the character of Marcos's title were sustained.

Mitchell v. Furman, 180 U. S. 402, 45 L. ed. 596, 21 Sup. Ct. Rep. 430; Chaires v. United States, 3 How. 619, 11 L. ed. 752.

Until the survey as a private land claim was approved by the Land Department, the lands patented to Teresa Rodriguez were not subject to taxation even if confirmed in A. D. 1828.

Whitney v. Gunderson, 31 Wis. 359; Whitney v. Morrow, 34 Wis. 644.

The grant of Marcos being of no particular lands, the confirmation did not operate to vest a title to any particular land in Teresa Rodriguez and her children.

United States v. King, 3 How. 788, 11 L. ed. 831; Mitchell v. Furman, 180 U. S. 439, 45 L. ed. 613, 21 Sup. Ct. Rep. 430.

If only something without form and shape is claimed, a confirmation of the claim will amount only to a declaration that the claimant is entitled to that something; but it will not give him a standing in court against occupants of specific tracts with a color of title . . . the confirmation . . . amounted only to a declaration that they were entitled to something to which, when ascertained, the government would grant them a title.

Slidell v. Grandjean, 111 U. S. 412, 439, 440, 28 L. ed. 321, 330, 474, 4 Sup. Ct. Rep. 475.

The Land Department from A. D. 1828 to A. D. 1894 held that the grant to Marcos had not been confirmed. Its holding was con-

clusive until set aside by the Secretary or by the courts.

Van Reynegan v. Bolton, 95 U. S. 33, 36, 24 L. ed. 351, 352; Shanklin v. McNamara, 87 Cal. 381, 26 Pac. 345.

Until patent issues, land is in process of administration and subject to the jurisdiction of the Land Department.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 592, 593, 42 L. ed. 592, 593, 18 Sup. Ct. Rep. 208; Gauthier v. Morrison, 232 U. S. 452, 58 L. ed. 680, 34 Sup. Ct. Rep. 384.

In any aspect of the title granted Marcos, the grant was not subject to taxation and sale for nonpayment of taxes. Even a perfect, complete grant exceeding a league square could not be taxed until the league square within the bounds of the grant was segregated. The excess was a part of the public domain. Until A. D. 1894 a league square was held and declared by this court and by the Land Department to be 4,428.68 acres.

United States v. Perot, 98 U. S. 429, 25 L. ed. 252; Mitchell v. United States, 15 Pet. 52, 57, 64–91, 10 L. ed. 658, 660, 662–672.

It is true, lands held under concessions from Spain were and generally are taxable before the patent issues, but only when the grant is to a definite tract of land and during the period the United States recognizes the title of the grantee. The moment this title is forfeited by an act of Congress, and the United States claims the full, absolute title to the land, the state has no power to tax it. Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670.

The United States must determine for itself when the lands are its property, certainly in its relations to a state, upon the principle of comity.

Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The survey by the United States as public lands, of the lands granted Marcos, was prima facie evidence of title in the United States, and evidence that the United States claimed ownership thereof.

United States v. Repentigny, 5 Wall. 211, 268, 18 L. ed. 627, 646; McMicken v. United States, 97 U. S. 204, 218, 24 L. ed. 947, 952; Mitchel v. United States, 9 Pet. 743, 744, 9 L. ed. 294, 295; Nofire v. United States, 164 U. S. 660, 41 L. ed. 589, 17 Sup. Ct. Rep. 212; Carpenter v. Rannels, 19 Wall. 138, 22 L. ed. 77.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The tedious volume and prolixity of the bill are directed to establish that Miguel Marcos, the ancestor of complainants, received a grant from the Spanish authorities, not becoming complete in his descendants, the complainants, until June 18, 1894, and until such time the lands which the grant embraced were not subject to state taxation, and that, therefore, the deeds issued to defendant in consequence of such taxation are void. And of this view were the two lower courts, the one in consequence entering a decree to quiet the title of complainants against the deeds, and the other affirming such decree. This appeal was then taken.

A motion is made to dismiss the appeal on the ground that the jurisdiction of the court was invoked solely because the complainants were aliens and the defendant was a citizen of the United States. This is a narrow view of the bill. It seeks to quiet the title of complainants to a tract of land commencing in a grant from Spain, depending for its completeness upon the treaty with Spain and laws of the United States, and the action under those laws by the officers of the Land Department of the United States, and it especially relies on those laws to defeat defendant's claim of title, and to have it removed as a cloud upon that asserted by complainants. Indeed, there [644] is scarcely a contention of complainants which does not primarily or ultimately depend upon the laws of the United States. The motion to dismiss is therefore denied.

The first proposition on the merits is the character of the grant from Spain to Marcos. Complainants contend, as we have seen, that it was an inchoate or incomplete grant. The defendant, *per contra*, insists that it was confirmed as a complete and perfect title by the force and effect of the treaty between the United States and Spain.

It is well here to repeat some of the allegations of the bill, that their scope and effect may be understood. It alleges the action of the board of land commissioners reporting the grant to Congress for confirmation, and the several acts of Congress relating thereto, especially the act of May 23, 1828 (4 Stat. at L. page 284, chap. 70). That the grant was, under the laws of Spain, "called a first title or permit to occupy the land, and, after occupancy and proof thereof, to secure a complete or Royal title." It is, however, further averred that before a perfect title could be obtained, Florida was ceded to the United States, who, by the 8th article of the treaty, pledged itself to confirm the title; and that to secure such confirmation Teresa Rodriguez, widow of Marcos, applied to the board of land commissioners, and the board reported the grant to Congress as valid, and recom-

mended its confirmation, and that thereafter Congress, by the act of May 23, 1828, confirmed it to the extent of a league square, to be located within the limits of the original claim and bounded by sectional lines, and to be "in quantities of not less than one section."

This apparently left nothing to be done but to segregate the land by a survey; but the bill alleges that the grantees were required to accept the confirmation as a final settlement, or bring their claim before the judge of the superior court for the district of East Florida. [645] This was not done, it is alleged, but it is again alleged that the title was confirmed to the extent of one league square, to be located within the bounds of the original grant.

Notwithstanding they had a grant confirmed to them of a possible league square, possession was not taken, it is alleged, because, under the act of March 3, 1807 [2 Stat. at L. 445, chap. 46], to have taken possession would have forfeited their right, and that it was not until February 12, 1894, when their title was recognized by the Land Department of the United States, that they were able to assert ownership of the land. In other words, that until such date the United States did not relinquish its title and possession of the lands; that the obligation to confirm grants of lands, assumed by the United States by the treaty with Spain, was political in character, and to be discharged as the United States deemed expedient; and as to the grant to Marcos, the United States retained possession and title thereto from May 23, 1828, to the issuance of the patent; that before the approval of the survey of the lands granted to Marcos, the legal title was in the United States, and the claim of complainants attached to no particular lands.

It will be observed, therefore, that the basis of the contention of complainants is that their ancestor, Marcos, received an inchoate title to an unspecified tract of land "2 miles north of Long Lake on both banks of a creek emptying into the St. John's river, if this tract of land could be identified," and because it was not identified, even by the survey approved by the Land Department, counsel say that "the title to the lands in controversy, therefore, whether Marcos held a first cession or a Royal title, is held under the United States, and not under Spain."

This, however, we assume, is but another way of stating that complainants had no interest in the land that they could assert, or that the state of Florida could tax, until the United States issued its patent; and yet the United [646] States has done no more than recognize the title derived from Spain and as derived from Spain. It is true there were at first some doubts and hesitation, but ultimately the recognition was complete, following and in pursuance of the confirmation of the Marcos grant by the act of May 23, 1828, and upon a survey made as early as 1851. At whose instance the survey was made does not appear. Section 1 of the act of May 23, 1828, requires the land confirmed by it "to be located by the claimants, or their agents, within the limits of such claims or surveys . . . which location shall be made within the bounds of the original grant, in quantities of not less than one section and to be bounded by sectional lines." Some uncertainty arises from § 2. It provides that no more than the number of acres contained in a league square shall be confirmed within the bounds of any one grant; and no confirmation shall be effectual until a full and final release of all claim to the residue contained in the grant. And something is made of the provision by complainants to refute the contention of defendant that the act was an absolute confirmation of the grant, but it certainly cannot be contended that it took all power from the act and left the grant without any foundation whatever; and we are brought back to the consideration that a valuable property was confirmed to complainants, which only needed a survey to identify it, and, when surveyed, was segregated from the public domain, and subject to the taxing jurisdiction of the state. The survey was made, we have seen, in 1851, under contract, with Benjamin A. Putnam, surveyor general. The act of June 28, 1848 (9 Stat. at L. 242, chap. 83), directed that surveys be made as soon as practicable of the private claims or grants which had been duly confirmed, situated in the state of Florida. It is probable that the survey was made in obedience to this direction. The field notes of the survey and the official plat thereof were approved by the surveyor general June 20, 1851, [647] and the patent recites that the description of the land therein given is taken "from the approved field notes of the survey thereof as executed by M. A. Williams, a deputy surveyor, in the month of January, 1851, under his contract with Benjamin A. Putnam, surveyor general of Florida, of the 19th of October, 1850." Indeed, the patent rests alone on the survey as a description and segregation of the land, the grant of which was confirmed by the act of Congress of May 23, 1828, as claim No. 22, recommended for confirmation December 16, 1825, by the board of commissioners in pursuance of the act of Congress of March 3, 1823 [3 Stat. at L. 750, chap. 28].

All the conditions of a taxable property existed, unless there be merit in the contention of the complainants that the survey of 1851, upon which the patent was predicated, was of no effect unless and until approved by the Commissioner of the General Land Office. This contention has been earnestly pressed upon our attention, but is untenable. It has no support in any statute or regulation that was in force at the time. The confirmatory act of May 23, 1828, and the act of June 28, 1848, were both silent upon the subject, and in the absence of some applicable special provision the general statute relating to public surveys was controlling. The general statute was then embraced in the act of May 18, 1796 (1 Stat. at L. 464, chap. 29), and its amendments, and was afterwards incorporated in chapters 1 and 9 of title 32 of the Revised Statutes, more especially §§ 2223 and 2395 (Comp. Stat. 1913, §§ 4457 and 4803). It expressly dealt with the survey of private land claims as well as of public lands, but contained no requirement that the survey of either be approved by the Commissioner. This is apparent upon an inspection of the statute, and is shown by two decisions of this court, one relating to the survey of a private land claim resting upon a confirmed Mexican grant, and the other to the survey of public lands. Frasher v. O'Connor, 115 U. S. 102, 115, 29 L. ed. 311, 315, 5 Sup. Ct. Rep. 1141; Tubbs v. Wilhoit, 138 U. S. 134, 142–144, 34 L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279. [648] In both cases the court approvingly referred to a decision of the Secretary of the Interior, in the latter case quoting the Secretary of the Interior as follows: "There is nothing in the act of 1786, or in the subsequent acts, which requires the approval of the Commissioner of the General Land Office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this Department. There can be no doubt but that, under the act of July 4, 1836 [5 Stat. at L. 107, chap. 352, Comp. Stat. 1913, § 699], reorganizing the General Land Office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general. But when the survey is correct, it becomes final and effective when the plat is filed in the local office by that officer." And it was added: "This practice was changed by the Land Department in April, 1879, and communicated in its instructions to surveyors general *on the* 17th of that month. It was not until after such instructions that the duplicate plats filed in the local land offices were required to be previously approved by the Commissioner of the General Land Office." It follows that the land granted and confirmed was fully identified by the survey of 1851, the field notes and plat of which are shown in the record. Of the office of the patent it is enough to repeat what was said in Beard v. Federy, 3 Wall. 478, 491, 18 L. ed. 88, 92: "In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the [649] country." In Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 344, 53 L. ed. 822, 825, 29 Sup. Ct. Rep. 493, such a patent was described "as a confirmation in a strict sense." See also § 3 of the act of May 23, 1828.

It will be observed, from the allegations of the bill, which we have taken the trouble to repeat, that the foundation of the title of complainants is a grant from Spain, which was reported as valid by the board of commissioners of the United States, recommended by such board for confirmation, and confirmed by the act of Congress of May 23, 1828, to the extent of one league, "to be located by the claimants;" that subsequently (1851) a survey was made under a contract of the surveyor general of Florida, which has been accepted as the segregation of the land and set forth in the patent, and that the sole basis of the patent is the title so derived and confirmed.

It is true, as we have stated, that the Commissioner of the Land Office in 1890 refused to issue a patent, deciding that the claim had been "surveyed in Twp. 19, S., Rs. 28 and 29 E., for 5,426.82 acres." The grounds of his decision were these: The claim was before Congress when the act of February 8, 1827 (4 Stat. at L. p. 202, chap. 9), was passed, but that that act only confirmed those claims which were under the quantity of 3,500 acres, and provided "for the survey of this [Teresa Rodriguez] and other claims, exceeding in area 3,500 acres." Referring to the act of May 23, 1828, it was said that by its 6th section those holding claims like that under consideration might secure a confirmation thereof by prosecuting the same in the courts. It was further said that "patents in this class of cases are based on some

confirmatory act of Congress, or upon a confirmation of some tribunal created by Congress for that purpose." Considering that there was no confirmation by Congress and no decision of any tribunal created by Congress, the Commissioner declined "to patent the same for the want of proper evidence upon which to base such action." A review of the decision and [650] action was invoked, and the attention of the Commissioner was directed to § 1 of the act of May 23, 1828, and a confirmation claimed thereunder on the ground "that its survey contains a less quantity than a league square." To this the Commissioner answered that the "grant was made by Spanish authority, and must be understood to mean a grant of 5,500 acres according to the measurement used by Spain in measuring grants of this character. . . . A 'league square' by this measurement contains 25,000,000 varas, or 4438.68 English acres.

"The Rodriguez claim, as before stated, has been surveyed so as to embrace 5,426.82 acres, or 988.14 acres in excess of a Spanish 'league square.'

"Said act of 1828 provided a method by which claims not confirmed by its 1st section might be confirmed by its 2d section. This 2d section required the claimants who accepted its provisions to release the land in excess of a league square.

"No release of the 988.14 acres herein referred to is found on file here. . . .

"The Rodriguez claim not having been confirmed, I must decline to take up the same with a view to the issuance of a patent therefor."

An appeal was taken to the Secretary of the Interior and a decision rendered by him February 12, 1894. The Secretary stated that the lands within the limits of the grant have been surveyed in Twp. 19 S., Rs. 28 and 29 E., in Florida, that it was presented to the board of land commissioners in Florida for 5,500 acres, and contained, according to said survey, 5,486.46 acres. The opinion then recites the history of the grant and the steps which had been taken for its confirmation, defined a league square to contain 6,002.50 acres of land, and that in accordance therewith the grant was petitioned and allowed for 5,500 acres.

In answer to the view expressed by the Commissioner [651] that a Spanish league was meant, it was said that the conclusion was "at variance with and repugnant to every fact and circumstance in the history of Spanish grants in the provinces mentioned [Louisiana and the Floridas] and in the legislation of Congress in relation thereto." It was hence held that a "league square" of land, as understood by Congress in the act of May 23, 1828, meant a tract of land containing 6,002.50 acres; and that it followed, therefore, that the Rodriguez claim "contained, as shown by the survey, less than a league square, and is confirmed by the 1st section of the act of May 23, 1828, supra." The decision of the Commissioner was reversed, and that officer was "directed to patent said claim in accordance with the survey thereof."

Both the Commissioner and the Secretary proceeded upon the theory that the survey as approved by the surveyor general in 1851 was effective, if the grant was confirmed by the 1st section of the act of 1828.

We have been at pains to cite at length from these decisions to show how little stood in the way of the complete assurance of complainants' title, and that its foundation was the direct confirmation of it by the act of May 23, 1828, and that the grant needed definition only by a survey, which was made, as we have seen, in 1851. This survey was referred to by counsel for complainants, by the Commissioners of the Land Office and the Secretary of the Interior and in the patent, it being made the foundation of the latter. The case, therefore, becomes in principle like Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Northern P. R. Co. v. Patterson, 154 U. S. 130, 38 L. ed. 934, 14 Sup. Ct. Rep. 977; Maish v. Arizona, 164 U. S. 599, 41 L. ed. 567, 17 Sup. Ct. Rep. 193.

This disposes of the primary proposition in the case, to wit, that complainants had a taxable interest in the granted lands; but, assuming the contrary, defendant yet insists that complainants are not entitled to the relief [652] which they pray. There are other contentions as well, urged respectively by defendant and complainants, upon which the courts below did not pass, and we are brought to consider what disposition should be made of the case in view of such contentions.

The first of the contentions relates to the title of defendant, which has its foundation in a sale for taxes by the state of Florida, alleged to have been assessed for the years 1845 to 1851, both included, and a deed from the sheriff to one John Starke (1852), and subsequently an assessment to the latter for taxes and a sale for his delinquency, title ultimately reaching defendant through mesne conveyances.

The validity of the tax deeds is attacked by complainants, they asserting that the deeds were not preceded by a valid assessment, nor indeed any assessment, nor executed in accordance with the laws of the state, nor (as to some of them) by the proper officer. On these contentions, as we

have said, the courts below expressed no opinion. Their solution depends upon testimony somewhat voluminous and not very satisfactory, of which there is no analysis either by the master or by the trial court or by the court of appeals.

The statute of the state, it is agreed, in 1845 to 1851, required the assessors of the counties "to take down and assess the taxable property in his county," and on or before the 1st day of March in each year "to make out three books in alphabetical order of all the taxable property in his county, one of which books he shall forward to the comptroller of the treasury, one other of said books he shall deliver to the sheriff of his said county, and the other book he shall deliver to the board of county commissioners of his said county."

The act provided that in default of an assessment by the assessors the sheriffs of the counties should assess and list the taxes for their respective counties, and to proceed [653] to have the property therein assessed in such manner as the assessors were required to perform such duty.

The chief clerk of the comptroller's office, upon being called as a witness by complainants, testified that he found duplicate tax rolls of 1845 to 1851, inclusive, except for the year 1847, which he could not find. To his certain knowledge the rolls had been in the office for thirty years. The rolls were certified by the assessor as correct so far as his knowledge extended. Some of the rolls were not indorsed as filed. The witness testified that he could add nothing to the identity of the rolls other than the certificates, and that he could not determine whether the roll of 1845 was made in accordance with law or not. And further, that the "book" (roll) was alphabetically arranged to the extent of the first letter in the surnames, and that the land was designated according to its quality as first, second, or third rate, and assessed respectively at three fourths, one half and one quarter of a cent an acre, but the number of acres was not given nor a description of the land.

To the question whether there was property assessed to Teresa Rodriguez, he answered, "So far as the question of whether any lands are entered there opposite the name of Teresa Rodriguez is concerned, I will say that I am unable to find that particular name. But I will state further that it is impossible for me to declare that the property of Teresa Rodriguez is not assessed, for the reason that property is entered on this book, following after the word 'same' in a number of instances, and for that reason I don't know who 'same' was intended to be. In a number of instances ne' appears there, and 'ditto.' In making the ditto they used two ditto marks. Wherever the word 'same' appears a name immediately precedes it, but where the ditto marks (or dots, the intention of which I do not know) just precede those, no name appears."

There is other testimony equally confusing as to the [654] roll of 1846. He testified that some portions of it were rotted out. But how far this affected the roll does not clearly appear. And as to the roll of 1848 he testified that it was so mutilated and torn that he was unable to arrive at any conclusion as to how the lands were assessed therein; and further, that he was unable to give the names that were entered between the letter P and the letter S, for the reason that by decay they had become so dim and stained that he was unable to make them out. The testimony was clearer as to the roll of 1849, and the name of Teresa Rodriguez did not appear thereon. The witness testified that Teresa Rodriguez's name did not appear on the roll of 1850, but he was not able to say whether her property was attempted to be assessed or not; that he was only prepared to say that her name was not on the roll. The certificate to this roll stated "that the foregoing assessment of state taxes corresponds exactly with that contained in the book filed by me in the office of the judge probate, and were retained by me, John Simpson, tax assessor and collector." It may be observed in passing that John Simpson, as sheriff and tax collector, levied upon and sold to John Starke lands "supposed to belong to Teresa Rodriguez." There is some presumption that he proceeded upon a knowledge of the records and the requirements of the law. We have seen the statute required the sheriffs to make assessments if the assessors failed to make them.

On cross-examination the clerk of the comptroller's office repeated that he was unable to determine if Teresa Rodriguez's lands had been assessed; that, "in the absence of specific descriptions, it would be impossible to determine a question of that nature."

Testimony was offered on the part of defendant to the effect that the courthouse of Orange county, where the lands are situated, was destroyed by fire in 1868 or 1869, and one only of the books of record was saved, it not being in the courthouse at the time of the fire. It was a miscellaneous [655] record, separate volumes of deeds, mortgages, and miscellaneous matter not then being required. There was nothing in its index which covered tax sales or tax assessments.

It will be observed, therefore, the testimony as to assessments is somewhat uncer-

tain and confused, and that the courts below made no attempt to analyze or explain it, their view of the case making it unnecessary.

There are other contentions equally dependent upon testimony. For instance, defendant asserts that the record shows that complainants were guilty of laches, more than twelve years having elapsed from the date of the patent to the filing of the bill, and that, besides, the suit is barred by the statute of limitations. And further, that one of the parties in the tax title took possession immediately upon his purchase of the lands in 1872, and remained in possession until 1882, cultivated a portion of the lands, cut timber therefrom and exercised other acts of ownership. That his successor in title succeeded also to the possession, holding it until his sale in 1884 to the Florida Colonization Company, the grantor of the defendant, from which, in 1890, defendant received the title and possession.

It is contended that during all such time complainants neither paid nor offered to pay taxes, that the other parties did, the defendant successively from 1890, and that it also made other expenditures; that complainant asserted no claim to the lands against it and let twelve years elapse after patent was issued before bringing this suit.

The courts below rejected these contentions. The trial court seemed to have arrived at its conclusion by disregarding the possession, whatever it was, which was held by defendant's predecessors in the title, or its possession prior to the issue of the patent. "It makes no difference," the court said, "what the occupation or possession may have been while the title to the property was in the United States, and it is not considered that the possession during [656] such time can be resorted to to determine whether or not the property was, after the issue of the patent, in the actual possession of the defendant through its agent sufficient to legally bar a right to maintain a bill to remove cloud from title."

We think the learned court erred in this. The continuity of possession was a factor to be considered,—we do not say determinative. The evidence of numerous witnesses seems to conflict upon the character and extent of such possession, an analysis of which can better be made in the first instance by the master or the trial court than by an appellate court.

There are other contentions, besides, which were not passed upon. The validity of the deed from the sheriff to Starke is questioned because, it is asserted, it has neither subscribing witnesses nor evidence of having been acknowledged, and, it is contended, under the laws of Florida a certified copy of a deed is not admissible in evidence as proof of the execution or contents of the original, if the record has not been made upon the evidence of execution required by the statute, citing Kendrick v. Latham, 25 Fla. 819, 6 So. 871. Indeed, the contention is even that a deed without subscribing witnesses does not convey the land described for a term of more than two years, citing Hart v. Bostwick, 14 Fla. 162, 173; Neal v. Gregory, 19 Fla. 356.

To this defendant opposes the contention that the laws of Florida did not require subscribing witnesses to a deed from a sheriff, made in execution of a levy upon the property for the collection of taxes, and that, further, even if so, there was a right to receive a deed from the successor of the sheriff, and that, therefore, an equitable title was conveyed to Starke, which was subject to taxation and to sale upon his delinquency.

We do not pass upon the contention, nor intimate an opinion of the other contentions we have mentioned, or [657] which are presented by the pleadings. We refer to them to show that on account of the view of the courts below on the taxability of the lands, they omitted to pass on a number of important issues, some of which require a consideration of testimony, and some—it may be all—an examination of the local laws and decisions, as dependent on such testimony. And, we repeat, a consideration of such testimony should be made in the first instance by the trial court. Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 169, 44 L. ed. 418, 20 Sup. Ct. Rep. 336; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82.

Decree reversed and cause remanded for further proceedings in accordance with this opinion.

DAVID McCORMICK, Appt.,
v.
CITY OF OKLAHOMA CITY et al.

(See S. C. Reporter's ed. 657-660.)

Error to circuit court of appeals — finality of decision — diverse citizenship case.

The jurisdiction of a Federal circuit court over a suit by a nonresident to compel a municipality specifically to perform certain paving contracts was none the less

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Generally, as to diverse citizenship as ground of Federal jurisdiction—see notes to

dependent upon diverse citizenship, so as to make the decree of the circuit court of appeals final, because the bill also asserted violations of alleged vested rights protected by the Federal Constitution, where the basis of such assertion is that complainant had binding contracts with the municipality which the latter refused to permit him to perform.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

[No. 170.]

Argued March 4, 1915. Decided March 15, 1915.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Oklahoma, dismissing a suit for specific performance. Dismissed for want of jurisdiction.

See same case below, 122 C. C. A. 215, 203 Fed. 921.

Mr. B. F. Burwell argued the cause and filed a brief for appellant.

Mr. Claude Weaver argued the cause, and Messrs. J. W. Johnson and V. V. Hardcastle filed a brief for appellees.

Memorandum opinion by Mr. Justice McKenna, by direction of the court:

Suit for specific performance of eighteen contracts for the paving of certain streets in the city of Oklahoma City, Oklahoma.

A temporary restraining order was applied for and denied. The suit subsequently came on to be heard on the bill, answer, and proofs, and a decree was entered dismissing it. The decree was affirmed by the circuit court of appeals. 122 C. C. A. 215, 203 Fed. 921.

A question of jurisdiction arises: that is, whether an appeal lies from the decree of the circuit court of appeals to this court, and that depends upon the ground on which the jurisdiction of the district court was invoked, and whether, as a consequence, the decree of the circuit court of appeals was final.

The bill alleges that McCormick, whom we shall designate as complainant, is a citizen and resident of St. Louis, Missouri, and that the city of Oklahoma City is a citizen and resident of Oklahoma, being a municipal corporation thereof, and that the other defendants are its officers.

The gravamen of the suit is that under an ordinance of the city, resolutions were passed by the city council at different times providing for the paving of certain streets in the city, and that under due and legal proceedings had under such resolutions plans, specifications, and estimates of the work were prepared by the city engineer. That in accordance with these and notices published complainant filed with the city clerk proposals and bids which were afterwards by the council duly accepted; that they, therefore, [659] became and constituted valid and binding contracts between the city and complainant for making such improvements, and that he, by reason of such contracts, has a vested right of property in the same, and is entitled to be permitted to perform the same. That subsequently the council attempted by resolution or motion to reconsider its action and to set aside the awards, in violation of complainant's rights. That he tendered formal written contracts and requested the acting mayor to execute them, but that officer refused to do so, or to approve the bonds presented therewith. That complainant has done in all other particulars the things required to be done and performed by him, and had done some work under his contracts before they were attempted to be set aside. That, unless restrained, the city will deprive complainant of the privilege of making the improvements and prevent him from making the profits thereon, which would amount to at least $45,000; that the attempt of the city to set aside the awards to complainant "is in violation of the Constitution of the United States, and in violation of the Constitution and laws of the state of Oklahoma, and is an attempt to deprive this complainant of property without due process of law."

These are the general outlines of the bill, and they are sufficient to show that diversity of citizenship was alleged, and, in a general way, that the Constitution of the United States and of the state of Oklahoma were violated. The basis of the latter allegation is that complainant had binding contracts with the city which the city refused to permit him to perform. Their breach is alleged and nothing more, and the allegation gets no other quality or character by the assertion that complainant had a "vested right of property" in the contracts or their performance, and that to take this away is a deprivation of property without due process of law. Nor would such be the result if complainant had averred that the circumstances amounted [660] to an impairment of the obligation of his contract,—

Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; McDonald v. Smalley, 7 L. ed. U. S. 287; and Roberts v. Lewis 36 L. ed. U. S. 579.

a contention which he in effect urged upon the oral argument.

The case, therefore, falls under the ruling in St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575, and subsequent cases.

In Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 181, 49 L. ed. 713, 716, 25 Sup. Ct. Rep. 420, it was said that the mere fact that a city is a municipal corporation does not give to its refusal to perform a contract the character of a law impairing its obligation, or depriving of property without due process of law. St. Paul Gaslight Co. v. St. Paul, supra, was adduced.

In Shawnee Sewerage & Drainage Co. v. Stearns, 220 U. S. 462, 471, 55 L. ed. 544, 547, 31 Sup. Ct. Rep. 452, it was said: "The breach of a contract is neither a confiscation of property nor a taking of property without due process of law."

It follows that the bill presents a case of diversity of citizenship only, and the decree of the circuit court of appeals was final.

We may observe that that court and the district court decided that there were no contracts consummated by complainant with the city.

Appeal dismissed.

AMERICAN SEEDING MACHINE COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 660–662.)

Constitutional law — due process of law — indefiniteness in criminal statutes — state anti-trust laws.

The uncertainty as to what the selling price of an article would have been had there been no combination of its manufacturers renders invalid a conviction under Carroll's Ky. Stat. §§ 3915, 3941a, under which, as construed by the state courts, combinations for the purpose of controlling prices are made unlawful only when for the purpose, or with the effect, of fixing a price for an article greater or less than its real value, which is further declared by such courts to be the market value under fair competition and under normal conditions.

[For other cases, see Constitutional Law, IV. b, 9; Criminal Law, I. a, in Digest Sup. Ct. 1908.]

[No. 175.]

Argued March 5, 1915. Decided March 15, 1915.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Circuit Court of Barren County, in that state, of violations of the state anti-trust laws. Reversed.

See same case below, 152 Ky. 589, 153 S. W. 972.

Mr. J. E. Bowman argued the cause, and, with Mr. Alexander P. Humphrey, filed a brief for plaintiff in error.

No appearance for defendant in error.

Memorandum opinion by Mr. Justice McKenna, by direction of the court:

Plaintiff in error was convicted in the circuit court of Barren county, Kentucky, and fined for alleged violation of §§ 3915 and 3941a, of the Kentucky laws commonly known as the Kentucky Anti-trust Statutes, and prosecutes this writ to review the judgment.

The grounds of error assigned are: (1) That the statutes in question are in conflict with the 14th Amendment to the Constitution of the United States; (2) that the particular transactions involved were transactions of interstate commerce, and protected from state regulation by the commerce clause of the Constitution of the United States.

These grounds were presented to the lower court first by demurrer, which was overruled, and, after answer and trial to a jury, by a request for peremptory instructions for defendant.

The sections of the laws of Kentucky referred to were declared to be invalid by this court under the 14th Amendment because they, as construed by the court of [662] appeals of the state, offered no standard of conduct that it is possible to know. International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853. Therefore, the judgment of conviction against plaintiff in error must be reversed.

It is not necessary to pass on any other question.

Judgment reversed.

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

A. J. PHILLIPS COMPANY, Plff. in Err.,
v.
GRAND TRUNK WESTERN RAILWAY COMPANY et al.

(See S. C. Reporter's ed. 662–668.)

Carriers — reparation suits — excess charges — finding of Interstate Commerce Commission.

1. A shipper who was not a party to the proceedings before the Interstate Commerce Commission to have an increase in freight rates declared to be unreasonable may maintain a reparation claim by appropriate proceedings before the Commission or the courts, based upon the Commission's general finding that such increase was unreasonable.

[For other cases, see Carriers, III. c., in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — reparation claims — limitation.

2. Neither proceedings begun by other shippers before the Interstate Commerce Commission to have a certain increase in freight rates declared to be unreasonable, nor findings of unreasonableness and orders issued thereon by the Commission, will save the right of a shipper to recover the overcharge where he has disregarded the requirements of the act of June 29, 1906 (34 Stat. at L. 590, chap. 3591, Comp. Stat. 1913, § 8584), that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after, provided that claims accrued prior to the passage of this act may be presented within one year."

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Pleading — statute of limitations — general demurrer.

3. Any rule which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration can have no application where a shipper who failed to file his claim within the two years allowed by the act of June 29, 1906 (34 Stat. at L. 590, chap. 3591, Comp. Stat. 1913, § 8584), brought a reparation suit against a carrier, based upon the general finding of the Interstate Commerce Commission that a certain increase in freight rates was unreasonable, since, under the provisions of that statute that all complaints for damages must be filed within two years, "and not after," the lapse of that time not only bars the remedy, but destroys the liability.

[For other cases, see Pleading, III. g, 2, in Digest Sup. Ct. 1908.]

[No. 124.]

Note.—On recovering back excessive payment to public service corporation—see note to Illinois Glass Co. v. Chicago Teleph. Co. 18 L.R.A.(N.S.) 124.

Argued January 15, 1915. Decided March 15, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Michigan which sustained a demurrer to the declaration in a suit by a shipper to recover an overcharge from a carrier. Affirmed.

See same case below, 115 C. C. A. 94, 195 Fed. 12.

The facts are stated in the opinion.

Messrs. Edward H. S. Martin and George M. Stephen argued the cause and filed a brief for plaintiff in error:

Because of the necessity for uniformity of decision throughout the country, § 9 of the act to regulate commerce does not permit suit to be brought to recover alleged excessive freight charges exacted under a duly established tariff, where the Commission has never decided such rate to be unreasonable.

Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

However, where the right to sue under § 9 carries no threat of destruction of such uniformity of decision, it is not to be supposed that the courts will decide such right to sue does not exist, in the face of oft repeated decisions that it is not for the courts, under the guise of construction, to repeal or nullify an enactment of the legislative body.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 474, 479, 55 L. ed. 297, 300, 302, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 405, 53 L. ed. 836, 847, 29 Sup. Ct. Rep. 527; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; 36 Cyc. 1103, 1128, 1129.

Clearly, then, the provision for suit in § 9 must refer to suits brought after the Commission has once decided the rate to be unreasonable, for then there would be no danger of conflict or interference with the desired uniformity of rates.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 257, 57 L. ed. 1472, 1476, 33 Sup. Ct. Rep. 916; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 489, 58 L. ed. 1055, 1061, 34 Sup. Ct. Rep. 641; National Pole Co. v. Chicago & N. W. R. Co. 127 C. C. A. 561, 211 Fed. 65; 14 Columbia L. Rev. 512–514.

Plaintiff can rely on the Commission's decision in a proceeding to which it was not a party.

Southern R. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846; Tift v. Southern R. Co. 159 Fed. 555.

The defense of the statute of limitations was not raised by the pleadings in the case at bar, and therefore cannot be availed of by defendants. Under the common-law practice prevailing in Michigan, the bar of the statute must be raised by plea, and cannot be availed of upon demurrer or motion to dismiss.

First Nat. Bank v. Steel, 136 Mich. 588, 99 N. W. 786; 25 Cyc. 1396.

Regardless of this, however, the action is not barred. While the interstate commerce act fixes a limitation of time to file complaint with the Commission, and one year to apply under § 16 for the enforcement of the order of the Commission by a person who has filed such complaint, the act does not establish any limitation at all for suit in court under § 9. The action in court is therefore limited by the state statute of limitations only.

Campbell v. Haverhill, 155 U. S. 610, 614, 39 L. ed. 280, 281, 15 Sup. Ct. Rep. 217; O'Sullivan v. Felix, 233 U. S. 318, 58 L. ed. 980, 34 Sup. Ct. Rep. 596.

Mr. L. C. Stanley argued the cause and filed a brief for defendants in error:

The action of the Commission upon the shipments in question giving a reparation is a condition precedent to an action in court, and that action must be by way of an order of the court enforcing the order of reparation granted by the court.

National Pole Co. v. Chicago & N. W. R. Co. 127 C. C. A. 561, 211 Fed. 65; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 545; Lehigh Valley R. Co. v. Meeker, 128 C. C. A. 311, 211 Fed. 785; Franklin v. Philadelphia & R. R. Co. 203 Fed. 134; Morrisdale Coal Co. v. Pennsylvania R. Co. 106 C. C. A. 269, 183 Fed. 929; Howard Supply Co. v. Chesapeake & O. R. Co. 162 Fed. 188; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Jacoby v. Pennsylvania R. Co. 200 Fed. 989; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; National Pole Co. v. Chicago & N. W. R. Co. 200 Fed. 185; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Texas & P. R. Co. v. American Tie & Timber Co. 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

Mr. Justice Lamar delivered the opinion of the court:

The A. J. Phillips Company is a manufacturer of doors at Fenton, Michigan. For use in its business it purchased large quantities of lumber, much of which was shipped from points in Alabama, over the lines of the Illinois Central, the Southern, the Grand Trunk Western, and the Detroit & Milwaukee Railway Companies. Prior to April, 1903, the rate to Fenton was 28 cents a hundred, of which 14 cents was the charge for the haul over the Southern and the Illinois Central, from Alabama points to the Ohio river. The remaining 14 cents represented the charge of the Grand Trunk and the Detroit Companies for the haul from the Ohio river to Fenton.

In April, 1903, the Illinois Central, the Southern Railway, and other carriers operating in the Gulf states, filed a tariff which made an advance of 2 cents per hundred on lumber shipped from Alabama mills to the Ohio river and beyond.

On July 24, 1903, the Yellow Pine Association filed a complaint with the Interstate Commerce Commission, seeking to have this increase declared to be unreasonable. [664] After a hearing the Commission held (10 Inters. Com. Rep. 505–547) that "the advance . . . of 2 cents . . . was not warranted under all the facts in evidence and that the resultant increased rate is unreasonable and unjust. An order will be issued in accordance with these views." The carriers sought to have this order enjoined, but the action of the Commission was sustained by the circuit court, and on May 27, 1907, that ruling was affirmed by the Supreme Court of the United States (206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700); after which, as appears from the official reports (Joice v. Illinois C. R. Co. 15 Inters. Com. Rep. 239), the Commission approved the settlement of a number of claims for reparation which had been previously filed. The Phillips Company was not a party to the proceedings before the Commission, and made no claim for reparation, but on May 11, 1909, it brought suit in the circuit court of the United States for the eastern district of Michigan, against the four carriers named above, for the recovery of the overcharge. The declaration—which by reference, made the report of the Commission in 10 Inters. Com. Rep. 505, a part of the pleading (Robinson v. Baltimore & O. R. Co. 222 U. S. 507, 56 L. ed. 289, 32 Sup. Ct. Rep. 114)—alleged that the four carriers had charged plaintiff 30 cents per hundred, though they well knew that 28 cents was

the highest just and reasonable freight rate that could be charged on lumber, and that anything in excess of 28 cents was illegal, unjust, and excessive. It was also averred that the Commission, on the complaint of the Yellow Pine Association, had found the 2-cent advance to be unreasonable, and for that reason the plaintiff claimed that the defendant-carriers were each and all bound to return to it the 2-cent overcharge on 218 cars of lumber. There was a prayer for judgment for $5,000 damages and $2,000 attorneys' fees.

The Southern Railway was not served. The Illinois Central, having no office in the district, was ultimately dismissed from the case. The demurrer of the other two [665] defendants was sustained. That judgment was affirmed by the circuit court of appeals, and the case brought here by writ of error.

1. The Phillips Company, relying on a finding by the Commission on the complaint of the Yellow Pine Association, that a 2-cents advance in a lumber rate was unreasonable, brought suit against four carriers to recover an overcharge collected on 90,432,500 pounds of lumber shipped to it over their connecting lines. But, as the plaintiff was not a party before the Commission, the defendants insist that it cannot take advantage of the order that the rate was unjust, so as to be able to maintain the present suit.

But the proceeding before the Commission, to determine the reasonableness of the 2-cents advance, was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record, and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order. See Abilene Cotton Oil Co. Case, 204 U. S. 446, 51 L. ed. 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. supra; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 489, 58 L. ed. 1055, 1061, 34 Sup. Ct. Rep. 641, and compare Nicola, S. & M. Co. v. Louisville & N. R. Co. 14 Inters. Com. Rep. 200 (4), 205.

2. But while every person who had paid the rate could [666] take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose, and the shipper at once had the right to file a complaint, or to intervene in proceedings instituted by others. If he failed to take either of those steps, and there was a finding of unreasonableness in the proceedings begun by others, he could, if in time, present his claim, and await the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid, he would then be in position to obtain reparation from the Commission—or a judgment from a court of competent jurisdiction, on a claim that had been seasonably presented. But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that

"all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after, provided that claims accrued prior to the passage of this act may be presented within one year." 34 Stat. at L. 590, chap. 3591, Comp. Stat. 1913, § 8584.

In the present case the overcharges were made and paid prior to August, 1904. The present suit was brought May 9, 1909, less than two years after the validity of the Commission's order was sustained by the Supreme Court, but more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose.

3. It is argued, however, that under the conformity act (Rev. Stat. § 914, Comp. Stat. 1913, § 1537), the case is to be governed by the Michigan [667] practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, *and not after*. Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123

U. S. 227, 232, 31 L. ed. 128, 130, 8 Sup. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer. For when it appeared that the complaint had not been [668] file within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action.

4. There is the further contention that the connecting carriers operating north of the Ohio river had to collect the filed tariff rate of 30 cents per hundred, even though they were not responsible for the advance; and that in no event could they be held liable for the refund until after they had been heard by the Commission. There is nothing in this record indicating that the Commission undertook to impose a liability upon those who had not been heard. But the conclusion that the plaintiff's cause of action had been lost by lapse of time makes it unnecessary to determine whether carriers participating in the haul, but who did not put in the advance, or who were not parties to the proceeding in which a portion of the rate was held to be unreasonable, could be held jointly and severally liable for the collections made by them while the 30-cent rate was in force. The suit was properly dismissed on other grounds, and the judgment is affirmed.

SEABOARD AIR LINE RAILWAY, Plff. in Err.,

v.

CLARA V. PADGETT, Administratrix of the Estate of Lewis H. Padgett, Deceased.

(See S. C. Reporter's ed. 668–674.)

Error to state court — scope of review — non-Federal questions.

1. The Federal Supreme Court, when reviewing a judgment of a state court in an action in which the right to recover was based upon the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), cannot consider merely incidental questions not Federal in character, *i. e.*, those which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, the right of the defendant to be shielded from responsibility under that statute, because, when properly applied, no liability on his part from the statute would result.

[For other cases, see Appeal and Error, 2072–2123, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

2. The contention in a suit in a state court based upon the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), that the jury was misled concerning the doctrine of assumption of risk by two statements by the court, which, standing alone,

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NOTE.—On the general subjects of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On what questions the Federal Supreme Court will consider when reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On the constitutionality, application, and effect of the Federal employers' liability act —see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

may be confusing, may have sufficient strength to serve as the basis of a writ of error from the Federal Supreme Court, although that court may agree with the state court in thinking that the statements in question could not have produced a mistaken conception in the minds of the jury, when considered with the express instructions concerning the doctrine of assumption of risk as applied to the case at bar.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

Trial — misleading instructions.

3. Whether instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

4. The Federal question presented by the contention that error was committed by the state trial court in not taking from the jury a case based upon the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and in not instructing the jury to render a verdict for the defendant, upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration, manifestly cannot be said to be so frivolous as not to serve as the basis of a writ of error from the Federal Supreme Court, where the highest state court was divided on the question, and some members of the Federal Supreme Court consider that the proposition affords adequate ground for reversal.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

[No. 710.]

Argued February 24, 1915. Decided March 22, 1915.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Court of Common Pleas for Lexington County, in that state, in favor of plaintiff in an action based on the Federal employers' liability act. Affirmed.

See same case below, — S. C. —, 83 S. E. 633.

The facts are stated in the opinion.

Mr. J. B. S. Lyles argued the cause and filed a brief for plaintiff in error:

The complaint specifically alleged that the defendant was a common carrier by railroad, engaged in commerce between several of the states, and that plaintiff's intestate was injured by the negligence of the defendant while he was employed by the defendant in such commerce. These are the essential allegations, determining the application, and, consequently, the exclusive jurisdiction, of the Federal act.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

The cause of action was, therefore, predicated entirely upon the Federal act, which superseded all state law governing the same field, although he latter might have given to plaintiff a cause of action in the absence of the existence of the Federal act. The Federal act is exclusive, independent, self-sufficient, supreme. It cannot be interfered with, pieced out, or detracted from by any state law—common, statutory, or constitutional.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

When a motion is made to direct a verdict at the conclusion of the testimony, as was done in this case, it then becomes a question of law for the supreme court to determine whether the circuit court committed error in refusing such motion.

Guess v. Atlantic Coast Line R. Co. 88 S. C. 87, 70 S. E. 427; Wyatt v. Cely, 86 S. C. 544, 68 S. E. 657; Baker v. Western U. Teleg. Co. 84 S. C. 477, 137 Am. St. Rep. 848, 66 S. E. 182; Stone v. Atlantic Coast Line R. Co. 96 S. C. 228, 80 S. E. 433; Jones v. Charleston & W. C. R. Co. 98 S. C. 197, 82 S. E. 415; Crosby v. Seaboard Air Line R. Co. 83 S. C. 575, 65 S. E. 827.

The practice in South Carolina provides that the charge of the trial judge is the law of the case, and that the verdict of the jury must conform to the law, so that if there be no evidence to support the verdict under the charge, a motion for a new trial on the minutes, on such grounds, raises a legal question, which, upon exception duly saved, within thirty days after the service of notice of intention of appeal (or this time duly extended), raises a question of law for the consideration of the supreme court.

Dent v. Bryce, 16 S. C. 1; Thompson v. Lee, 19 S. C. 489; McCord v. Blackwell, 31 S. C. 138, 9 S. E. 777; Robert Buist Co. v. Lancaster Mercantile Co. 68 S. C. 526, 47 S. E. 978; Towles v. Atlantic Coast Line R. Co. 83 S. C. 504, 65 S. E. 638.

A Federal question will be regarded as properly raised at the proper time and place in instances where the state court of last resort holds that such "question is made be-

fore it, according to its practice," and proceeds to determine it.

Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 Sup. Ct. Rep. 309; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

This court will review the findings of fact in the lower courts.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

The question of directing a verdict should have been determined by the uniform test of sufficient evidence prevailing in the Federal courts, and not by the peculiar, local test of scintilla of evidence, prevailing in South Carolina.

Crosby v. Seaboard Air Line R. Co. 81 S. C. 31, 61 S. E. 1064; Howell v. Atlantic Coast Line R. Co. 99 S. C. 404, 83 S. E. 639; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

The supreme court of South Carolina erred in ruling upon the entire evidence that there was evidence to justify the submission to the jury of the issue whether intestate was employed in interstate commerce when he came to his death.

Benson v. Lancashire & Y. R. Co. [1904] 1 K. B. 242, 73 L. J. K. B. N. S. 122, 68 J. P. 149, 52 Week. Rep. 243, 89 L. T. N. S. 715, 20 Times L. R. 139; 3 Elliott, Railroads, 2d ed. § 1303; Dent v. Bryce, 16 S. C. 1; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 150, 57 L. ed. 1127, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Towles v. Atlantic Coast Line R. Co. 83 S. C. 504, 65 S. E. 638.

The supreme court of South Carolina erred in concluding, as a proposition of law, upon the facts as found by such court, that there was evidence justifying the submission to the jury of the issue whether intestate was employed in interstate commerce when he came to his death.

Ellsworth v. Metheney, 51 L.R.A. 389, 44 C. C. A. 484, 104 Fed. 119; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Russell v. Oregon Short Line R. Co. 83 C. C. A. 618, 155 Fed. 22; St. Louis Southwestern R. Co. v. Harvey, 75 C. C. A. 536, 144 Fed. 806.

The supreme court of South Carolina erred in ruling, upon the entire case, that there was evidence to justify the submission to the jury of the issue whether defendant below had been guilty of negligence towards intestate, proximately causing or contributing to intestate's death.

Ellis v. Louisville, H. & St. L. R. Co. 155 Ky. 745, 160 S. W. 512; Kennedy v. Southern R. Co. 59 S. C. 535, 38 S. E. 169; Murphy v. Atlanta & C. Air Line R. Co. 89 S. C. 15, 71 S. E. 296; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Stone v. Atlantic Coast Line R. Co. 96 S. C. 228, 80 S. E. 433.

The supreme court of South Carolina erred in holding that the entire evidence admitted of any inference except that intestate assumed the risks.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475.

Mr. W. Boyd Evans argued the cause, and, with Messrs. James H. Fanning, W. H. Sharpe, and A. D. Martin, filed a brief for defendant in error:

It is not sufficient that the case was brought under the Federal statute, but it is the determination of the Federal question that confers jurisdiction.

San Francisco v. Scott, 111 U. S. 768, 769, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 624, 30 L. ed. 519, 523, 7 Sup. Ct. Rep. 398; Bank of Old Dominion v. McVeigh, 98 U. S. 332, 25 L. ed. 110; Rockhold v. Rockhold, 92 U. S. 129, 23 L. ed. 507; New York L. Ins. Co. v. Hendren, 92 U. S. 286, 23 L. ed. 709; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

This court is clearly without jurisdiction to review the findings of fact of the two lower courts.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 63, 48 L. ed. 619, 24 Sup. Ct. Rep. 396; Adams v. Church, 193 U. S. 513, 48 L. ed. 770, 24 Sup. Ct. Rep. 512; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 222, 48 L. ed. 948, 24 Sup. Ct. Rep. 632.

Mr. W. Boyd Evans also filed a separate brief for defendant in error:

There was evidence that at least was sufficient to go to the jury.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 260, 58 L. ed. 591, 596, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Sanders v. Charleston & W. C. R. Co. 97 S. C. 50, 81 S. E. 283; Myers v. Pittsburgh Coal Co. 233 U. S. 184, 58 L. ed. 906, 34 Sup. Ct. Rep. 559; American R. Co. v. Didricksen, 227 U. S. 145, 147, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224; Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.

Mr. Chief Justice White delivered the opinion of the court:

Is there jurisdiction to review the action of the court below in affirming the judgment of the trial court, which was entered on the verdict of a jury, and if so, was error below committed, are the questions for decision (— S. C. —, 83 S. E. 633).

The suit was brought to recover damages alleged to have been suffered by the death of Lewis H. Padgett, a railroad engineer in the service of the defendant company, the plaintiff in error, caused by his having fallen during the [671] early morning hours into a drop pit in a locomotive roundhouse belonging to the company. The negligence charged was not only the failure to cover the pit, but also to properly light the roundhouse. If our jurisdiction attaches, it can only be because the right to recover was based upon the act of Congress commonly known as the employers' liability act, in having been averred that the deceased was an employee of the company, actually engaged in interstate commerce. But, as pointed out in St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 275, 57 L. ed. 1179, 1185, 33 Sup. Ct. Rep. 858, although the cause of action relied upon was based upon the Federal statute, nevertheless, "as it comes here from a state court, our power to review is controlled by Rev. Stat. § 709 [§ 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214)] and we may therefore not consider merely incidental questions not Federal in character; that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse; that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result. Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464." The existence of jurisdiction to review under the principles just stated depends not merely upon form, but upon substance; that is, in this class of cases, as in others, the general rule controls that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous. There is no doubt that the assignments of error on their face embrace Federal questions which give jurisdiction to review. We therefore exercise jurisdiction and come to consider the questions on their merits, incidentally pointing out in doing so the reasons why the questions are not of such a frivolous character as not to afford a basis for the [672] authority to examine and dispose of them. The trial court gave to the jury every instruction concerning the meaning and application of the act of Congress asked by the company, and therefore there is no ground whatever for saying that the view of the statute relied upon by the company was not given to the jury. But, despite this fact, two of the nine assignments of error insist that the jury was misled concerning the doctrine of assumption of the risk applicable under the statute because of two statements as to the law on the subject, made by the court to the jury over the exception of the defendant, which are asserted to have been confusing because possibly conflicting with each other. But while the proposition has sufficient strength to exclude the conception that the contention is frivolous, we are nevertheless of opinion that the court below was right in holding that even upon the concession, for argument's sake, that the two charges referred to, if they had stood alone, might have tended to give to the jury a mistaken conception of the law of assumption of the risk, nevertheless there was no reason for saying that they could have produced such a result in view of the express instruction concerning the doctrine of assumption of the risk as applied to the case in hand which was given by the court to the jury in the very words asked by the company, and which was so explicit as to dispel the possibility of misconception. Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied. And as from both of these points of view we are of opinion that there is no room whatever for the conclusion that any confusion or misconception as to the doctrine of

assumption of the risk could have arisen from the particular statements which are relied upon, the proposition based upon them is without merit.

[673] While this disposes of the two assignments which are directly and specifically concerned with the interpretation of the statute, nevertheless the remaining seven also raise questions of law under the statute, since they all, in one form or another, rest upon the contention that error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration. Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 276, 277, 57 L. ed. 1186, 33 Sup. Ct. Rep. 858; Miedreich v. Lauenstein, 232 U. S. 236, 243, 244, 58 L. ed. 584, 589, 590, 34 Sup. Ct. Rep. 309; Carlson v. Washington, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717. Considering the case from this point of view we think the contention cannot be said to be frivolous, since its solution is by no means free from difficulty,—a situation which was manifested by the division of opinion which arose on the subject in the court below, and by the further fact that some members of this court now consider the proposition as affording adequate ground for reversal. But although the question is not free from complexity, a majority of the court is of opinion that the proof was sufficient to justify the submission of the case to the jury, and therefore the proposition affords no basis for holding that reversible error was committed because that course was pursued. As the considerations by which this conclusion is sustained depend solely upon an analysis of the evidence, and as a statement upon the subject, therefore, would amount only to giving a summary of the proof in this case and its tendencies involving no matter of doctrinal importance, for this reason and additionally in view of the fact that both the courts below have concurred in holding that there was no sufficient ground to take the case from the jury, we think it is unnecessary to state the proof and its tendencies, and we therefore content ourselves with saying [674] that the contention that error was committed in not taking the case from the jury is found, after an examination of the record, to be without merit.

In the argument a contention was urged based upon some expression made use of by the trial court in refusing the request to take the case from the jury. Although we have considered the proposition and find it totally devoid of merit, we do not stop to further state the contention or the reasons which control us concerning it as we think it is manifestly an afterthought, as it was virtually not raised in the trial court, and was not included in the assignments of error made for the purpose of review by the court below, nor in those made in this court on the suing out of the writ of error.

Affirmed.

WILLIAM A. WRIGHT, Comptroller General of Georgia, Appt.,
v.
CENTRAL OF GEORGIA RAILWAY COMPANY.

(See S. C. Reporter's ed. 674-687.)

Constitutional law — impairing contract obligations — exemption from tax — effect of lease.

Additional taxation of railway property and franchises as the property of a railway company in possession under leases permitted and encouraged by state legislation must be regarded as a violation of an irrepealable contract exemption, in the charters of the lessor railway companies, from all taxation of their property other than a specified percentage of annual income, notwithstanding the distinctions made by Ga. Code 1861, between the usufruct of a tenant and an estate for years,—especially since the state has long been content with collecting from the lessors the tax authorized in their charters.

[For others cases, see Constitutional Law, 1118-1158, in Digest Sup. Ct. 1908.]

[No. 161.]

Argued January 28 and 29, 1915. Decided March 22, 1915.

APPEAL from the District Court of the United States for the Northern District of Georgia to review a decree which enjoined the collection of certain taxes on

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NOTE.—Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; Bullard v. Northern P. R. Co. 11 L.R.A. 246; and Henderson v. State Soldiers & S. Monument, 13 L.R.A. 169.

On corporate taxation as affected by the contract clause in the Federal Constitution—see note to Adams v. Yazoo & M. V. R. Co. 60 L.R.A. 33.

On taxation of land under perpetual lease or ground rent—see note to Penick v. Atkinson, 46 L.R.A.(N.S.) 284.

railway property and franchises which were alleged to violate the Federal Constitution. Affirmed.

See same case below, 206 Fed. 107.

The facts are stated in the opinion.

Messrs. John C. Hart and Samuel H. Sibley argued the cause and filed a brief for appellant:

The state charter contract limiting the tax rate is personal to these corporations to whom granted, and did not run with the property, not having been transferred to the Central of Georgia Railway Company with the consent of the state of Georgia at a time when the state could give such consent, and cannot be invoked by appellee, lessee, for its own benefit.

Rochester R. Co. v. Rochester, 205 U. S. 247, 51 L. ed. 788, 27 Sup. Ct. Rep. 469; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413.

At the time that appellee was incorporated the Constitution of this state prohibited the exemption of property of corporations from taxation, and hence appellee cannot claim any benefits from these charter exemptions.

Rochester R. Co. v. Rochester, 205 U. S. 247, 51 L. ed. 788, 27 Sup. Ct. Rep. 469; Trask v. Maguire, 18 Wall. 391, 21 L. ed. 938; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261.

Whether the exemption claimed is total or a commuted tax rate, it stands upon the same principle.

Great Northern R. Co. v. Minnesota, 216 U. S. 206, 54 L. ed. 446, 30 Sup. Ct. Rep. 344.

A lessee in perpetuity is the owner of property for the purpose of taxation.

Penick v. Atkinson, 139 Ga. 649, 46 L.R.A. (N.S.) 284, 77 S. E. 1055, Ann. Cas. 1914B, 842; Wells v. Savannah, 87 Ga. 397, 13 S. E. 442; Cincinnati College v. Yeatman, 1 Ohio St. 276; Street v. Columbus, 75 Ga. 822, 23 So. 773; Washington Market Co. v. District of Columbia, 4 Mackey, 416; Norfolk v. J. W. Perry Co. 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867, 220 U. S. 472, 479, 55 L. ed. 548, 551, 31 Sup. Ct. Rep. 465.

Neglect to pay taxes in the past is no reason for future exemption.

Wells v. Savannah, 181 U. S. 547, 45 L. ed. 994, 21 Sup. Ct. Rep. 697.

The liability to taxation, and the incidents thereof, are controlled by the state laws. In the absence of a construction of them by the state courts upon a point the decision of which will either subject property to the constitutional taxation or except it therefrom, this court will resolve every doubt in favor of the constitutional taxation.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; State Assessors v. Comptoir National d'Escompte, 191 U. S. 402, 48 L. ed. 238, 24 Sup. Ct. Rep. 109.

Such leases are clearly, in a matter of taxation, to be treated as base fees, and the lessee owes the taxes.

Penick v. Atkinson, 139 Ga. 649, 46 L.R.A. (N.S.) 284, 77 S. E. 1055, Ann. Cas. 1914B, 842; 37 Cyc. 791.

Estates upon condition subsequent have, until defeated, the same qualities and incidents as though no condition was annexed thereto.

16 Cyc. 607, note 83.

The absence of words of succession is immaterial. The language clearly, by technical words appropriate for the purpose, conveys a leasehold estate in perpetuity. There is no room for construction. Words of succession were not necessary in a conveyance to a corporation, even at common law, when words of inheritance were so scrupulously insisted on to make an inheritable estate in natural persons.

13 Cyc. 644, note 88.

It cannot be denied that the Central of Georgia, save for the conditions subsequent, such as nonpayment of rent, has every use and control of this property that it is possible to have.

Wells v. Savannah, 87 Ga. 401, 13 S. E. 442; Norfolk v. J. W. Perry Co. 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867.

Messrs. T. M. Cuningham, Jr., and A. R. Lawton argued the cause and filed a brief for appellee:

The fact that the leases have been in effect about fifty years, and during all this time the railroad lines covered by the leases have been taxed to their respective owners and in accordance with the provisions of their charters, is strongly persuasive against the construction now put forward by the appel-

lant that the lease contracts should be so construed as to cast the ownership of these two railroad properties upon the appellee, and to defeat the scheme of taxation provided by the charters of the lessors.

Temple Baptist Church v. Georgia Terminal Co. 128 Ga. 680, 58 S. E. 157; Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 426, 54 L. ed. 544, 553, 30 Sup. Ct. Rep. 242; Louisville & N. R. Co. v. Wright, 199 Fed. 454.

The leases did not cast the ownership of the property upon the Central, nor were the tax provisions of the charters impaired or affected by the leases.

Wright v. Southwestern R. Co. 64 Ga. 783; Central R. & Bkg. Co. v. Macon, 43 Ga. 648; Louisville & N. R. Co. v. Wright. 199 Fed. 454, 119 C. C. A. 282, 201 Fed. 1023; Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387; New Jersey v. Wilson, 7 Cranch, 164, 167, 3 L. ed. 303, 304; University of the South v. Skidmore, 87 Tenn. 155, 9 S. W. 893; Jetton v. University of the South, 208 U. S. 489, 499, 52 L. ed. 584, 588, 28 Sup. Ct. Rep. 375; Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 432, 54 L. ed. 544, 556, 30 Sup. Ct. Rep. 242.

The length of time does not affect the character of the leases. These leases are not perpetual, but, even if the term was perpetual, they would still be leases.

Central R. & Bkg. Co. v. Macon, 43 Ga. 646; 18 Am. & Eng. Enc. Law, 611; 22 Am. & Eng. Enc. Law, 706; First Nat. Bank v. Sioux City Terminal R. & Warehouse Co. 69 Fed. 441; Todhunter v. Des Moines, I. & M. R. Co. 58 Iowa, 205, 12 N. W. 267; Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290, 873; Underhill, Land. & T. § 54; Hill v. Atlantic & N. C. R. Co. 143 N. C. 539, 9 L.R.A.(N.S.) 606, 55 S. E. 854; Dickinson v. Consolidated Traction Co. 56 C. C. A. 401, 119 Fed. 871; Tate v. Neary, 52 App. Div. 78, 65 N. Y. Supp. 40; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309, affirmed in 163 U. S. 564, 592, 41 L. ed. 265, 275, 16 Sup. Ct. Rep. 1173; Brown v. Schleier, 55 C. C. A. 475, 118 Fed. 985; Nicoll v. New York & E. R. Co. 12 Barb. 460, affirmed in 12 N. Y. 121; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Noyes, Intercorporate Relations, § 201; 23 Am. & Eng. Enc. Law, 781; Chicago & A. R. Co. v. People, 153 Ill. 409, 29 L.R.A. 69, 38 N. E. 1075; 5 Thomp. Corp. § 5896; Baldwin, Am. Railroad Law, 458; State ex rel. Glenn v. Mississippi River Bridge Co. 109 Mo. 253, 19 S. W. 421, 134 Mo. 321, 35 S. W. 592; East Tennessee, V. & G. R. Co. v. Morristown, — Tenn. —, 35 S. W. 771; Chicago & A. R. Co. v. People, 153 Ill. 409, 29 L.R.A. 69, 38 N. E. 1075; St. Louis & S. F. R. Co. v. Williams, 53 Ark. 58, 13 S. W. 796; Morrison v. St. Paul & N. P. R. Co. 63 Minn. 75, 30 L.R.A. 546, 65 N. W. 141.

The lessor is liable for taxes.

Taylor, Land. & T. §§ 318a, 341, 342; Cooley, Taxn. pp. 818, 822, 823; Underhill, Land. & T. §§ 605–607, 618, p. 1005; East Tennessee, V. & G. R. Co. v. Morristown, — Tenn. —, 35 S. W. 771; Perrin & S. Printing Co. v. Cook Hotel & Excursion Co. 118 Mo. App. 44, 93 S. W. 337; Elliot v. Gantt, 64 Mo. App. 248; Knight v. Orchard, 92 Mo. App. 466; McManus v. Fair Shoe & Clothing Co. 60 Mo. App. 216; Gedge v. Shoenberger, 83 Ky. 94; Bowditch v. Chickering, 139 Mass. 283, 30 N. E. 92; Amory v. Melvin, 112 Mass. 83; Carnes v. Hersey, 117 Mass. 269; National Bank v. Danforth, 80 Ga. 56, 7 S. E. 546; Burns v. Lewis, 86 Ga. 600, 13 S. E. 123; Wells v. Savannah, 87 Ga. 399, 13 S. E. 442; Sheibley v. Rome, 107 Ga. 384, 33 S. E. 398; Norris v. Coley, 100 Ga. 547, 28 S. E. 222; Justice v. Parnin, 130 Ga. 869, 61 S. E. 1044; Mixon v. Stanley, 100 Ga. 372, 28 S. E. 440; South Carolina & G. R. Co. v. Augusta Southern R. Co. 107 Ga. 164, 33 S. E. 36, 111 Ga. 420, 36 S. E. 593.

These leases do not grant an estate, but merely create the relation of landlord and tenant, and all that the tenant acquired was the usufruct of the property.

Hutcheson v. Hodnett, 115 Ga. 993, 42 S. E. 422; Burnett v. Rich, 45 Ga. 212; State v. Western & A. R. Co. 136 Ga. 619, 71 S. E. 1055; Western & A. R. Co. v. Western U. Teleg. Co. 138 Ga. 420, 42 L.R.A.(N.S.) 225, 75 S. E. 471; Sykes v. Benton, 90 Ga. 402, 17 S. E. 1022; Bentley v. Atlanta, 92 Ga. 623, 18 S. E. 1013; Singleton v. Southwestern R. Co. 70 Ga. 464, 48 Am. Rep. 574; Underhill, Land. & T. § 37; 2 Minor, Inst. p. 165; Taylor, Land. & T. §§ 14, 50; Ex parte Gay, 5 Mass. 419; Penick v. Atkinson, 139 Ga. 649, 46 L.R.A.(N.S.) 284, 77 S. E. 1055, Ann. Cas. 1914B, 842; Louisville & N. R. Co. v. Wright, 199 Fed. 454, 119 C. C. A. 282, 201 Fed. 1023.

Even if the leases created an estate for years, such estate is not taxable under the statutes of Georgia, because successive estates in land are not taxes separately. The practice is to tax the property itself.

Georgia R. & Bkg. Co. v. Wright, 125 Ga. 589, 54 S. E. 52; Daugherty v. Thompson, 71 Tex. 192, 9 S. W. 101; Elder v. Wood, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; Hutcheson v. Hodnett, 115 Ga. 994, 42 S. E. 422.

Holmes delivered the opinion

bill in equity, brought by the
mpany, the appellee, to prevent
tion of certain taxes, which, it is
ould be contrary to article 1., § 10,
the 14th Amendment of the Con-
n of the United States. The case
eard on bill, demurrer, and answer,
ertain agreed facts, and the district
issued an injunction as prayed. 206
107. The facts, stripped of details
material to the question before us, are
follows: In 1912 the defendant issued
xecutions against the plaintiff to collect ad
valorem taxes on the "real estate, roadbed,
and franchise value, [677] after crediting
. . . ½ of 1 per cent of the net income,
. . . on that portion of its property
known in its system" respectively as the
Augusta & Savannah Railroad and the
Southwestern Railroad. These roads were
built under special charters admitted to
constitute irrepealable contracts, by which
the property was not subject to be taxed
higher than ½ of 1 per cent upon the annual
income; so that it may be assumed that the
present taxes could not be sustained if the
roads still were in the separate hands of
the corporations that built them.

But in 1862, the Augusta & Savannah
Railroad and in 1869 the Southwestern
Railroad made leases of their respective
roads and franchises to the Central Rail-
road & Banking Company of Georgia during
the continuance of the charters of the less-
ors. In 1892 the property of the lessee
went into the hands of a receiver, and the
lessors, being allowed an election by the
court, elected to allow the property to re-
main in his hands, which it did until a sale
of the same and purchase, under a reor-
ganization plan, by the appellee, the Central
of Georgia Railway Company. In 1895, by
agreement between the latter and the two
lessors, the leases were modified so as to
run for one hundred and one years from
November 1 of that year, renewable in like
periods upon the same terms forever. Not-
withstanding these leases the state has been
content down to this time to collect from
the lessors the tax provided for in their
charter, but now, conceiving the state and
its officers to have been mistaken, the comp-
troller seeks to tax the whole property to
the lessee.

The executions are for taxes on property
of the plaintiff, and must show jurisdiction
to issue them. Harris v. Smith, 133 Ga.
373, 374, 65 S. E. 883; Equitable Bldg. &
L. Asso. v. State, 115 Ga. 746, 42 S. E. 87.
Here the jurisdiction depends upon these
ds being in effect the plaintiff's property
of law. If they are not, the at-
tempt is an attempt [678] to tax the plain-
tiff upon property that it does not own. To
decide whether these taxes are such an unjus-
tified exaction we must turn to the legisla-
tion of the state, bearing in mind that the
practical construction given to the law for
nearly half a century is strong evidence that
the plaintiff's contention is right. Wright v.
Georgia R. & Bkg. Co. 216 U. S. 420, 426,
54 L. ed. 544, 553, 30 Sup. Ct. Rep. 242;
Temple Baptist Church v. Georgia Terminal
Co. 128 Ga. 669, 680, 58 S. E. 157.

The charter of the Augusta & Waynes-
boro' Rail Road, afterwards the Augusta &
Savannah, approved December 31, 1838,
alongside of the taxing provision in § 13,
to which we have referred, provided as fol-
lows in § 16: "That said company shall at
all times have the exclusive use of the said
rail road, for the transportation or convey-
ance of merchandise, goods, wares, and
freight of every kind, and passengers, over
the said rail road, so long as they see fit
to use this exclusive privilege, and said
company shall be authorized to charge the
same rates for freight or passage as are
allowed in the charter of the Georgia Rail
Road & Banking Company: Provided al-
ways, that said company may, when they
see fit, rent or farm out all or any part
of their exclusive right of transportation
of freight, or conveyance of passengers, with
the privilege, to any individual or individ-
uals, or other company, and for such term
as may be agreed upon,"—it being added
that the company, in the exercise of the
right of transportation, or the persons or
company "so renting from said company
. . . shall, so far as they act on the same,
be regarded as common carriers."

It will be perceived that when this sec-
tion was drawn it was supposed that dif-
ferent persons might be allowed to put the
carriages upon the new form of road,
perhaps may be seen even more clearly
other early charters in Georgia and
where. And the revenue that was
derived from the exclusive privilege
ed might be [679] obtained by do
whole business, by letting in others
a part of it, or by making a lea
whole. Any one of the three
permitted, one deemed as likely
and also, so far as appears, s
alike in the mind of the legisla
spect of any legal effect up
grant of rights.

The foregoing view of § 1
us to believe that no chan
of tax exemption was ex
from the demise of the ro
it would have followed f
of another carrier to p
an individual to carry

that is only an introduction to further considerations. We cannot suppose that the legislature meant either to practise a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the state an unlimited right to impose upon the lessee all that it had renounced as against the lessor. For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways; or, if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result.

After the charter came a special act of January 22, 1852, which authorized the Central Railroad & Banking Company "to lease and work for such time and on such terms as may be agreed on by the parties interested," the two roads with which we are concerned, among others, and reciprocally giving power to the corporations owning those roads "so to lease to the Central Railroad & Banking Company of Georgia their respective railroads for such term of time and on such other terms as they respectively may deem best." In the interval, the rail road had become a railroad; but we see no ground for believing that there had been any change in the attitude of the state toward the pioneer enterprises [680] that it was encouraging a few years before. We still cannot suppose that it was inviting the lessors to lose the benefit of their exemption, or the lessees to find themselves entrapped with a burden made possible only by accepting the invitation of the act.

We are not suggesting that the contract in the charters of the lessors passed by assignment to the lessee, nor are we implying that the property was exempted generally, into whosesoever hands it might come. We are dealing only with the specific transaction permitted and encouraged by the acts of 1838 and 1852, and saying that we cannot reconcile it with our construction of those acts to allow that transaction to change the position for the worse. We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor, the protection of the lessee being necessary in order to make good that promised to the lessor.

The present instruments, made in pursuance of the foregoing powers in October, 1895, purport to "demise, lease, and to farm let" the property for the term of one hundred and one years, renewable as above stated. The lessee covenants to pay a fixed rent semiannually and various expenses incident to taking over the occupation of the road, and there is a clause of re-entry in case of failure for six months to make the semiannual payment as agreed. Meantime, however, the Code of 1861 had introduced distinctions, hard to grasp for one trained only in the common law of real property, between the usufruct of a tenant and an estate for years; Code of 1910, §§ 3685, 3687, 3690, 3691; and it is argued that these leases created estates of such a nature that the lessee was practically in the position of owner subject to a rent charge, and was taxable for the land. We agree that technical distinctions are to be avoided as far as may be in matters of taxation, and we are not curious to insist upon the differences between [681] a lease, having about eighty-five years to run, that may, not must, be renewed in perpetuity, and a fee subject to a rent charge. But the disregard of technical distinctions is in the interest of substantial justice, not for the purpose of enabling the state to escape from a binding bargain. If we are right in our interpretation of the statute from which the parties to the leases got their powers, this later legislation of Georgia is immaterial, or should not be construed as embracing an attempt to escape from a contract by a subtlety that almost defies ingenuity to understand. See Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 432, 54 L. ed. 544, 556, 30 Sup. Ct. Rep. 242.

The executions, as we have said, must stand or fall on the jurisdiction that they disclose. They attempt to tax the fee as the property of the plaintiff. The injunction runs only against taxing the plaintiff as owner. We discuss nothing but the question before us. For the reasons that we have given we are of opinion that the taxes cannot be collected on the present executions. The court cannot take the place of the taxing power. Yost v. Dallas County (Jan. 18, 1915 [236 U. S. 50, ante, 460, 35 Sup. Ct. Rep. 235]). It follows that the injunction must be sustained.

Decree affirmed.

Mr. Justice **Lamar** took no part in this decision.

Mr. Justice **Hughes**, dissenting:

It has repeatedly been declared by this court to be settled law that tax exemptions, or tax limitations, are personal to the grantee; that is, are nontransferable, and do not run with the property unless the legislature has explicitly provided otherwise. It has been held not to be enough that the grantee is authorized to make a conveyance of all its property, estate, privileges, and franchises. [682] Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Wilson v.

Gaines, 103 U. S. 417, 26 L. ed. 401; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Memphis & L. R. Co. v. Railroad Comrs. (Memphis & L. R. Co. v. Berry) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; St. Louis, & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469. As the court said in the last-mentioned case (p. 248) after fully reviewing the authorities: "A legislative authorization of the transfer of 'the property and franchises,' . . . of 'the property,' . . . of 'the charter and works,' . . . or of 'the rights of franchise and property,' . . . is not sufficient to include an exemption from the taxing or other power of the state, and it cannot be contended that the word 'estate' has any larger meaning." And it was further held (p. 252) that it must be regarded as the established rule "that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity." See also Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 437, 54 L. ed. 544, 558, 30 Sup. Ct. Rep. 242. The controlling principle of these decisions is that, in view of the supreme importance of the taxing power of the state, every doubt must be resolved in favor of its continuance. "This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris.*" Memphis, L. R. Co. v. Railroad Comrs. (Memphis & L. R. Co. v. Berry) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299. "If the legislature can lay aside a power devolved upon it for the good of the whole people of the state, for the benefit of a private party, it must speak in such unmistakable terms that they will not admit of any [683] reasonable construction consistent with the reservation of the power." Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640.

I do not find a word in the statutes of *Georgia* which confers any immunity from the taxing power upon this appellee. The question relates to its interest, not to that of the original companies. What that interest or property may be, and how it is to be assessed, is another question. The first inquiry is whether the appellee has any immunity under the contract clause; and that, I submit, is answered when it is found that it has no contract of its own and no stipulation for a transfer to it of the immunity of others.

The principle which precludes the implication of such a transfer applies equally to leases—even leases for ordinary periods. A lessee is in no better position to claim tax exemptions or limitations than a mortgagee, or a purchaser at a foreclosure sale, who, under legal authority, takes all the property, franchises, and privileges of the mortgagor. The question as to a leasehold interest was presented in Jetton v. University of the South, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375. There, the state had granted an exemption to the University of 1,000 acres of land. The University gave leases of lots within this tract, and thus a village community was developed. An effort was made by the state to tax the property against the University upon the ground that the leases took it out of the exemption. But the state court held otherwise; the property could not be taxed against the University. University of the South v. Skidmore, 87 Tenn. 155, 9 S. W. 892. Thereupon the state, under new legislation authorizing the taxing of leasehold interest, assessed the lessees, and the University, with the lessees, brought suit in the Federal court to enjoin the collection of the taxes upon the ground of impairment of contract. The circuit court entered a decree in favor of the University, and enjoined the assessment. On the appeal to this court, it was urged in support of the decree that, [684] in taxing the leased property, the tax was placed upon the only use to which the property could be put in order that it might be made of benefit to the University. Indeed, it was said that the assessment under the legislative act destroyed the value of the exemption; that is, that it was necessary to protect the lessee in order to save the contract right. But this court overruled these contentions. It was thought to be "plain that an exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years." The immunity of the one gave no immunity to the other, and the contract of exemption did not imply "in the most remote degree" that the state would not thereafter "so change its mode

of assessment as to reach the interest of a lessee directly." The state taxed what it had a right to tax, the lessee's interest, even though it could not tax the University. The exemption, said the court, "lasts only so long as the university owns the lands, and when it conveys a certain interest in them to a third person it no longer owns that interest, which at once becomes subject to the right of the state to tax it." In the present case, it may be assumed that, what the appellee has, it has acquired lawfully, but it cannot claim to be immune from taxation, or plead the contract of another.

I emphasize this, for it seems to me that its full recognition is important to a proper determination of the case, and that what is denied to the appellee under the contract clause should not be asserted and permitted to have a dominating effect under another name. Nor would there be any basis for an imputation of unfair dealing or sharp practice, in case a state undertakes to tax the property of a company which itself has no immunity from taxation, simply because its grantor had an immunity which it was not able to transfer. The appellee says in [685] its argument that it "is not claiming any tax exemptions," and, as in fact it appears to have none, we should deal with the case upon this footing.

What, then, is the relation of the appellee to the property in question? Its predecessor, the Central Railroad & Banking Company of Georgia, had leased the railroad properties of the Augusta & Savannah and Southwestern Companies, respectively, in perpetuity, or during the entire existence of the lessor companies. The property of the Central Railroad & Banking Company of Georgia was sold under foreclosure in 1895, and the appellee was organized as a successor corporation, and leases to it of the railroad properties in question were executed by both the original companies "for the full term of one hundred and one years, and renewable in like periods upon the same terms forever." The rental in each case was the fixed sum of 5 per cent on the amount of the capital stock then outstanding; that is to say, the sum of $51,145 in the case of the Augusta & Savannah Company and $259,555 in the case of the Southwestern Company. In short, under what is termed a lease, the appellee took the entire property, to hold, if it pleased, in perpetuity, subject to an annual charge of the amounts specified.

Dealing with the substance of things, as we must when the Constitution of the United States is involved, and not with mere forms or names, I am unable to see how an ad valorem tax against the appellee upon the property which it thus holds is a violation of due process of law under the 14th Amendment. Under a system which tolerates such incongruities as the taxing of the entire value of the land to the owner of the equity of redemption, while the interest of the mortgagee is separately taxed, it would seem to be difficult to find ground for a constitutional objection to the treatment of the holder of a perpetual lease as virtual owner. See J. W. Perry Co. v. Norfolk, 220 U. S. 472, 478, 55 L. ed. 548, 551, 31 Sup. Ct. Rep. 465. In the language of Mr. Chief [686] Justice Bleckley in Wells v. Savannah, 87 Ga. 397, 399, 13 S. E. 442 (see 181 U. S. 531, 544, 545, 45 L. ed. 986, 993, 994, 21 Sup. Ct. Rep. 697): "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all the land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold or by a contract of bargain and sale demised forever, subject to a perpetual rent, is taxable as corporeal property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent." It can hardly be said that it makes a constitutional difference that a so-called lessee, who may enjoy forever, if it chooses, has also the privilege of giving up the property at the renewal dates. Nor do I understand it to be important, under the Federal Constitution, how the interest of the appellee—which in substance is ownership—is technically described. Surely, the 14th Amendment is not concerned with mere technicalities of tenure; these, the state is free to abolish. And it should be added that we do not have here any question of double taxation, as the state has credited to the appellee against the tax demanded the ½ of 1 per cent upon the net income, which was payable by the original companies, and the payment of which the appellee had assumed.

In considering the constitutional capacity of the state, we are dealing, of course, with the question as to what it may do by the exercise of all the power it possesses, and not merely with the interpretation of its existing statutes. Castillo v. McConnico, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229. I recognize fully the difficulties in this case, so far as it has to do with the interpretation and application of the Georgia tax laws. And if it were the decision of the court as a mere matter

of [687] construction of the local law—in the absence of a controlling local decision—that the statutes of Georgia did not justify the assessment actually made, I should withhold this expression of dissent; for that would leave the matter, as I conceive it should be left, within the control of the courts and legislature of the state, so far as the mere imposition of an ad valorem tax upon the property held and enjoyed by the appellee is concerned.

But I am unable to concur in the view that the tax here sought to be collected violates the Constitution of the United States.

I am authorized to say that Mr. Justice Pitney concurs in this dissent.

Mr. Justice McReynolds also dissents.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia, Petitioner,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and Atlantic Coast Line Company.

(See S. C. Reporter's ed. 687–691.)

Constitutional law — impairing contract obligations — exemption from taxation — effect of lease.

1. An irrepealable contract exemption in a railway charter, from all taxation other than a specified percentage of annual income, exempts the railway property from additional taxation as the property of railway companies in possession under a lease encouraged and permitted by the original charter as a means of deriving a revenue from the privilege granted.

[For others cases, see Constitutional Law, 1118–1158, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — exemption from taxation — effect of lease — property exempted.

2. The railway property exempted from other than a specified tax on annual income while in the possession of certain railway companies under a lease permitted and encouraged by the lessor's charter, by reason of an irrepealable contract exemption in such charter, includes betterments and improvements of the demised road, such as the lessor naturally would have made to meet the necessities of an increasing business, the rolling stock substituted for or added to that turned over to the lessees, which, under the lease, becomes the property of the lessor as soon as acquired, necessary and proper improvements made by the lessor before the lease and paid for by the proceeds of bonds issued by it, terminals added to the demised property belonging to the lessor, although bought with money belonging to the lessees, and so much of the property converted into and used as a joint terminal as is part of the exempted line.

[For others cases, see Constitutional Law, 1118–1158, in Digest Sup. Ct. 1908.]

Taxes — nonresidents — stock and bonds.

3. Railway companies not domiciled in the state are not taxable there for stock and bonds of other companies merely appearing to be owned by them.

[For other cases, see Taxes, I. c, 6, in Digest Sup. Ct. 1908.]

[No. 162.]

Argued January 29, 1915. Decided March 22, 1915.

ON WRIT and CROSS WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Northern District of Georgia granting a part of the relief sought by the bill in a suit to enjoin the collection of a tax upon property operated by a railway company under lease. Modified by including in the exempted property so much of the property converted into and used as a joint terminal as is part of the exempted line, and, as so modified, affirmed.

See same case below, 119 C. C. A. 282, 201 Fed. 1023.

The facts are stated in the opinion.

Mr. Samuel H. Sibley argued the cause and filed a brief for petitioner:

Contractual restraint of taxation is personal.

Rochester R. Co. v. Rochester, 205 U. S. 236, 247, 254, 51 L. ed. 784, 788, 791, 27 Sup. Ct. Rep. 469; Great Northern R. Co. v. Minnesota, 216 U. S. 206, 54 L. ed. 446, 30 Sup. Ct. Rep. 344; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860.

A contract for limited taxation is gov-

NOTE.—Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; Bullard v. Northern P. R. Co. 11 L.R.A. 246; and Henderson v. State Soldiers & S. Monument, 13 L.R.A. 169.

On corporate taxation as affected by the contract clause in the Federal Constitution—see note to Adams v. Yazoo & M. V. R. Co. 60 L.R.A. 33.

On taxation of land under perpetual lease or ground rent—see note to Penick v. Atkinson, 46 L.R.A.(N.S.) 284.

On taxation of capital stock of corporations—see note to State Board v. People, 58 L.R.A. 513.

erned by the same rules as one for total exemption.

Tucker v. Ferguson, 22 Wall. 575, 22 L. ed. 816; Rochester R. Co. v. Rochester, 205 U. S. 236, 247, 254, 51 L. ed. 784, 788, 791, 27 Sup. Ct. Rep. 469; Stearns v. Minnesota, 179 U. S. 255, 45 L. ed. 178, 21 Sup. Ct. Rep. 73.

Taxes are chargeable to the "owner" of property.

Mixon v. Stanley, 100 Ga. 377, 28 S. E. 440; Dubois v. Hepburn, 10 Pet. 1, 9 L. ed. 325.

An estate for years is ownership in Georgia.

James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co. 140 Ga. 593, 79 S. E. 465; Southern R. Co. v. State, 116 Ga. 276, 42 S. E. 508; South Carolina & G. R. Co. v. Augusta Southern R. Co. 107 Ga. 180, 33 S. E. 36; 27 Am. & Eng. Enc. Law, 2d ed. 677.

This lease creates an estate for years.

Austell v. Swann, 74 Ga. 281; Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; South Carolina & G. R. Co. v. Augusta Southern R. Co. 107 Ga. 164, 33 S. E. 36; Central R. & Bkg. Co. v. Macon, 43 Ga. 606; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 72, 42 S. E. 315; James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co. 140 Ga. 593, 79 S. E. 465.

That the Georgia Railroad & Banking Company has not been absolved by the lease from its liabilities to the public has no significance. Its liabilities would continue though it sold its road in fee simple.

Banks v. Georgia R. & Bkg. Co. 112 Ga. 655, 37 S. E. 992; Hawkins v. Central of Georgia R. Co. 119 Ga. 159, 46 S. E. 82; Georgia R. & Bkg. Co. v. Haas, 127 Ga. 188, 119 Am. St. Rep. 327, 56 S. E. 313, 9 Ann. Cas. 677.

That there are conditions on which the lease may be terminated does not affect the question.

Wells v. Savannah, 87 Ga. 399, 13 S. E. 442.

Complainants own at least a taxable interest.

Jetton v. University of the South, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375; Wells v. Savannah, 87 Ga. 399, 13 S. E. 442.

Sufficient tax machinery exists.

Atlanta Nat. Bldg. & L. Asso. v. Stewart, 109 Ga. 80, 35 S. E. 73; New Orleans v. Sempel, 175 U. S. 316, 44 L. ed. 178, 20 Sup. Ct. Rep. 110.

Betterments are liable to taxation.

Leach v. Goode, 19 Mo. 501; 24 Cyc. 1075; 37 Cyc. 778; 18 Am. & Eng. Enc. Law, 651; Philadelphia, W. & B. R. Co. v. Appeal Tax Ct. 50 Md. 397; People ex rel. New York Elev. R. Co. v. New York Tax & A. Comrs. 82 N. Y. 459.

Rolling stock is taxable to complainants.

15 Cyc. 169.

Stocks and bonds are taxable.

Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16; Armour Packing Co. v. Clark, 124 Ga. 369, 52 S. E. 145; Armour Packing Co. v. Augusta, 118 Ga. 552, 98 Am. St. Rep. 128, 45 S. E. 424.

A corporation cannot extend its own exemption to cover property not strictly within the purposes of the charter.

37 Cyc. 911, 916; Bibb County v. Central R. & Bkg. Co. 40 Ga. 646; Wright v. Southwestern R. Co. 64 Ga. 799.

The same is true of the property of an exempt charity when put to other uses:

Massenburg v. Grand Lodge, F. & A. M. 81 Ga. 212, 7 S. E. 636; Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783.

Complications arising from any confusion of exempt and unexempt values can be solved by fair apportionments.

Massenburg v. Grand Lodge, F. & A. M. 81 Ga. 212, 7 S. E. 636.

Mr. John C. Hart also filed a brief for petitioner:

Under the terms of this lease the Georgia Railroad & Banking Company, lessors, are no longer "doing business" in this state.

McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361.

All property in this state must be taxed unless exempted.

Georgia State Bldg. & L. Asso. v. Savannah, 109 Ga. 67, 35 S. E. 67; Wells v. Savannah, 87 Ga. 397, 13 S. E. 442.

The law is not much concerned with the technical niceties of title, but with the broader proposition, as to who enjoys the value, it is concerned.

Wells v. Savannah, 87 Ga. 399, 13 S. E. 442.

The contract relative to taxation is a personal privilege.

Rochester R. Co. v. Rochester, 205 U. S. 247, 51 L. ed. 788, 27 Sup. Ct. Rep. 469; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Norfolk & W. R. Co. v.

Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413.

The Constitution of this state forbids exemption.

Rochester R. Co. v. Rochester, 205 U. S. 247, 51 L. ed. 788, 27 Sup. Ct. Rep. 469; Trask v. Maguire, 18 Wall. 391, 21 L. ed. 938; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261.

Whether the exemption claimed is total or a commuted tax rate, it stands upon the same principle.

Great Northern R. Co. v. Minnesota, 216 U. S. 207, 54 L. ed. 446, 30 Sup. Ct. Rep. 344; Bloxham v. Florida C. & P. R. Co. 35 Fla. 625, 17 So. 902; Com. v. Nashville, C. & St. L. R. Co. 93 Ky. 430, 20 S. W. 383; Huck v. Chicago & A. R. Co. 86 Ill. 353; State v. Great Northern R. Co. 106 Minn. 303, 119 N. W. 202; Morris Canal & Bkg. Co. v. State Assessors, 76 N. J. L. 627, 71 Atl. 328; State Assessors v. Morris & E. R. Co. 49 N. J. L. 221, 7 Atl. 826; Philadelphia, W. & B. R. Co. v. Appeal Tax Ct. 50 Md. 397.

Lessees are chargeable with the taxes though the fee is nontaxable.

Jetton v. University of the South, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep 375; J. W. Perry Co. v. Norfolk, 220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465.

Contracts of exemption or surrender of the taxing power of the state are to be strictly construed, and never to be extended in scope or duration beyond its express concession.

St. Louis v. United R. Co. 210 U. S. 273, 52 L. ed. 1057, 28 Sup. Ct. Rep. 630.

Mr. **Alexander C. King** argued the cause, and, with Mr. Joseph B. Cumming, filed a brief for respondents and cross petitioners:

Since this lease every department of the state government, until now, has treated the Georgia Railroad & Banking Company as the proper and sole taxpayer. This is persuasive evidence of the law to a court first declaring it.

Temple Baptist Church v. Georgia Terminal Co. 128 Ga. 680, 58 S. E. 157.

The lease of the Georgia Railroad & Banking Company to W. M. Wadley created a usufruct, and not an estate, in the lessee.

State v. Western & A. R. Co. 136 Ga. 625, 71 S. E. 1055; Western & A. R. Co. v. Western U. Teleg. Co. 138 Ga. 430, 42 L.R.A. (N.S.) 225, 75 S. E. 471; J. W. Perry Co. v. Norfolk, 220 U. S. 472, 479, 55 L. ed. 548, 551, 31 Sup. Ct. Rep. 465.

In the case of an estate for years, the landlord, or owner of the fee, and not the tenant, pays all taxes.

Taylor, Land & T. 3d ed. § 341; East Tennessee, V. & G. R. Co. v. Morristown, — Tenn. —, 35 S. W. 771; 12 Am. & Eng. Enc. Law, 2d ed. 709; Boston Molasses Co. v. Com. 193 Mass. 387, 79 N. E. 827; Cooley, Taxn. 3d ed. pp. 819, 822; State ex rel. Glenn v. Mississippi River Bridge Co. 109 Mo. 253, 19 S. W. 421; Chicago & A. R. Co. v. People, 153 Ill. 409, 29 L.R.A. 69, 38 N. E. 1075.

Where a lessee covenants to pay taxes, it is a promise to pay what the lessor owes to the state, and is really due to the lessor as a part of the rent.

Perrin & S. Printing Co. v. Cook Hotel & Excursion Co. 118 Mo. App. 44, 93 S. W. 337; Elliott v. Gantt, 64 Mo. App. 248; Knight v. Orchard, 92 Mo. App. 466; McManus v. Fair Shoe & Clothing Co. 60 Mo. App. 216; Gedge v. Shoenberger, 83 Ky. 94; Bowditch v. Chickering, 139 Mass. 283, 30 N. E. 92; Amory v. Melvin, 112 Mass. 83; Carnes v. Hersey, 117 Mass. 269.

If a tenant contract to pay taxes, that means only such taxes as the landlord is liable for, and if the landlord is exempt, or pays a special tax, such is the measure of the tenant's obligation.

People ex rel. International Nav. Co. v. Barker, 153 N. Y. 98, 47 N. E. 46; Bowditch v. Chickering, 139 Mass. 283, 30 N. E. 92; Underhill, Land. & T. §§ 605, 607.

The lessor here provides for enlargement pending the lease on his own account, and at its own expense, in order to discharge its growing public duty. All property added or substituted "shall be" the property of the lessor.

Gardner v. Georgia R. & Bkg. Co. 117 Ga. 522, 43 S. E. 863.

This is especially true in a railroad lease like this. The lessor does not cease to be operating the property.

Georgia R. & Bkg. Co. v. Haas, 127 Ga. 193, 119 Am. St. Rep. 327, 56 S. E. 313, 9 Ann. Cas. 677.

It does not, as in case of a sale, cease to be the owner. It has only at most created a chattel real interest in the thing it still owns, and operates it through the lessee as its agency.

Re New York, L. & W. R. Co. 99 N. Y. 12, 1 N. E. 27; Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422.

In some leases additions remain the lessee's property, and taxable as such to the lessee. This is only where the lessee can remove the same at the expiration of the

lease. Here they become instantly the lessor's property.

Bass v. Metropolitan West Side Elev. R. Co. 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857; People ex rel. International Nav. Co. v. Barker, 153 N. Y. 98, 47 N. E. 46.

The charter provides a method of taxation of this property; certainly until it has ceased to belong to the Georgia Company.

Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 425, 430, 54 L. ed. 544, 553, 555, 30 Sup. Ct. Rep. 242; McHenry v. Alford, 168 U. S. 651, 661, 42 L. ed. 614, 618, 18 Sup. Ct. Rep. 242; Traverse County v. St. Paul, M. & M. R. Co. 73 Minn. 417, 76 N. W. 217; Columbia Water Power Co. v. Campbell, 75 S. C. 34, 54 S. E. 833; Boston Molasses Co. v. Com. 193 Mass. 387, 79 N. E. 827.

Accretions and accessions, proportioned to and suited to the increasing business of a carrier, are a part of its legitimate railroads and plant, and subject to like taxation as its original road.

Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. Rep. 242; Augusta v. Georgia R. & Bkg. Co. 26 Ga. 662; Gardner v. Georgia R. & Bkg. Co. 117 Ga. 532, 43 S. E. 863.

The charter method of taxation is not confined to the investment of the original four million dollars of stock.

Atlanta v. Grant, 57 Ga. 340; Farmers' Loan & T. Co. v. Candler, 87 Ga. 241, 13 S. E. 560.

The complainants are not liable to be taxed on their leasehold interest as a separate property under the law of Georgia.

Georgia R. & Bkg. Co. v. Wright, 125 Ga. 589, 54 S. E. 52; Wells v. Savannah, 87 Ga. 397, 13 S. E. 442; East Tennessee, V. & G. R. Co. v. Morristown, — Tenn. —, 35 S. W. 771; University of the South v. Skidmore, 87 Tenn. 155, 9 S. W. 892; Jetton v. University of the South, 208 U. S. 489, 503, 504, 52 L. ed. 584, 589, 590, 28 Sup. Ct. Rep. 375.

The demand that these respondents, Louisville & Nashville Railroad, a corporation of Kentucky, and the Atlantic Coast Line Railroad Company, a corporation of New Jersey, should pay to the state of Georgia taxes on stocks and bonds, is without legal support.

Georgia R. & Bkg. Co. v. Wright, 125 Ga. 589, 54 S. E. 52; Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 353, 357, 49 L. ed. 1077, 1081, 1083, 25 Sup. Ct. Rep. 669; State Tax on foreign-held Bonds (Cleveland, P. & A. R. Co. v. Pennsylvania) 15 Wall. 300, 21 L. ed. 179; Kirtland v. Hotchkiss, 100 U. S. 491, 498, 25 L. ed. 558, 562.

The proposition that this joint use of the Georgia Railroad & Banking Company terminals is not in the interest of that railroad or its business, or that such use is an alienation thereof, is not only wholly unsupported by the agreed statement of facts, but is in the teeth of the decision of the supreme court of Georgia on the legal status of a practically similar arrangement.

Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315.

Where an assessment is illegal as a whole and indivisible, it must fall, even though a legal assessment might be made.

Norwood v. Baker, 172 U. S. 269, 292, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187; Meyer v. Wells, F. & Co. 223 U. S. 298, 301, 56 L. ed. 445, 447, 32 Sup. Ct. Rep. 218.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the railroad companies, respondents, to prevent the collection of a tax upon the Georgia Railroad, operated by them under a lease and assessed to them as their property. The district court made a decree for the plaintiffs with certain exceptions, which was affirmed on appeal and cross appeal by the circuit court of appeals for the reasons given by the district court. 199 Fed. 454; 119 C. C. A. 282, 201 Fed. 1023.

The main question is similar to that disposed of in Wright v. Central of Georgia R. Co. just decided [236 U. S. 674, ante, 781, 35 Sup. Ct. Rep. 471].

By its charter granted on December 21, 1833, the stock of the company and its branches is subject only to a "tax not exceeding one-half 1 per cent per annum on the net proceeds of their investments." § 15. This language is interpreted and held to constitute [689] a binding contract in Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. Rep. 242. So it is admitted that the present tax could not be levied on the lessor. By § 12 of the same charter the company is authorized to "rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon." So the state has covenanted that the company's property shall be exempt from tax except upon its income, which it is authorized to make in any of three ways. And as bearing on the different uses of the company's franchise that were deemed possible in that day, as we remarked in the other case, we may add that by § 13, if any persons intrude upon the railroad by any manner of use thereof, they shall forfeit to the com-

pany all the vehicles and animals that may be so intrustively introduced and used; that by § 14 the company, if it sees fit to farm out any part of its exclusive right, may prescribe the value and size of vehicles to be used or pass on its road, and the locomotive power; and that by § 22, the company, if it prefers, instead of railroads, may construct common roads and use steam carriages thereon.

The plaintiffs are operating the roads in question under a lease made to one Wadley, to whose rights they have succeeded. Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315. This instrument purported, in the language quoted above from § 12 of the charter, to "rent and farm out" the privileges and roads of the lessor for a term of ninety-nine years from April 1, 1881. For the reasons given in the other case we cannot believe that if the company saw fit to gain "the net proceeds of their investments" (to ½ of 1 per cent of which their tax was limited) by letting the whole road instead of allowing others to introduce carriages, the statute silently opened the right to resume as against the lessee all that [690] had been renounced as against the lessor. If the fee of the roads is taxable to no one while the liability of the lessor to the above-mentioned ½ of 1 per cent remains, an attempt to collect a tax upon the fee from the plaintiffs is an attempt on the part of the state to tax the leased property which was completely beyond the reach of its taxing power except in so far as permitted by the contract, the obligations of which could not be impaired without a violation of the contract clause of the Constitution of the United States. Thus, the particular features of the case in hand take it without the rule applied in Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469, and other kindred cases, from which we have no purpose to depart.

Some subordinate questions remain. Betterments and improvements of the demised road such as the lessor naturally would have made to meet the necessities of an enlarging business stand on the same footing as the original road and are exempt. Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 427-432, 54 L. ed. 544, 554-556, 30 Sup. Ct. Rep. 242; Gardner v. Georgia R. & Bkg. Co. 117 Ga. 522, 532, 43 S. E. 863. The rolling stock substituted for or added to that turned over to the lessees became the property of the lessor as soon as acquired, and also is exempt like that of which it took the place. The lessee covenants to return the property in as good condition as it was then in, and the lease provides that "the property substituted for and added to that which is hereby rented and farmed out shall be the property of" the lessor. "Shall be" obviously means shall be when so substituted. It is not confined to such substituted property as may be on hand at the end of the lease. The lessor is to be kept continuously the owner of an equipped road The railroads not being domiciled in Georgia are not taxable there for stock and bonds of other companies merely appearing to be owned by them. Some necessary and proper improvements were made by the lessor before the lease, and paid for by the proceeds of [691] bonds issued by it. We do not perceive why they should be put on a different footing from the others. And we are not prepared to say that terminals, etc., added to the demised property belonging to the lessor, although bought with $225,000 of money belonging to the lessees, were not reasonable betterments and exempt.

The Atlanta terminals require separate treatment. Besides so much of them as was embraced in the lease, there seems to be other land belonging to the West Point Company, and other land again of the Louisville & Nashville Railroad. By an agreement between the plaintiffs and the West Point Company this property is converted into and used as a joint terminal. The assessment complained of deals with this as a separate entity and item, and in the decree is excepted from the injunction. It appears to us that so much of the property as is part of the exempted line still is exempt. It is used for the purposes of the line, although the relations have become more complex. The rest may be subject to taxation, but not in this assessment. The decree will be modified in this respect, but otherwise is affirmed.

Decree modified and affirmed.

Mr. Justice Lamar took no part in the decision.

Mr. Justice Hughes, Mr. Justice Pitney, and Mr. Justice McReynolds dissent.

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[692] OLIVER P. NEWMAN,[1] Louis Brownlow, and Charles W. Kutz, Commissioners of the District of Columbia, Petitioners,

v.

LYNCHBURG INVESTMENT CORPORATION and Holmes Central Realty Corporation.

(See S. C. Reporter's ed. 692-697.)

Publication — notice — eminent domain.

1. One publication of the notice of condemnation proceedings in each of the three

[1] Retirement of Cuno H. Rudolph, John A.

daily papers, not less than twenty days before the date fixed for appearance, satisfies the requirement of D. C. Code, § 491c (34 Stat. at L. 151, chap. 2070), that public notice of not less than twenty days, of the institution of such proceedings, be given by advertisement in three daily newspapers published in the District of Columbia. Twenty distinct publications are not required.

[For other cases, see Publication, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — eminent domain — special benefits.

2. The burden is upon the commissioners of the District of Columbia in street extension and widening proceedings instituted under the act of June 30, 1911 (37 Stat. at L. 1, chap. 1), to establish by a preponderance of evidence the extent of the special benefits accruing to the property to be charged.

[For other cases, see Evidence, II. k, in Digest Sup. Ct. 1908.]

Appeal — proper judgment — reversal in part.

3. Error in failing to instruct the jury in accordance with D. C. Code, § 491g, to take into consideration, in assessing benefits in a street extension and widening proceeding, the dedication of land for the improvement and the value of the land so dedicated, cannot be corrected by a reversal of the judgment in part, where the assessments for benefits cannot be separated.

[For other case, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

[No. 163.]

Argued March 3, 1915. Decided March 22, 1915.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which reversed a judgment of the Supreme Court of the District confirming an assessment of damages in a street extension and widening proceeding. Affirmed.

See same case below, 40 App. D. C. 129.

The facts are stated in the opinion.

Messrs. **Conrad H. Syme** and **James Francis Smith** argued the cause and filed a brief for petitioners:

The notice by publication satisfies the requirements of the law.

Page & J. Taxn. by Assessment, § 763; Lewis, Em. Dom. § 579, 3d ed. p. 1026; Royal Ins. Co. v. South Park Comrs. 175 Ill. 491, 51 N. E. 558; Central Sav. Bank v. Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283; Philadelphia, W. & B. R. Co. v. Shipley, 72 Md. 90, 19 Atl. 1; Baltimore v. Little Sisters of the Poor, 56 Md. 400; Harrison v. Newman, 71 Kan. 325, 80 Pac. 599; McGilvery v. Lewiston, 13 Idaho, 338, 90 Pac. 348; Nishnabotna Drainage Dist. v. Campbell, 154 Mo. 151, 55 S. W. 276; German Bank v. Stumpf, 73 Mo. 311; Muskingum Valley Turnp. Co. v. Ward, 13 Ohio, 120, 42 Am. Dec. 191; Andrews v. Ohio & M. R. Co. 14 Ind. 169; Jenkins v. Pierce, 98 Ill. 646; Re Bassford, 50 N. Y. 510; Weld v. Rees, 48 Ill. 428; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Aldis v. South Park Comrs. 171 Ill. 424, 49 N. E. 565.

No instruction appears to have been requested by any of the parties respecting dedication, nor is the matter made the subject of any exception. This court will not review an alleged error unless brought up in due form by a bill of exceptions.

Metropolitan R. Co. v. District of Columbia (Metropolitan R. Co. v. Macfarland) 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28.

The question was properly presented to the trial judge, who heard all of the evidence on the objections by the respondents to the confirmation of the verdict. The trial judge overruled the exceptions and confirmed the verdict. It is in the nature of a motion for a new trial, and the action of the trial judge will not be reviewed here.

District of Columbia v. Prospect Hill Cemetery, 5 App. D. C. 497; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 560, 54 L. ed. 877, 882, 30 Sup. Ct. Rep. 581, 19 Ann. Cas. 854.

The burden of proof as to benefits did not rest upon the petitioners.

Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Wight v. Davidson, 181 U. S. 371, 380, 45 L. ed. 900, 904, 21 Sup. Ct. Rep. 616; Henderson v. MacFarland, 33 App. D. C. 317; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 54 L ed. 877, 30 Sup. Ct. Rep. 581, 19 Ann. Cas. 854; Briscoe v. Rudolph, 221 U. S. 547, 55 L. ed. 848, 31 Sup. Ct. Rep. 679.

The court of appeals erred in directing the setting aside of the verdict *in toto*, notwithstanding only two parties appealed.

Briscoe v. Macfarland, 32 App. D. C. 167.

Messrs. **Joseph W. Cox** and **W. C. Sullivan** argued the cause, and, with Messrs. J. J. Darlington, A. E. L. Leckie, and John A. Kratz, filed a brief for respondents:

The assessments of benefits against the

Johnston, and Chester Harding, as commissioners of the District of Columbia, suggested, and the appearance of Oliver P. Newman, Louis Brownlow, and Charles W. Kutz, their successors in office, filed and entered January 27, 1915.

NOTE.—On the right to set off benefits against damages in eminent domain proceedings—see note to Peoria, B. & C. Traction Co. v. Vance, 9 L.R.A.(N.S.) 781.

lands of the respondents are excessive, unjust, and unreasonable,—a result which followed the disregard by the court and the jury of the provision of § 491g of the Code, requiring that the dedications and the value of lands dedicated shall be taken into consideration in assessing benefits.

Dill. Mun. Corp. 5th ed. § 1402, p. 2450; Hamilton, Special Assessments, § 559; Fay v. Macfarland, 32 App. D. C. 295; Macfarland v. Moore, 32 App. D. C. 213; Macfarland v. Elverson, 32 App. D. C. 81; Lill v. Chicago, 29 Ill. 31; Merritt v. Portchester, 71 N. Y. 309, 27 Am. Rep. 47; McManus v. Hornaday, 99 Iowa, 507, 68 N. W. 812; Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70; Chamberlain v. Cleveland, 34 Ohio St. 551; Long v. Barber Asphalt Paving Co. 151 Ky. 1, 151 S. W. 6; Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538; St. Louis v. Koch, 169 Mo. 587, 70 S. W. 143; Lewis, Em. Dom. §§ 387, 388; Brown v. Macfarland, 19 App. D. C. 525; Brandenburg v. District of Columbia, 26 App. D. C. 140; Berdel v. Chicago, 217 Ill. 429, 75 N. E. 386; Espert v. Chicago, 201 Ill. 264, 66 N. E. 212; Martin v. District of Columbia, 205 U. S. 135, 140, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440.

The notice as published was not sufficient to authorize the court to make the assessment of benefits.

Londoner v. Denver, 210 U. S. 373, 385, 386, 52 L. ed. 1103, 1112, 1113, 28 Sup. Ct. Rep. 708; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Glidden v. Herrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 318, 43 L. ed. 460, 461, 19 Sup. Ct. Rep. 205; Galpin v. Page, 18 Wall. 350, 368, 369, 21 L. ed. 959, 963, 964; Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 137, 148, 35 L. ed. 116, 120, 11 Sup. Ct. Rep. 512; Dick v. Foraker, 155 U. S. 404, 413, 39 L. ed. 201, 204, 15 Sup. Ct. Rep. 124; 2 Cooley, Taxn. 929, 930; Delogny v. Smith, 3 La. 423; Shannon v. Omaha, 72 Neb. 281, 100 N. W. 298; Stine v. Wilkson, 10 Mo. 75; Washington v. Bassett, 15 R. I. 563, 2 Am. St. Rep. 929, 10 Atl. 625; Armstrong v. Scott, 3 G. Greene, 434; Leffler v. Armstrong, 4 Iowa, 487, 68 Am. Dec. 672; Union P. R. Co. v. Montgomery, 49 Neb. 432, 68 N. W. 619; Nebraska Land, S. G. & Investment Co. v. McKinley-Lanning Loan & T. Co. 47 Neb. 412, 72 N. W. 357; 29 Cyc. 1121.

The burden of proof was upon the district to show the extent of special benefits.

Bennett v. Woody, 137 Mo. 377, 38 S. W. 972; Pochila v. Calvert, W. & B. Valley R. Co. 31 Tex. Civ. App. 398, 72 S. W. 255; Re Riverside Park, 59 App. Div. 603, 69 N. Y. Supp. 742, affirmed in 167 N. Y. 627, 60 N. E. 1116; Hamilton, Special Assessments, § 762.

Although the court of appeals considered it unnecessary to hold the refusal to grant the instruction as to burden of proof to be reversible error, it seems clear that the refusal could not be a harmless error.

Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 103, 30 L. ed. 299, 300, 7 Sup. Ct. Rep. 118; Mexia v. Oliver, 148 U. S. 664, 673, 37 L. ed. 602, 605, 13 Sup. Ct. Rep. 754; Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; Crawford v. United States, 212 U. S. 183, 203, 53 L. ed. 465, 473, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392.

Mr. Justice Holmes delivered the opinion of the court:

This was a proceeding by the petitioners for the extension and widening of Colorado avenue and Kennedy street in the District of Columbia, under a special act of June 30, 1911, chap. 1, 37 Stat. at L. 1. A jury was summoned, assessed the damages for the land to be condemned for the purpose, found that the lots described in a schedule would be benefited to the amounts set forth, and assessed those sums against them. The verdict was objected to and excepted to by the respondents, but was confirmed by the supreme court. On appeal the judgment was reversed by the court of appeals of the District. 40 App. D. C. 129.

[695] The first ground of reversal was that the notice of the proceedings was insufficient, which, if true, will cast a cloud upon a great number of condemnations that have been made heretofore. The condemnation is a proceeding *in rem* under and in accordance with subchapter one, of chapter 15, of the District Code. By § 491c of that subchapter the court is to "cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia," etc. [34 Stat. at L. 151, chap. 2070]. The order in this case directs publication "once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, . . . commencing at least twenty days before" January 9, 1912, the date fixed for appearance. The objection and the decision of the court of appeals was that the order did not follow the stat-

ute, because the statute requires that notice shall be published in three daily papers for at least twenty days.

The respondents are concerned only as parties assessed for the betterment. As such they could not be mentioned by name in the notice, since by the statute the jury decides what land is benefited, as well as the sum with which it shall be charged. § 491g. It is necessary, of course, that due precautions should be taken to see that they get notice in fact. This consideration, together with the requirement that the publication shall be in a daily paper, and its view of the meaning of the words, led the court of appeals to the conclusion to which it came. Nevertheless we are of a different opinion. The statute means that notice shall be given either not less than twenty days before the time set, or on twenty distinct days before that time. We think it means the former. As to the usage of speech, when we speak of giving a week's or a month's notice we mean a notice that is a week or a month before the event. The fact that the statute has been so construed [696] in a great number of cases in the District, a list of which has been submitted to us, is important not only as confirmation of our view, but as a reason for taking it if we felt more doubt than we do. It seems to be the prevailing rule in the state courts, although there are decisions on the other side. Publication in daily papers is explained sufficiently by their being the papers that business men are most likely to read. It was said that, construed as we construe it, the statute would be satisfied if a single publication were made a year before the day. The answer is that the court fixes the notice, and will see that no injustice is done. It should be observed further that the statute itself is notice of everything except the time and place of the proceeding. It locates exactly upon the face of the earth the extensions to be made and gives their length and width. We are of opinion that the order of publication complied with the law.

The other questions brought before us by the certiorari are of no general importance and may be disposed of in a few words. They concern the conduct of the trial,—matters that, in the absence of very clear error, we leave to the local courts. It was held to be error not to instruct the jury that the burden was upon the District to establish by a preponderance of evidence the extent of the special benefits accruing to the property to be charged. We may assume that the special act has adjudicated the extent of the benefits as a whole (Briscoe v. Rudolph, 221 U. S. 547, 551, 55 L. ed. 848, 850, 31 Sup. Ct. Rep. 679), but it leaves open all questions as to any particular lot. Those elements of the petitioners' case remained for them to prove.

A matter more insisted upon by the court of appeals is that the jury were not instructed to take into consideration the dedication of land for the improvement, and the value of the land so dedicated, as the Code requires that they should be. § 491g. The court was satisfied from an examination of the record that the jury did not [697] consider valuable dedications made by the respondents. The argument is very strong that the court was right on the matter of fact, and as the jury were not instructed as to their duty, we accept the conclusion of the court of appeals. We also agree with that court that the assessments for benefits cannot be separated, and therefore that the error cannot be corrected by a reversal of the judgment in part. The result is that although the Court of Appeals erred upon the matter of most general importance, its judgment reversing that of the Supreme Court must be affirmed.

Judgment affirmed.

J. G. DAVIS, Plff. in Err.,
v.
COMMONWEALTH OF VIRGINIA.

(See S. C. Reporter's ed. 697–699.)

Commerce — state license tax — peddlers and drummers.

An agent of a nonresident portrait manufacturer, to whom the latter ships portraits made to fill orders taken by local solicitors, and, in a separate parcel, frames suitable for such portraits, the orders for which contemplate delivery in appropriate frames which the customers may select at wholesale prices, cannot constitutionally be required to take out a peddler's license when engaged in putting the portraits into appropriate frames, delivering them, and offering the customers a choice of three different styles of frames, the customers taking one or none at their option, since any sale

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NOTE.—As to license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise as a violation of the commerce clause—see notes to Dozier v. State, 28 L.R.A.(N.S.) 265; and State v. Bayer, 19 L.R.A.(N.S.) 297.

As to peddlers and drummers as related to interstate commerce—see notes to Re Spain, 14 L.R.A. 97, and Stockard v. Morgan, 46 L. ed. U. S. 785.

On license tax on peddlers, agents, and drummers—see note to Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On sale of picture frame as incidental to transaction protected by the commerce clause—see note to Dozier v. Alabama, 54 L. ed. U. S. 965.

of the frames must be regarded as a part of the interstate transaction between the nonresident manufacturer and the customer.

[For other cases, see Commerce, 438–462, in Digest Sup. Ct. 1908.]

[No. 184.]

Argued March 9, 1915. Decided March 22, 1915.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a conviction in the Corporation Court of the City of Newport News for peddling without a license. Reversed.

See same case below, 113 Va. 562, 75 S. E. 1135.

The facts are stated in the opinion.

Messrs. John Winston Read and **Thomas J. Christian** argued the cause and filed a brief for plaintiff in error:

The sale of the frames cannot be separated from the rest of the transaction so as to sustain the license tax.

Dozier v. Alabama, 28 L.R.A.(N.S.) 264, note; State v. Bayer, 19 L.R.A.(N.S.) 297, note; Chicago Portrait Co. v. Macon, 147 Fed. 967; State v. Coop, 52 S. C. 508, 41 L.R.A. 501, 30 S. E. 609; Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Laurens v. Elmore, 55 S. C. 477, 45 L.R.A. 249, 33 S. E. 560.

Mr. Christopher B. Garnett argued the cause, and, with Mr. John Garland Pollard, Attorney General of Virginia, filed a brief for defendant in error:

It is clear that this is not a case in which the state law makes a discrimination in favor of home manufacturers and against the manufacturers of other states, as was the case in Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Com. v. Myer, 92 Va. 809, 31 L.R.A. 379, 23 S. E. 915. Nor is it a case where the state law imposes a discriminating tax upon the residents of other states, as in Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449. Nor does it belong to that class of cases in which an order is given for goods which are out of the state, and the goods are subsequently sent into the state, either directly to the purchaser or to the agent of the vendor, to be delivered to the purchaser. [illegible]well v. North Carolina, 187 U. S. 622, [illegible] 336, 23 Sup. Ct. Rep. 229; Robbins [illegible] 120 U. S. 489, 30 L. ed. 694, [illegible] p. 45, 7 Sup. Ct. Rep. 592.

Nor is this a case where, after property has entered the state, a tax or burden is laid upon it by reason of its foreign origin.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.

The question here involved is whether the sale of the frame at the time of the delivery of the portrait was a part of a commercially continuous transaction which formed an interstate bargain, as was the case in Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; or whether the frame had been so acted upon by the importer that it had become incorporated and mixed up with the mass of property in the state, and, therefore, subject to state taxation, as was the case in Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367. See also Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The frames were not brought into the state as a result of any contractual obligation; but having been brought into the state without any previous order therefor, and having been taken from place to place and sold at the same time that they were offered for sale by an itinerant salesman who had no fixed place of business, this case comes squarely within the rule of Emert v. Missouri, supra.

The statute of Virginia now in question is in no wise repugnant to the power of Congress to regulate commerce among the several states, but it is a valid exercise of the power of the state over persons and business within its borders. Roselle v. Virginia, 223 U. S. 716, 56 L. ed. 627, 32 Sup. Ct. Rep 522, affirming 110 Va. 235, 65 S. E. 526.

[698] Mr. Justice **Holmes** delivered the opinion of the court:

The plaintiff in error was convicted of peddling without a license. His defense was that, if applied to his dealings, the Virginia law would interfere with commerce among the states, contrary to article I., § 8 of the Constitution. The facts are as follows. The Empire Art Institute of New York sent soliciting agents to Virginia, who took orders on a blank furnished by the company. These blanks stated that the company would place a limited number of a "new Aquarell Portrait" "at cost of material, India Ink $1.98 and Water Color $3.96," and the one exhibited went on: "On or about Apr. 10, 1911, we agree to deliver to the holder of this contract a fully finished Ink Portrait ———x——— as shown by our salesman. Mrs T. P. Morrisette agrees to pay $1.98 for the portrait when delivered. We do not compel you to take frames from us but owing to the deli-

cate nature of the work all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices." On receipt of such order the company shipped the portrait when prepared, and, in a separate parcel, frames suitable for them, to an agent, in this case the plaintiff in error. The latter put the pictures into appropriate frames and then delivered the portraits, offering the customer a choice of three different styles of frames, the customer taking one or not, at his will.

The court below thought that the purchase of the frames was to be regarded as a separate transaction, occurring wholly in Virginia. Whether or not this was its technical aspect as an executed contract, it often has been pointed out that commerce among the states is a practical, not a technical, conception. The preliminary contract bound the company to furnish a chance to take a frame with the portrait. Obviously it was contemplated that the frames would be sent from New York as well as the pictures, as [699] in practice they were, and although the bargain was not complete until the company's offer was accepted in Virginia, the furnishing of the opportunity was a part of the interstate transaction. From the point of view of commerce, the business was one affair. Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A. (N.S.) 264, 30 Sup. Ct. Rep. 649; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Browning v. Waycross, 233 U. S. 16, 21, 58 L. ed. 828, 832, 34 Sup. Ct. Rep. 578.

Judgment reversed.

DALTON ADDING MACHINE COMPANY, Appt.,
v.
STATE CORPORATION COMMISSION of the Commonwealth of Virginia, Robert R. Prentis, William F. Rhea, and J. Richard Wingfield, Members of said Commission.

(See S. C. Reporter's ed. 699–701.)

Injunction — against enforcement of statute — remedy at law.

The threatened enforcement, by the proper officers, of Va. Code, Supp. 1910, §§ 1104, 1105, requiring foreign corporations doing business in the state to obtain a license, will not be enjoined at the instance of a corporation which asserts that its business within the state is wholly interstate, where it is not claimed that the statute is unconstitutional, but only that it may be enforced in such a way as to violate the commerce clause of the Federal Constitution, since the corporation has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or to recover the license fee if it pays it under protest.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

[No. 190.]

Submitted March 8, 1915. Decided March 22, 1915.

APPEAL from the District Court of the United States for the Eastern District of Virginia to review a decree refusing to enjoin the threatened enforcement of a state statute requiring foreign corporations doing business in the state to obtain a license, at the instance of a corporation which asserts that its business within the state is wholly interstate. Affirmed.

See same case below, 213 Fed. 889.

The facts are stated in the opinion.

Mr. **Thomas A. Banning** submitted the cause for appellant. Mr. Samuel Walker Banning was on the brief:

The complainant is entitled to relief in this court by injunction.

Prentis v. Atlantic Coast Line Co. 211 U. S. 230, 53 L. ed. 160, 29 Sup. Ct. Rep. 67; Barrett v. New York, 232 U. S. 14, 23, 58 L. ed. 483, 487, 34 Sup. Ct. Rep. 203; Poindexter v. Greenhow, 114 U. S. 295, 29 L. ed. 194, 5 Sup. Ct. Rep. 903, 962; General Oil Co. v. Crain, 209 U. S. 227, 52 L. ed. 764, 28 Sup. Ct. Rep. 475; Southern R. Co. v. Greensboro Ice & Coal Co. 134 Fed. 82; Scott v. Donald, 165 U. S. 112, 41 L. ed. 653, 17 Sup. Ct. Rep. 262, 67 Fed. 856; Ex parte Young, 209 U. S. 155, 52 L. ed. 727, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Louisiana v. Lagarde, 60 Fed. 191; Southern Exp. Co. v. Ensley, 116 Fed. 758.

Mr. **John Garland Pollard**, Attorney General of Virginia, and Mr. **Christopher B. Garnett** submitted the cause for appellees:

The complainant had an adequate remedy at law.

Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Hannewinkle v. Georgetown, 15 Wall. 547, 548, 21 L. ed. 231, 232; Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan), 113 U. S. 516, 525, 28 L. ed. 1098, 1101, 5 Sup. Ct. Rep. 601; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. ed. 651, 23 Sup. Ct. Rep. 452; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 273, 44 L. ed. 159, 160, 20 Sup.

NOTE.—As to injunction to restrain acts of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

Ct. Rep. 119; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426; Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839, 8 Ann. Cas. 667; Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; Richmond v. Judah, 5 Leigh, 305; Phillips v. Portsmouth, 115 Va. 180, 78 S. E. 651.

The petition does not set out any special circumstances bringing the case within some recognized head of equity jurisdiction.

Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. ed. 651, 23 Sup. Ct. Rep. 452; Pacific Exp. Co. v. Seibert, 44 Fed. 310, affirmed in 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; 2 Cooley, Taxn. 3d ed. p. 1444; Louisville & N. R. Co. v. Bate, 22 Fed. 480; Moore v. Albany, 98 N. Y. 396.

[700] Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from an order of three judges, denying a preliminary injunction, as prayed in the appellant's bill. The bill alleges that the appellant is a Missouri corporation, having its factory in Missouri, that it obtains orders for its machines in Virginia through drummers, considers and accepts or rejects them in Missouri, and, if it accepts, forwards the machine from its factory. In some cases the possible customer is allowed to try a machine previously forwarded and in the hands of the Virginia agent, and if he is accepted as a purchaser and desires to keep it, is permitted to do so. The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to article I., § 8, of the Constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer irreparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states. 213 Fed. 889.

The court below remarked that it was not contended that the statute was unconstitutional, but was alleged only that it was feared that it might be enforced in such a way as to contravene the commerce clause, and suggested that if proceedings should be instituted by the commission there would be a hearing before it, with a right to appeal to the supreme court of appeals, and, upon a proper showing, to take the case to this court, and that there was nothing to indicate that the commission [701] would not give the appellant a fair hearing, or would attempt to enforce the law against it in an oppressive way. On this ground, without expressing an opinion as to the liability of the appellant under the statute, it held that no case for an injunction was made out.

We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of the commission is or is not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat. § 720. Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 226, 230, 53 L. ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. First Nat. Bank v. Albright, 208 U. S. 548, 553, 52 L. ed. 614, 616, 28 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. Boisé Artesian Hot & Cold Water Co. v. Boisé City, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 690, 47 L. ed. 651, 656, 23 Sup. Ct. Rep. 452.

Decree affirmed.

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[702] GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,

v.

JAMES A. HOWER, Individually and as Trustee; Anna H. Hower, Wife of James A. Hower; Nonpareil Consolidated Copper Company, et al.

(See S. C. Reporter's ed. 702–717.)

Evidence — burden of proof — bona fide purchase from homestead entryman.

1. A bona fide purchase from a home-

NOTE.—Necessity of both residence and cultivation as condition of patent under homestead entry—see note to United States v. Mills, 42 L.R.A.(N.S.) 752.

stead entryman is an affirmative defense which the grantee must set up and establish in order to defeat the right of a railway company claiming under the land grant made by the act of August 5, 1892 (27 Stat. at L. 390, chap. 382), to have a trust declared in the land in question—if the bill is otherwise sufficient for that purpose.

[For other cases, see Evidence, II. c, in Digest Sup. Ct. 1908.]

Public lands — homestead — constructive residence.

2. A settler on unsurveyed public land whose dwelling house, cultivated land, and improvements were separated by a 40-acre tract from the quarter section which he undertook to enter under the homestead laws, but upon which he did nothing except to lay out a trail, post certain notices, and build a small stable or barn for storage purposes, cannot be said to have a constructive residence on such quarter section which will satisfy the requirement of actual residence which, under U. S. Rev. Stat. § 2291, Comp. Stat. 1913, § 4532, is essential in order to support a homestead claim, although he may have acted in entire good faith, and meant to comply with the law.

[For other cases, see Public Lands, I. e, 8, in Digest Sup. Ct. 1908.]

[No. 88.]

Submitted November 11, 1914. Decided March 22, 1915.

IN ERROR to the Supreme Court of the State of Washington to review a decree which affirmed a decree of the Superior Court for Snohomish County, in that state, sustaining a demurrer to and dismissing the complaint in a suit by a railway company to establish title to a quarter section which defendants claim under a conveyance from a homestead entryman. Reversed and remanded for further proceedings.

See same case below, 69 Wash. 380, 125 Pac. 159.

The facts are stated in the opinion.

Messrs. E. C. Lindley and Thomas R. Benton submitted the cause for plaintiff in error. Messrs. F. V. Brown and F. G. Dorety were on the brief:

If Carter was an actual settler on the land in question at the time of the Manitoba Company's selection thereof, his rights under his entry and patent were and are prior and superior to those of plaintiff in error's grantor, the Manitoba Company.

St. Paul, M. & M. R. Co. v. Donohue, 210 U. S. 21, 52 L. ed. 941, 28 Sup. Ct. Rep. 600.

The question of the location of the dwelling house, the place of the claimant's residence in homestead and pre-emption claims, off the land claimed, has arisen in the Department in a number of cases, and such residence has frequently been recognized as a sufficient compliance with the requirements of the law; but in all the cases where so recognized the residence was but a short distance from the line, was moved onto the land claimed as soon as the mistake was discovered, and in nearly all, if not all, of these cases, there were substantial improvements on the land claimed.

Talkington v. Hempfling, 2 Land Dec. 46; Re Huling, 10 Land Dec. 83; Kendrick v. Doyle, 12 Land Dec. 67; Staples v. Richardson, 16 Land Dec. 248; Keogle v. Griffith, 13 Land Dec. 7; Lindsey v. Hawes, 2 Black, 554, 17 L. ed. 265; Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138.

On the other hand, both the Department and this court have held in a number of cases that residence upon one tract of land will not support a pre-emption or homestead claim to another and distinct tract, even where the claimant has made substantial improvements upon the latter.

Guyton v. Prince, 2 Land Dec. 143; Re Parker, 8 Land Dec. 547; Re Harten, 10 Land Dec. 130; Re Bowen, 41 Land Dec. 424; Ferguson v. McLaughlin, 96 U. S. 174, 24 L. ed. 624; St. Paul, M. & M. R. Co. v. Donohue, supra; Child v. Minor, 15 Land Dec. 574; Nix v. Allen, 112 U. S. 129, 28 L. ed. 675, 5 Sup. Ct. Rep. 70.

Mr. Eugene G. Kremer submitted the cause for defendants in error. Mr. J. A. Coleman was on the brief:

At the time of the conveyance to Hower, that is to say, after the delivery to Carter of the final certificate, Hower was not bound to hunt for grounds of doubt.

United States v. Clark, 200 U. S. 601, 608, 609, 50 L. ed. 613, 616, 617, 26 Sup. Ct. Rep. 340.

The defendants in error are bona fide purchasers for value and without notice, and their rights will be protected by this court.

United States v. Burlington & M. River R. Co. 98 U. S. 334, 25 L. ed. 198; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; United States v. California & O. Land Co. 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458.

In the absence of fraud or mistake, the decisions of the Land Department upon questions of fact in all matters properly before it must be regarded as conclusive; and where a patent has issued and transfers have been made to others, the rights so acquired can be overturned only upon the clearest evidence; but where the doubt rests upon a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

Marquez v. Frisbie, 101 U. S. 473, 25 L.

ed. 800; Shepley v. Cowan, 91 U. S. 331, 23 L. ed. 424; Lee v. Johnson, 116 U. S. 49, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

The prevailing and long continued construction of the act by the Land Department is entitled to great weight in determining the questions raised.

Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; Moore v. Cormode, 180 U. S. 167, 45 L. ed. 476, 21 Sup. Ct. Rep. 324.

Mr. Justice Day delivered the opinion of the court:

The Great Northern Railway Company filed its amended complaint against James A. Hower, individually and as [704] trustee, Anna H. Hower, his wife, Nonpareil Consolidated Copper Company, Nicholas H. Rudebeck, and James McCreery Realty Company, in the superior court of the state of Washington, in and for the county of Snohomish, seeking to establish title to the northeast quarter of section 2, township 27 north, range 10 east, Willamette meridian, in said county and state. Defendants appeared and demurred upon the ground, among others, that the amended complaint did not state facts sufficient to constitute a cause of action. The superior court sustained the demurrer, and upon appeal to the supreme court of the state of Washington, judgment on the demurrer dismissing the suit was affirmed (69 Wash. 380, 125 Pac. 159) and the case was brought here.

Various paragraphs of the bill allege the selection of the lands in controversy by the complainant's grantor, the St. Paul, Minneapolis, & Manitoba Railway Company, under the provisions of the act of Congress of August 5, 1892 (27 Stat. at L. 390, chap. 382), which selection was made on March 24, 1894. Other paragraphs of the bill allege the filing of an application by one Melvin J. Carter on April 18, 1899, in the district land office to enter the northeast quarter of section 2, township 27 north, range 10 east, under the homestead laws of the United States, Carter claiming that he had settled on the land December 1, 1893. The complaint recites the controversy between the railway company and Carter before the district land officers, and the taking of testimony, which, it is alleged, showed that Carter on September 19, 1893, purchased the improvements of a former settler upon a tract of unsurveyed land on the left bank of the north fork of the Skykomish river, a short distance below the mouth of a tributary of said river known as Trout creek; that he thereupon established a residence in the cabin of the former settler, and commenced the construction of a new dwelling house which he finished in the spring of 1894; that he moved his [705] family into this dwelling house and had continued to reside therein and on said land with his family to the time of said hearing; that his improvements consisted of the dwelling house and a small clearing in which he set out trees and shrubbery and raised vegetables from year to year. It is alleged that the evidence taken at the hearing further showed that Carter's improvements were all situated on the left bank of the north fork of the Skykomish river, about two or three hundred feet from said river and about one-half mile below the mouth of said Trout creek, and not upon the land applied for by Carter under the homestead law; that on the evidence alleged, the register and receiver, on August 28, 1903, held and decided that Carter had duly settled upon the land claimed by him during the month of September, 1893, and had continued to reside upon, improve, and cultivate said land to the time of said hearing on June 1, 1903, and that he should be allowed to enter the land applied for under the homestead law, and that the railway company's selection thereof should be canceled.

It was further charged that upon appeal to the Commissioner of the General Land Office, the railway company alleged among other things that the evidence showed that the dwelling house and other improvements of Carter were not on the land selected by said railway company and applied for by Carter, but were and at all times had been situated more than three eighths of a mile from said land; that the Commissioner of the General Land Office, on March 23, 1904, held and decided that said Carter had settled upon the land upon which his improvements were made in the fall of 1893, and that he had commenced his residence thereon with his family in the spring of 1894, and had continued to reside upon and improve same. The Commissioner further held that the evidence taken tended to show that Carter's improvements were all situated on the northwest quarter of [706] section 2, township 27 north, range 10 east, and not on the northeast quarter of said section 2, and ordered a further hearing.

It was alleged that on the further hearing before the register and receiver of the Seattle Land Office on December 16, 1904, the evidence conclusively showed that the improvements, including the dwelling house and residence of Carter, were all situated on lot 2 of said section 2, township 27 north, range 10 east; that said lot 2 is located in and is a part of the northwest quarter of the northwest quarter of said section, and that the east line of said lot is located a quarter of a mile west of the west line of

the northeast quarter of section 2; that the evidence taken at the hearing further showed that at some time prior to said hearing Carter had constructed or taken part in the construction of a trail up Trout creek, and extending over and across a part of the northeast quarter of section 2; that about the year 1899 there had been constructed on the northwesterly part of the northeast quarter of section 2 a small stable or barn, and that Carter had at times used said stable or barn for storage purposes; and that upon the evidence taken at said rehearing the register and receiver of said Seattle Land Office held and decided, on January 21, 1905, that all of said Carter's improvements were located on said lot 2 of said section 2.

The complaint further alleged that on the 30th day of June, 1905, the Commissioner of the General Land Office, on the evidence taken at the rehearing, held and decided that on September 19, 1893, Melvin J. Carter purchased the claim, cabin, and improvements of a former settler; that he built for himself and family a new cabin on the claim purchased; that he lived in the cabin and cultivated a small tract of land on the claim; that about a year after his settlement Carter constructed trails across section 2 and up Trout creek for the purpose of getting to different [707] places on his claim; that he also built a barn or stable and used it for storing supplies; that a part of the trails and the stable or barn were on the northeast quarter of section 2, and that the dwelling house and cultivated land were all on the northwest quarter of said section 2, about one fourth of a mile west of the west line of the northeast quarter of said section; that notwithstanding that the evidence produced at said rehearing failed to show that Carter ever resided upon, improved, or cultivated any part of the northeast quarter of section 2, and did conclusively show that Carter's dwelling house and cultivated land and improvements, except only said trails and stable or barn, which were constructed after the railway company's selection of said land, were situated more than one fourth of a mile from northeast quarter, and the Commissioner of the General Land Office found such to be the facts, said Commissioner wrongfully and unlawfully, it is alleged, and in fraud of the railway company's rights to the land and to complete its selection thereof, and to receive the patent of the United States therefor, held, as a matter of law, that Carter's residence was established and maintained in good faith and in the belief that his dwelling house was upon the land embraced in his homestead application, and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the northeast quarter of said section 2, was a constructive residence on said northeast quarter, and that said Carter should be permitted to make homestead entry of said land, and that the selection thereof by the St. Paul, Minneapolis, & Manitoba Railway Company should be canceled.

The complaint further alleged that the railway company appealed to the Secretary of the Interior from the decision of the Commissioner of the General Land Office, alleging that Carter's dwelling house and improvements were situated more than a quarter of a mile from the [708] northeast quarter; that he had never resided upon, occupied, cultivated, or in any manner improved the land embraced in his homestead application; and that his acts did not constitute a settlement upon said northeast quarter within the meaning of the homestead law; that on the 23d day of November, 1905, the Secretary of the Interior, passing on said appeal, held the facts in the case to be as found by the Commissioner in his decision, and on the facts, wrongfully and in fraud of the right of the railway company to said land, held and decided as a matter of law that as Carter was shown to have been a bona fide homestead settler upon unsurveyed land at the time the railway company made selection of the northeast quarter of said section 2, and subsequently complied with the law as to residence and improvements, he was constructively a settler upon said northeast quarter, and that his application to enter the land under the homestead law should be allowed, and the selection thereof by the railway company canceled.

It was further averred that the railway company's selection of the northeast quarter of section 2 was canceled, pursuant to the decision of the Secretary of the Interior, and that afterwards, on the 16th day of March, 1906, said Melvin J. Carter was permitted to make, and did make, homestead entry on the northeast quarter of section 2, and that on May 16, 1906, he made the final proofs required, and received a final entry certificate for the land; and that thereafter, on the 8th day of March, 1907, patent of the United States was issued to Carter, conveying to him the legal title to said lands.

It is also averred that the decisions of the Commissioner of the General Land Office and the Secretary of the Interior, and the cancelation of the railway company's selection, were wrongfully and erroneously made through a mistake of law, in this, that it was in and by said decisions held

that the settlement and residence of Carter [709] upon a tract of land situated one fourth of a mile distant from the land sought to be entered by him was constructively, and within the meaning of the homestead law of the United States, a settlement upon the land last mentioned.

It was further averred, that on the 9th day of July, 1906, prior to the issuing of patent of the United States to Carter, said Melvin J. Carter and Clara Carter, his wife, granted to the defendant, James A. Hower, as trustee, their right, title, and interest in said northeast quarter of section 2, township 27 north, range 10, east, and that the beneficiaries of the trust created by the deed, or the terms and conditions thereof, are not set forth in the deed, and plaintiff has no knowledge or information concerning the beneficiaries or the terms and conditions of the trust; and it was further averred that the defendant Nonpareil Consolidated Copper Company claims an interest or estate in said section 2 adverse to plaintiff, but that plaintiff has no knowledge or information concerning the nature or extent of the interest so claimed. A like allegation is made as to the defendants Nicholas H. Rudebeck and James McCreery Realty Company. It is averred that the interest of the said defendants, if any they have, is subsequent, subordinate, and inferior to the claim of the plaintiff.

The prayer is that the plaintiff be adjudged the owner of the title, and the defendants decreed and required to convey the same to it.

The supreme court of Washington affirmed the judgment of the lower court, sustaining the demurrer, upon the ground that the decisions of the Land Department should be followed, and that Carter's homestead entry was duly and properly approved. Apart from this ground of decision, it is argued by the defendants in error that the judgment was properly sustained in view of the want of allegation that the defendants in error—purchasers, so far as [710] appears, in good faith, and without notice of the claims of the plaintiff in error—had knowledge or notice of the plaintiff's claims, or such notice as the law requires as to the alleged invalidity of the title as would deprive them of the rights of bona fide purchasers.

It will be noticed that the allegations of the bill are that the deed to Hower, as trustee, was made on July 9, 1906, before the patents issued on the 8th day of March, 1907, to Carter, but after the hearings and decisions to which we have referred, and after May 6, 1906, when Carter made the final proofs of settlement and cultivation [illegible]ed by § 2291, Rev. Stat. (Comp. Stat. 1913, § 4532), and after he had received final entry certificate for the lands upon that date.

Under these circumstances, it is said the grantee had such title as might be conveyed, notwithstanding the patent had not issued, and the rights of a bona fide purchaser will be protected. United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340.

It is the contention of the defendant in error that it appearing in the complaint that the grantee had complied with the requirements of the law, and everything was complete except the issuance of the patent, it was necessary to further aver that the purchaser had knowledge or notice of the supposed mistakes or wrongs charged in order to deprive him of the benefit which inheres in the position of a bona fide purchaser. And this, it is contended, is the effect of United States v. Clark, supra. But the position of a bona fide purchaser is not to be assumed from the allegations of the complaint, which do no more than state the several transfers, without any allegation showing affirmatively that the defendants are bona fide purchasers for value, in which event only could this defense be successfully made by demurrer to the complaint. Bona fide purchase is an affirmative defense, which the grantee must set up in order to defeat the right of the railroad company to have a trust declared in the lands in question, if the bill is otherwise sufficient for that purpose. This matter was [711] directly involved and considered in Wright, Blodgett Co. v. United States, decided February 23, 1915 [236 U. S. 397, ante, 637, 35 Sup. Ct. Rep. 339], and it is only necessary in this connection to refer to that case.

The question, then, is, was there sufficient compliance with the homestead law to entitle Carter to the benefit thereof? It is not contended that the courts may refuse to follow the conclusions of the land office, based upon testimony as to matters of fact, but the insistence is that there is here such a clear mistake of law upon the facts found as to entitle the complainant to the relief sought. As it is stipulated in the decision on the demurrer that the findings of the officers of the Interior Department may be looked to, they must be had in mind in addition to the facts already recited from the complaint. Upon the appeal to the Commissioner of the Land Office from the finding of the register and receiver, that official held:

"I, therefore, have no doubt of the good faith of Carter in his present application, and he now offers to amend his application so as to include the land which the govern-

ment finally determines his improvements are placed upon, and to drop from either the eastern or the southern boundary of his claim sufficient land to enable him to include the actual tracts upon which his improvements are located; provided the Department finally holds that his homestead improvements are not upon the N. E. ¼.

"The patenting of lot 2 to E. B. Carter, and lot 1, which lies between him and N. E. ¼, to the railway company, place them beyond the jurisdiction of this office, and the suggested adjustment cannot be had, and the only relief that can be extended to him is to award him the N. E. ¼, upon the principle of constructive residence, which, I think, may, in all equity and justice, be applied in his case; he made some improvements on the N. E. ¼, believed he was residing on that quarter, and lived there six years in that belief, and made application for that [712] tract, so believing; therefore, under the decisions of the Department in Kendrick v. Doyle, 12 Land Dec. 67; Noe v. Tipton, 14 Land Dec. 447; Staples v. Richardson, 16 Land Dec. 248, and others, I rule that Carter's residence in good faith in a house believed to be upon the land covered by his application is a constructive residence on such land, and that since said residence antedates the selection of the railroad company, he had the better right thereto.

"I therefore hold the company's selection of the said N. E. ¼ for rejection, subject to appeal, with a view to permitting Melvin J. Carter to perfect homestead entry thereof should this decision become final."

Upon appeal to the Secretary of the Interior, it was decided, among other things, as follows:

"It is evident from the testimony and circumstances in the case that when Melvin J. Carter purchased the cabin and improvements of Doolin, and built the new house into which he moved with his family, the land being then unsurveyed, he intended to claim land extending to the east of said improvements. This is shown from the fact he built the barn, made the trails, and posted notices of his claim over a quarter of a mile to the east, as shown in the case. It does not appear why he did not apply for lot 1, or fractional N. E. ¼ of N. W. ¼, situated between his house and the land applied for. It does appear, however, that several surveys of the land, either public or private, had been made, and that the situation was confusing as to the lines and stakes, even to those accustomed to looking up lines and corners. As Carter tendered his homestead application directly after the filing of the plat, presumably he still believed that his house was located on the N. E. ¼.

"As he is shown to have been a bona fide homestead settler upon unsurveyed land at the time the railway company made selection thereof, and subsequently has made a good compliance with the law as to residence and improvements, the Department is of the opinion that his [713] application for the tract in question should be allowed. As the railway company made selection of the entire section, it loses no more land than it would if Carter had applied for said lot 1 with sufficient in the N. E. ¼ to make 160 acres.

"Your office decision holding in favor of Carter is affirmed, and upon his perfecting his application for said N. E. ¼ of sec. 2, T. 27, N. R. 10 E., the railway company's selection thereof will be canceled."

The statute of the United States (Rev. Stat. § 2291) is specific in its requirements that, in order to obtain a patent for a homestead, the applicant must have actually resided upon or cultivated the same for a term of five years succeeding the filing of the claim, etc.[1]

The question, therefore, is, was an actual residence within the meaning of the statute sufficiently shown to comply with these provisions? It is true, as the supreme court of Washington stated in its opinion in this case, referring to the opinion of this court in Ard v. Brandon, 156 U. S. 537, 543, 39 L. ed. 524, 526, 15 Sup. Ct. Rep. 406, "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." This is as it should be, and the courts have shown a commendable disposition to uphold one who has acted in good faith in entering upon the public lands for this purpose. Nevertheless, the right is a statutory one, and in this case it was essential to show actual residence upon the land as a prerequisite to the granting of a patent and obtaining title to the same.

Conceding that Carter acted in entire good faith, and that he meant to comply with the law, it is nevertheless the fact that his settlement was upon, and the land cultivated was in, a different quarter section from that which [714] he undertook to enter, and the quarter which he contends for was separated from the one which he occupied by a 40-acre tract. It is true that some time during his occupancy a trail was laid out, and a small stable constructed on the

[1] Since this case arose the statute has been amended so as to require a habitable house upon the land, and actual residence and cultivation for the term of three years. Act of June 6, 1912 [37 Stat. at L. 123, chap. 153], Comp. Stat. 1913, § 4532.

northeast quarter. But the fact remains that his residence and improvements by way of cultivation were upon a quarter section entirely separate and apart from the one to which title is now claimed. It seems to us to be going too far to say that, because of the trail to the northeast quarter and the small stable thereon, and the notices posted upon it, there was a constructive residence on that quarter, although the actual residence was upon the other quarter.

We have been cited to no cases in the Land Department which go so far as is required in this instance in order to support title. We have been unable to find anything in our own decisions which would sanction such liberal treatment of the statutory requirement as to residence.

In Talkington v. Hempfling, 2 Land Dec. 46, the house of the entryman was, by mistake, built 30 yards outside of the lines of his claim, and was occupied in good faith, in the belief that it was on the land claimed. In Re Huling, 10 Land Dec. 83, the house was built just across the line in the belief that it was actually inside the limits and upon the land claimed by the entryman. In Kendrick v. Doyle, 12 Land Dec. 67, the entryman was honestly mistaken as to the limits of his claim, owing to conflicting surveys, and his house was built in a corner where the boundary line admittedly was in doubt, but the correct survey showed the house to be a little outside the line. In Staples v. Richardson, 16 Land. Dec. 248, the entryman discovered that he had built his house outside his limits, and razed it and built another house inside the supposed limits, but found that house to be outside, and built a third house, this time within the line limits. In Keogle v. Griffith, 13 Land Dec. 7, the claimant's first dwelling was [715] about 40 rods from his land boundary. Upon discovering the mistake, he built another house upon the land entered. In Lindsey v. Hawes, 2 Black, 554, 17 L. ed. 265, the claimant's dwelling house was on the boundary line of the land claimed. A similar situation existed in Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138. In each of these cases the residence was held sufficient to satisfy the requirement of the statute. On the other hand, both the Department and this court have held in a number of cases that residence upon one tract of land will not support a pre-emption or homestead claim to another and distinct tract, even where the claimant has made substantial improvements upon the latter. In Guyton v. Prince, 2 Land Dec. 143, the claimant had purchased from a railroad company a tract which adjoined that of his homestead entry; two cabins had been built upon the homestead land, one by Prince, besides a stable, smokehouse, and other buildings. The land was cultivated after entry, but at no time did the claimant reside upon the land, contenting himself with a few stays of a week or two at a time, and living in his dwelling upon the land purchased from the railroad company. His claim to homestead was denied because of his failure to reside upon the land claimed. The case of Re Harten, 10 Land Dec. 130, is somewhat similar, the claimant having purchased a possessory right to a tract of land embracing the homestead attempted to be claimed, and resided on the tract purchased, intending thereby to claim the entire tract. When the land was surveyed, his house was found to be 200 feet distant from the line of the homestead, while his garden and spring, as well as some out-buildings, were on the homestead tract. He cultivated the homestead tract, and shortly after his homestead entry built a house upon the homestead tract, residing since his entry thereon one night each month, hoping thus to establish his residence. The Department held this to be no residence, however, and denied his [716] claim. In Re Parker, 8 Land Dec. 547, Parker made scrip location of unsurveyed land, and after the survey was made, made further entry under the homestead laws for the remaining three quarters of the section. His residence and most of his improvements were on the scrip claim, until he made his homestead entry, when he removed upon the lands embraced in said entry. It was held that he was not a settler on the homestead land until he moved his residence thereon. In the case of Re Bowen, 41 Land Dec. 424, the settler had made an entry for a quarter section of some surveyed lands, and upon presenting his homestead proof he included the adjacent quarter of some unsurveyed lands. His dwelling house was situated on the latter tract, where he had resided and had cultivated some five acres in the adjacent tract. His title to the unsurveyed lands was denied for reasons not necessary to be set forth here, and as to the surveyed tract his claim was denied because of lack of residence upon the proper section. In Ferguson v. McLaughlin, 96 U. S. 174, 24 L. ed. 624, it was held that under § 6 of the act of March 3, 1853 (10 Stat. at L. 244, chap. 145), a settler upon unsurveyed public lands in California has no valid claim to pre-empt a quarter section, or any part thereof included in his settlement, unless

it appears by the government surveys, when the same are made and filed in the local land office, that his dwelling house was on that quarter section.

In St. Paul, M. & M. R. Co. v. Donohue, 210 U. S. 21, 52 L. ed. 941, 28 Sup. Ct. Rep. 600, this court summarized the requisites concerning pre-emptions and homesteads essential to the acquirement of the rights intended by the statute, and said, at page 33:

"As a result of this review of the legislation concerning pre-emptions and homesteads, and of the settled interpretation continuously given to the same, we think there is no merit in the proposition that a homesteader who initiates a right as to either surveyed or unsurveyed land, and [717] complies with the legal regulations, may not, when he enters the land, embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice of the extent of his claim."

In this case it appears that the residence was not upon any part of the tract claimed by the homesteader; nor was the residence upon a contiguous tract of land, but was entirely separate and apart from the land claimed. Under these circumstances we are constrained to the conclusion that the complaint, upon its face, made a case entitling the plaintiff in error to the relief sought. As we have said, the rights of a *bona fide* purchaser, if such exist in this case, must be affirmatively set up by answer and sustained by proof. In the brief for the defendants in error a contention is made that the plaintiff is estopped from asserting a claim to the quarter section in question by reason of having wrongfully obtained a patent for the land actually settled upon by Carter, and having failed or refused to surrender that tract when the contest was pending in the land office; but it is enough to say of this that the facts upon which the contention is rested are not sufficiently disclosed in the complaint to require or justify its consideration at this time. If there be facts warranting such a contention, they should be distinctly set forth in the answer and appropriately proved.

We think the court below erred in sustaining the demurrer to the complaint, and it follows that its judgment must be reversed, and the case remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed.

[718] ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plff. in Err.,
v.
SPRING RIVER STONE COMPANY.

(See S. C. Reporter's ed. 718-723.)

Carriers — rates — settlement — wrong basis.

A settlement in good faith on the basis of actual shipping weights of a controversy between shipper and carrier over the freight charges on goods transported in larger cars than the shipper requested, coupled with the absence of anything to show that the capacity of the cars so requested was noted upon the bill of lading and waybill, as is required by a rule in the carrier's tariff schedule, which provides that when larger cars are supplied by the carrier for its own convenience, the freight charges shall be based upon the minimum carload capacity of the cars ordered by the shipper, prevents the carrier from recovering from the shipper the difference between the charge as settled, and the rate based upon car capacity.

[For other cases, see Carriers, II. b, 5, in Digest Sup. Ct. 1908.]

[No. 158.]

Submitted January 27, 1915. Decided March 22, 1915.

IN ERROR to the Springfield Court of Appeals of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Jasper County, in that state, in favor of defendant in a suit by a carrier to recover from a shipper the difference between the freight charges paid and the charges which the carrier claims should have been collected. Affirmed.

See same case below, 169 Mo. App. 109, 154 S. W. 465.

The facts are stated in the opinion.

Messrs. S. H. West, E. A. Hald, and Roy F. Britton submitted the cause for plaintiff in error. Messrs. C. C. Collins and H. C. Barker were on the brief:

Common carriers by railroad engaged in interstate commerce are required by the acts of Congress regulating commerce to collect the rates published in the schedules or tariffs on file with the Interstate Commerce Commission.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242.

NOTE.—On contracts fixing rates other than those established in accordance with the interstate commerce act—see notes to Armour Packing Co. v. United States, 14 L.R.A.(N.S.) 400, and Atchison, T. & S. F. R. Co. v. Bell, 38 L.R.A.(N.S.) 351.

50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Texas & P. R. Co. v. Cisco Oil Mill Co. 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Illinois C. R. Co. v. Henderson Elevator Co. 226 U. S. 441, 57 L. ed. 290, 33 Sup. Ct. Rep. 176; Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418; L. W. Blinn Lumber Co. v. Southern P. Co. 18 Inters. Com. Rep. 430; Gerber v. Wabash R. Co. 63 Mo App. 145; Sutton v. St. Louis & S. F. R. Co. 159 Mo. App. 685, 140 S. W. 76; Dunne v. St. Louis & S. W. R. Co. 166 Mo. App. 372, 148 S. W. 997.

Shippers are presumed to know the provisions of tariffs duly published and filed with the Interstate Commerce Commission, and rates named in such tariffs are not the subject of contract between carriers and shippers.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648; Ann. Cas. 1914A, 501; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526; Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co. 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; Mires v. St. Louis & S. F. R. Co. 134 Mo. App. 379, 114 S. W. 1052; Drey & K. Glass Co. v. Missouri P. R. Co. 156 Mo. App. 178, 136 S. W. 757; United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323.

The shipping ticket prepared by respondent's employee and signed by appellant's agent is a "bill of lading." A bill of lading is the carrier's receipt for goods delivered to it for transportation. It may also contain the contract of carriage, but this is not necessary to make the instrument a bill of lading.

Porter, Bills of Lading; Standard Dict.; Webster's New Int. Dict.; Century Dict.; Cope v. Cordova, 1 Rawle, 203; The Mayflower, Brown, Adm. 376, Fed. Cas. No. 9,345; Hutchinson, Carr.

The provision of the tariffs requiring that the shipper's order for cars of certain capacity be noted on the bill of lading to authorize the use of the marked capacity of the cars so ordered as the minimum weight on shipments is a "regulation affecting the charges" within the meaning of § 6 of the act to regulate commerce; such regulations are a part of the contract of shipment which automatically determine the rates to be charged, and must be complied with by both shipper and carrier.

Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

Mr. Thomas Hackney submitted the cause for defendant in error:

It was not within the right of the carrier after the lower rate had become fixed to neglect its duty and deprive the shipper of his rate. It was not a matter of waiver or contract thenceforth.

Kaye & C. Lumber Co. v. Minnesota & I. R. Co. 16 Inters. Com. Rep. 285; General Chemical Co. v. Norfolk & W. R. Co. 15 Inters. Com. Rep. 349; Noble v. Baltimore & O. R. Co. 22 Inters. Com. Rep. 432.

Where a shipper orders a car of the minimum capacity provided by the published tariff, and the carrier furnishes one of greater capacity, the shipper does not, by accepting and using the car furnished, waive his right to have charges assessed on the marked capacity of the car actually ordered, and not the one furnished.

General Chemical Co. v. Norfolk & W. R. Co. 15 Inters. Com. Rep. 349.

A shipper cannot be deprived through a carrier's negligence of any lawful privilege offered by another carrier.

Kile & M. Co. v. Deepwater R. Co. 15 Inters. Com. Rep. 235.

No stipulation in a bill of lading can exempt a carrier from a duty imposed by law.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 201, 55 L. ed. 167, 180, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

It was the duty of the plaintiff to return to the defendant the overcharge collected by it on the shipments in question without resort to the Interstate Commerce Commission.

Montgomery Freight Bureau v. Western R. Co. 15 Inters. Com. Rep. 199; Tyson & J. Buggy Co. v. Aberdeen & A. R. Co. 17 Inters. Com. Rep. 330; Edison Portland Cement Co. v. Delaware, L. & W. R. Co. 20 Inters. Com. Rep. 95.

The settlement between the carrier and the shipper having been made in good faith, and with full knowledge of the facts, and the overcharge having been refunded by the plaintiff to the defendant, the sum thus refunded cannot be recovered back by the plaintiff.

8 Cyc. 517; 2 Enc. Pl. & Pr. 1016, 1018, ¶ (b); Campbell v. Clark, 44 Mo. App. 249; State ex rel. Scotland County v. Ewing, 116 Mo. 129, 22 S. W. 476; Corbin v. Adair County, 171 Mo. 385, 71 S. W. 674; Hethcock v. Crawford County, 200 Mo. 172, 98 S. W. 582; Missouri Lincoln Trust Co. v. Third Nat. Bank, 154 Mo. App. 108, 133 S. W. 357.

Mr. Justice McReynolds delivered the opinion of the court:

A controversy between the railway company and defendant shipper concerning freight charges was adjusted by computing them upon the actual weight of the merchandise transported. Afterwards, claiming that the reckoning should have been upon the minimum capacity of cars used, the railway company sued for the difference between the two results. Defendant relied upon the settlement and also full payment; the trial court directed a verdict for it; this was approved upon appeal (169 Mo. App. 109, 154 S. W. 465); and the cause is here by writ of error.

Plaintiff in error operates a road extending northward from Fort Worth, Texas, which connects through an intermediate one with the St. Louis & San Francisco Railroad whose line reaches Carthage, Missouri, where defendant is engaged in quarrying, selling and shipping stone. Having been advised by plaintiff in error's commercial agent that the rate on stone in cars of 50,000 pounds capacity to Fort Worth was 27½ cents per hundred, defendant contracted to deliver five carloads to a purchaser located there. The local agent of the initial carrier at Carthage was informed that such cars would be required for the proposed shipments, and in November and December, 1908, he was requested by telephone to supply them. Cars of that size were scarce, and for its own convenience the railroad company furnished five larger ones—60,000 to 88,000 pounds—in which the shipments were made, the weight in each instance being less than the marked minimum, but appropriate for a 50,000-pound car. [721] When these arrived at Fort Worth, charges of 27½ cents per hundred, marked capacity, were demanded. They were paid, and immediately thereafter the shipper presented a claim for the amount exacted above a reckoning based on actual weights. Careful investigation was promptly made, and in February, 1909, the excess was refunded. All parties acted with knowledge of the facts, in good faith, and without purpose to evade the law.

Upon the theory that it was bound to collect freight charges according to car capacity, and that the settlement was prohibited by regulations of the Interstate Commerce Commission, two years thereafter plaintiff in error commenced this action to recover what it had repaid.

At the trial the waybills were not introduced, their absence was not accounted for, and their contents do not appear. No carrier's order book was produced. The shipper received no bill of lading, but the railway company offered to introduce alleged copies of five signed by the Carthage agent. They were rejected because not properly identified, and no further effort was made to prove their contents. Five so-called shipping tickets were put in evidence. These requested the initial carrier to accept the freight, and upon them appears the following, signed by its agent: "This shipment is tendered and received subject to the terms and conditions of the company's uniform bill of lading. All conditions herein to the contrary are canceled."

The applicable duly filed tariff schedule specified freight rate on stone between Carthage and Fort Worth as 27½ cents per hundred when loaded in 50,000-pound cars. It also provided that "minimum weight will be the marked capacity of car on stone;" and item No. 81 was in these words: "The following rule will be observed in assessing the freight charges for the minimum weights, according to capacity of car: 'When the carrier cannot furnish car of capacity ordered by shipper, and for his own convenience [722] provides a car of greater capacity than the one ordered by the shipper, it may be used on the basis of the minimum car-load weight fixed in tariff applied on size of car ordered by shipper, but in no case less than the actual weight. Capacity of car ordered, number of the order, and date of same to be shown in each instance on the bill of lading and the carrier's waybill.' In no case must shipment be billed at minimum weight of a car of less capacity than in service on initial line."

The so-called shipping tickets may not be treated as bills of lading within the requirement; upon their face they refer to "the company's uniform bill of lading," and plaintiff in error undertook to introduce alleged copies of bills of that character. The facts concerning the waybills are undisclosed. It is not possible, therefore, to ascertain from the record the contents of any of the bills.

In effect the railway company now contends that, as the evidence fails affirmatively to show the notations required by rule 81, the law imposes an absolute obligation upon the shipper to pay charges estimated upon the marked capacity of cars utilized, notwithstanding the settlement and good

faith of all parties. To this position we cannot give assent. In the circumstances the initial carrier was charged with the duty of making these notations; and for the purposes of this suit the shipper might assume compliance with that duty,—he was not required to establish actual performance. He only sought and received what was authorized by the tariff on file. Larger cars than he requested were supplied for the carrier's special accommodation, and the commands of the applicable rule addressed to the latter imposed the clerical task of recording information within its peculiar knowledge upon documents for whose preparation it was responsible.

Nothing herein is intended to modify conclusions announced in former opinions in respect of the obligation [723] upon both carrier and shipper strictly to observe lawful tariffs. We determine only the narrow point adequate for disposition of this cause upon the particular facts revealed by an unsatisfactory record.

The judgment of the court below is affirmed.

W. S. TYLER COMPANY, Appt.,
v.
LUDLOW-SAYLOR WIRE COMPANY.
(No. 441.)

W. S. TYLER COMPANY, Petitioner,
v.
LUDLOW-SAYLOR WIRE COMPANY.
(No. 622.)

(See S. C. Reporter's ed. 723–725.)

Courts — proper district for suit — patent infringement case.

1. A foreign corporation which employs an eastern representative with office room in New York city to solicit orders to be filled at the home office of the corporation in Missouri, paying him a small salary, commissions on sales, and traveling expenses, does not have "a regular and established place of business" in the southern district of New York, within the meaning of the act of March 3, 1897 (29 Stat. at L. 695, chap. 395, Comp. Stat. 1913, § 1030), giving the Federal circuit (now district) courts jurisdiction of patent infringement suits in the district of which the defendant is an inhabitant, or in any district in which the defendant "shall have committed acts of infringement and have a regular and established place of business."

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

Courts — proper district for suit — patent infringement case.

2. A foreign corporation did not infringe the complainant's patent in the southern district of New York, within the intendment of the act of March 3, 1897 (29 Stat. at L. 695, chap. 395, Comp. Stat. 1913, § 1030), giving the Federal circuit (now district) courts jurisdiction of patent infringement suits in the district of which the defendant is an inhabitant, or in any district in which the defendant "shall have committed acts of infringement and have a regular and established place of business," where its local representative in New York city received and forwarded to the corporation at its home office in Missouri an order for the infringing articles, which the corporation thereafter manufactured and shipped to the purchaser in New York.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

[Nos. 441 and 622.]

Argued and submitted December 15, 1914.
Decided March 22, 1915.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing, for want of jurisdiction, a patent infringement suit. Affirmed. Also a

PETITION for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which dismissed an appeal from the the same decree of the District Court for the Southern District of New York. Denied.

See same case below in No. 622, 129 C. C. A. 12, 212 Fed. 156.

Mr. Charles C. Linthicum argued the cause, and, with Messrs. J. Negley Cooke and D. Anthony Usina, filed a brief for appellant in No. 441:

The appellee undoubtedly had an established place of business in the southern district of New York, and acts of infringement were actually committed in said district.

Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co. 118 Fed. 852; American Stoker Co. v. Underfeed Stoker Co. 182 Fed. 642; Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. 116 Fed. 641, 121 Fed. 101; Chadeloid Chemical Co. v. Chicago Wood Finishing Co. 180 Fed. 770.

Messrs. James P. Dawson and William E. Garvin submitted the cause for appellee in No. 441:

The district court for the southern district of New York did not have jurisdiction for the reason that neither the complainant nor the defendant was an inhabitant of that district, and the defendant did not have any

NOTE.—On proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

regular or established place of business therein, nor had it committed any act of infringement therein.

Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. 116 Fed. 641; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Weller v. Pennsylvania R. Co. 113 Fed. 502.

Mr. D. Anthony Usina for petitioner in No. 622.

Mr. James P. Dawson for respondent in No. 622.

Memorandum opinion by Mr. Justice McReynolds, by direction of the court:

Alleging infringement of its patent, and asking appropriate relief, appellant, an Ohio corporation, instituted this proceeding in equity against the Ludlow-Saylor Wire Company, a corporation organized under the laws of Missouri, in the United States district court for the southern district of New York. Objection to the jurisdiction was sustained and a direct appeal to this court allowed.

The cause is properly here upon the appeal, and the application for certiorari heretofore presented (No. 622) must be denied. The act of March 3, 1897 (29 Stat. at L. 695, chap. 395, Comp. Stat. 1913, § 1030), provides: "That in suits brought for the infringement of letters patent the circuit [now district] courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business."

Evidence was introduced to show that appellee had the requisite place of business in New York city, and also had committed an act of infringement by making a sale there. The trial court held neither claim was established.

[725] The Wire Company is a manufacturer of screens, with plant and home office at St. Louis, Missouri. For some eighteen months in 1911 and 1912 it employed Guerin, upon whom process was served, as "Eastern representative," paying him a small salary, commission on sales, and traveling expenses. During this period he was also employed by another corporation which rented a room in the building at No. 30 Church street, New York city, and there he maintained headquarters as representative of both concerns—the rent and stenographer's wages being apportioned between them according to agreement. His duty to appellee was "to solicit orders [and] forward them when received to the home office for execution." Considering all the facts disclosed we think them insufficient to support the allegation that appellee had a regular and established place of business at 30 Church street within the intendment of the statute. Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 533, 51 L. ed. 916, 917, 27 Sup. Ct. Rep. 595.

The circumstances attending only one sale appear in the record, and this was negotiated by the purchaser in order that it might afford the basis for a suit. Guerin received and forwarded, and his principal accepted, the order for goods, which were thereafter manufactured and shipped by express to the purchaser in New York city. This sale was consummated at St. Louis, and did not constitute an infringement of appellant's patent within the district where suit was brought. Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. 116 Fed. 641.

The decree is affirmed.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1914.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1914.

UNITED STATES, Plff. in Err.,
v.
FREDERICK W. HVOSLEF and William S. Walsh, Survivors of William Bennett.

(See S. C. Reporter's ed. 1-18.)

Claims — against United States — jurisdiction — refunding stamp taxes.

1. Claims under the act of July 27, 1912 (37 Stat. at L. 240, chap. 256, Comp. Stat. 1913, § 6370), for the refunding of stamp taxes alleged to have been wrongfully collected under the war revenue act of June 13, 1898 (30 Stat. at L. 448, chap. 448, Comp. Stat. 1913, § 6144), were founded upon a "law of Congress" within the meaning of the Judicial Code, § 24, ¶ 20, which confers jurisdiction concurrent with the court of claims upon the district courts of all claims not exceeding $10,000, founded upon the Constitution of the United States or any law of Congress.

[For other cases, see Claims, I. d, 2, in Digest Sup. Ct. 1908.]

Internal revenue — stamp taxes — refunding.

2. Death duties erroneously or illegally assessed were not the only taxes to be refunded under the act of July 27, 1912 (37 Stat. at L. 240, chap. 256, Comp. Stat. 1913, § 6370), providing for the presentation and payment of all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the war revenue act of June 13, 1898 (30 Stat. at L. 448, chap. 448, Comp. Stat. 1913, § 6144), § 29, or of any sums alleged to have been excessive or in any manner wrongfully collected under the provisions of that act.

[For other cases, see Internal Revenue, VII., in Digest Sup. Ct. 1908.]

Courts — proper district for suit — claim against United States — waiver.

3. Pleading to the merits without specifically objecting that the suit was brought in the wrong Federal district waives the requirement of the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, Comp. Stat. 1913, § 991 (20)), § 5, that suits upon claims against the United States must be brought in the district where the plaintiff resides.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

Internal revenue — recovery back of taxes paid — protest.

4. Payment under protest is not essential to the maintenance of a suit founded upon the act of July 27, 1912 (37 Stat. at L. 240, chap 256, Comp. Stat. 1913, § 6370), which provides for the presentation and payment of all claims for the refunding of any internal tax erroneously or illegally assessed or collected under the war revenue act of June 13, 1898 (30 Stat. at L. 448, chap. 448, Comp. Stat. 1913, § 6144), § 29, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of that act.

[For other cases, see Internal Revenue, 347-352, in Digest Sup. Ct. 1908.]

Commerce — export duties — stamp tax on charter parties.

5. The stamp tax assessed under the war revenue act of June 13, 1898 (30 Stat. at L. 448, chap. 448, Comp. Stat. 1913, § 6144), § 25, upon charter parties which were exclusively for the carriage of cargo from state ports to foreign ports, violated the provisions of U. S. Const. art. 1, § 9, that no tax or duty shall be laid on articles exported from any state.

[For other cases, see Commerce, 499-502, in Digest Sup. Ct. 1908.]

NOTE.—As to when taxes illegally assessed may be recovered back—see notes to Phelps v. New York, 2 L.R.A. 626; State ex rel. McCarty v. Nelson, 4 L.R.A. 300; and Erskine v. Van Arsdale, 21 L. ed. U. S. 63.

On proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

Commerce — export duties — stamp tax on charter parties.

6. A stamp tax on charter parties, assessed under the war revenue act of June 13, 1898 (30 Stat. at L. 448, chap. 448, Comp. Stat. 1913, § 6144), § 25, is no less repugnant to U. S. Const. art. 1, § 9, as being a duty on exports, because the goods were not on the vessel when the charter party was made, where the charter related only to the exportation of cargo from state ports to foreign ports.

[For other cases, see Commerce, 499–502, in Digest Sup. Ct. 1908.]

[No. 331.]

Argued January 13, 1915. Decided March 22, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment for the recovery back of stamp taxes paid upon charter parties for the carriage of cargo from state ports to foreign ports. Affirmed

See same case below on demurrer, 217 Fed. 680.

The facts are stated in the opinion.

Solicitor General **Davis** argued the cause, and, with Mr. Theodore Megaarden, filed a brief for plaintiff in error:

The claim of the petitioners was presented to the commissioner of internal revenue and by him rejected. The remedy of petitioners was therefore an action against the collector of internal revenue, and not against the United States.

Edison Electric Illuminating Co. v. United States, 38 Ct. Cl. 208; Nichols v. United States, 7 Wall. 122, 129, 19 L. ed. 125, 128; Sybrandt v. United States, 19 Ct. Cl. 461; United States v. Kaufman, 96 U. S. 567, 24 L. ed. 792; United States v. Real Estate Sav. Bank, 104 U. S. 728, 734, 26 L. ed. 908, 909.

The Tucker act (under which this suit was brought) declares that suit must be brought in the district where the plaintiff resides; and this provision as to venue is mandatory.

Reid Wrecking Co. v. United States, 202 Fed. 314.

There can be no recovery in the absence of any showing that the taxes were paid under protest.

Chesebrough v. United States, 192 U. S. 253, 48 L. ed. 432, 24 Sup. Ct. Rep. 262; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327.

To "require" the payment of stamps upon *charter parties* on the part of the Treasury *Department* does not constitute duress, or make payment under protest unnecessary to a recovery.

United States v. Edmondston, 181 U. S. 500, 45 L. ed. 971, 21 Sup. Ct. Rep. 718.

The act of July 27, 1912, does not dispense with protest or duress as a condition precedent to a recovery.

Chesebrough v. United States and United States v. New York & C. Mail S. S. Co. supra.

The tax in question was measured by the tonnage of the vessels chartered, and tonnage taxes may lawfully be imposed by Congress.

State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 216, 20 L. ed. 370, 374.

And a duty on tonnage may be imposed with a view to revenue, as well as with a view to the regulation of commerce.

Gibbons v. Ogden, 9 Wheat. 1, 202, 6 L. ed. 23, 71; State Tonnage Tax Cases, supra.

The tax only incidentally and remotely affected articles exported, and the act imposing it does not come within the constitutional prohibition of a tax or duty on such articles.

Armour Packing Co. v. United States, 209 U. S. 56, 79, 80, 52 L. ed. 681, 693, 694, 28 Sup. Ct. Rep. 428; Chicago, B. & Q. R. Co. v. United States, 209 U. S. 90, 52 L. ed. 698, 28 Sup. Ct. Rep. 439.

The tax was not a tax on articles exported; the most that can be claimed is that the taxes were paid on goods intended for exportation; and goods intended for exportation are not exports.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; Pace v. Burgess, 92 U. S. 372, 23 L. ed. 657; Turpin v. Burgess, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835.

Mr. Everett P. Wheeler argued the cause and filed a brief for defendants in error:

The statute being remedial in its character, and relating to the law of procedure, is to be liberally construed with reference to the purpose of its enactment.

Bechtel v. United States, 101 U. S. 597, 599, 25 L. ed. 1019, 1020; United States v. Musgrave, 160 Fed. 700.

In such construction we should consider the occasion and necessity of its enactment, the defects and evils of the former law, and the remedy provided by the new one.

United States v. Ninety-Nine Diamonds, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 961.

Remedial statutes should be construed liberally.

Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138;

Merchants' Nat. Bank v. United States, 42 Ct. Cl. 6; 1 Kent, Com. 465.

Thus construed, it is obvious that the act of July 27, 1912, applied to the claims in question.

Thacher v. United States, 149 Fed. 902; Kaufman's Case, 11 Ct. Cl. 668.

Sections 3226–3228 of U. S. Rev. Stat. Comp. Stat. 1913, §§ 5949–5951, are limitations upon any suit in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed. It was the bar created by these sections that is removed by the act under consideration.

United States v. Finch, 119 C. C. A. 433, 201 Fed. 95; Dooley v. United States, 182 U. S. 222, 228, 45 L. ed. 1074, 1080, 21 Sup. Ct. Rep. 762; Christie-Street Commission Co. v. United States, 69 C. C. A. 464, 136 Fed. 326; Medbury v. United States, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503; Foster v. United States, 32 Ct. Cl. 170; Daly's Case, 26 Ops. Atty. Gen. 194.

A legislature cannot do indirectly what the Constitution forbids it to do directly.

Passenger Cases, 7 How. 283, 414, 12 L. ed. 702, 757; Inman S. S. Co. v. Tinker, 94 U. S. 238, 24 L. ed. 118; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327; North River S. B. Co. v. Livingston, 3 Cow. 713; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Bailey v. Alabama, 219 U. S. 219, 244, 55 L. ed. 191, 202, 31 Sup. Ct. Rep. 145; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 280.

The power to tax involves the power to destroy.

3 Webster's Works, p. 408; Fairbank v. United States, 181 U. S. 283, 290, 45 L. ed. 862, 865, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482.

The charter party is a commercially necessary document, in view of the way in which business is actually done.

Ireland v. Livingston, L. R. 5 H. L. 395, 41 L. J. Q. B. N. S. 201, 27 L. T. N. S. 79; Tamvaco v. Lucas, 1 Best & S. 185.

The objection that a suit is not brought in the proper district must be taken specially at the outset, or it is waived.

Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720; Re Moore, 209 U. S. 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; New York & O. S. S. Co. v. United States, 202 Fed. 311.

The allegation of the petition is sufficient. Residence is a word of various significance, and should be construed in a statute according to the subject-matter. In the case of a firm its residence is its place of business. This is alleged to have been in the southern district. It is so found. It is there, and not in the district where the partner's family lives, that the suit should be brought. One is his home, the other his partnership or business residence. This is analogous to the rule in corporation cases.

Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221.

Tonnage taxes as levied by the United States are obviously a regulation of commerce.

Aguirre v. Maxwell, 3 Blatchf. 140, Fed. Cas. No. 101.

The power to impose them is prohibited to the states.

State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 215, 20 L. ed. 370, 374.

Messrs. Simon Lyon and R. B. H. Lyon filed a brief as *amici curiæ:*

The question of jurisdiction in the case at bar is identical with that raised by the United States in the case of the Fidelity Trust Co. v. United States, 45 Ct. Cl. 362.

Suits brought to recover money due under the refunding act of July 27, 1912, are not actions for the recovery of taxes, but for money held by the government in trust for the benefit of parties to whom it rightfully belongs. The act by its terms creates and acknowledges an obligation of the government. A method is prescribed by which each party can secure it.

Daly's Case, 26 Ops. Atty. Gen. 194; United States v. Jordan, 113 U. S. 418, 28 L. ed. 1013, 5 Sup. Ct. Rep. 585; United States v. Wardwell, 172 U. S. 48, 43 L. ed. 360, 19 Sup. Ct. Rep. 86; United States v. Taylor, 104 U. S. 216, 26 L. ed. 721; United States v. Louisville, 169 U. S. 249, 42 L. ed. 735, 18 Sup. Ct. Rep. 358; Campbell v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; Thacher v. United States, 149 Fed. 902; United States v. Shipley, 116 C. C. A. 627, 197 Fed. 265; Boughton v. United States, 12 Ct. Cl. 330.

No protest was necessary.

Fidelity Trust Co. v. United States, 45 Ct. Cl. 362; Boughton's Case, 12 Ct. Cl. 330; United States v. Jordan, 113 U. S. 418, 28 L. ed. 1013, 5 Sup. Ct. Rep. 585; United States v. Louisville, 169 U. S. 249, 42 L. ed. 735, 18 Sup. Ct. Rep. 358; United States v. Wardell, 172 U. S. 48, 43 L. ed.

360, 19 Sup. Ct. Rep. 86; Daly's Case, 26 Ops. Atty. Gen. 194; Thacher v. United States, 149 Fed. 903; United States v. Shipley, 116 C. C. A. 627, 197 Fed. 270.

The refunding act of July 27, 1912, is plain in its terms, as will be readily seen upon reading it, and should be construed with reference to the object intended to be effected by it.

United States v. Musgrave, 160 Fed. 700.

So long as the language used is unambiguous, a departure from the natural meaning is not justified by any consideration of its consequence or public policy, and it is the plain duty of the court to give it force and effect.

Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Johnson v. Southern P. Co. 196 U. S. 15, 49 L. ed. 368, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Cooley, Taxn. 2d ed. p. 464; Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227; Lewis v. United States, 92 U. S. 621, 23 L. ed. 514; Lake County v. Rollins, 130 U. S. 671, 32 L. ed. 1063, 9 Sup. Ct. Rep. 651; Washington Market Co. v Hoffman, 101 U. S. 112, 25 L. ed. 782; Schulenberg v. Harriman, 21 Wall. 62, 22 L. ed. 555; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 35, 35 L. ed. 60, 11 Sup. Ct. Rep. 489; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 549, 36 L. ed. 1084, 13 Sup. Ct. Rep. 170; New York Indians v. United States, 170 U. S. 18, 42 L. ed. 933, 18 Sup. Ct. Rep. 531; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; Hutchinson Invest. Co. v. Caldwell, 152 U. S. 69, 38 L. ed. 357, 14 Sup. Ct. Rep. 504; Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; Crane v. Reeder, 22 Mich. 322.

The statute is a remedial one, and should be liberally interpreted.

Johnson v. Southern P. Co. 196 U. S. 15, 49 L. ed. 368, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Heydon's Case, 3 Coke, 7; Pierce v. Hopper, 1 Strange, 253; Lauer v. District of Columbia, 11 App. D. C. 453; Prather v. United States, 9 App. D. C. 82; Beley v. Naphtaly, 169 U. S. 353, 361, 42 L. ed. 775, 778, 18 Sup. Ct. Rep. 354; Jones v. New York Guaranty & I. Co. 101 U. S. 626, 25 L. ed. 1034; Twenty Per Cent Cases (United States v. Fitzpatrick) 13 Wall. 575, 20 L. ed. 708; Ross v. Roe, 1 Pet. 667, 7 L. ed. 307; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; Smythe v. Fiske, 23 Wall. 374, 23 L. ed. 47; United States v. Stowell, 133 U. S. 12, 33 L. ed. [illegible] 10 Sup. Ct. Rep. 244; Knowlton v. [illegible] L. ed. 969, 20 Sup. Ct. Rep. 747; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508; Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138.

[7] Mr. Justice Hughes delivered the opinion of the court:

This is a writ of error to review a judgment of the district court awarding a recovery against the United States for the amount paid as stamp taxes upon certain charter parties under § 25 of the war revenue act of June 13, 1898, chap. 448, 30 Stat. at L. 448, 460, Comp. Stat. 1913, § 6144. These charter parties were exclusively for the carriage of cargo from ports in the states of the United States to foreign ports, and the imposition of the taxes was held to be in violation of § 9, article I. of the Constitution of the United States, which provides: "No tax or duty shall be laid on articles exported from any state."

The suit was brought under paragraph 20 of § 24 of the Judicial Code [36 Stat. at L. 1093, chap. 231, Comp. Stat. 1913, § 991 (20)], which confers jurisdiction, concurrent with the court of claims, upon the district court, "of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress" (see act of March 3, 1887, chap. 359, § 1, 24 Stat. at L. 505, Comp. Stat. 1913, § 991 (20)); and the claim of the plaintiffs (defendants in error) was based upon the act of July 27, 1912, chap. 256, 37 Stat. at L. 240, Comp. Stat. 1913, § 6370, which is as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their [8] claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid."

The government demurred to the petition upon the grounds that the court had no jurisdiction of the defendant, or of the sub-

ject of the action, and that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled (217 Fed. 680), and, after answer, the case was heard on the merits. The court found in substance that the firm, of which the defendants in error were the surviving members, had paid without protest certain stamp taxes on charter parties of the character described; that, on filing their claim under the act of 1912, it had been certified by the collector to be correct in its statement of facts, but that the Commissioner of Internal Revenue had rejected it for the reason that the act was not applicable. Holding the taxes to be unconstitutional, and the claim to have been duly presented, the court rendered judgment for the claimants.

The government contends that the court erred in deciding (1) that the court had jurisdiction of the case, (2) that it need not be averred or proved that the tax was paid under protest, and (3) that the tax was invalid.

The first contention—with respect to jurisdiction—is that, the claim having been rejected, the remedy of the claimants was an action against the collector of internal revenue, and not against the United States. The course of the pertinent legislation since the passage of the war revenue act of 1898 may be briefly reviewed: In 1900, Congress provided for the redemption of, or allowance for, internal revenue stamps, including cases where "the rates or duties represented thereby" had been "excessive in amount, paid in error, or in any manner wrongfully collected." Act of May 12, 1900, chap. 393, 31 Stat. at L. 177, Comp. Stat. 1913, § 6346. In 1902, [9] various provisions of the war revenue act, and amendments thereof, including §§ 6, 12, 25, schedules A and B, with regard to stamp taxes, and § 29 as to taxes on legacies and distributive shares, were repealed. Act of April 12, 1902, chap. 500, 32 Stat. at L. 96, 97, Comp. Stat. 1913, §§ 6144, 6369. The repealing act was to take effect on July 1, 1902, and shortly before that date Congress made specific provision that certain taxes collected under the repealed statute should be refunded. Act of June 27, 1902, chap. 1160, 32 Stat. at L. 406. These taxes were (1) those that had been paid upon bequests for uses of a religious, literary, charitable, or educational character, etc.; (2) the "sums paid for documentary stamps used on export bills of lading, such stamps representing taxes which were illegally assessed and collected;" and (3) taxes theretofore or thereafter paid upon legacies or distributive shares to the extent that they were collected "on contingent beneficial interests" which had not become vested prior to July 1, 1902. It was also provided that no tax should thereafter be assessed under the act in respect of any such interest which had not become "absolutely vested in possession or enjoyment" prior to the date mentioned.

The act of 1902 was followed by other refunding statutes. In United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327, suit had been brought in the district court to recover taxes which had been paid under the war revenue act upon manifests of cargoes bound to foreign ports, and it was held (following Chesebrough v. United States, 192 U. S. 253, 48 L. ed. 432, 24 Sup. Ct. Rep. 262) that no recovery could be had because the payment had been voluntarily made; the jurisdiction of the court was not impugned. Thereupon Congress provided for the refunding of sums paid for stamps "on export ships' manifests" representing taxes "which were illegally assessed and collected," "said refund to be made whether said stamp taxes were paid under protest or not, and without being subject to any statute of limitations." Act of March 4, 1907, chap. 2919, 34 Stat. at L. 1373. [10] Again, in 1909, the Secretary of the Treasury was directed to pay to those who had duly presented their claims prior to July 1, 1904, the sums paid for stamps used "on foreign bills of exchange" (drawn between July 1, 1898, and June 30, 1901) "against the value of products or merchandise actually exported to foreign countries, such stamps representing taxes which were illegally assessed and collected, said refund to be made whether said stamp taxes were paid under protest or duress or not." Act of February 1, 1909, chap. 53, 35 Stat. at L. 590; see also acts of August 5, 1909, chap. 7, 36 Stat. at L 120; June 25, 1910, chap. 385, 36 Stat. at L. 779; August 26, 1912, chap. 408, 37 Stat at L. 626.

It thus appears that the act of 1912—upon which the present claim is based—was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims, and it follows that these claims must be deemed to be founded upon a "law of Congress" within the meaning of the provisions of the Tucker act, now incorporated in the Judicial Code. See Medbury v. United States, 173 U. S. 492, 497, 43 L. ed. 779, 782, 19 Sup. Ct. Rep. 503; McLean v. United States, 226 U. S. 374, 378, 57 L. ed. 260, 262, 33 Sup. Ct. Rep. 122. With respect to the refunding of taxes paid on the "contingent interests" described in the act of June 27, 1902, supra, it has been held that upon the rejec-

tion of the claim an action lies against the United States in the court of claims, or in the district court (where the amount is within the prescribed limit). Fidelity Trust Co. v. United States, 45 Ct. Cl. 362, s. c. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; United States v. Jones, 236 U. S. 106, ante, 261, 35 Sup. Ct. Rep. 261; Thacher v. United States, 149 Fed. 902; United States v. Shipley, 116 C. C. A. 627, 197 Fed. 265. And this is true not only where such taxes were paid before the refunding act was passed, but also where subsequently they were wrongfully collected in violation of its provisions. United States v. Jones, 236 U. S. 106, ante, 488, 35 Sup. Ct. Rep. 261. The same rule must obtain [11] as to all claims described in the act of 1912, and in this view we are not concerned in the present case with questions arising under the general provisions of the internal revenue laws.

It is urged by the government that Congress intended to limit the act of 1912 to the refunding of death duties erroneously or illegally assessed under § 29 of the war revenue act. Reference is made to the legislative history of the statute, but the contention lacks adequate support. See House Reports, 62d Cong. 2d Sess., Report No. 848, June 6, 1912. While the pendency of claims for the refunding of such taxes may have induced the passage of the act, its terms were not confined to these. On the contrary, after providing for the claims arising under § 29, Congress added the further clause making express provision for the presentation of claims for the refunding "of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act;" and the Secretary of the Treasury is directed to pay to those who duly present their claims and establish the erroneous or illegal collection "any sums paid by them . . . to the United States under the provisions of the act aforesaid." We are not at liberty to read these explicit clauses out of the statute.

Another objection to the jurisdiction of the district court is that under § 5 of the Tucker act (a provision which was saved from repeal by § 297 of the Judicial Code [36 Stat. at L. 1168, chap. 231, Comp. Stat. 1913, § 1274]) the suit was to be brought "in the district where the plaintiff resides." 24 Stat. at L. 506, chap. 359, Comp. Stat. 1913, § 1575. The petition alleged that petitioners were the surviving members of a copartnership engaged in business in the city of New York "within the district aforesaid," and that their "business and partnership residence was and is in the borough of Manhattan, city of New York, in said district." It is said that the allegation was insufficient to show the residence required by the statute, but it does not appear that any such objection was [12] made in the court below. The general language of the demurrer with respect to jurisdiction had appropriate reference to the general authority of the court to entertain such a suit against the United States and to the jurisdiction of the subject-matter of the action. But assuming that the subject-matter was within the jurisdiction of the court, the requirement as to the particular district within which the suit should be brought was but a modal and formal one, which could be waived, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits. St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 131, 35 L. ed. 659, 661, 11 Sup. Ct. Rep. 982; Central Trust Co. v. McGeorge, 151 U. S. 129, 133, 38 L. ed. 98, 100, 14 Sup. Ct. Rep. 286; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 688, 38 L. ed. 311, 316, 14 Sup. Ct. Rep. 533; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 220, 40 L. ed. 401, 402, 16 Sup. Ct. Rep. 272; Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720; Arizona & N. M. R. Co. v. Clark, 235 U. S. 669, 674, ante, 415, 418, 35 Sup. Ct. Rep. 210.

It is also apparent, in the light of the manifest purpose and scope of the legislation to which we have referred, that the contention based upon the absence of protest cannot be sustained. Where taxes have been illegally assessed upon the "contingent interests" described in the refunding act of 1902 it has been held that recovery may be had although the taxes were paid without protest. United States v. Jones, supra. In the acts of 1907 and 1909, supra, with respect to stamp taxes on "export ships' manifests" and on foreign bills of exchange against exports, Congress expressly provided for refunding whether the taxes had been paid under protest or not. The fact that these express words were not repeated in the act of 1912 cannot, in view of the nature of the subject, be regarded as evidencing a different intent; rather must this act receive in this respect the same construction as that which has been given to the act of 1902. If it appeared that the sums sought to be recovered were not legally payable, and the claim was duly presented within the time fixed, the right to [13] repayment was established by the express terms of the statute.

The question, then, is whether the tax, so far as it was laid upon charter parties which were exclusively for the carriage of

cargo from state ports to foreign ports, was a valid one. The constitutional provision that "no tax or duty shall be laid on articles exported from any state" has been the subject of elaborate and authoritative exposition, and we need but to apply the principles of construction which have been settled by previous decisions.

The prohibition relates only to exportation to foreign countries (Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Dooley v. United States, 183 U. S. 151, 154, 162, 46 L. ed. 128, 130, 133, 22 Sup. Ct. Rep. 62), and is designed to give immunity from taxation to property that is in the actual course of such exportation (Pace v. Burgess, 92 U. S. 372, 23 L. ed. 657; Turpin v. Burgess, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835; Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that "the process of exporting the products of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation." Miller, Const. p. 592. It was with this view that Chief Justice Marshall, in Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678,—holding that a state tax on the occupation of the importer was a tax on imports, and that the mode of imposing it merely varied the form without varying the substance,—drew the comparison between the two prohibitions: "The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported [14] from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?" Id. pp. 444, 445. And in Almy v. California, 24 How. 169, 16 L. ed. 644, applying the same principle, the court said, by Chief Justice Taney, that "a tax or duty on a bill of lading, although differing in form from a duty on the article shipped," was "in substance the same thing," for "a bill of lading, or some written instrument of the same import," was "necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another." There, as was pointed out in Woodruff v. Parham, supra, shipments to foreign ports were not in fact involved, but this did not detract from the force of the statement so far as it concerns the effect of the tax described.

In Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135, the question of Federal taxation of export bills of lading was directly involved, and after great consideration was definitely determined. In that case, there had been a conviction under the war revenue act of 1898. It was the contention of the government that no tax was placed upon the article exported; that, so far as the question was as to what might be exported, and how it should be exported, the statute imposed no restriction; that the full scope of the legislation was to impose a stamp duty on a document not necessarily, though ordinarily, used in connection with the exportation of goods; that it was a mere "stamp imposition [15] on an instrument," and similar to many such taxes which are imposed by Congress by virtue of its general power of taxation, not upon these alone, but upon a great variety of instruments used in the ordinary transactions of business. These arguments were not convincing. The court held that "the requirement of the Constitution is that exports should be free from any governmental burden." The language is "no tax or duty." "We know historically," said the court, "that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers, and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." In answer to the contention that the sole purpose of the prohibition was to prevent discrimination between the states, and that there should be enforcement only so far as necessary to prevent such discrimination, the court said: "If mere discrimination be-

tween the states was all that was contemplated, it would seem to follow that an ad valorem tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden." The court found an analogy in the construction which had been given to the commerce clause in protecting interstate commerce from state legislation imposing direct burdens (Robbins v. Taxing Dist. 120 U. S. 489, 494, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592); and legislative precedents for the tax were held [16] to be unavailing in view of the clear meaning and scope of the constitutional provision.

Following this decision, it was held by the district court that the stamp tax on manifests of cargoes for foreign ports was invalid. These manifests were essential to the exportation. New York & C. Mail S. S. Co. v. United States, 125 Fed. 320. And while the case was determined in this court upon another ground, the correctness of this ruling as to the invalidity of the tax was conceded by the United States. 200 U. S. 488, 491, 50 L. ed. 569, 570, 26 Sup. Ct. Rep. 327.

Under this established doctrine, we are of the opinion that the tax upon these charter parties cannot be sustained. A charter party may be a contract for the lease of the vessel, or for a special service to be rendered by the owner of the vessel. Where, as is very frequently the case, the shipowner undertakes to carry a cargo, to be provided by the charterer, on a designated voyage, the arrangement is, in contemplation of law, a mere contract of affreightment. By such a charter, the shipowner is the carrier of the goods transported by the ship, "for the reason that the charter party is a mere covenant for the conveyance of the merchandise or the performance of the stipulated service." Marcardier v. Chesapeake Ins. Co. 8 Cranch, 39, 49, 50, 3 L. ed. 481, 484; Reed v. United States, 11 Wall. 591, 600, 601, 20 L. ed. 220; Leary v. United States, 14 Wall. 607, 610, 20 L. ed. 756; Richardson v. Winsor, 3 Cliff. 395, 399, Fed. Cas. No. 11,795; The T. A. Goddard, 12 Fed. 174, 178; 1 Parsons, Shipping, p. 278. The findings in the present case do not permit us to question the character of the charter parties here involved. It appears that the defendants in error, being ship brokers, engaged at various times the vessels respectively, which are named in the schedule attached *to the findings,* solely for the carriage of cargo from ports in the United States to the foreign ports specified; that is, we understand the findings to mean that these charters were for [17] described voyages on which "cargoes of goods were to be, and were in fact, carried" to the places mentioned.

Instead of a contract for the carriage of a particular lot of goods occupying less than the entire cargo space, as in the case of an ordinary bill of lading, the charter party was a contract for the carriage of a full cargo lot. In legal principle, there is no distinction which can condemn the tax in the one case and save it in the other. Whether the contract of carriage covers a small lot, or a partial cargo, or an entire cargo, whether the goods occupy a part of the cargo space or the whole cargo space,—can make no constitutional difference. The charters were for the exportation; they related to it exclusively; they served no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports.

The government urges the analogy of tonnage taxes or duties. The same argument was pressed unsuccessfully in the Fairbank Case, 181 U. S. p. 305, 45 L. ed. 871, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135. It should be observed that a tonnage tax, as it has been laid by the Federal government from the beginning, is a tax on entry. 1 Stat. at L. 135, chap. 30; Rev. Stat. § 4219; acts Feb. 27, 1877, chap. 69, 19 Stat. at L. 250; June 26, 1884, chap. 121, § 14, 23 Stat. at L. 57; June 19, 1886, chap. 421, § 11, 24 Stat. at L. 81, Comp. Stat. 1913, § 7812. See Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 696, 27 L. ed. 584, 2 Sup. Ct. Rep. 732. A duty of tonnage under article 1, § 10, of the Constitution, has been described as a charge "for entering or leaving a port" (Huse v. Glover, 119 U. S. 543, 549, 30 L. ed. 487, 490, 7 Sup. Ct. Rep. 313); but Congress has not attempted to impose a tonnage tax for the privilege of leaving a state port for a foreign port, and we have no occasion to consider the question of the validity of such a tax. Again, it is contended that the tax bore only incidentally upon exportation. It was to be paid on all charter parties of vessels having a "registered tonnage." But, aside from any question as to the scope of this provision, the tax as [18] applied to the charter parties here in question was nothing else than a tax on exportation, and to this extent was, in any event, invalid. The same principle governs that has constantly been held to obtain in cases where it has been sought to give effect to taxes upon interstate commerce under general legisla-

tion of the states. In Robbins v. Taxing Dist. supra, it was strongly urged, "as if it were a material point in the case," that no discrimination was made "between domestic and foreign drummers,"—that is, between those of the state whose legislation was in question and those of other states; that all were taxed alike. But the court held that this did not meet the difficulty, inasmuch as interstate commerce could not "be taxed at all, even though the same amount of tax should be laid on domestic commerce." This had been decided, as the court pointed out, in the case of State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; and it has become one of the commonplaces of constitutional law. See Brennan v. Titusville, 153 U. S. 289, 304, 38 L. ed. 719, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 629, 47 L. ed. 336, 340, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 510, 51 L. ed. 295, 296, 27 Sup. Ct. Rep. 159; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294. We know of no ground upon which a different effect can be given to the explicit constitutional provision which denies to Congress the right to tax exportation from the states.

There is a further objection that the goods were not on the vessel at the time the charter party was made, but, as the charters related only to the exportation, this objection is plainly without merit.

The judgment of the District Court is affirmed.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[19] THAMES & MERSEY MARINE INSURANCE COMPANY, Limited, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 19-27.)

Courts — proper district for suit — claim against United States — waiver.

1. The requirement with respect to the proper district for suits upon claims against the United States, made by the Tucker act of March 3, 1887 (24 Stat. at L. 506, chap. 359, Comp. Stat. 1913, § 1575), § 5, was waived where the United States, though asserting in its demurrer to the petition that it appeared specially, raised by that pleading not simply the question of jurisdiction, but also that of the merits, such a demurrer being in substance a general appearance to the merits.

[For other cases, see Courts, V. c, 7; Appearance, III., in Digest Sup. Ct. 1908.]

Commerce — export duties — stamp tax on policies of marine insurance.

2. The stamp tax imposed under the war revenue act of June 13, 1898 (30 Stat. at L. 461, chap. 448), upon policies insuring cargoes against marine risks during the voyage from state ports to foreign ports, is invalid as being in substance a tax upon exportation, and hence contrary to U. S. Const. art. 1, § 9, prohibiting any tax or duty on articles exported from any state.

[For other cases, see Commerce, 499-501, in Digest Sup. Ct. 1908.]

[No. 616.]

Argued January 13, 1915. Decided April 5, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment dismissing the petition in an action to recover back stamp taxes paid on policies of marine insurance. Reversed.

See same case below on demurrer, 217 Fed. 685.

The facts are stated in the opinion.

Mr. Everett P. Wheeler argued the cause and filed a brief for plaintiff in error:

The constitutional prohibition against export duties applies when the document taxed is intended to and becomes a part of the business of exporting.

Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Almy v. California, 24 How. 169, 16 L. ed. 644; New York & C. Mail S. S. Co. v. United States, 125 Fed. 320.

When goods are to be exported, a bill of lading is obtained, and the goods described therein are insured. The bill of lading and the policy of insurance accompany the bill of exchange and are a part of the usual commercial documents which facilitate the export and make it possible on a large scale.

Tamvaco v. Lucas, 30 L. J. Q. B. N. S. 234, 1 Best & S. 185, 3 Best & S. 89, 31 L. J. Q. B. N. S. 296, 6 L. T. N. S. 697, 10 Week. Rep. 733; Hickox v. Adams, 34 L. T. N. S. 404, 3 Asp. Mar. L. Cas. 142; Ireland v. Livingstone, L. R. 5 H. L. 395, 41 L. J. Q. B. N. S. 201, 27 L. T. N. S. 79; Benjamin, Sales, 5th ed. § 590, p. 705; Ströms Bruks Aktie Bolag v. Hutchinson [1905] A. C. 515, 74

NOTE.—On proper district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

As to when taxes illegally assessed may be recovered back—see notes to Phelps v. New York, 2 L.R.A. 626; State ex rel. McCarty v. Nelson, 4 L.R.A. 300; and Erskine v. Van Arsdale, 21 L. ed. U. S. 63.

L. J. P. C. N. S. 130, 93 L. T. N. S. 562, 21 Times L. R. 718, 11 Com. Cas. 13, 10 Asp. Mar. L. Cas. 138; Mee v. McNider, 109 N. Y. 500, 17 N. E. 424.

The limitation as to residence does not apply to foreign corporations if the word "resident" in the Tucker act be strictly construed. It could not have been the intent of Congress to exclude foreigners from the benefit of that act.

New York & O. S. S. Co. v. United States, 202 Fed. 311.

In ordinary language a foreign corporation has a residence in the district where it has its principal place of business.

Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221.

The policies or certificates become part of the export trade the moment the goods begin their movement to the ship for exportation, and the certificates of insurance covering them are signed.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; The Daniel Ball, 10 Wall. 557, 565, 19 L. ed. 999, 1002.

Solicitor General Davis argued the cause, and, with Mr. Theodor Megaarden, filed a brief for defendant in error:

It does not affirmatively appear that the action was brought in the district in which the petitioner resides.

Brock v. Northwestern Fuel Co. 130 U. S. 341, 32 L. ed. 905, 9 Sup. Ct. Rep. 552; Germania Ins. Co. v. Francis, 11 Wall. 210, 216, 20 L. ed. 77, 78; Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935.

In a long line of decisions, beginning with Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357, and ending with New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. Rep. 167, it has been firmly established that insurance is not commerce; that a contract of insurance is not an instrumentality of commerce; that the making of such a contract is a mere incident of commercial intercourse; and that in this respect there is no difference between a contract of marine insurance and one covering risks by fire.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The taxes involved in this case affect articles exported in only the most remote and incidental manner, and a provision therefor is no more unconstitutional than an act of Congress in regulation of commerce which has a merely incidental effect upon exportations (Armour Packing Co. v. United States, 209 U. S. 56, 79, 80, 52 L. ed. 681, 693, 694, 28 Sup. Ct. Rep. 428; Chicago, B. & Q. R. Co. v. United States, 209 U. S. 90, 52 L. ed. 698, 28 Sup. Ct. Rep. 439), or than a law of a state, passed in the exercise of the police power, and having that as its primary purpose, with a remote and incidental effect, however, upon interstate commerce.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 50, 51 L. ed. 78, 86, 27 Sup. Ct. Rep. 1.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error is a corporation engaged in the business of underwriting policies of marine insurance. It brought this action to recover the amount paid as stamp taxes upon policies insuring certain exports against marine risks. The taxes were paid under the war revenue act of June 13, 1898 (chap. 448, 30 Stat. at L. 461); and the recovery was sought under the provisions of the act of July 27, 1912, (chap. 256, 37 Stat. at L. 240, Comp. Stat. 1913, § 6370), upon the ground that the tax was invalid, being in substance a tax upon exportation, and hence contrary to § 9, article I, of the Federal Constitution, prohibiting any tax or duty on articles exported from any state.

It was alleged that the policies were issued, in the following manner: Open policies were executed by the insurance company, containing an agreement that the company would insure all cargoes which the insured should ship in the foreign trade during the life of the policies, and that the shipper would procure such insurance, and from time to time would pay the premiums according to the regular rates for the particular voyages. When the shipper had a cargo of goods ready for export, "designated and set apart from all other goods for shipment on a particular ship," he filled up certain blank forms of declaration (furnished to him by the company) in accordance with the facts of each case, and delivered the declaration to the company at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration [23] was not delivered until the vessel had sailed. Upon receiving each of the declarations, the company entered the amount and rate of the premium, and delivered to the shipper a certificate of insurance by which the goods described were insured for the voyage and upon the vessel specified. It was further averred that bills of exchange were drawn by the exporters on the consignees of the merchandise for the purchase price, and that the bills of lading and the certificates of insurance were by custom required as the necessary documents to enable the exports to be made and the bills to be discounted; and that these documents were actually

forwarded to the foreign country to which the goods were shipped. At the end of each month, the company rendered to the insured a bill for the premiums which had accrued in accordance with the declaration; and, monthly, the company presented to the collector a book containing a summary of the premiums earned in respect of such insurance, and purchased the stamps required by the war revenue act. By direction of the collector, in accordance with the method prescribed for mutual convenience by the Commissioner of Internal Revenue, these stamps were affixed to the book, and then canceled. In each case, the goods were in fact exported, and were insured during their transit by sea to the foreign ports. The claim for the refunding of the taxes was duly presented to the collector, it was alleged, under the act of 1912, and was transmitted to the Commissioner of Internal Revenue, who refused payment.

The government demurred upon the grounds that the court had no jurisdiction of the defendant, or of the subject of the action, and that the petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, holding the tax to be a valid one. 217 Fed. 685. Judgment was entered dismissing the petition, and this writ of error has been sued out.

The government seeks to support the judgment by [24] denying the jurisdiction of the district court upon the ground that it was not shown that the petitioner resided within the district (act of March 3, 1887, chap. 359, § 5, 24 Stat. at L. 506, Comp. Stat. 1913, § 1575), as it was not set forth that the petitioner was incorporated in the state of New York (Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935). It was alleged that the petitioner was a corporation, and that "its principal office for conducting said business in the United States and its residence was and is in the borough of Manhattan, city of New York, in said district." On behalf of the company, it is asserted in argument that it is a foreign corporation, that is, foreign to the United States, and hence it is insisted that the provision of § 5 of the Tucker act is inapplicable, citing in Re Hohorst, 150 U. S. 653, 660, 37 L. ed. 1211, 1214, 14 Sup. Ct. Rep. 221. This question is not here, as the record does not show the place of incorporation. But the contention of the government is inadmissible for the reason that it does not appear that the objection as to the district was raised below, and the decision of the district court which has jurisdiction "concurrent with the court of claims" of the subject-matter of such an action within the prescribed limit as to amount (Judicial Code, § 24, ¶ 20 [36 Stat. at L. 1093, chap. 231, Comp. Stat. 1913, § 991 (20)]) was invited upon the merits. The requirement of § 5 of the Tucker act, which was saved from repeal (Judicial Code, § 297), is one of procedure, which could be waived (United States v. Hvoslef, 237 U. S. 1, ante, 813, 35 Sup. Ct. Rep. 459), and the question of jurisdiction submitted under the demurrer was deemed by the district court to be the same as that which had been considered and decided in the Hvoslef Case (217 Fed. 680, 682, 683); that is, as to the authority to entertain a suit against the United States under the act of July 27, 1912, supra. While the government asserted in its demurrer that it appeared specially, it raised by that pleading not simply the question of the jurisdiction of such a suit against the United States, but also that of the merits, seeking, and thus obtaining, a decision as to the constitutionality of [25] the tax, and hence of the insufficiency of the facts alleged to support a recovery. Such a demurrer is in substance "a general appearance to the merits," and is a waiver of objection with respect to the district in which the suit was brought. Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 372, 52 L. ed. 1101, 1103, 28 Sup. Ct. Rep. 720; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 130, 35 L. ed. 659, 660, 11 Sup. Ct. Rep. 982.

The other preliminary questions being identical with those determined in United States v. Hvoslef, supra, we come at once to the application of the constitutional provision; and upon this point it is unnecessary again to review the decisions establishing the governing principle. There the question was as to the validity of the tax upon charter parties which were exclusively for the carriage of cargo from state ports to foreign ports, and here the question is as to the tax upon policies insuring such exports during the voyage. Is the tax upon such policies so directly and closely related to the "process of exporting" that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition? It is manifest that we are not called upon to deal with transactions which merely anticipate exportation, or with goods that are not in the course of being actually exported. Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Turpin v. Burgess, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Cornell v. Coyne, 192 U. S. 418, 48 L. ed.

504, 24 Sup. Ct. Rep. 383. Nor have we to do, in the present case, with the taxation of the insurance business, as such, or with the power of the state to fix the conditions upon which foreign corporations may transact that business within its borders. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238; New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. Rep. 167. Let it be assumed, as this court has said, that the insurance business, generically considered, is not commerce; that the contract of insurance is a personal contract,—an indemnity against the happening of a contingent event. The inquiry still remains [26] whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon the exportation itself.

The answer must be found in the actual course of trade; for exportation is a trade movement, and the exigencies of trade determine what is essential to the process of exporting. The avails of exports are usually obtained by drawing bills against the goods; these drafts must be accompanied by the bills of lading and policies or certificates of insurance. It is true that the bills of lading represent the goods, but the business of exporting requires not only the contract of carriage, but appropriate provision for indemnity against marine risks during the voyage. The policy of insurance is universally recognized as one of the ordinary "shipping documents." Thus when payment is to be made in exchange for such documents, they are held to include not only a proper bill of lading, but also "a policy of insurance for the proper amount." Tamvaco v. Lucas, 1 Best & S. 185, 197, 206. It is not sufficient to tender the bill of lading without the policy. Benjamin, Sales, § 590, note; Hickox v. Adams, 34 L. T. N. S. 404, 3 Asp. Mar. L. Cas. 142. The requirements of exportation are reflected in the familiar "C. I. F." contract (that is, at a price to cover cost, insurance, and freight), which has "its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance, with a credit note for the freight, as explained by Lord Blackburn in Ireland v. Livingston, L. R. 5 H. L. 395, 406, 41 L. J. Q. B. N. S. 201, 27 L. T. N. S. 79." Ströms Bruks Aktie Bolag v. Hutchison [1905] A. C. 515, 528. See also Mee v. McNider, 109 N. Y. 500, 17 N. E. 424. It cannot be doubted that insurance during the voyage is, by virtue of the demands of commerce, an integral part of the exportation; the business of the world is conducted upon this basis. In illustration of this, the appellant appropriately directs [27] our attention to the recent action of Congress in establishing the War Risk Insurance Bureau, by which the government itself undertakes to supply insurance against war risks in order to protect exports from the burden of excessive rates. Act of September 2, 1914 (chap. 293, 38 Stat. at L. 711). In the report of the Committee of the House on interstate and Foreign Commerce, recommending the passage of the bill as an emergency measure, reference is made to the fact that other nations were insuring the vessels and cargoes under their respective flags against war risks. House Reports, 63d Cong. 2d Sess. Report No. 1112. The bill itself recites that the foreign commerce of the United States "is now greatly impeded and endangered" through the lack of such provision, and that it is deemed "necessary and expedient that the United States shall temporarily provide for the export shipping trade adequate facilities for the insurance of its commerce against the risks of war." This is a very clear recognition of the fact that proper insurance during the voyage is one of the necessities of exportation. The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process.

For these reasons, we must conclude that, under the established rule of construction, the tax as laid in the present case was within the constitutional prohibition. Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; United States v. Hvoslef, 237 U. S. 1, ante, 813, 35 Sup. Ct. Rep. 459.

Judgment reversed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

[28] UNITED STATES, Plff. in Err.,
v.
EMERY, BIRD, THAYER REALTY COMPANY.

(See S. C. Reporter's ed. 28-33.)

Internal revenue — recovery back of taxes — exclusiveness of remedy.

1. The remedy by suit against the collector where internal revenue taxes have been wrongfully collected under the Federal corporation tax law of August 5, 1909 (36 Stat. at L. 11, 112, chap. 6, Comp. Stat. 1913, § 6300), § 38, is not made exclusive by the provision of that section that all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable, are extended to this tax.

[For other cases, see Internal Revenue, VII., in Digest Sup. Ct. 1908.]

Claims — against United States — jurisdiction — refunding corporation tax.

2. Claims to recover back internal revenue taxes alleged to have been wrongfully collected under the Federal corporation tax law of August 5, 1909 (36 Stat. at L. 11, 112, chap. 6, Comp. Stat. 1913, § 6300), § 38, are founded upon that act within the meaning of the provision of the Judicial Code, § 24, ¶ 20, conferring jurisdiction on the Federal district courts of "all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress."

[For other cases, see Claims, I, d, 2, in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporation — doing business.

3. A real estate corporation whose powers are limited very nearly to the necessary incidents of holding a specific tract of land, and whose characteristic charter function, and the only one that it is carrying on, is the collection and distribution of the rent received from its single lessee, is not engaged in business within the meaning of the Federal corporation tax law of August 5, 1909 (36 Stat. at L. 11, 112, chap. 6, Comp. Stat. 1913, § 6300), § 38 imposing an excise tax upon the carrying on or doing of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

[No. 117.]

Argued January 12 and 13, 1915. Decided April 5, 1915.

IN ERROR to the District Court of the United States for the Western District of Missouri to review a judgment in favor of plaintiff in a suit to recover back taxes alleged to have been wrongfully collected under the Federal corporation tax law. Affirmed.

See same case below, 198 Fed. 242.

The facts are stated in the opinion.

Solicitor General Davis argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for plaintiff in error:

The district court was without jurisdiction of the suit.

(a) The remedy, if any, is an action against the collector, expressly provided by statute.

Nichols v. United States, 7 Wall. 122, 19 L. ed. 125.

(b) Where a revenue act expressly provides a particular remedy for the recovery of taxes illegally assessed and paid, such remedy is exclusive.

Arnson v. Murphy, 109 U. S. 238, 243, 27 L. ed. 920, 922, 3 Sup. Ct. Rep. 184; Cheatham v. United States (Cheatham v. Norvekl) 92 U. S. 85, 88, 23 L. ed. 561, 562; Nichols v. United States, 7 Wall. 122, 19 L. ed. 125.

The realty company was "engaged in business" within the meaning of the corporation tax act of 1909.

Flint v. Stone Tracy Co. 220 U. S. 107, 171, 55 L. ed. 389, 421, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

Mr. Albert R. Strother argued the cause, and, with Mr. James G. Smart, filed a brief for defendant in error:

The district court had jurisdiction.

United States v. Kaufman, 96 U. S. 567, 24 L. ed. 792; United States v. Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; United States v. American Tobacco Co. 166 U. S. 468, 41 L. ed. 1081, 17 Sup. Ct. Rep. 619; Swift & C. & B. Co. v. United States, 105 U. S. 691, 26 L. ed. 1108, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Campbell v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62; Chesebrough v. United States, 192 U. S. 253, 258, 48 L. ed. 432, 434, 24 Sup. Ct. Rep. 262; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327; Christie-Street Commission Co. v. United States, 69 C. C. A. 464, 136 Fed. 326; United States v. Hyams, 76 C. C. A. 523, 146 Fed. 15; United States v. Finch, 119 C. C. A. 433, 201 Fed. 95.

The realty company was not liable to the tax.

Flint v. Stone Tracy Co. 220 U. S. 107, 145, 55 L. ed. 389, 411, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Eliot v. Freeman, 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct.

NOTE.—As to when taxes illegally assessed may be recovered back—see notes to Phelps v. New York, 2 L.R.A. 626; State ex rel. McCarty v. Nelson, 4 L.R.A. 300; and Erskine v. Van Arsdale, 21 L. ed. U. S. 63.

Rep. 360; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; United States v. Nipissing Mines Co. 124 C. C. A. 313, 206 Fed. 431.

Mr. Everett P. Wheeler filed a brief as *amicus curiæ:*

The argument for the plaintiff in error in this case overlooks the origin of suits against officers of the government to recover for acts done by them in their official capacity. That origin is this: At common law the maxim was that the King could do no wrong. It followed that no suit could be maintained against him. When, however, an officer of the King transcended his authority and did something to a citizen which was in violation of law, the benefit of this maxim was not extended to the officer. On the contrary, the courts were astute to protect the rights of the injured citizen, and to assume that the illegal acts, while within the apparent scope of his authority, were not really authorized by the sovereign. Of this character is the following:

Hall v. Smith, 2 Bing. 156, 9 J. B. Moore, 266, 2 L. J. C. P. 113.

It commonly happened that, in such cases, the government defended the suit and indemnified the officer whose acts were drawn in question; but this circumstance did not affect the theory of the suit.

De Lima v. Bidwell, 182 U. S. 1, 177, 45 L. ed. 1041, 1048, 21 Sup. Ct. Rep. 743.

The same rule was adopted by the courts of the United States as part of the common law which our ancestors brought to this country, and the exemption from suit was held to extend to the United States government and to the government of each state; but, conversely, it was held that an officer of the government who transcended his power or committed an illegal act *colore officii* was personally liable.

Meigs v. M'Clung, 9 Cranch, 11, 3 L. ed. 639; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Britton v. Butler, 9 Blatchf. 457, Fed. Cas. No. 1,903; Story, Agency, § 319b, § 320.

Among the suits that were brought against officers of the United States government, to recover for acts alleged to be in violation of law, were suits against collectors of customs who had levied taxes upon imports alleged to be erroneous and excessive. In such cases they sought the benefit of the rule that a voluntary payment, even if erroneously made, could not be recovered, and that an agent who had collected money *for his principal,* and paid it over to the principal, was not liable to suit even though it should appear that the payment was erroneously made, unless he had been notified not to pay and that a personal claim would be made against him. For this reason it was held that no suit could be maintained against the collector of customs to recover duties levied by him in excess of the legal amount, unless he had been notified that the exaction was illegal and that a suit would be brought against him to recover the amount claimed to have been unlawfully demanded.

Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373.

At a subsequent period, the Parliament of Great Britain and the Congress of the United States passed acts which were designed to remedy this defect in the common law, and to give to persons injured by the action of government officials, within the scope of their authority, a direct remedy against the government itself.

United States v. Lee, 106 U. S. 196, 205, 27 L. ed. 171, 176, 1 Sup. Ct. Rep. 240.

The first clause of the Tucker act is broad enough to cover claims against the government for the repayment of moneys alleged to have been received by it in contravention either of the Constitution of the United States or of any law of Congress.

Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; Medbury v. United States, 173 U. S. 492, 497, 43 L. ed. 779, 782, 19 Sup. Ct. Rep. 503; Christie-Street Commission Co. v. United States, 69 C. C. A. 464, 136 Fed. 326; United States v. Shipley, 116 C. C. A. 627, 197 Fed. 265.

A statute remedial in its character, and relating to the law of procedure, is to be liberally construed with reference to the purpose of its enactment.

Bechtel v. United States, 101 U. S. 597, 25 L. ed. 1019.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit under the judicial code of March 3, 1911, chap. 231, § 24, ¶ 20, 36 Stat. at L. 1087, Comp. Stat. 1913, § 968, formerly the Tucker act of March 3, 1887, chap. 359, §§ 1, 2, 24 Stat. at L. 505, to recover the amount of taxes paid under protest. It presents two questions: Whether the district court, sitting as a court of claims, had jurisdiction of this case; and whether the claimant, the defendant in error, was "engaged in business" or "doing business" within the meaning of the corporation tax law of August 5, 1909, chap. 6, § 38, 36 Stat. at L. 11, 112, Comp. Stat. 1913, § 6300. The district court asserted its jurisdiction and

gave judgment for the claimant. 198 Fed. 242.

The facts do not need lengthy statement. The Emery, Bird, Thayer Dry Goods Company, a business corporation of Kansas City, Missouri, occupied certain lands partly hired and partly owned by it, for the purposes of its business. Eighteen months before the passage of the corporation tax law its members decided that the claimant should be organized, and it was, for the purpose of acquiring the Dry Goods Company's lands and of letting the same to the Dry Goods Company, the latter having [31] the management of the property and assuming the responsibilities in respect of it. The only business done by the claimant was to keep up its corporate organization and to collect and distribute the rent received from its single lessee; and the court found as a fact that it was not doing business within the statute, subject, of course, to the question whether the activities stated constituted such doing business as matter of law. The chartered powers of the claimant included performing and enforcing the performance of the respective covenants in the leases taken over and the sale of the property or any part of it upon the vote of not less than two thirds of the stockholders, who were very nearly the same as those of the Dry Goods Company. It also covenanted to rebuild in case the buildings were destroyed. But there has been no occasion to perform any of these undertakings. The taxes in question were paid under duress and protest, and were turned over by the collector to the United States, which still retains them. A claim to have the taxes refunded was submitted in due form to the collector of internal revenue, but repayment was denied.

The objection to the jurisdiction pressed by the government is that the only remedy is a suit against the collector. As the United States has received and keeps the money, and would indemnify the collector if he had to pay (Rev. Stat. § 3220, Comp. Stat. 1913, § 5944, the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that "all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable," etc., are extended to this tax (§ 38, 36 Stat. at L. 117, chap. 6), but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the collector for an unjustified collection was given by the common law. The jurisdiction over suits against the United [32] States under § 24 of the Judicial Code extends to "all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress." However gradually the result may have been approached in the earlier cases, it now has become accepted law that claims like the present are "founded upon" the revenue law. The argument that there is a distinction between claims "arising under" (Judicial Code, § 24, first) and those "founded upon" (id. § 24, twentieth) a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye. Dooley v. United States, 182 U. S. 222, 228, 45 L. ed. 1074, 1080, 21 Sup. Ct. Rep. 762; United States v. Hvoslef, March 22, 1915, [237 U. S. 1, ante, 813, 35 Sup. Ct. Rep. 459.] Jurisdiction was taken for granted in United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327, and was upheld in Christie-Street Commission Co. v. United States, 69 C. C. A. 464, 136 Fed. 326; United States v. Hyams, 76 C. C. A. 523, 146 Fed. 15, 18; United States v. Finch, 119 C. C. A. 433, 201 Fed. 95, 97.

Being of opinion that the district court had jurisdiction, we pass to the merits. They also may be disposed of without much discussion. The line lies between Cedar Street Co. v. Park Realty Co. 220 U. S. 107, 170, 55 L. ed. 389, 421, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312, and Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; the latter case being carried perhaps a little farther by McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419. We are of opinion that this case is governed by the last two, and that the decision was right. The question is rather what the corporation is doing that what it could do (228 U. S. 305, 306), but looking even to its powers they are limited very nearly to the necessary incidents of holding a specific tract of land. The possible sale of the whole would be merely the winding up of the corporation. That of a part would signify that the Dry Goods Company did not need it. The claimants' characteristic charter function, and the only one that it was carrying on, was the bare receipt and distribution to its stockholders [33] of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business,

it is hard to imagine how it could be less engaged.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

NEW ORLEANS TAXPAYERS' PROTECTIVE ASSOCIATION et al., Plffs. in Err.,

v.

SEWERAGE & WATER BOARD OF NEW ORLEANS.

(See S. C. Reporter's ed. 33-37.)

Error to state court — Federal question — impairment of contract obligations.

No substantial Federal question which will support a writ of error from the Federal Supreme Court to a state court is presented by the contention that the obligation of the contract between taxpayers and the city of New Orleans, alleged to have been created by the adoption by special election, ordinance, statute, and constitutional amendment, of a proposition for the municipal acquisition of a system of waterworks, and for the construction of a free sewerage system with free water therefor, was impaired by La. Acts 1908, No. 270, making it the duty of the city sewerage and water board to require all inhabited premises in the city to be connected with the mains of the public water system, and to take therefrom at least such water supply as shall be used on said premises for drinking and domestic purposes, exclusive of sewerage, at rates to be fixed.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

[No. 192.]

Argued March 11, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of Louisiana to review a decree which affirmed a decree of the Civil District Court of the Parish of Orleans, in that state, dismissing a suit founded upon the alleged unconstitutionality of a statute and certain ordinances of the municipal sewerage and water board, requiring all inhabited premises in the city to be connected with the mains of the public water system. Dismissed for want of jurisdiction.

See same case below, 132 La. 839, 61 So. 843.

Mr. Charles Louque argued the cause and filed a brief for plaintiffs in error.

Mr. Walter L. Gleason argued the cause, and, with Mr. Isaiah D. Moore, filed a brief for defendant in error.

Memorandum opinion by direction of the court. By Mr. Justice Holmes:

This is a petition to have an act of the Louisiana legislature (1908, No. 270) and ordinances of the respondent board declared unconstitutional as impairing the obligation of a contract between the property taxpayers and the city of New Orleans. The statute makes it the duty of the board to require all inhabited premises in the city to be connected with the mains of the public water system "and to take therefrom at least such water supply as shall be used on said premises for drinking and domestic purposes, exclusive of sewerage, at rates to be fixed." The contract supposed is that the water for drinking and domestic purposes should be free. The constitution of the state, art. 232, forbids taxation above a limit, which has been reached, except for permanent public improvements by vote of the property taxpayers in the place concerned. In this case the taxpayers petitioned the city to levy a special tax of 2 mills per annum for forty-three years for the acquisition of a system of waterworks and purification of the water, and for the construction "of a free sewerage system, with free water therefor." The proposition was adopted by special election, ordinance, statute, and constitutional [37] amendment, and this adoption is relied upon as making a contract to the above effect. Under the rules of the board, 1,000 gallons per quarter are allowed free, for flushing closets, but rates are fixed and charged for water otherwise used. These charges were held to be consistent with the actual contract, if any, by the supreme court of the state.

The argument for the plaintiffs in error is that as all water that goes into the sewers is sewerage after it gets there, the arrangement required that all such water should be free. But the character of the water that is to be free is determined before it reaches the sewer. It is water "therefor,"

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clarke, 51 L. ed. U. S. 619.

—that is, for a free sewerage system; or, in other words, water that is discharged into the sewers for the purpose of insuring the working of a free sewerage system. According to the finding of the supreme court the allowance for that purpose is liberal. The original statute of August 18, 1899, that was ratified by the Constitutional Amendment, itself provided that the board should "have power to fix the rates to be charged private consumers of water. and to collect the same from all persons who use water (except for sewerage purposes only) from the public water supply of the city of New Orleans," etc. § 21. Obviously, drinking or bathing water is not used for sewerage purposes, although it goes into the sewer after it has served its end, whereas water used for flushing closets does go into the sewer for sewerage purposes, simply to make them work. The act of 1908 goes no farther than that of 1899, and there is no ground for invoking the jurisdiction of this court.

Writ dismissed.

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[38] LEWIS E. SMOOT, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 38-42.)

United States — contracts — extra expense.

1. The cost of a duplicate plant erected by a contractor with the United States in order to provide for such increased deliveries per month as were made necessary under his contract because of his previous delay in delivery is properly borne by the contractor.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

United States — contracts — modification — quantity — lost profits.

2. A letter from the government engineer in charge, which, in outlining a general program of work to be done each month by one who has contracted to furnish the filter sand required by the United States for a filtration plant, calls in all for an amount in excess of the quantity approximately stated in the contract, is not a new contract definitely fixing the quantity, so as to entitle the contractor to recover for the lost profits which he would have realized had he been permitted to furnish the quantity called for in the letter, instead of the amount actually required and supplied.

[For other cases, see United States, VI. d, in Digest Sup. Ct. 1908.]

[No. 208.]

Argued March 18 and 19, 1915. Decided April 5, 1915.

APPEAL from the Court of Claims to review a judgment rejecting the claim of a contractor for lost profits and for the cost of erecting a duplicate plant. Affirmed.

See same case below, 48 Ct. Cl. 427.

The facts are stated in the opinion.

Mr. **William G. Johnson** argued the cause and filed a brief for appellant.

Assistant Attorney General **Thompson** argued the cause and filed a brief for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a claim for the profits that would have been realized on sand that the claimant alleges to have been contracted for by the United States, but that the United States refused to receive, and for the cost of additional plant alleged to have been provided for the purpose of furnishing the sand. The court of claims rejected the claim. 48 Ct. Cl. 427. The facts are as follows:

By a contract approved on April 20, 1903, the claimant undertook to furnish for the Washington filtration plant 140,200 cubic yards, more or less, of filter sand, to be deposited in twenty-nine filter beds, at $2.65 per yard. The contract and specifications showed explicitly that the quantities mentioned were approximate only, and in October, 1904, there was a discussion in the claimant's presence as to the probabilities of an increase over the 140,200 yards to meet shrinkage, which had not been taken into account. The delivery began in August, 1904, but the claimant's progress was not satisfactory to the government engineers. By January 3, 1905, 15 of the 29 [40] beds were completed and the engineer in charge wrote to the claimant directing him to complete the deliveries in the 15 beds by placing there before May 15, 70,000 yards in addition to 20,936 yards then in place. The claimant replied, holding out prospects of performance, and saying that he had another plant under way. But on February 17, the total sand in place was 28,231 cubic yards.

On that date the engineer in charge wrote to the claimant saying that he had "laid down a general program of work to be done during each of the months from now on," with the following particulars among others:

"February and March . . . filter sand, complete beds 17, 18, 21, 22, about 19,000 cubic yards.

April . . . filter sand, complete 15, 16, 20, about 18,000 cubic yards.

May . . . filter sand, complete 3, 4, 5, begin 1, 21,000 cubic yards.
June . . . filter sand, complete 1, 2, 9, 14, 21,000 cubic yards.
July . . . filter sand, complete 7, 8, 13, begin 12, 21,000 cubic yards.
August . . . filter sand, complete 10, 11, 12, 6, 21,000 cubic yards.
September . . . filter sand, complete 25, 26, 27, 18,000 cubic yards.
October, filter sand, complete 28, 29, 12,000 cubic yards.

"In the program outlined above the quantity of sand going into each bed has been assumed as 6,000 cubic yards. The depth of sand varies for the different beds, but 6,000 yards is about the average. Three and one-half beds have been indicated as a month's work. In some cases 3½ beds will require more than 21,000 cubic yards of sand, while in others they will require less. In any case the yardage is the item to which especial attention must be paid, and this should in all cases be equal to that indicated in the program. . . . You are required to take notice that the quantities of work, and, unless otherwise ordered, the locations of the same above scheduled for the several months, will be rigorously exacted as a minimum, and any failure on your part to perform in any month the quantity of work stipulated for that month [41] will be considered by me as sufficient cause for the exercise" of several stringent rights,—to go elsewhere, to annul the contract, etc.

This letter is relied upon by the claimant as a contract making definite the amount that was stated only approximately by the original one. It called for 151,000 yards in addition to the 28,231 yards in place, or, in all, 179,231, as against the 140,200, more or less, originally mentioned. The actual amount needed after allowing for shrinkage ultimately was fixed by the engineers at about 157,000 cubic yards, but the claimant was not notified until May 29, when he immediately entered a protest He actually supplied 157,725 yards. The claim is for the net profit upon the 21,506 yards that would have been furnished had the figures of the letter been exact. As to the duplicate plant, it is found that it was erected to provide for such increased deliveries per month as were necessary under the claimant's contract. There is no justification in the finding for the attempt to attribute the second plant to the letter of February 17, and therefore so much of the claim may be dismissed. It is not necessary to consider whether the claimant would fall under the general rule that in contracts for sale and delivery the purchaser is not concerned with the steps that his vendor may take in order to enable himself to perform. United States v. O'Brien, 220 U. S. 321, 327, 55 L. ed. 481, 484, 31 Sup. Ct. Rep. 406; Bacon v. Parker, 137 Mass. 309, 311; or rather under Parish v. United States, 100 U. S. 500, 25 L. ed. 763. We also pass the question whether complete indemnity is not embraced in the claim for profits. Noble v. Ames Mfg. Co. 112 Mass. 492.

The appellant admits that neither claim can be maintained unless the letter quoted bound the United States as an unqualified contract. We agree with the court of claims that it neither purported to modify the formal agreement originally made, nor had that or any effect upon it. The letter was a spur to a tardy contractor and [42] a sketch of what was expected, but it said nothing to indicate that the engineer in charge was attempting to affect the agreement made by his superior, if he could have done so, or if, notwithstanding the reasons given by the court of claims, the claimant could recover for anything but the work actually done in any event. The obviously dominant measure of the sand to be furnished was what was needed for the filters, and the figures in the letter on their face were the engineer's estimate of what would be needed, not an order for those amounts whether needed or not. Brawley v. United States, 96 U. S. 168, 24 L. ed. 622. In that case Mr. Justice Bradley refers to the control of monuments over distances and estimates of quantity, as an analogy. In general, specific or individual marks prevail over generic ones. *Præsentia corporis tollit errorem nominis.* Watts v. Camors, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91. United States v. Harvey Steel Co. 196 U. S. 310, 318, 49 L. ed. 492, 494, 25 Sup. Ct. Rep. 240. In Parish v. United States, supra, the contract to furnish the ice required at certain points named, for armies that were in the field, manifestly referred to no certain objective standard, but could be made definite only by orders. Here no one could have supposed that the United States undertook to purchase more than was needed for its plant, and what was needed only was roughly estimated in round numbers by the engineer, to let the dilatory claimant know what he must be ready to do.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

[43] HENRY HENKEL, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel, and Mamie Henkel, Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 43–52.)

Indians — right of selection — relinquishment to United States.

1. The broad authority conferred upon the Secretary of the Interior by the reclamation act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, Comp. Stat. 1913, § 4700), §§ 7, 10, to acquire for the United States by purchase or condemnation any rights or property necessary in carrying out the provisions of that act, and to perform any and all acts necessary and proper for the purpose of carrying the provisions of that act into effect, empowers him to acquire for the United States by purchase, for a cash consideration and the grant of the right to select other lands, the lands in the Blackfeet Indian Reservation needed for reclamation purposes which were occupied by an Indian family under the agreement of September 28, 1895 (29 Stat. at L. 353), approved by the act of June 10, 1896 (29 Stat. at L. 357, chap. 398), which, while conferring a right of selection upon the Indians, recognized the reserved right of the government, upon making compensation therefor, to use the lands for public improvements.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — property rights — release to United States — minors — power of natural guardian.

2. Minor Indians must be deemed to be bound by the action of their mother in their behalf in relinquishing to the United States for reclamation purposes all their right, title, and interest in land occupied by them with their parents in the Blackfeet Indian Reservation, in view of the practice of the Interior Department to require the interest of minors to be represented by their natural guardians.

[For other cases, see Indians, VIII; Guardian and Ward, II., in Digest Sup. Ct. 1908.]

[No. 142.]

Argued January 20 and 21, 1915. Decided April 5, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Montana in an action in ejectment, brought by the United States to recover lands in an Indian Reservation. Affirmed.

See same case below, 116 C. C. A. 165, 196 Fed. 345.

The facts are stated in the opinion.

Mr. Thomas J. Walsh argued the cause and filed a brief for plaintiffs in error:

The Indian plaintiffs in error had an inchoate right to select the lands as their allotments. They had improved them, presumably with a view to selecting them eventually as their allotments.

Hy-Yu-Tse-Mil-Kin v. Smith, 55 C. C. A. 216, 119 Fed. 114, 194 U. S. 401–414, 48 L. ed. 1039–1046, 24 Sup. Ct. Rep. 676; Waldron v. United States, 143 Fed. 413; Smith v. United States, 142 Fed. 225; Guyett v. McWhirk, 154 Fed. 784; Bonifer v. Smith, 92 C. C. A. 604, 166 Fed. 846; Reynolds v. United States, 98 C. C. A. 220, 174 Fed. 213.

A contract affecting the right of an Indian to his allotment, made in anticipation of his selection, is void equally with one executed after the allotment has been completed.

Beck v. Flournoy Live Stock & Real-Estate Co. 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30.

This right of selection is akin to the preemption right, and such a right has never been held or regarded as either assignable or the subject of a relinquishment. While one in the occupation of public lands, intending to enter them under either the pre-emption or the homestead law, might deliver up the same with his improvements to a purchaser, who, if qualified, might make his entry thereof (Catholic Bishop v. Gibbon, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779), and a note given in payment for the improvements and possession surrendered would be supported by a sufficient consideration (Moore v. McIntosh, 6 Kan. 39; McWilliams v. Bridges, 7 Neb. 419; Tarrance v. Hatfield, 71 Ala. 234; Paxton Cattle Co. v. First Nat. Bank, 21 Neb. 621, 59 Am. Rep. 852, 33 N. W. 271), he cannot transfer the right to enter (Porter v. Bishop, 25 Fla. 749, 6 So. 863), and it needs no argument to establish the proposition that if he refused to surrender possession after having contracted in form to do so, there would be available no means to dispossess him.

May officers of the Federal government devote a portion of an Indian reservation to some government purpose disassociated from that for which the reservation is set apart?

La Breche v. United States not yet officially reported; Leecy v. United States, 111 C. C. A. 254, 190 Fed. 289.

No act general in its character is to be deemed authority to take lands within an Indian reservation for any purpose; because to that extent the general act would operate as a repeal of the special act creating the reservation.

1 Lewis's Sutherland, Stat. Constr. 274.

In entering into the agreement of 1895 the Indians were giving up no rights which they theretofore enjoyed. They were surrendering a portion of the reservation, and

we ought to look for new rights accruing to them rather than the abandonment of those they then enjoyed.

Winters v. United States, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207.

When the Indians conceded the right to construct canals and irrigating ditches across the reservation, they certainly accorded no right, nor can it be conceived that they considered that they conceded any right, to flood unlimited acres of their territory by turning them into reservoirs. If I grant to one a right of way across my land for a ditch, I certainly do not grant the right to turn the whole of it or half of it or any part of it into a reservoir. Such a construction could not be given to the language in question if it appeared in a private grant. Every intendment in construing the instrument in question must be indulged in favor of the Indians by perfectly well settled rules.

Jones v. Meehan, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1.

Assistant Attorney General **Wallace** argued the cause and filed a brief for defendant in error:

The "Indian title" is a mere right of occupancy. The ultimate fee is in the United States.

Johnson v. M'Intosh, 8 Wheat. 543, 585, 5 L. ed. 681, 691; Jones v. Meehan, 175 U. S. 8, 44 L. ed. 52, 20 Sup. Ct. Rep. 1; Caldwell v. Robinson, 59 Fed. 653.

The individual Indian had no interest in any land.

Sizemore v. Brady, 235 U. S. 441, 446, ante, 308, 35 Sup. Ct. Rep. 135; Jones v. Meehan, 175 U. S. 8, 44 L. ed. 52, 20 Sup. Ct. Rep. 1.

Tribal assent is not an essential to the exercise by Congress of the power of primary disposal.

United States v. Alaska Packers' Asso. 79 Fed. 152.

Broad as is the language of the reclamation act, equally broad are the reasons for not narrowing its meaning.

United States v. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728; Jones v. New York Guaranty & I. Co. 101 U. S. 626, 25 L. ed. 1034; Thompson v. New York & H. R. Co. 3 Sandf. Ch. 625; Flint & P. M. R. Co. v. Marine Ins. Co. 71 Fed. 210; Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; The Annie S. Cooper, 48 Fed. 703.

The mother is the head of this Indian family.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 403, 414, 48 L. ed. 1039, 1040, 1046, 24 Sup. Ct. Rep. 676.

The interests of living minors, whether in their own allotments or those inherited, must be relinquished by their natural guardians as such.

38 Land Dec. 45.

Mr. Justice **Day** delivered the opinion of the court:

This suit was an action in ejectment brought by the United States in the United States circuit court for the [44] district of Montana, to recover certain lands in the Blackfeet Indian Reservation. The defendants (now plaintiffs in error) other than Henry Henkel are members of the Piegan Tribe of Indians. Henry Henkel is the husband of Caroline Henkel, and the other defendants to the action are their children. They lived together as a family and occupied the lands in question, upon which they had constructed certain buildings and improvements. On November 5th, 1906, Caroline Henkel, for herself and two daughters, together with her two sons, George Henkel and William Henkel, executed a document addressed to the Commissioner of Indian Affairs, by which, describing themselves as members of the Piegan Tribe of Indians, they undertook to relinquish all claims to lands and buildings then occupied by them on the Blackfeet Indian Reservation, Montana, comprising about 800 acres of land, the lands being situated at the foot of Lower St. Mary lake, and south of Swift Current creek. The conditions of the surrender of the lands for use in connection with the proposed St. Mary reservoir of the United States Reclamation Service were that they should be paid the sum of $7,500 for the improvements on such selections, and be subsequently allowed to select allotments of equal area, or as provided by law, from the unoccupied lands of the Blackfeet Reservation in Montana. Henry Henkel, as husband and father, concurred in the agreement and indorsed his approval thereon.

On February 15th, 1907, the price named in the instrument just referred to, $7,500, was paid to Caroline Henkel, who, for herself and two daughters, and George and William Henkel, for themselves, relinquished to the United States all their right, title, and claim in and to the lands and buildings then occupied by them on the Blackfeet Indian Reservation, Montana, and located at the foot of Lower St. Mary lake, and south of Swift Current creek, and released the United [45] States from all claims for damages to all improvements of whatsoever nature on the land. This receipt and release was also agreed to by the husband, Henry Henkel.

These facts are set up in the complaint, and it is averred that pursuant to the act of Congress of June 17, 1902 (32 Stat. at

L. 388, chap. 1093, Comp. Stat. 1913, § 4700), the government had made investigations of and surveys for an irrigation project which was known as the Milk River Irrigation Project, under and by virtue of which certain lands in the northern part of the state of Montana were to be irrigated; that among other works forming part of the system to be established, a dam was to be built at the foot of the Lower St. Mary lake, by which the lands above mentioned, and now in controversy, were to be flooded, and that the same were necessary for flooding in connection with the reclamation project above referred to.

The defendants answered, admitting the execution and delivery of the instrument above referred to, and the payment of the money, as recited in the release and receipt. They averred that they were all members of the Piegan Tribe of Indians, except Henry Henkel, and had the right as such Indians to be upon the Blackfeet Indian Reservation; that they had settled upon the lands in question more than ten years before the beginning of this suit, which, since a recent survey, were designated by congressional subdivisions, and embraced the land in controversy, and ever since their settlement upon said lands they had occupied the same in common as their home, and since the passage of the act of March 1, 1907 (34 Stat. at L. 1035, chap. 2285), opening the reservation to settlement, they had selected such lands as their allotments under that act, the lands being grazing in character. The answer sets out the selection of each of the defendants entitled to allotments, and it is alleged that each acquiesced in the selection made by the other. The answer then avers that the allotting officers had refused to allot the lands in [46] question to them, but that, under protest, William Henkel, George Henkel, and Lizzie Henkel had been allotted lands elsewhere, which lands they offered to surrender if the lands selected by them should be allotted to them; the refusal to allot such lands, as the answer avers, being based upon the instruments referred to in the complaint. The answer averred that the lands were at all times since the execution of these instruments worth more than the price offered by the government, which sum the defendants offered to return.

To this answer a demurrer was sustained by the court, and the plaintiffs in error electing to stand upon the answer, judgment was rendered accordingly, awarding to the United States the possession of the premises. The case was taken to the circuit court of appeals for the ninth circuit, where the judgment of the lower court was affirmed. (116 C. C. A. 165, 196 Fed. 345.) The case is now here upon writ of error.

The contention of the plaintiffs in error, defendants below, is that no statute of the United States has conferred authority upon the government or its officers to acquire the lands described by the relinquishment from the Henkels, as above set forth. Such action, it is contended, would amount to an act of bad faith upon the part of the government toward these Indians, in view of their established rights in these lands; and to permit the reclamation statute of 1902 to have such effect, it is insisted, would be virtually to permit it to repeal previous acts of Congress disposing of these lands for the benefit of the Indians.

A consideration of these matters requires some examination of the previous status of the Indians and what Congress has undertaken to do by legislation in their behalf.

By the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), as amended February 28, 1891 (26 Stat. at L. 794, chap. 383, Comp. Stat. 1913, § 4195), authority was given to the President, as to any reservation [47] which he should consider advantageous for agricultural or grazing purposes, to allot, after survey thereof, "to each Indian located thereon one eighth of a section of land;" and if the lands allotted were valuable for grazing purposes only, to allot to each a quarter section of land. Allotments, which were to be set apart under the provisions of the act were to be selected by the Indians, heads of families selecting for their minor children, in such manner as to embrace the improvements of the Indians making the selection. Upon the approval of the allotments by the Secretary of the Interior, patents were to issue therefor, in the name of the allottees, which patents should declare that the United States would hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indians to whom allotted, and that conveyances of land set apart and allotted as provided in the statute, or any contract concerning the same, before the expiration of the time above mentioned, should be null and void. In that act it was provided that nothing therein contained should affect the power of Congress to grant the right of way through any lands granted to an Indian for railroads, or other highways or telegraph lines, for the public use, or to condemn such lands to public uses upon making just compensation.

On September 28, 1895, an agreement was made with the Indians (29 Stat. at L. 353) which was approved by the act of June 10, 1896 (29 Stat. at L. 357, chap. 398). Article 5 of that agreement provides as follows: "Since the situation of the Black-

feet Reservation renders it wholly unfit for agriculture, and since these Indians have shown within the past four years that they can successfully raise horned cattle, and there is every probability that they will become self-supporting by attention to this industry, it is agreed that during the existence of this agreement no allotments of land in [48] severalty shall be made to them, but that this whole reservation shall continue to be held by these Indians as a communal grazing tract upon which their herds may feed undisturbed; and that after the expiration of this agreement the lands shall continue to be held until such time as a majority of the adult males of the tribe shall request in writing that allotment in severalty shall be made of their lands:" provided, however,

"That any member of the tribe may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act, and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of such description shall give the said members of the tribe the right to take such land when allotments of the land in severalty shall be made."

While the Henkel family had occupied this 800-acre tract, it does not appear that they had filed a description of the land and improvements with the agent, so as to give them the right to take such land when allotment of the same should be made. Nevertheless, they would have a strong equity for recognition, in view of their settlement upon the land and construction of improvements thereon, and but for the relinquishment relied upon in this case, they might perfect their right to the allotment. It is to be noted, however, that this agreement, in article VII., contains an important recognition of a reserved right of the government to use the lands upon compensation being made therefor, for certain public improvements. As it is therein provided, "whenever, in the opinion of the President, the public interests require the construction of railroads or other highways, telegraph or telephone lines, canals and irrigating ditches, through any portion of this reservation, right of way shall be and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions [49] as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians."

While the plaintiffs in error were thus occupying the lands under this agreement and statute, the reclamation act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, Comp. Stat. 1913, § 4700), was passed. That act outlines a comprehensive reclamation scheme, and provides for the examination and survey of lands and for construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semi-arid lands. Section 7 of that act provides—

"That where in carrying out the provisions of this act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation."

Section 10 of the same act provides—

"The Secretary of the Interior is hereby authorized to perform any and all acts . . . necessary and proper for the purpose of carrying the provisions of this act into . . . effect."

In 1902, preliminary surveys for the Milk River Reclamation Project were begun by the Reclamation Service, and the boundaries of the St. Mary dam and its right of way for flooding area were outlined. On February 28, 1903, the Secretary of the Interior, on recommendation of the director of the service, withdrew, under the terms of the reclamation act, a strip of land ¼ mile wide around lower St. Mary lake and on each side of the river, after which construction was authorized and a large amount of work has since been done.

The authority of the Congress of the United States to devote these lands to irrigation purposes is unquestioned. As a matter of fact, it might, if it saw fit, remove the Indians therefrom and devote the land to such uses. [50] Recognizing the injustice of arbitrary appropriations to other uses, no effort has been made to take these lands without compensation to the Indians for the improvements which they have made, and they have been given the right to select other lands in place of those released. The reclamation projects undertaken by the government are very extensive and cover many states; and they must involve in their construction the flooding of lands in connection with dams designed to hold water for such purposes; and must necessarily include much territory which is included in Indian reservations. This situation was of course well known to Congress when it passed the reclamation act, and we cannot doubt, in view of the broad authority conferred by §§ 7 and 10, above quoted, that it was the purpose of Congress to give the Secretary of the Interior the right to acquire such rights as are here involved, when necessary for reclamation purposes. In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for

that purpose, and to acquire the same either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe it was the intention of Congress, because of the Indians' right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the reclamation projects which it was evidently the purpose of Congress to authorize and promote. The Secretary of the Interior, in interpreting this act, dealt fairly with the Indians in so far as this record shows, paid them for the improvements they had put upon the lands, and gave them the right to select other lands which might be open to allotment, of equal area, as provided by law, from the unoccupied lands [51] of the Blackfeet Indian Reservation. In so doing, we think he acted within his authority, and was executing the purposes intended by the act of Congress to which we have referred.

The circuit court of appeals in its decision laid emphasis upon the case of Williams v. First Nat. Bank, 216 U. S. 582, 54 L. ed. 625, 30 Sup. Ct. Rep. 441, in which this court recognized the right of one Indian to surrender and relinquish to another Indian a preference right to an allotment of a tract of land. In that case it was held that one Indian might sell his improvements and holdings to another Indian for allotment, and lay his own on other land which he might find vacant, or which he might, in turn, purchase from another Indian, and the circuit court of appeals held that, this being so, as a matter of course, and for stronger reasons, an Indian might relinquish his rights to the United States, and that restrictions had been placed upon the power of the Indians to alienate their lands or convey their rights of possession only for their protection, and not for the purpose of restricting their right to deal with the United States or to relinquish their rights to the government, citing Lykins v. McGrath, 184 U. S. 169, 46 L. ed. 485, 22 Sup. Ct. Rep. 450, and Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1. Without questioning the correctness of this reasoning, we think the purpose of the United States to acquire any property necessary for the reclamation project embraced such transactions as the Secretary had in this case with the Indians, and the action which he took under the authority conferred by that act wholly justified all that was done in the premises.

As to the contention that the daughters for whom the mother signed are not bound by the release: The mother undertook to act for them as minors, and there is nothing to indicate that they were not such, as there is no allegation in the answer to which the demurrer was sustained that they were adults and therefore capable of acting for themselves. The references to the regulations of the [52] Interior Department, which are called to our attention by the government, show that that Department has uniformly required the interest of minors to be represented by the natural guardian, which in this case was the mother. There is no court to which they could have applied for the judicial appointment of a guardian, and we see no reason to question the legality of the practice of the Department in this respect. A communication from the Acting Commissioner of Indian Affairs, attached to the government's brief, declares that that office and the Interior Department have uniformly held that the natural guardian could execute valid relinquishments in behalf of minor children, and we see no reason why this authority should be questioned.

We reach the conclusion that the Court of Appeals did not err in affirming the judgment of the Circuit Court, and its judgment is accordingly affirmed.

Mr. Justice McReynolds took no part in this decision.

S. J. SLIGH, Plff. in Err.,
v.
JAMES A. KIRKWOOD, as Sheriff of Orange County, Florida.

(See S. C. Reporter's ed. 52-62.)

Commerce — state regulation — police power — congressional inaction — shipment of immature fruit.

1. The delivery for shipment in interstate commerce of citrus fruits which are

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NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On power of state to prohibit exportation of unwholesome food—see note to State v. Peet, 14 L.R.A. (N.S.) 677.

On judicial notice, generally—see note to Olive v. State, 4 L.R.A. 33.

immature and unfit for consumption may, until Congress exercises its supreme authority over the subject, be made a criminal offense, as is done by Fla. Laws 1911, chap. 6236, such legislation being a valid exercise of the police power of the state, and only incidentally and indirectly affecting interstate commerce.

[For other cases, see Commerce, III. b; I. c, in Digest Sup. Ct. 1908.]

Evidence — judicial notice — state industries.

2. The Federal Supreme Court may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida.

[For other cases, see Evidence, I. e, in Digest Sup. Ct. 1908.]

[No. 185.]

Argued March 9 and 10, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of Florida to review a judgment which affirmed a judgment of the Circuit Court of Orange County, in that state, refusing relief by habeas corpus to a person convicted in the Criminal Court of Record in that County of having delivered immature fruit for shipment in interstate commerce. Affirmed.

See same case below, 65 Fla. 123, 61 So. 185.

The facts are stated in the opinion.

Mr. **Charles B. Robinson** argued the cause, and, with Mr. E. J. L'Engle, filed a brief for plaintiff in error:

The act in question in this cause was not a justifiable exercise by the state of its police power.

Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Tiedeman, Pol. Powers, p. 4; 31 Cyc. 902; Barrett v. New York, 232 U. S. 14, 31, 58 L. ed. 483, 490, 34 Sup. Ct. Rep. 203; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 79, 58 L. ed. 857, 859, 34 Sup. Ct. Rep. 564; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The provision of the act of the Florida legislature under consideration here (in so far as the same applies to shipments of citrus fruits beyond the limits of the state of Florida) seeks to limit, regulate, and control interstate commerce, and is directly in conflict with the Constitution of the United States and the general legislation of Congress enacted to give effect to the constitutional provision.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 396, 57 L. ed. 1511, 1540, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Bowman v. Chicago & N. W. R. Co. 125 U. S. 479, 31 L. ed. 704, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; State v. Peet, 80 Vt. 449, 14 L.R.A.(N.S.) 677, 130 Am. St. Rep. 998, 68 Atl. 661.

Mr. **Charles B. Parkhill** submitted the cause for defendant in error:

The power of the state to impose restraints upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, not directly restrained by the Constitution of the United States, and essentially exclusive.

Re Rahrer, 140 U. S. 545, 547, 35 L. ed. 572, 573, 11 Sup. Ct. Rep. 865.

The regulation of food stuff has in view the protection of health.

Freund, Pol. Power, chap. 28, 232

The term "provisions" means "food." Oranges are highly nutritious and are food.

State v. Angelo, 71 N. H. 224, 51 Atl. 905; 6 Words & Phrases, 5754.

Any substance which, taken into the body, is capable of sustaining or nourishing the living, is food.

13 Am. & Eng. Enc. Law, 2d ed. 729; 3 Words & Phrases, 2856; Arbuckle v. Blackburn, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616.

The term "fruit" includes oranges.

Humphreys v. Union Ins. Co. 3 Mason, 429, Fed. Cas. No. 6,871; 4 Words & Phrases, 2994.

One of the informations filed against the plaintiff in error covers citrus fruits which are not only immature, but otherwise unfit for consumption. Clearly this statute is designed to protect the public health.

People v. Cipperly, 101 N. Y. 634, 4 N. E. 107.

This statute does not seek to limit, regulate, and control interstate commerce.

17 Am. & Eng. Enc. Law, 2d ed. 67, 68; Turner v. Maryland, 107 U. S. 38, 52, 27 L. ed. 370, 376, 2 Sup. Ct. Rep. 44; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; State v. Harrub, 95 Ala. 176, 15 L.R.A. 761, 4 Inters. Com. Rep. 99, 36 Am. St. Rep. 195, 10 So. 752; Com. v. Savage, 155 Mass. 278, 29 N. E. 468; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep.

715; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity or the public welfare, as well as those designed to promote the public safety or the public health.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047.

Where a law is for the protection of the life, liberty, and prosperity or the general welfare, there is no limitation upon the power of the legislature except as found in the Constitution.

Hawthorn v. People, 109 Ill. 302, 50 Am. Am. Rep. 610.

The police power extends to regulations to preserve the reputation of the states in foreign markets.

Freund, Pol. Power, § 276; Clintsman v. Northrop, 8 Cow. 46.

[57] Mr. Justice Day delivered the opinion of the court:

A statute of the state of Florida undertakes to make it unlawful for any one to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.[1]

Plaintiff in error, S. J. Sligh, was charged by information containing three counts in the criminal court of record in Orange county, Florida, with violation of this statute. One of the counts charged that Sligh delivered to an agent of the Seaboard Air Line Railway Company, a common carrier, for shipment to Winecoff & Adams, Birmingham, Alabama, one car of oranges, which were citrus fruits, then and there immature and unfit for consumption. Upon petition for writ of habeas corpus in the circuit court of Florida for Orange county, the court refused to order the release of Sligh, and remanded him to the custody of the sheriff. Upon writ of error to the supreme court of Florida, that judgment was affirmed (65 Fla. 123, 61 So. 185), and the case is brought here.

The single question is: Was it within the authority of the state of Florida to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits,—oranges in this case,—then and there immature and unfit for consumption?

It will be observed that the oranges must not only be immature, but they must be in such condition as renders [58] them unfit for consumption; that is, giving the words their ordinary signification, unfit to be used for food. Of course, fruits of this character, in that condition, may be deleterious to the public health, and, in the public interest, it may be highly desirable to prevent their shipment and sale. Not disputing this, the contention of the plaintiff in error is that the statute contravenes the Federal Constitution in that the legislature has undertaken to pass a law beyond the power of the state, because of the exclusive control of Congress over commerce among the states, under the Federal Constitution.

That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the state, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject: while this is true, this court from the beginning has recognized that there may be legitimate action by the state in the matter of local regulation, which the state may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

While this proposition seems to be conceded, and the competency of the state to provide local measures in the interest of the safety and welfare of the people is not doubted, although such regulations incidentally and indirectly involve interstate commerce, the contention is that this statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other states who may receive the fruits from Florida in a condition unfit for consumption; and however commendable it may be to protect the health of such foreign peoples, such purpose is not within the police power of the state.

The limitations upon the police power are hard to define, [59] and its far-reaching

[1] "Section 1. That it shall be unlawful for anyone to sell, offer for sale, ship or deliver for shipment any citrus fruits which are immature or otherwise unfit for consumption, and for anyone to receive any such fruits under a contract of sale, or for the purpose of sale, or of offering for sale or for shipment or delivery for shipment. This section shall not apply to sales or contracts for sale of citrus fruits on the trees under this section; nor shall it apply to common carriers or their agents who are not interested in such fruits, and who are merely receiving the same for transportation." [Fla. Sess. Laws 1911, p. 205, chap. 6236.]

scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the state. New York v. Miln, 11 Pet. 102, 139, 9 L. ed. 648, 662. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. In one of the latest utterances of this court upon the subject, it was said: "Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. . . . And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.'" Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192.

The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, [60] it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. "Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution." Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 489, 31 L. ed. 700, 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state. In Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, a conviction was sustained of one who was charged with having in his possession game birds, killed within the state, with the intention of procuring transportation of the same beyond state limits. This law was attacked upon the ground that it was a direct attempt to regulate commerce among the states. After discussing the peculiar nature of such property, and the power of the state over it, this court said (p. 534): "Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23." In New York ex rel. Silz v. [61] Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10, it was held that the state might punish the sale of imported game during the closed season in New York, notwithstanding such game was imported from abroad, and was thus beyond the control of the state, the law being sustained upon the ground that, while foreign commerce was incidentally affected, the state might prohibit the sale of such game in order to protect local game during the closed season; and to make such regulations effective required the prohibition of the sale of all game of that kind.

So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the state from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the

police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation.

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be [62] said that this legislation has no reasonable relation to the accomplishment of that purpose.

As to the suggestion that the shipment of such fruit may be legitimately made for commercial purposes, for the purpose of making wine, citric acid, and possibly other articles, it is sufficient to say that this case does not present any such state of facts, and of course the constitutional objection must be considered in view of the case made before the court, which was a delivery for shipment of oranges so immature as to be unfit for consumption. Whether such a case, as supposed, of shipment for commercial purposes, would be within the statute, would be primarily for the state court to determine, and it is not for us to say, as no such case is here presented.

It is pointed out in the opinion of the supreme court of Florida, and we repeat here, that no act of Congress has been called to our attention undertaking to regulate shipments of this character, which would be contravened by the act in question. As the Florida court says, the sixth subdivision of the food and drugs act, if citrus fruits should be held to be within the prohibitions against vegetable substances, includes only such as are in whole or in part filthy, decomposed, or putrid. Green or immature fruit, equally deleterious to health, does not seem to be within the Federal act. Therefore until Congress does legislate upon the subject, the state is free to enter the field. Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

In the Vermont case, referred to by counsel for plaintiff in error (State v. Peet, 80 Vt. 449, 14 L.R.A.(N.S.) 677, 130 Am. St. Rep. 998, 68 Atl. 661), the act made it unlawful to ship without the state veal less than four weeks old when killed, and it was held to run counter to the Federal act and regulation upon the same subject.

We find no error in the judgment of the Supreme Court of Florida, and it is affirmed.

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[63] STATE OF SOUTH CAROLINA EX RELATIONE PHOENIX MUTUAL LIFE INSURANCE COMPANY, Plff. in Err.,

v.

FITZ H. McMASTER, as Insurance Commissioner of the State of South Carolina. (No. 195.)

STATE OF SOUTH CAROLINA EX RELATIONE LOUIS SHERFESEE and Frank F. Covington, Plffs. in Err.,

v.

FITZ H. McMASTER, as Insurance Commissioner of the State of South Carolina. (No. 196.)

(See S. C. Reporter's ed. 63-74.)

Constitutional law — due process of law — exclusion of foreign insurance company.

1. A foreign life insurance company is not denied the due process of law guaranteed by U. S. Const. 14th Amend., because a state insurance commissioner, in the exercise of his discretion under S. C act March 8, 1910, § 13, to determine which applicants for the privilege of doing insurance business in the state shall deposit an approved bond, and which shall deposit approved securities, has refused to accept the bond of a surety company tendered with the insurance company's application for a license, unless it shall invest one fourth of

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NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On recognition or exclusion of foreign corporation—see note to Cone Export & Commission Co. v. Poole, 24 L.R.A. 289.

On exclusion of foreign corporation as interference with interstate commerce—see note to Kindel v. Beck & P. Lithographing Co. 24 L.R.A. 311.

As to restrictions on business of foreign insurance companies—see note to State ex rel. Richards v. Ackerman, 24 L.R.A. 298.

its reserve on South Carolina policies in approved South Carolina securities.

[For other cases, see Constitutional Law, IV. b, 2, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — excluding foreign insurance company.

2. A foreign life insurance company which has less than one fourth of its reserve on South Carolina policies invested in South Carolina securities, and has not indicated any purpose or intention of acquiring more of such securities, is not denied the equal protection of the laws, contrary to U. S. Const. 14th Amend., because the state insurance commissioner, in the exercise of his discretion under S. C. act March 8, 1910, § 13, to determine which applicants for the privilege of doing insurance business in the state shall deposit an approved bond and which shall deposit approved securities, has refused to accept the bond of a surety company tendered with the insurance company's application for a license, unless it shall invest at least one fourth of its reserve on South Carolina policies in South Carolina securities, although he may have accepted a surety company's bond tendered with the application of another foreign life insurance company which had not invested in South Carolina securities that percentage of its reserve on South Carolina policies, where the latter company had real estate mortgage loans in the state duly approved and awaiting investment, considerably in excess of that amount.

[For other cases, see Constitutional Law, 254-265, in Digest Sup. Ct. 1908.]

[Nos. 195 and 196.]

Argued March 12, 1915. Decided April 5, 1915.

TWO WRITS OF ERROR to the Supreme Court of the State of South Carolina to review judgments refusing a writ of mandamus to compel the state insurance commissioner to issue a license to a foreign life insurance company to do business in the state. Affirmed.

See same case below, 94 S. C. 379, 77 S. E. 401.

The facts are stated in the opinion.

Mr. T. Moultrie Mordecai argued the cause and filed a brief for plaintiff in error:

Classification, in its very definition, implies equality of the individuals of each class. Discrimination between individuals of the same class is a denial of the equal protection of the laws, and a deprivation of property without due process of law. That the same means and methods shall be applied impartially to all the constituents of each class, and that no greater burdens shall be laid upon one than are laid upon another in the same calling, are the keys for the interpretation of the 14th Amendment, used by this court in numerous cases.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Kentucky R. Tax Cases, 115 U. S. 337, 29 L. ed. 419, 6 Sup. Ct. Rep. 57; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Moore v. Missouri, 159 U. S. 678, 40 L. ed. 303, 16 Sup. Ct. Rep. 179; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Citizens' Teleph. Co. v. Fuller, 229 U. S. 332, 57 L. ed. 1214, 33 Sup. Ct. Rep. 833; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69.

A corollary of the provisions of the 14th Amendment, as clear as the rule itself, is that the distinctions upon which the classification is based must be reasonable, and not arbitrary.

Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

It would have been competent for the defendant in error, had the statute under which he acted so authorized, to have determined upon what differences a distinction should be made for the purpose of classification between individuals otherwise having resemblances; but such a classification must be based upon reason and sound justice, and the power, if so given, cannot be arbitrarily exercised.

International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859.

In Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, the court held that the assessment by a state board of

equalization of the franchises and other property of one corporation at a different rate and by a different method from that employed for other corporations of the same class for the same year was a denial of the due process of law and the equal protection of the laws secured by the 14th Amendment.

Mr. F. H. Dominick argued the cause, and Mr. Thomas H. Peeples, Attorney General of South Carolina, filed a brief for defendant in error:

The insurance business cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972.

A foreign insurance company is not within the jurisdiction of the state of South Carolina until it has complied with the laws of the state as to the payment of license fees, taxes, and the deposit of securities or the giving of a bond. A company having complied with the law and received a license for a year is within the state for that year, but it is within the power of the state to change the conditions of admission at any time as to the future, and if it makes such a change for the future, the foreign corporation is not within the state after the expiration of the year for which it was licensed, until it has complied with such changed conditions.

Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

Whenever by the laws of a state or by state authority a tax assessment or other burden is imposed upon property for the public use, whether it be of a whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person of such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Kentucky R. Tax Cases, 115 U. S. 337, 29 L. ed. 419, 6 Sup. Ct. Rep. 57.

Neither the 14th Amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes called the police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Mr. Justice Day delivered the opinion of the court:

These cases involve the same questions, and, being practically one proceeding, may be disposed of together. They arise out of an application to the supreme court of the state of South Carolina for a writ of mandamus, requiring the respondent, Fitz H. McMaster, as insurance commissioner of the state of South Carolina, to issue to the Phœnix Mutual Life Insurance Company, a corporation of the state of Connecticut (hereinafter called the Phœnix Company), a license to do business in South Carolina as a life insurance company for the year beginning April 1st, 1912. The supreme court of the state refused to issue the writ (94 S. C. 370, 382, 77 S. E. 401), and the case is brought here, because of alleged deprivation of rights under the 14th Amendment to the Federal Constitution.

By the act of March 8, 1910, 26 Stat. at L. (South Carolina) 774, § 13, it was provided:

"Before licensing any insurance company to do business in this state, the insurance commissioner shall require each such company to deposit with him an approved bond or approved securities, in the discretion of the commissioner, as follows: Each legal reserve life insurance company, $20,000; each fire, accident, or casualty or surety insurance company, or any company not herein specified, $10,000: Provided, that domestic industrial insurance companies shall in no case [68] be required to deposit more than the legal reserve on their policies, but not less than $1,000, which said deposit may be made at the rate of $500 a year, on April 1st, of each year, until the whole be deposited; each domestic

mutual life insurance company doing business on a recognized table of mortality with interest assumption not higher than 4 per centum per annum, not less than $3,000. But each such domestic company shall keep on deposit with the insurance commissioner at all times, not less than the legal reserve on all of its outstanding policies: Provided, further, that the terms of this section shall not apply to domestic mutual assessment companies not doing business in more than two adjoining counties. If a bond be given, it shall be conditioned to pay any judgment entered up against any such company in any court of competent jurisdiction in this state, and such judgment shall be a lien upon the bond or securities. In case a bond is given, the judgment creditor shall have the right to bring suit on said bond for the satisfaction of the judgment in the county in which the judgment is received."

Under authority of this act, the insurance commissioner notified insurance companies that, exercising a discretion reposed in him to require such companies to make deposits with the insurance commissioner or accept a surety bond, beginning April 1st, 1912, companies which had not invested at least one fourth of their reserve in South Carolina in securities named in the act of 1910 would be required to deposit South Carolina securities with the department. From such companies no surety bond would be accepted. From companies which had invested at least one fourth of their reserve on South Carolina policies in securities of that state, a surety bond would be accepted. The letter also stated that the department would receive on deposit South Carolina state, county, or municipal bonds; first-mortgage bonds of real estate in the state; [69] first-mortgage bonds of solvent domestic corporations, whose property was situate entirely within the state; or time certificates of deposit in banks of the state.

The Phœnix Company applied for a license for the year beginning April 1st. 1912, and inclosed its check for the license fee and a surety bond in the sum of $20,000. The insurance commissioner refused the license, and declined to issue the same unless the Phœnix Company would make a deposit with him of securities acceptable to him, in the sum of $20,000, in bonds of the state of South Carolina, of any county, state, or town of the state of South Carolina, or first-mortgage bonds on real estate in the state of South Carolina, or first-mortgage bonds of solvent domestic corporations, whose property was situated entirely within that state, or any property situated in that state and taxable therein, or time certificates of deposit in banks of that state.

Afterwards the commissioner notified the surety company that he would not accept a bond from the Phœnix Company unless the latter would furnish him with an affidavit showing that at least one fourth of its reserve on South Carolina policies had been invested in the securities named in the act of 1910. The insurance company declined to make such affidavit, or to make such investments, on the ground that the same was not required by any law of the state of South Carolina. It is the contention of the insurance company that the action of the commissioner in undertaking to exact from it as a condition of receiving a license the investment of at least one fourth of its reserves in the securities as required by the commissioner, and in accepting from other insurance companies, which had complied with the requirement of the commissioner, the bond of a surety company, and issuing to them a license, was discriminatory. And the Phoenix Company particularly insisted that the action of the commissioner in licensing the Mutual Benefit [70] Life Insurance Company of New Jersey on giving a surety company bond, without that company having invested 25 per cent of its reserve in securities demanded by the commissioner, discriminated against the plaintiff in error, which action, it was contended, deprived the company of its property without due process of law, and violated the equal protection clause of the 14th Amendment to the Constitution of the United States.

The supreme court of the state of South Carolina put its decision denying the writ on the ground that the petitioner had failed to deposit with the insurance commissioner any securities, or to comply with the law and the ruling of the commissioner, and that it stood in no position to raise the question involved; and dealing with the equal protection of the law, the court held that the commissioner, under the act of 1910, was given broad authority to examine into the safety and solvency of applicants for the privilege of doing business within the state, with reference to their dealings and the conduct of their business; that the statute gave him authority to determine whether the applicant had the necessary qualifications for doing business within the state; and that the commissioner had the right to determine whether the particular applicant should deposit bond or securities. In this way only could the discretionary power conferred upon the commissioner be exercised, and the court therefore concluded that there was no denial of the equal protection of the laws.

The case is presented here only in its aspect of deprivation of alleged rights secured by the Federal Constitution. We fail to see any substantial merit in the contention that the applicant has been deprived of due process of law in the exercise of the discretion given to the commissioner to accept or reject applicants for the insurance privilege under the laws of the state, and in requiring some to give bonds and others to deposit securities, after having [71] investigated their condition and methods of doing business.

The main contention, pressed in argument, and upon which the reversal of the judgment of the supreme court of South Carolina is contended for, is based upon the equal protection clause of the 14th Amendment because of the alleged discriminatory action of the commissioner in dealing with different insurance companies, and particularly with the case of the Mutual Benefit Life Insurance Company of New Jersey. An inspection of the record, however, shows a different condition of facts with reference to that company from that shown as to the Phœnix Company. While it is true that both are life insurance companies, and doubtless solvent and sound in their business methods, and while it appears that the Mutual Benefit Life Insurance Company did not have, actually invested in South Carolina securities, one fourth of its reserve on South Carolina policies, it did have, on April 1st, 1912, real estate mortgage loans in the state, duly approved, and awaiting investment, considerably in excess of one fourth of its reserve on South Carolina policies; while the Phœnix Company, out of its reserve on South Carolina policies of $375,000, had only $10,350 of investments in the form of South Carolina securities, and did not indicate any purpose or intention of acquiring more.

Furthermore, the Phœnix Company is a foreign corporation, whose license to do business in the state of South Carolina would expire upon the 1st day of April, 1912, and, therefore, it was within the power of the state, so long as it did not impose upon the company as a condition of doing business within the state any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the state. This principle has been often affirmed by the decisions of this court, and the insurance company, being within that [72] class of companies not doing an interstate business, the state might, in the exercise of its lawful authority, exclude it from doing business within the state, so long as no rights conferred by the Constitution and laws of the United States were destroyed or abridged. See Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 332, 333, 58 L. ed. 621, 626, 627, L.R.A. —, —, 34 Sup. Ct. Rep. 333, and cases in this court therein cited.

Assuming, without deciding, that the Phœnix Company occupied such attitude in the state of South Carolina as to entitle it to claim the benefit of the equal protection clause of the 14th Amendment, we are of opinion that upon this record no such facts are shown as would lead to the conclusion that the action of the insurance commissioner in this case amounted to a deprivation of the equal protection of the law. The state court put its decision, as we have seen, upon the ground that under the authority given in the statute to the insurance commissioner to license one company and reject another, the exercise of such statutory authority in good faith would not make his action in any given case obnoxious to the protection of the rule of equality prescribed by the Constitution.

The equal protection of the laws, as this court has frequently decided, means subjection to equal laws applying alike to all in the same situation, or, as expressed by Mr. Justice Field, speaking for this court in Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357,—a case much relied upon by the plaintiffs in error,—equal protection of laws means "that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights. . . . That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition." In this general definition, the court recognizes, as it always has, that what [73] the equal protection of the law requires is equality of burdens upon those in like situation or condition. It has always been held consistent with this general requirement to permit the states to classify the subjects of legislation, and make differences of regulation where substantial differences of condition exist.

In this case, when the insurance commissioner was under examination concerning the differences between the treatment of the Mutual Benefit Life Insurance Company and the Phœnix Company, after speaking of the action of the Mutual Benefit Company in making large loans in [illegible] state of South Carolina, when inq[illegible] of as to whether approved loans

Mutual Benefit Company would bring property into the state of South Carolina, against which local policy holders could enforce their claims, the commissioner answered that it was not a question of added safety, but to have within the state of South Carolina actual things that could be levied upon in case of suit. These large loans of the Mutual Benefit Company within the state of South Carolina would not only bring property into that state, which might be reached through the local courts, but would evidence a purpose in the company to remain in the state in a permanent way,—a fact which was entitled to significance in determining the matter of licensing the company to do business.

The supreme court of South Carolina has sustained the act as giving authority, so far as the state is concerned, to the insurance commissioner to take the action which he did concerning the withholding of a license to the Phœnix Company and the granting of licenses to other companies, notably the Mutual Benefit Life Insurance Company of New Jersey. We are only concerned with the question whether this conduct of the state authority was so arbitrary and discriminatory in its character as to amount to a deprivation of the equal protection of the [74] laws, within the meaning of the Federal Constitution. We think the action here challenged was based upon real and substantial differences, and was not that merely arbitrary classification which this court has condemned because of the 14th Amendment.

We find no error in the judgment of the Supreme Court of the State of South Carolina, and the same is affirmed.

UNITED STATES OF AMERICA, Appt.,
v.
CHARLES F. NOBLE, John M. Cooper,[1] A. J. Thompson, A. S. Thompson, and V. E. Thompson.

(See S. C. Reporter's ed. 74–84.)

Indians — restrictions on alienation — assignments of rents and royalties.

1. Assignments of rents and royalties to accrue under certain mining leases of a Quapaw Indian allotment were not permitted by the provision of the act of June 7, 1897 (30 Stat. at L. 62, chap. 3), modifying the general restrictions on alienation made by the act of March 2, 1895 (28 Stat. at L. 876, chap. 188), by authorizing Quapaw Indian allottees to lease their lands for a term not exceeding ten years for mining or business purposes.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — restrictions on alienation — overlapping leases.

2. The authority granted to Quapaw Indian allottees by the provision of the act of June 7, 1897 (30 Stat. at L. 62, chap. 3), modifying the general restrictions on alienation made by the act of March 2, 1895 (28 Stat. at L. 876, chap. 188), to lease their lands for a term not exceeding ten years for mining or business purposes, does not empower such an allottee to make a ten-year mining lease subject to a valid existing ten-year mining lease of the same property, which still has several years to run.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 127.]

Argued March 1 and 2, 1915. Decided April 5, 1915.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Oklahoma, dismissing a suit to set aside certain mining leases of an Indian allotment, and assignments of rents and royalties. Reversed and remanded for further proceedings.

See same case below, 116 C. C. A. 654, 197 Fed. 292.

The facts are stated in the opinion.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for appellant:

The leasing power should be construed strictly.

Starr v. Long Jim, 227 U. S. 613, 623, 57 L. ed. 670, 675, 33 Sup. Ct. Rep. 358.

The general policy of protecting the Indian resolves every reasonable doubt against a power in him to dispose of his estate.

Taylor v. Parker, 235 U. S. 42, ante, 121, 35 Sup. Ct. Rep. 22.

The allotment was inalienable for the period of twenty-five years from September 26, 1896,—the date of the patent.

Bowling v. United States, 233 U. S. 528, 58 L. ed. 1080, 34 Sup. Ct. Rep. 659.

The lease to Jones and Thompson was either a reversionary lease, intended to take effect *in futuro*, or a concurrent lease based upon an assignment in part of the reversion. In either event it exceeded the leasing power, construed in the light of common-law rules.

Ibid.; 4 Greenleaf's Cruise's Dig.** 165, 166; Taussig v. Reel, 134 Mo. 544, 34 S. W. 1104; Sinclair v. Jackson, 8 Cow. 581; 2

[1] Death of John M. Cooper, one of the appellees herein, suggested, and the appearance of W. W. Wyatt and T. Connor, executors of the estate of John M. Cooper, deceased, filed and entered February 26, 1915, as parties appellees herein.

Sugden, Powers,** 345, 376 et seq.; 1 Woodfall, Land & T. *211.

The Indian had no power to assign the rents and royalties.

1 Washb. Real Prop. §§ 672, 699–702; Thursby v. Plant, 1 Wms' Saund. 230; Patten v. Deshon, 1 Gray, 325; Burns v. Cooper, 31 Pa. 426.

The Indian was a ward of the government, whose protection, particularly in respect of the allotment, had not been committed to the laws of the state.

United States v. Celestine, 215 U. S. 278, 290, 54 L. ed. 195, 199, 30 Sup. Ct. Rep. 93; Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817; Bowling v. United States, 233 U. S. 528, 534, 58 L. ed. 1080, 1083, 34 Sup. Ct. Rep. 659; United States v. Pelican, 232 U. S. 442, 450, 451, 58 L. ed. 676, 679, 680, 34 Sup. Ct. Rep. 396; Perrin v. United States, 232 U. S. 478, 481, 486, 58 L. ed. 691, 693, 695, 34 Sup. Ct. Rep. 387; Ex parte Webb, 225 U. S. 663, 682, 56 L. ed. 1248, 1256, 32 Sup. Ct. Rep. 769.

The general policy of Congress evinced in the restriction on alienation is violated by a fraudulent abuse of the leasing privilege.

Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424.

The government was authorized to bring suit in the name of the United States for the purpose of setting aside the fraudulent leases.

Heckman v. United States, 224 U. S. 444, 445, 56 L. ed. 832, 833, 32 Sup. Ct. Rep. 424; United States v. Gray, 119 C. C. A. 529, 201 Fed. 291; United States v. Fitzgerald, 119 C. C. A. 533, 201 Fed. 295.

Messrs. **A. Scott Thompson and Vern E. Thompson**, *in propriis personis* argued the cause and filed a brief for appellees:

The title conveyed was a complete fee-simple title with a restriction against alienation.

16 Cyc. 602, 604, 614; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Francis v. Francis, 203 U. S. 233, 240, 51 L. ed. 165, 167, 27 Sup. Ct. Rep. 129; Re Heff, 197 U. S. 489, 509, 49 L. ed. 848, 857, 25 Sup. Ct. Rep. 506.

The act of June 7, 1897, releases the restrictions on the mineral estate for ten years.

Whitham v. Lehmer, 22 Okla. 627, 98 Pac. 351; Williams v. Williams, 22 Okla. 672, 98 Pac. 909; Scraper v. Boggs, 27 Okla. 715, 117 Pac. 193; Scherer v. Hulquist, 39 Okla. 434, 130 Pac. 544; Moore v. Girten, 5 Ind. Terr. 384, 82 S. W. 848; United States v. Abrams, 114 C. C. A. 160, 194 Fed. 82.

The United States cannot bring suit to cancel a lease or contract made within, and not violative of, said leasing period, even though secured by fraudulent practices.

United States v. Brooks, 10 How. 442, 13 L. ed. 489.

Indian legislation of recent years manifests a purpose to hasten, as much as may be consistent with his welfare, the time when the Indian in this state shall have the same rights of disposition of his property as his white neighbor exercises over his.

Re Heff, 197 U. S. 490, 499, 49 L. ed. 849, 853, 25 Sup Ct. Rep. 506; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817.

The Indian at all times is given full and complete *jus disponendi* over the mining estate in his land for a period of ten years. He is given full power to lease without restriction within said ten-year period. No express restrictions to the assignment of the royalty reserved in these leases appear. The intent of Congress to leave the Indian unhampered during this period is clear, but even if the question should be in doubt, the principle laid down by the supreme court of Oklahoma to the effect that "it would be manifestly inappropriate to imply restrictions where the intent itself is not clear" is the correct rule of statutory construction to apply.

Stout v. Simpson, 34 Okla. 138, 124 Pac. 754; Mullen v. United States, 224 U. S. 453, 56 L. ed. 839, 32 Sup. Ct. Rep. 494; Goat v. United States, 224 U. S. 458, 56 L. ed. 841, 32 Sup. Ct. Rep. 544; Godfrey v. Iowa Land & T. Co. 21 Okla. 293, 95 Pac. 792; Hancock v. Mutual Trust Co. 24 Okla. 391, 103 Pac. 566.

Rent or royalty dependent upon a certain per centum of the value of the ore mined, as is provided for in the Noble assignment, could never be considered as a part of the corpus of the estate, nor as a right or license to mine, but the provision in said assignment "providing that if the lease to Abrams, to which it refers, should be surrendered and become void, the within lease shall hold good for a period of ten years," does not transform the instrument into a lease, even if, by a clear clerical error, the word "lease" is used instead of assignment.

Payn v. Beal, 4 Denio, 412; Fisk v. Brayman, 21 R. I. 195, 42 Atl. 878; Lacey v. Newcomb, 95 Iowa, 287, 63 N. W. 704; 1 Barringer & A. Mines & Mining, p. 117; Steele v. Mills, 68 Iowa, 406, 27 N. W. 294.

If it be conceded that Blackhawk could assign his royalties under the Abrams lease, and if Abrams should surrender his lease or it should become void by reason of failure to work or any other cause amounting to a forfeiture, and Blackhawk should subsequently, within the term of the assignment, execute a new lease to Abrams or another, we contend that the subsequent lessees

would take subject to an existing assignment of rents for the period of assignment, on the theory that an obligation to pay rent is a covenant which runs with the land, and in effect by such an assignment Blackhawk assigned any rents which might be recovered during the ten-year period in which he was allowed the full *jus disponendi* over his mineral estate, and hence it would be immaterial to the assignment whether the original Abrams lease or any of the subsequent leases were in force.

1 Barringer & A. Mines & Mining, pp. 118, 136.

Messrs. S. C. Fullerton and Preston S. Davis filed a brief for appellee A. J. Thompson.

Mr. Justice Hughes delivered the opinion of the court:

The government brings this appeal to review a decree of the circuit court of appeals, which affirmed a decree dismissing, upon demurrer, its suit as against the appellees. 116 C. C. A. 654, 197 Fed. 292.

The suit was instituted against the appellees and others, to set aside certain mining leases of an Indian allotment, and assignments of rents and royalties, upon the ground that they were procured in fraud of the allottee, and were in violation of the restriction against alienation imposed by Congress. The land in question had been allotted to Charley Quapaw Blackhawk a member of the Quapaw tribe of Indians, under the act of March 2, 1895, chap. 188, 28 Stat. at L. 876, 907. Patent was issued on September 26, 1896. The act of 1895 contained the following restriction:

"Provided that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

[76] By the act of June 10, 1896, chap. 398, 29 Stat. at L. 321, 331, Congress authorized the allottees of lands within the limits of the Quapaw Agency, "to lease the same for a term not exceeding three years for farming purposes, or five years for mining or business purposes." A further authorization—the one here involved—was made by the act of June 7, 1897, chap. 3, 30 Stat. at L. 62, 72, which was as follows:

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes. And said allottees and their lessees and tenants shall have the right to employ such assistants, laborers, and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or disability, any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased, in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him. All acts and parts of acts inconsistent with this are hereby repealed."

The bill alleges that the allottee made the following mining leases of the allotted lands, and assignments of rents and royalties, to wit:

(1) Lease, dated January 11, 1902, to A. W. Abrams, for ten years from date, in consideration of the sum of $10, and a royalty of 5 per cent of the market value of all minerals mined or removed (except gas, for which there was to be paid $40 per annum for each paying well), with the proviso that there should be a minimum rental of $20 a year in case the royalties did not exceed that amount. On August 13, 1903, the lease was assigned by Abrams to the Iowa & Oklahoma Mining Company.

(2) Lease, dated August 24, 1903, to A. W. Abrams, [77] for ten years from date, in consideration of $18, and of royalties which were the same as in first lease save that the minimum rental was $21 a year. This lease was assigned on November 2, 1904, to the Iowa & Oklahoma Mining Company.

(3) Lease, dated March 25, 1905, to L. C. Jones, and the appellee A. J. Thompson, for ten years from date, for $10 and 5 per cent royalty. It was stated that the lease was subject to the first lease above mentioned. The interest of Jones was assigned to the appellee A. J. Thompson, on July 31, 1905.

(4) Lease, dated April 4, 1905, to the Iowa & Oklahoma Mining Company, for ten years from date, for $25, with the same royalties as in the first lease above mentioned and with minimum rental of $21 a year.

(5) Lease, dated May 12, 1906, to the same company, for ten years from date, and with the same consideration as that of the lease described in paragraph (4). It was provided that "this lease and all former leases above referred to shall run concurrently,"—the lessee being entitled to elect under which of the leases it would operate.

(6) Lease, dated July 28, 1906, to the same company, for the term of twenty years from date for $21, with the same royalties and minimum rental as those reserved in the preceding lease described in paragraph (5).

(7) Grant or assignment, dated August 16, 1902, to the appellee Charles F. Noble,

of all the allottee's "right, title, and interest in and to the royalty, rent, and proceeds" of the mining lease dated January 11, 1902, made to Abrams, described in paragraph (1). It was further agreed by said instrument that if the Abrams' lease "should be surrendered and become void the within lease should hold good for the period of ten years." On the same date, Noble assigned "a one-half interest in the above-described instrument" to John M. Cooper.

(8) Assignment, dated February 21, 1906, to the appellees [78] A. S. Thompson and V. E. Thompson. It recited a judgment, in a suit against Noble and Cooper, decreeing that the allottee was the owner "of 2½ percentage of the entire product mined from said land and sold on or subsequent to the 31st day of January, 1906, and up to and including the 11th day of January, 1912," and assigned to the above-mentioned appellees "an undivided one-half interest in and to the said judgment for royalties," that is, "1¼ per cent of the whole product on said lands" during the period covered by the first lease to Abrams, described in paragraph (1).

The bill further averred that the allottee, Charles Quapaw Blackhawk, was a full-blood Indian, born in 1835, unable "to read, or write, or understand intelligently the English language," an "ignorant and uneducated child of nature," old and infirm, and wholly incapacitated for the transaction of business; that the lands were worth approximately $100,000; that on January 11, 1902, when the first lease was made, the lands had not been prospected and the value for mining purposes was uncertain, and that the consideration mentioned in that lease was "equitable and sufficient;" that immediately thereafter, the lessee (the defendant Abrams) caused the lands to be drilled and prospected and found "large, valuable, and paying bodies of lead and zinc ore;" that for the five years preceding the filing of the bill (July, 1909), there had been "a number of concentrating plants or so-called ore mills located upon the said land, and in operation," and that "the actual value of the output thereof, when in operation," was in excess of $50,000 a year; that in 1905, and before, the defendant Abrams, through his assignee, the Iowa & Oklahoma Mining Company, had sublet to other mining companies portions of the lands in consideration of a royalty of 15 per cent of the market value of the ores mined, which was a reasonable royalty; and that the transactions narrated in the [79] bill (apart from the first lease to Abrams) were "inequitable and unconscionable" and a fraud upon the allottee.

The validity of the first lease was conceded by the government, but it was alleged that all the other leases and the assignments were in violation of the express restriction subject to which the allotment was made.

Demurrers were filed by all the defendants. The circuit court held that the government was not entitled to impeach the transactions upon the ground of fraud, but could challenge the validity of the several instruments as being in violation of the statutory restriction. It is not important here to consider the disposition made of the leases described in paragraphs (2), (4), (5), and (6), as these are not involved in this appeal. It is sufficient to say that the demurrers of Abrams and the Iowa & Oklahoma Mining Company were overruled, and that those of the appellees were sustained. United States v. Abrams, 181 Fed. 847. As to the latter, the bill was dismissed, and the decree to that effect was affirmed by the circuit court of appeals, as already stated.

We have, then, the question of the validity of the lease and assignments described in paragraphs (3), (7), and (8).

The Quapaws are still under national tutelage. The government maintains an agency, and, pursuant to the treaty of May 13, 1833 (7 Stat. at L. 424), an annual appropriation is made for education and other assistance (37 Stat. at L. 530, chap. 388). In 1893, the Quapaw National Council made provision for allotments in severalty which were to be subject to the action of Congress, and in the act of ratification of 1895 Congress imposed the restriction upon alienation which has been quoted. The guardianship of the United States continues, notwithstanding the citizenship conferred upon the allottees (United States v. Celestine, 215 U. S. 278, 291, 54 L. ed. 195, 199, 30 Sup. Ct. Rep. 93; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 315, 316, 55 L. ed. 738, 749, 750, 31 Sup. Ct. Rep. 578; Hallowell v. United States, 221 U. S. 317, 324, 55 L. ed. 750, 753, 31 Sup. Ct. Rep. 587; United States v. Sandoval, 231 U. S. 28, 48, 58 L. ed. 107, 114, 34 Sup. Ct. Rep. 1); [80] and, where Congress has imposed restrictions upon the alienation of an allotment, the United States has capacity to sue for the purpose of setting aside conveyances or contracts by which these restrictions have been transgressed. Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Mullen v. United States, 224 U. S. 448, 451, 56 L. ed. 834, 838, 32 Sup. Ct. Rep. 494; Bowling v. United States, 233 U. S. 528, 534, 58 L. ed. 1080, 1083, 34 Sup. Ct. Rep. 659.

1. We may first consider the assignments of rents and royalties. Under his patent,

the allottee took an estate in fee, subject to the limitation that the land should be "inalienable for the period of twenty-five years" from date. This restriction bound the land for the time stated, whether in the hands of the allottee or his heirs. Bowling v. United States, supra. It put it beyond the power of him, or of them, to alienate the land, or any interest therein, in any manner except as permitted by the acts of 1896 and 1897. See Taylor v. Parker, 235 U. S. 42, ante, 121, 35 Sup. Ct. Rep. 22. The comprehensiveness of the restriction was modified only by the power to lease; and while the allottee could make leases, as provided in these acts, they gave him no power to dispose of his interest in the land subject to the lease, or of any part of it. The rents and royalties were profit issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor. As such, they would pass to his heirs, and not to his personal representatives. 1 Washb. Real Prop. *337; Wright v. Williams, 5 Cow. 501. It is true that the owner of the reversion, when unrestricted in his right to convey, may sever the rent and grant it separately, but this is by virtue of his freedom to deal with the estate in the land. 2 Bl. Com. *176.

It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties. It is said that the leases contemplated the payment of sums of money, equal to the agreed percentage [81] of the market value of the minerals, and thus that the assignment was of these moneys; but the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land. The further argument is made that the power to lease should be construed as implying the power to dispose of the rents to accrue. This is wholly untenable. The one is in no way involved in the other; the complete exercise of the authority which the statute confers would still leave the rents and royalties to accrue as part of the estate remaining in the lessor. It was the intent of Congress that the allottees, during the period of restriction, should be secure in their actual enjoyment of their interest in the land. Heckman v. United States, supra. The restriction was removed only to the extent specified; otherwise, the prohibition against alienation remained absolute.

The first assignment of royalties, as above described (paragraph (7)), was made on August 16, 1902, of rents to accrue under *the first* lease, of January 11, 1902, which was to run for ten years. The second assignment, made in February, 1906 (paragraph (8)) was, in substance, of "1¼ per cent of the whole product on said lands" until January 11, 1912. Both were assignments of interests which pertained to the reversion, and both must be held to be invalid under the statute.

2. The lease here in controversy was made on March 25, 1905, for ten years from date (paragraph (3)). The property was already subject to a lease, concededly valid, for ten years from January 11, 1902. The lease under which the appellee claims is what is known as an "overlapping lease." It is not necessary to describe transactions of this character, for they are abundantly illustrated in the record, which shows that this allottee made six leases of the same rights in less than five years, each for ten years from date, with the exception of the last, which was for twenty years, and all reserving substantially the same rents and [82] royalties which were reserved in the first lease at a time when the property had not been prospected. The practice, to say the least, is an abnormal one, and it requires no extended discussion to show that it would facilitate abuses in dealing with ignorant and inexperienced Indians. It is urged, however, that the manner of dealing with the Indians, in gradually releasing them from guardianship and preparing them for complete independence, is for Congress to determine; that Congress has in this case authorized a lease for ten years; that this was a lease for ten years, and no longer, and hence was within the authority; and that, however wise it might have been to prohibit "overlapping leases," Congress did not so provide.

We are of the opinion that this is too short a view. The question is as to the scope of the authority given by Congress; that is, whether it did not extend simply to leases in possession, and should be taken not to include "leases in reversion." The allottee, as we have seen, is under an absolute restriction with respect to his reversion for a period of twenty-five years from the date of his patent. In the light of this restriction, and of the governmental policy which induced it, there is sound reason for construing the power as not authorizing anything more than a lease in possession, as well understood in the law. At common law, as the government points out, it was the established doctrine that a tenant for life, with a general power to make leases, could make only leases in possession, and not leases in reversion or *in futuro*. He was not authorized by such a power to make a lease to commence "after the determination of a lease in being." Such a lease was

deemed to be "reversionary." Sussex v. Wroth, Cro. Eliz. pt. 1, p. 5; Shecomb v. Hawkins, Cro. Jac. 318, Yelv. 222; Winter v. Loveday, 1 Comyns, Rep. 37; Sugden, Powers, p. 749; 4 Greenleaf's Cruise's Dig. 165, 166; Taussig v. Reel, 134 Mo. 530, 544-547, 34 S. W. 1104; Woodfall, Land. & T. 19th ed. 239, 244, 245. "A general [83] power to lease for a certain number of years without saying either in possession or reversion, authorizes only a lease in possession, and not *in futuro*." Such a power receives the same construction as a power to make leases in possession. What is expressed in the one is understood in the other. Shaw v. Summers, 3 J. B. Moore 196. This is not to say that an agreement for a new lease, at a fair rental, made shortly before the expiration of an existing lease, would not be sustained in equity. See Dowell v. Dew, 1 Younge & C. Ch. Cas. 345, 12 L. J. Ch. N. S. 158, 7 Jur. 117.

We are unable to see that the allottee under the power in question has any better position. The protection accorded by Congress, through the restriction upon the alienation of the allottee's estate,—modified only by the power to lease as specified,—was not less complete, because the limitation was not in the interest of a remainderman, but was for the benefit of the allottee himself as a ward of the Nation. The act of 1897 gives him authority "to lease" for a term not exceeding the stated limit. Taking the words in their natural sense, they authorize leases in possession, and nothing more. The language does not compel the recognition of leases which are to take effect in possession many years after their execution, if, indeed, it could be assumed that they were not intended to be concurrent. Such leases certainly violate the spirit of the statute, and according to the analogies of the law, they violate its letter.

If, on the other hand, the lease be deemed to be a concurrent lease, that is, to be effective from its date, then it could only have that effect, being subject to the existing lease, as a grant or assignment of the reversion while the existing lease continued. Accordingly, it would entitle the lessee, as assignee of part of the reversion, to the rent reserved in the previous lease. Bacon Abr. title, Leases (N); Harmer v. Bean, 3 Car. & K. 307; Woodfall, Land. & T. 19th ed. 245, 246. But every conveyance [84] of the reversion, or of any interest therein, was clearly prohibited by the restriction.

From every point of view, we must conclude that a lease for ten years, made in 1905, subject to an existing lease for ten years, of the same property, which by its terms was to run until 1912, was unauthorized and void.

As the United States was entitled to maintain the suit to cancel these instruments as transgressing the statutory restriction, it is unnecessary to consider the question whether, in the absence of such a violation, the government would have capacity to sue to redress alleged frauds committed against allottees.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

GEORGE R. ROBINSON, Plff. in Err.,
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 84-94.)

Evidence — admissibility under pleadings — release.

1. An agreement of a Pullman Company car porter to release all railway companies hauling the car from all liability for injuries sustained by him, if a defense, is properly admitted in evidence under the plea of not guilty in a suit against such a railway company to recover damages for injuries sustained by such porter in a collision due to the railway company's negligence, notwithstanding an earlier ruling sustaining a demurrer to a special plea setting up the release.

[For other cases, see Evidence, XIII. a, in Digest Sup. Ct. 1908.]

Carriers — negligence — contract exemption.

2. A provision in a contract of employment entered into by a Pullman Company car porter by which he releases all railway companies over whose lines the cars of the Pullman Company may be operated while he is traveling in its service from all claims for liability of any nature or character whatsoever on account of any personal injury or death is valid unless condemned by statute, and is a complete bar to any re-

NOTE.—As to contract exempting railway company from liability for negligent injury to sleeping car employees or others sustaining a similar relation to the company—see notes to Denver & R. G. R. Co. v. Whan, 11 L.R.A.(N.S.) 432, and Coleman v. Pennsylvania R. Co. 50 L.R.A.(N.S.) 432.

On the constitutionality, application, and effect of the Federal employers' liability act —see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 1.

covery from the railway hauling the car because of injuries received by such porter in a collision due to the railway company's negligence.

[For other cases, see Carriers, II. b, 7, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — contract exemption.

3. A porter in charge of one of the cars of the Pullman Company, which supplies a distinct and separate service performed by its own employees under its own management, subject only to the exigencies of railway transportation, and to such control by railway companies as is essential to enable them to perform their functions as common carriers, may stipulate in his contract of employment to exempt any railway company hauling the cars from liability for injuries sustained by him, notwithstanding the prohibition of the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), § 5, against contracts intended to exempt carriers from the liability created by that act. since he is not an employee of the railway company within the meaning of that act, and does not become such because, as an accommodation to passengers boarding the car in the early morning hours, he collects their railway tickets and fares, afterwards turning them over to the train conductor.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1913.]

[No. 167.]

Argued March 3 and 4, 1915. Decided April 5, 1915.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of defendant in a personal-injury action. Affirmed.

See same case below, 40 App. D. C. 169, L.R.A.1915D, 510.

The facts are stated in the opinion.

Mr. **Levi H. David** argued the cause, and, with Mr. Alexander Wolf, filed a brief for plaintiff in error:

Plaintiff was an employee of the railway company, either as matter of law or fact.

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; Williams v. Pullman Palace Car Co. 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, 8 Am. Neg. Cas. 302; Thorpe v. New York C. & H. R. R. Co. 76 N. Y. 402, 32 Am. Rep. 325; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Louisville, N. & G. S. R. Co. v. Katzenberger, 16 Lea, 380, 57 Am. Rep. 232, 1 S. W. 44; Nashville, C. & St. L. R. Co. v. Lillie, 112 Tenn. 341, 105 Am. St. Rep. 947, 78 S. W. 1055; Louisville & N. R. Co. v. Ray, 101 Tenn. 10, 46 S. W. 554; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 520, 44 L. ed. 560, 570, 20 Sup. Ct. Rep. 385; O'Brien v. Chicago & N. W. R. Co. 116 Fed. 502; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593, 82 C. C. A. 461, 153 Fed. 511.

Plaintiff was an employee of both companies.

Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 520, 44 L. ed. 560, 570, 20 Sup. Ct. Rep. 385; Oliver v. Northern P. R. Co. 196 Fed. 432; Ward v. Thompson, 22 How. 330, 16 L. ed. 249; McKinney, Fellow Servants, p. 46; Cleveland, C. C. & I. R. Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321, 12 Am. Neg. Cas. 428; Swainson v. Northeastern R. Co. L. R. 3 Exch. Div. 341, 47 L. J. Exch. N. S. 372, 38 L. T. N. S. 201, 26 Week. Rep. 413; Denver & R. G. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505; Gaines v. Bard, 57 Ark. 615, 38 Am. St. Rep. 266, 22 S. W. 570.

Plaintiff became *pro hac vice* an employee of the railroad company.

Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252; Brooks v. Central Sainte Jeanne, 228 U. S. 688, 57 L. ed. 1025, 33 Sup. Ct. Rep. 700; Morgan v. Smith, 159 Mass. 571, 35 N. E. 101; Hasty v. Sears, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759; Johnson v. Lindsay [1891] A. C. 371, 16 L. J. Q. B. N. S. 90, 65 L. T. N. S. 97, 40 Week. Rep. 405, 55 J. P. 644; Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, 36 L. T. N. S. 49, 25 Week. Rep. 263; McDowell v. Homer Ramsdell Transp. Co. 78 Hun, 228, 28 N. Y. Supp. 821; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; Kimball v. Cushman, 103 Mass. 194, 4 Am. Rep. 528; Brown v. Smith, 86 Ga. 274, 22 Am. St. Rep. 456, 12 S. E. 411; Clapp v. Kemp, 122 Mass. 481; Murray v. Currie, L. R. 6 C. P. 24, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104; Missouri P. R. Co. v. Jones, 75 Tex. 151, 16 Am. St. Rep. 879, 12 S. W. 972; Cleveland, C. C. & I. R. Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321, 12 Am. Neg. Cas. 428; Westover v. Hoover, 88 Neb. 201, L.R.A.—, —, 129 N. W. 285, 3 N. C. C. A. 471; Thomp. Neg. 2d ed. § 3742; Missouri, K. & T. R. Co. v. Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332; Vary v. Burlington, C. R. & M. R. Co. 42 Iowa, 246; Hannigan v. Union Warehouse Co. 3 App. Div. 618, 73 N. Y. S. R. 753, 38 N. Y. Supp. 72; Mound City Paint & Color Co. v. Conlon, 92 Mo. 229, 4 S. W. 922, 16 Am. Neg. Cas. 435; Atkyn v. Wabash R. Co. 41 Fed. 193.

If it be held that the uncontradicted evidence submitted by the plaintiff did not show him to have been an employee of the

defendant, or the employee of defendant and the Pullman Company, as a matter of law, then the evidence was sufficient to be submitted to the jury.

Northwestern Union Packet Co. v. McCue, 17 Wall. 508, 21 L. ed. 705; Missouri, K. & T. R. Co. v. West, 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471; Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 So. 98; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 118, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Sacker v. Waddell, 98 Md. 50, 103 Am. St. Rep. 374, 56 Atl. 399, 15 Am. Neg. Rep. 324.

The plaintiff in error was not a volunteer in the collection of railroad transportation from its passengers.

Brooks v. Central Sainte Jeanne, 228 U. S. 688, 57 L. ed. 1025, 33 Sup. Ct. Rep. 700; Pullman Palace Car Co. v. Lee, 49 Ill. App. 77.

The alleged release is no bar.

Standard Oil Co. v. Anderson, 212 U. S. 221, 53 L. ed. 483, 29 Sup. Ct. Rep. 252; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 513, 44 L. ed. 567, 20 Sup. Ct. Rep. 385; O'Brien v. Chicago & N. W. R. Co. 116 Fed. 502.

Mr. John W. Yerkes argued the cause, and, with Messrs. John J. Hamilton and George E. Hamilton, filed a brief for defendant in error:

The legislative intent must be taken as expressed by the words which the legislature itself employed.

Shaw v. Northern Pennsylvania R. Co. 101 U. S. 565, 25 L. ed. 894; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 36, 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508; Denn ex dem. Scott v. Reid, 10 Pet. 524, 9 L. ed. 519.

Plaintiff was not an employee of the defendant railroad.

McDermon v. Southern P. Co. 122 Fed. 669; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 3 Ann. Cas. 42; Hughson v. Richmond & D. R. Co. 2 App. D. C. 98; Denver & R. G. R. Co. v. Whan, 39 Colo. 230, 11 L.R.A.(N.S.) 432, 89 Pac. 39, 12 Ann. Cas. 732; Missouri, K. & T. R. Co. v. Blalack, 105 Tex. 297, 147 S. W. 559; Missouri, K. & T. R. Co. v. West, 38 Okla. 581, 134 Pac. 655; Missouri, K. & T. R. Co. v. West, 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471; Davis v. Chesapeake & O. R. Co. 122 Ky. 528, 5 L.R.A.(N.S.) 458, 121 Am. St. Rep. 481, 92 S. W. 339, 12 Ann. Cas. 723; Jones v. St. Louis Southwestern R. Co. 125 Mo. 666, 26 L.R.A. 718, 46 Am. St. Rep. 514, 28 S. W. 883; McCluskey v. Cromwell, 11 N. Y. 596.

The trial court committed no error in allowing the contract between the plaintiff and the Pullman Company to be received in evidence.

Brown v. Baltimore & O. R. Co. 6 App. D. C. 242; Shafer v. Stonebraker, 4 Gill & J. 347; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 10 L. ed. 535; Tietz v. Tietz, 90 Wis. 66, 62 N. W. 939; Patton v. Fox, 179 Mo. 533, 78 S. W. 804.

Mr. Justice Hughes delivered the opinion of the court:

George R. Robinson, the plaintiff in error, brought this action to recover damages for personal injuries sustained by him while performing his duty as a porter in charge of a Pullman car which was being hauled by the defendant as a part of an interstate train. The injuries were received in a collision which was due, it was alleged, to the defendant's negligence. The defendant introduced in evidence the plaintiff's contract of employment[1] with the Pullman [90] Company, by which he released all railroad corporations over whose lines the cars of that company might be operated while he was traveling in its service "from all claims for liability of any nature or character whatsoever on account of any personal injury or death." The trial court directed a verdict in favor of the defendant, and the judgment, [91] entered accordingly, was affirmed by the court of appeals. 40 App. D. C. 169, L.R.A.—, —.

The plaintiff in error complains of the admission of the contract in evidence, in view of the fact that a demurrer to a special plea setting up the release had been sustained; but, if the contract was a defense, it cannot be said that the court erred in giving effect to it, despite the earlier ruling. The evidence was admissible under the plea of not guilty. Brown v. Baltimore & O. R. Co. 6 App. D. C. 237, 242; Shafer v. Stonebraker, 4 Gill & J. 345, 355, 356; Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 133, 29 Atl. 854. It is also clear that, unless condemned by statute, the contract was a valid one and a bar to recovery. Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385;

[1] The material portions of the contract are as follows:

"Be it known, That I, the undersigned, hereby accept employment by, and enter into, or continue from this date, in the service of the Pullman Company upon the following express terms, conditions and agreements, which in consideration of such employment and the wages thereof I do hereby make with said the Pullman Company, to wit:

"First. So long as I shall remain in said employment and service, I will fully comply with all regulations, rules and orders of said company or its agents, issued for the

Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. 228 U. S. 177, 57 L. ed. 787, 33 Sup. Ct. Rep. 474.

The substantial question is whether the contract of release was invalid under § 5 of the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), which provides that "any contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." The application of this provision depends upon the plaintiff's employment. For the "liability created" by the act is a liability to the "employees" of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was "employed" by the railroad company within the meaning of the act. It will be observed that the question is not whether the railroad company, by virtue of its duty to passengers, of which it cannot devest itself by any arrangement with a sleeping car company, would not be liable for the negligence of a sleeping car porter in matters involving the passenger's safety (Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141). Nor are we here concerned with the measure of the obligation of the railroad company, in the absence of special contract, to one in the plaintiff's situation by [92] reason of the fact that he was lawfully on the train, although not a passenger. The inquiry rather is whether the plaintiff comes within the statutory description; that is, whether, upon the facts disclosed in the record, it can be said that within the sense of the act the plaintiff was an employee of the railroad company, or whether he is not to be regarded as outside that description, being, in truth, on the train simply in the character of a servant of another master by whom he was hired, directed, and paid, and at whose will he was to be continued in service or discharged.

The contract between the Pullman Company and the railroad company was introduced in evidence. Without attempting to state its details, it is sufficient to say that the case was not one of coproprietorship (see Oliver v. Northern P. R. Co. 196 Fed. 432, 435). It appeared that there was supplied by the Pullman Company on its own cars a distinct and separate service which was performed by its own employees under its own management. For this service the Pullman Company charged its customary rates. It was provided that the railroad company should not receive compensation from the Pullman Company for the movement of cars furnished under the contract, nor should the Pullman Company be paid for their use. But whenever the gross revenue from sales of seats and berths in the Pullman cars exceeded an average of $7,750 per car per annum, the Pullman Company was to pay to the railroad company one half of the excess; and if the average gross revenue from the Pullman cars (from causes

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government of its employees, go wherever I may be required in said service, and well, faithfully and honestly perform all duties assigned to me.

"Second. My wages shall at all times be calculated and paid at the monthly rate per day for the number of days I shall have been actually employed, and I may quit or resign, or may be suspended or discharged from such employment and service, at any time, or at any place, without previous notice. . . .

"Fourth. I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge the Pullman Company, and its officers and employees, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"Fifth. I am aware that said the Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts, wherein said the Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to *the employees* of said the Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said the Pullman Company and do agree to protect, indemnify and hold harmless said the Pullman Company with respect to any and all sums of money it may be compelled to pay, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said the Pullman Company may be operated while I am traveling over said lines in the employment or service of said the Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service."

beyond the control of the Pullman Company) was less than $6,000 per car per annum for two consecutive years, that company was entitled to terminate the agreement upon twelve months' notice, with the option, however, on the part of the railroad company, to pay to the Pullman Company such sum as would bring the gross revenue up to the specified amount, or to purchase the cars at a price to be determined. We think it to be [93] clear that in employing its servants the Pullman Company did not act as the agent of the railroad company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation.

With this limitation, the Pullman Company supplied its own facilities, and for this purpose organized and controlled its own service, including the service of porters; it selected its servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure. See Hughson v. Richmond & D. R. Co. 2 App. D. C. 98; McDermon v. Southern P. Co. 122 Fed. 669; Jones v. St. Louis Southwestern R. Co. 125 Mo. 666, 26 L.R.A. 718, 46 Am. St. Rep. 514, 28 S. W. 883; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 3 Ann. Cas. 42. It is said that the plaintiff had been promoted to be a "porter in charge" of the Pullman car between Washington and Wheeling, with increased compensation, but he still was the porter of the Pullman Company, employed in its work. It is insisted that he should be regarded as the employee of the railroad company because of the fact that in the case of passengers coming on the train after 3 o'clock in the morning, he received the railroad ticket or fare, which he placed in an envelop and gave to the train conductor "when he came back;" the railroad ticket was punched or canceled by the conductor. This, however, was an obvious accommodation to the passenger in the Pullman car, and in any event it was merely an incidental matter which cannot be deemed to qualify the character of plaintiff's employment as it is to be viewed from the standpoint of the statute.

[94] We are of the opinion that Congress used the words "employee" and "employed" in the statute in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the act.

We conclude that the plaintiff in error was not an employee of the defendant company within the meaning of the employers' liability act, and that the judgment must be affirmed.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

G. A. MAXWELL.

(See S. C. Reporter's ed. 94-100.)

Carriers — discrimination — erroneous quotation of rates.

1. A carrier which has exacted less than the published rate for interstate round-trip passenger tickets over the different routes, going and returning, desired by the purchaser, may, by virtue of the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 6, as amended by the act of June 29, 1906 (34 Stat. at L. 587, chap. 3591), Comp. Stat. 1913, § 8597), prohibiting any deviation from the published rates, recover from such purchaser the difference between the amount paid and the amount which should have been charged and collected, although he could have gone to destination and re-

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On contracts fixing rates other than those established in accordance with the interstate commerce act—see notes to Armour Packing Co. v. United States, 14 L.R.A.(N.S.) 400, and Atchison, T. & S. F. R. Co. v. Bell, 38 L.R.A.(N.S.) 351.

On the right of a carrier to recover difference between rate charged shipper and proper rate—see note to Central R. Co. v. Mauser, 49 L.R.A.(N.S.) 92.

turned over other routes, going and returning, at the rate which he paid.

[For other cases, see Carriers, II. b, 5, in Digest Sup. Ct. 1913 Supp.]

Error to state court — scope of review — findings of fact.

2. The findings of the state court showing that the fare paid by an interstate passenger was less than the amount due under the applicable published rates are conclusive on the Federal Supreme Court on writ of error to the state court, where the carrier's tariffs are not included in the record.

[For other cases, see Appeal and Error, 2175-2208, in Digest Sup. Ct. 1908.]

[No. 181.]

Submitted March 8, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which affirmed a judgment of the Court of Civil Appeals, affirming a judgment of the Circuit Court of Putnam County, in that state, which had affirmed a judgment of a Justice of the Peace of such county in favor of defendant in a suit by a carrier to recover an alleged undercharge on the sale of interstate railway tickets. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. John B. Keeble submitted the cause for plaintiff in error. Mr. Ed T. Seay was on the brief:

The railroad company may, notwithstanding the illegality of its contract, recover from the passenger or shipper the undercharge.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 437, 51 L. ed. 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 197, 57 L. ed. 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Armour Packing Co. v. United States, 209 U. S. 56, 80, 81, 52 L. ed. 681, 694, 695, 28 Sup. Ct. Rep. 428; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, 227 U. S. 653, 57 L. ed. 688, 33 Sup. Ct. Rep. 391; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; A. J. Poor Grain Co. v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418; Southern R. Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552; Louisville & N. R. Co. v. Allen, 152 Ky. 145, 153 S. W. 198.

Messrs. John A. Pitts and K. T. McConnico submitted the cause for defendant in error.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought, before a justice of the peace in Tennessee, by the Louisville & Nashville Railroad Company, to recover $58.30 as the amount of an alleged undercharge on the sale of railroad tickets. Judgment for the defendant was affirmed by the court of civil appeals and by the supreme court of the state. The case comes here on error.

The facts, which were said to be undisputed, were found by the state court to be as follows:

Defendant in error, G. A. Maxwell, after repeated interviews and correspondence with the representatives of the Louisville & Nashville Railroad Company in regard to rates on round trip tickets to Salt Lake City, purchased [96] on or about the 1st day of June, 1910, "two passenger tickets from Nashville, Tennessee, to Salt Lake City, by way of Chicago, Illinois, Denver, Colorado, and routed to return by Denver, Colorado, Amarillo and Fort Worth, Texas, and Memphis, Tennessee, and paid for each ticket the sum of $49.50.

"There were at the time, published rates under the provision of the interstate commerce act by which fares over the route actually traveled, going and coming, aggregated $78.65 each, or $29.15 each more than was charged and collected therefor, making a difference of $58.30 between the amount paid by Mr. Maxwell for the tickets in question, and the amount that should have been charged and collected.

"Mr. Maxwell was informed when he first made inquiry about the tickets in January, that there were no special rate tickets at that time, but likely would be by May or June 1st. He then, and on several occasions thereafter, made known his desire to go to Salt Lake City by one route, and return by the other, and was told that he could not be furnished reduced rates except by going and coming over the same route; but after repeated inquiries, and the correspondence referred to, he was informed that he could make the trip on reduced rates one way, and return another; and when he went finally to purchase the two tickets, he stated to the agent that he wanted to go by way of Chicago and Denver, and return by way of Stamford, Texas, and was given the tickets routed as hereinbefore noted, at the rates mentioned. At the time, he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes, going and returning through Chicago and

Denver, or through St. Louis and Denver, or through Memphis and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo, and Memphis.

"Mr. Maxwell was in no way at fault in the matter. [97] He did no more than tell the agent the points to which he wished to go, and make it known that he did not wish to go and return by the same route. The agent fixed the routing in the tickets and named the fare, and Maxwell paid without further question."

Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The act (§ 6) provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." [34 Stat. at L. 587, chap. 3591, Comp. Stat. 1913, § 8597.]

The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906) have been set forth in numerous decisions. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 445, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; [98] New York C. & H. R. R. Co. v. United States, 212 U. S. 500, 504, 53 L. ed. 624, 627, 29 Sup. Ct. Rep. 309; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Illinois C. R. Co. v. Henderson Elevator Co. 226 U. S. 441, 57 L. ed. 290, 33 Sup. Ct. Rep. 176; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 653, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 197, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 110-113, 58 L. ed. 868, 875, 876, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 284, ante, 576, 582, 35 Sup. Ct. Rep. 351. In the Mugg Case, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, it appeared that a rate, less than the lawful scheduled rate, had been quoted to the shipper by the agent of the railroad. The shipper had relied upon the quoted rate in making his shipments and sales. But it was held that he was bound to pay the established rate, and was not entitled to the delivery of the goods without such payment. This was upon the ground that it was beyond the power of the carrier to depart from the filed rates, and that the erroneous quotation of the rate by its agent did not justify it in making a different charge from that which was lawfully applicable to the shipment. As was said in Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 653, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391: "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid." It was "the purpose of the act to have but one rate, open to all alike, and from which there could be no departure." Boston & M. R. Co. v. Hooker, 233 U. S. 97, 110-113, 58 L. ed. 868, 875, 876, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526. The rule is applicable to the transportation of passengers and their baggage. Ibid.

The supreme court of the state fully recognized the established principle, but stated that the majority of the court were of the opinion that it was not controlling here, [99] for the reason that Mr. Maxwell could have gone to the point of destination, Salt Lake City, on one route, and have returned on another route, at the price actually paid for the tickets, and that, therefore, "the mere misrouting of the ticket by the railroad company" was not a discrimination. In thus holding, the assumption was that

there was an error on the part of the railroad company in the routing, by which he was misled, and that, as it is said, Mr. Maxwell "could have gone to Salt Lake City at the price paid over other routes, going and returning through Chicago and Denver, or going through St. Louis and Denver, and returning through Denver, Amarillo, and Memphis, either one of which would have met his requirements."

We are unable to reach the conclusion that this ground of decision was available under the findings of fact. A misstatement or misquotation of the rate over a given route is one thing; misrouting is a different matter. We do not think that it can be said that there is a "misrouting," in any proper sense, when the route given by the company is that requested by the shipper or passenger. See Sprickels Bros. Commercial Co. v. Monongahela R. Co. 18 Inters. Com. Rep. 190, 191. According to the findings of fact, it appears that, after his interviews and correspondence, Mr. Maxwell finally "stated to the agent that he wanted to go by the way of Chicago and Denver, and return by the way of Stamford, Texas." His request covered four points,—Chicago, Denver, Salt Lake City, and Stamford. It appears by the findings that he could have gone, at the rate actually paid, through St. Louis and Denver, returning through Denver, Amarillo, and Memphis, or that he could have made the trip, at that rate, "going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver." But, according to the findings, he was not entitled at the rate which he paid to make the trip through Chicago and Denver, returning [100] as he desired through Stamford, Texas. We are not concerned with the reasons for the differences in rates on the various routes, but merely with the fact that they existed under the applicable tariffs as filed. Under these tariffs, the findings of fact show that the amount paid was less than the amount due over the route selected.

The counsel for the defendant in error insist that as the tariffs are not included in the record, the judgment cannot be reversed. But, as we have said, we take the findings of the state court.

It is further insisted that, on reference to the tariffs, it will appear that the railroad company is mistaken in its assertion that there was an undercharge, and that the rate actually paid was, in truth, the lawful rate. The tariffs have not been submitted to us, and it is sufficient to say that if, in the further proceedings in this case, it shall appear that the defendant in error *is right* in this contention, it will necessarily follow that the railroad company will be unable to recover. But we cannot so hold upon the case as it is now presented.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice McReynolds dissents.

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[101] JOSEPH F. GUFFEY et al., Petitioners,
v.
JAMES A. SMITH et al.

(See S. C. Reporter's ed. 101-119.)

Federal courts — following decisions of state courts — rules of property.

1. Decisions of the state courts by which it is settled that an oil and gas lease in the form in common use in undeveloped territory passes to the lessee, his heirs and assigns, a freehold interest in the premises which is taxable as real property, and that a clause therein giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will, or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality, constitute rules of property which must be followed by the Federal courts.

[For other cases, see Courts, VII. c, 2, in Digest Sup. Ct. 1908.]

Federal courts — conformity to state practice — actions at law.

2. The holders of an oil and gas lease are precluded, by reason of the requirement of U. S. Rev. Stat. §§ 721, 914, Comp. Stat. 1913, §§ 1538, 1547, that in actions at law in the Federal courts of first instance effect shall be given to local laws and modes of proceeding, from maintaining an action of ejectment thereon in the Federal courts, if such an action is not maintainable in the state courts.

[For other cases, see Courts, V. e, 1, in Digest Sup. Ct. 1908.]

Federal courts — following state practice — equity causes.

3. The remedies afforded and modes of proceeding pursued in the Federal courts

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NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380.

On effect of second lease to a third party before expiration of term of prior lease—see note to Benjamin v. Northwestern F. & M. Ins. Co. 41 L.R.A.(N.S.) 395.

sitting as courts of equity are not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in those courts, wherever sitting.

[For other cases, see Courts, V. e, 2, in Digest Sup. Ct. 1908.]

Federal courts — following state practice — equity causes.

4. The settled Illinois rule that the presence of a clause in an oil and gas lease giving the lessee an option to surrender it operates to prevent the lessee from directly or indirectly enforcing it in equity does not control the Federal courts.

[For other cases, see Courts, V. e, 2, in Digest Sup. Ct. 1908.]

Injunction — against destruction of oil leasehold — effect of surrender clause.

5. Equitable relief to the holders of a gas and oil lease by way of enjoining operations under a later and similar lease of the same land, and of granting a discovery and an accounting in respect of the oil and gas produced and sold, may not be refused on the theory that because the lease contains a clause giving the lessee the option to surrender the lease at any time the rule is applicable that persons against whom specific performance of an executory contract cannot be enforced cannot themselves maintain a suit for specific performance.

[For other cases, see Injunction, I. e; Mines, II. b; Specific Performance, IV. e, in Digest Sup. Ct. 1908.]

Injunction — against destruction of oil leasehold — unfair or inequitable lease.

6. Relief in equity against the practical destruction of the freehold interest vested under an oil and gas lease may not be denied on the ground that the lease is unfair and inequitable where, the land being in an undeveloped district, the owner leased the same in consideration of $1 and of the covenants and agreements of the lessee, who was to bear the cost of the drilling, and expressly covenanted to drill a well within nine months or to pay a rental of 25 cents per acre per year for such time as the completion of the well should be delayed beyond that period, the lease to remain in force five years and as much longer as oil or gas was being produced from the premises, with a reserved option in the lessee to surrender the lease at any time, the lessor to receive substantial royalties if the undertaking proved successful.

[For other cases, see Injunction, I. e; Mines, II. b, in Digest Sup. Ct. 1908.]

Injunction — against destruction of oil leasehold — delay in payment of rent.

7. Delay in making the first payments of rent is not a ground for refusing equitable relief to the holders of a gas and oil lease by way of enjoining operations under a later and similar lease of the same land, and of granting a discovery and accounting in respect of oil and gas already produced, where the rental was not in arrears when the subsequent lease was given, and there was no attempt at any time to forfeit or put an end to the lease because of the omissions to pay strictly in advance.

[For other cases, see Injunction, I. e; Mines, II. b, in Digest Sup. Ct. 1908.]

Accounting — for destruction of oil leasehold — deductions.

8. The cost of improvements and operations incurred by the holders of an oil and gas lease while they were in actual ignorance of the existence of an earlier recorded lease, and were proceeding in the honest belief that their lease was the only one on the premises, should be deducted when requiring them to account to the holders of the earlier lease in respect to the oil produced and sold, but no such deduction should be made for expenses incurred after the holders of the second lease were actually and fully informed of the prior lease, and of the purpose of its holders to insist upon the rights conferred by it, and to obtain redress for the invasion of their rights.

[Matters as to accounting, see Accounting, in Digest Sup. Ct. 1908.]

[No. 86.]

Argued December 2 and 3, 1914. Decided April 5, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which, reversing a decree of the Circuit Court for the Eastern District of Illinois, directed the dismissal of the bill in a suit in equity by the holders of an oil and gas lease to enjoin operations under a later and similar lease, and to obtain a discovery and an accounting in respect of the oil and gas already produced and sold. Reversed and remanded to the District Court for the Eastern District of Illinois for the entry of a decree in conformity with the opinion.

See same case below, 120 C. C. A. 436, 202 Fed. 106.

The facts are stated in the opinion.

Messrs. Joseph W. Bailey and J. H. Beal argued the cause, and, with Mr. Robert J. Dodds, filed a brief for petitioners:

Priority rests clearly with the petitioners.

Willoughby v. Lawrence, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356.

The petitioners' leases, notwithstanding the presence of the so-called surrender clause, are valid and binding leases (Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46), and they vest in the petitioners a freehold estate (People ex rel. Carrell v. Bell, 237 Ill. 332, 19 L.R.A.(N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511).

Federal courts, in the exercise of their jurisdiction in equity, and in determining questions which depend upon the general principles of equity jurisprudence, are not bound to follow the decisions of the courts of the state wherein they sit or where the controversy arose.

Russell v. Southard, 12 How. 139, 13 L. ed. 927; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep 140; Black, Judicial Precedents, 1912, § 198, pp. 655, 656.

The provision giving petitioners the right, for a valuable consideration, to surrender the leases, does not bar the petitioners from relief in a court of equity.

Mutuality in Specific Performance, 3 Columbia L. Rev. pp. 1–12; 36 Cyc. 528, 631, 632; Jones v. Tankerville [1909] 2 Ch. 440, 5 B. R. C. —, 78 L. J. Ch. N. S. 674, 101 L. T. N. S. 202, 25 Times L. R. 714; 1 Harvard L. Rev. p. 104; Northern C. R. Co. v. Walworth, 193 Pa. 207, 74 Am. St. Rep. 683, 44 Atl. 253; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep 404, 9 Atl. 626; Montgomery Light & P. Co. v. Montgomery Traction Co. 191 Fed. 657; Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 702; Busch-Everett Co. v. Vivian Oil Co. 128 La. 886, 55 So. 564; Central Ohio Natural Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281; Professor Henry Schofield in 3 Illinois L. Rev. 43, 601, 608; Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764; Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co. 61 C. C. A. 359, 126 Fed. 623; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Singer Sewing-Mach. Co. v. Union Buttonhole & Embroidery Co. Holmes, 253, Fed. Cas. No. 12,904; Western U. Teleg. Co. v. Union P. R. Co. 1 McCrary, 418, 3 Fed. 423; Goddard v. Wilde, 17 Fed. 845; Chicago & A. R. Co. v. New York, L. E. & W. R. Co. 24 Fed. 516; General Electric Co. v. Westinghouse Electric Co. 151 Fed. 664; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; Great Northern R. Co. v. Manchester R. Co. 5 DeG. & S. 138, 16 Jur. 146.

Even under the decisions of the supreme court of Illinois it is held that it is lack of mutuality at the time of the entry of the decree, and not lack of mutuality at the time of the making of the contract, which prevents relief.

Gibson v. Brown, 214 Ill. 330, 73 N. E. 578; Cohen v. Segal, 253 Ill. 34, 97 N. E. 222.

Mr. Jay A. Hindman argued the cause and filed a brief for respondents:

To warrant the granting of any of the relief sought, the complainants must not only come into court with "clean hands," but it must clearly appear that the contract upon which they base their demand for relief is one which a court of equity will enforce. They must recover, if at all, upon the strength of their own title and upon the merits of their own cause.

Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. 49 C. C. A. 324, 111 Fed. 284; Jackson v. Ashton, 11 Pet. 229, 9 L. ed. 698; Pope Mfg. Co. v. Gormully, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 675, 22 Mor. Min. Rep. 429, 112 Fed. 373, 22 Mor. Min. Rep. 25; Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; High, Inj. 3d ed. §§ 22, 698; 22 Cyc. 749; 10 Am. & Eng. Enc. Law, 784, 785.

Because of the peculiar character of oil and gas as "property," and the violent fluctuations in the value of lands and leaseholds incident to the discovery of these substances, the courts have placed contracts of this kind in a class by themselves, and, in the light of the known character of the business of "oil mining," construe them most strictly against the lessee, and favorably to the lessor.

Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Bettman v. Harness, 42 W. Va. 433, 36 L.R.A. 566, 21 S. E. 271, 18 Mor. Min. Rep. 500; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep. 543; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; Bryan, Petroleum & Natural Gas, p. 146; Donahue, Petroleum & Gas, p. 149; Thornton, Oil & Gas, p. 98.

The contracts upon which the complainants base these actions should not be enforced in a court of equity, because they are deceptive, unjust, unequal, unfair, and inequitable; while they purport to be "for the sole and only purpose of mining and operating for oil and gas," they contain no provision requiring this "purpose" to be accomplished, but permit the complainants to hold the premises dormant for the purpose of speculation, and thus defeat the very purpose for which they were given.

Nash v. Towne, 5 Wall. 689, 698, 18 L. ed. 527, 529; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429, 112 Fed. 373, 22 Mor. Min. Rep. 25; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Pope Mfg. Co. v. Gormully, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632;

Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. 49 C. C. A. 324, 111 Fed. 284, 8 Am. & Eng. Dec. in Eq. 186; Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; Mississippi & M. R. Co. v. Cromwell, 91 U. S. 643, 23 L. ed. 367; King v. Hamilton, 4 Pet. 311, 7 L. ed. 869.

The leases owned by the complainants, and upon which they base these actions, are not enforceable in a court of equity (a) for want of consideration; (b) for want of mutuality of engagement; and (c) for want of mutuality of remedy.

The consideration for the execution of the leases in question was not the recited $1, nor the 25 cents a year mentioned, but the real consideration was the development of the premises for, and, if found, the production of, oil and gas, and the rents and royalties resulting therefrom and dependent thereon. If the lease fails to bind the lessee to diligent search for oil and gas, it is without consideration, binding upon neither party, and voidable at the pleasure of either.

Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839; National Oil & Pipe Line Co. v. Teel, — Tex. Civ. App. —, 67 S. W. 545, 95 Tex. 586, 68 S. W. 979, 22 Mor. Min. Rep. 263; Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Trees v. Eclipse Oil Co. 47 W. Va. 107, 34 S. E. 933, 20 Mor. Min. Rep. 260; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 20 Mor. Min. Rep. 145; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978; Crawford v. Ritchey, 43 W. Va. 252, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep. 543; Cassell v. Crothers, 193 Pa. 359, 44 Atl. 446, 20 Mor. Min. Rep. 160; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680.

Contracts unperformed, optional as to one of the parties, are optional as to both.

Southern Exp. Co. v. Western North Carolina R. Co. 99 U. S. 191, 25 L. ed. 319; United States v. Noe, 23 How. 312, 16 L. ed. 462; Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429, 112 Fed. 373, 22 Mor. Min. Rep. 25; Reese v. Zinn, 103 Fed. 97; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. 57 L.R.A. 699, 52 C. C. A. 25, 114 Fed. 77; American Cotton Co. v. Kirk, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; Crane v. Crane, 45 C. C. A. 96, 105 Fed. 869; Weaver v. Weaver, 109 Ill. 225; Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27; Vogel v. Pekoc, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; Welty v. Jacobs, 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 723; East St. Louis Connecting R. Co. v. East St. Louis, 182 Ill. 433, 55 N. E. 553; Cleveland v. Martin, 218 Ill. 73, 3 L.R.A. (N.S.) 629, 75 N. E. 772; Bauer v. Lumaghi Coal Co. 209 Ill. 316, 70 N. E. 634; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 200; Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696; Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; Iron Age Pub. Co. v. Western U. Teleg. Co. 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449; Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Snodgrass v. South Penn Oil Co. 47 W. Va. 509, 35 S. E. 820, 20 Mor. Min. Rep. 428; Campbell v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Hoffman v. Maffioli, 104 Wis. 630, 47 L.R.A. 427, 80 N. W. 1032; National Oil & Pipe Line Co. v. Teel, — Tex. Civ. App. —, 67 S. W. 545; Luke v. Livingston, — Ga. App. —, 70 S. E. 21; Mallet v. Watkins, 132 Ga. 700, 131 Am. St. Rep. 226, 64 S. E. 999; Fowler Utilities Co. v. Gray, 168 Ind. 1, 7 L.R.A.(N.S.) 726, 120 Am. St. Rep. 344, 79 N. E. 897; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; Donahue, Petroleum & Gas, p. 155; 22 Cyc. 950.

A court of equity never interferes where the power of revocation exists.

Southern Exp. Co. v. Western North Carolina R. Co. 99 U. S. 191, 25 L. ed. 319; Rutland Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. ed. 955, 961, 3 Mor. Min. Rep. 291; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25, 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429; Karrick v. Hannaman, 168 U. S. 328, 336, 19 L. ed. 484, 490, 18 Sup. Ct. Rep. 135; Reese v. Zinn, 103 Fed. 97; Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; Pantages v. Grauman, 112 C. C. A. 61, 191 Fed. 318; Shubert v. Woodward, 92 C. C. A. 509, 167 Fed. 47; Norris v. Fox, 45 Fed. 406; Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; Iron Age Pub. Co. v. Western U. Teleg. Co. 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449; Fowler Utilities Co. v. Gray, 168 Ind. 1, 7 L.R.A.(N.S.) 726, 120 Am. St. Rep. 344, 79 N. E. 897; Welty v.

Jacobs, 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 728; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696.

The complainants should not recover in this action for the reason that they have neither done equity by performing nor by tendering performance of the optional provisions of the lease, nor in their bill do they offer to do equity by offering to perform whatever the court shall decree ought to be done on their part.

Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 675, 22 Mor. Min. Rep. 429; Kelsey v. Crowther, 162 U. S. 404, 40 L. ed. 1017, 16 Sup. Ct. Rep. 808; Morgan v. Morgan, 2 Wheat. 290, 4 L. ed. 242; Colson v. Thompson, 2 Wheat. 336, 4 L. ed. 253; Brashier v. Gratz, 6 Wheat. 528, 5 L. ed. 322; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. ed. 219; Purcell v. Miner (Purcell v. Coleman) 4 Wall. 513, 18 L. ed. 435; Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437; Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; Boone v. Missouri Iron Co. 17 How. 340, 15 L. ed. 171; Thayer v. Wilmington Star Min. Co. 105 Ill. 540; Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616; Story, Eq. Jur. § 736; Pom. Spec. Perf. § 330.

The completion of a well upon the demised premises within the time stipulated (nine months) was a condition precedent to the vesting of any estate; and at the expiration of the time given in which to make the preliminary test, none having been made, the lessor had a right to avoid the lease by leasing to another.

Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25; Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep. 543.

The lease of the complainants should not be enforced in a court of equity because of the laches of the complainants in that they failed to carry out the purpose of the lease, but stood by, awaiting the result of development by others, the fruit of whose enterprise, labor, and money they now seek to appropriate.

Hollingsworth v. Fry, 4 Dall. 345, 1 L. ed. 860, Fed. Cas. No. 6619; Twin-Lick Oil Co. v. Marbury, 91 U. S. 593, 23 L. ed. 331, 3 Mor. Min. Rep. 688; Johnson v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 90 Fed. 606, 20 Mor. Min. Rep. 377; Munroe v. Armstrong, 96 Pa. 307; Cassell v. Crothers, 193 Pa. 359, 44 Atl. 446, 20 Mor. Min. Rep. 160; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep. 543; Rorer Iron Co. v. Trout, 83 Va. 409, 5 Am. St. Rep. 285, 2 S. E. 713; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; 16 Cyc. 161–163; 22 Am. & Eng. Enc. Law, 1043.

Oil and gas *in situ* are not capable of private ownership, but they become "property" only when reduced to possession. Title to these substances is inchoate and contingent upon their discovery and production. Leases of this character, therefore, vest in the lessee no present title to the oil and gas, but are a mere license to explore for, and, if found, to reduce the same to possession.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429, 112 Fed. 373, 22 Mor. Min. Rep. 25; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839; State v. Ohio Oil Co. 150 Ind. 21, 47 L.R.A. 627, 49 N. E. 809; Heal v. Niagara Oil Co. 150 Ind. 483, 50 N. E. 482; People's Gas Co. v. Tyner, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481; Townsend v. State, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; Hancock v. Diamond Plate Glass Co. 162 Ind. 146, 70 N. E. 149; New American Oil & Min. Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; Ray v. Western Pennsylvania Natural Gas Co. 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065, 17 Mor. Min. Rep. 374; Dark v. Johnson, 55 Pa. 164, 93 Am. Dec. 732, 9 Mor. Min. Rep. 283; Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109, 18 Mor. Min. Rep. 404; Brown v. Vandergrift, 80 Pa. 142; Funk v. Haldeman, 53 Pa. 229, 7 Mor. Min. Rep. 203; Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109, 18 Mor. Min. Rep. 404; Kier v. Peterson, 41 Pa. 357, 8 Mor. Min. Rep. 499; Jones v. Forest Oil Co. 194 Pa. 379, 48 L.R.A. 748, 44 Atl. 1074, 20 Mor. Min. Rep. 350; Wood County Petroleum Co. v. West Virginia

Transp. Co. 28 W. Va. 210, 57 Am. Rep. 659; Hall v. Vernon, 47 W. Va. 295, 49 L.R.A. 464, 81 Am. St. Rep. 791, 34 S. E. 764; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; Guffy v. Hukill, 34 W. Va. 49, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754; Shepherd v. McCalmont Oil Co. 38 Hun, 37; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Bruner v. Hicks, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696; Barringer & A. Mines & Mining, pp. 30, 31.

If the oil and gas in place, like solid minerals, were capable of ownership, and if it were conceded that the leases in question conveyed to the complainants title to the oil and gas *in situ*, the measure of damages, in an action at law for their conversion, would be the value of these substances in place, and not the amount for which they were sold, unless the trespass was wilful or malicious.

E. E. Bolles Wooden-Ware Co. v. United States, 106 U. S. 433, 27 L. ed. 230, 1 Sup. Ct. Rep. 398; Colorado Cent. Consol. Min. Co. v. Turck, 17 C. C. A. 128, 36 U. S. App. 208, 70 Fed. 294; Durant Min. Co. v. Percy Consol. Min. Co. 35 C. C. A. 252, 93 Fed. 166, 20 Mor. Min. Rep. 27; Golden Reward Min. Co. v. Buxton Min. Co. 38 C. C. A. 228, 97 Fed. 413; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. 64 C. C. A. 180, 129 Fed. 668; Montana Min. Co. v. St. Louis Min. & Mill. Co. 78 C. C. A. 33, 147 Fed. 897; United States v. Homestake Min. Co. 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365; Montrozona Gold Min. Co. v. Thatcher, 19 Colo. App. 371, 75 Pac. 595; United Coal Co. v. Canon City Coal Co. 24 Colo. 116, 48 Pac. 1045, 18 Mor. Min. Rep. 639; Dyke v. National Transit Co. 22 App. Div. 360, 49 N. Y. Supp. 180; Crawford v. Forest Oil Co. 208 Pa. 5, 57 Atl. 47; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 6 Mor. Min. Rep. 317.

Where one having a superior title goes into a court of equity to assert his right to property, even as against a wilful wrongdoer, he is required to do equity by paying for improvements placed upon the property; and if he seek an accounting for rents and profits, he must bear the cost of production.

Williams v. Gibbes, 20 How. 535, 15 L. ed. 1013; Ruffner v. Lewis, 7 Leigh, 720, 30 Am. Dec. 513; Lagger v. Mutual Union Loan & Bldg. Asso. 146 Ill. 296, 33 N. E. 946; Williams v. Vanderbilt, 145 Ill. 239, 21 L.R.A. 489, 36 Am. St. Rep. 486, 34 N. E. 476; Butler v. Butler, 164 Ill. 171, 45 N. E. 426; Eury v. Merrill, 42 Ill. App. 193; Glos v. Clark, 97 Ill. App. 609; Gable v. Ellis, 120 Ill. 136, 11 N. E. 188; Breit v. Yeaton, 101 Ill. 242; Bradley v. Snyder, 14 Ill. 263, 58 Am. Dec. 564; Williamson v. Jones, 43 W. Va. 563, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19; Chaney v. Coleman, 77 Tex. 100, 13 S. W. 850; Crawford v. Forest Oil Co. 208 Pa. 5, 57 Atl. 47; Phillips v. Coast, 130 Pa. 572, 18 Atl. 998; 3 Pom. Eq. Jur. § 1241.

It was error to charge interest on the respective amounts the defendants were decreed to pay the complainants, from the 10th day of August, 1910.

Imperial Hotel Co. v. H. B. Claflin Co. 175 Ill. 124, 51 N. E. 610; Florsheim v. Illinois Trust & Sav. Bank, 192 Ill. 382, 61 N. E. 491; Foote v. Illinois Trust & Sav. Bank, 194 Ill. 600, 62 N. E. 834; Espert v. Ahlschlager, 117 Ill. App. 484; Hoblit v. Bloomington, 71 Ill. App. 204; Glos v. Clark, 97 Ill. App. 609.

When the nature of "property" in natural gas and oil contained in the earth, and the legal effect of instruments of the character of those here involved, have been settled authoritatively by the rulings of the highest court of the state in which they have their situs, such decisions establish rules of property peculiar to mining in that state, which the Federal courts will recognize and follow.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Brown v. Van Braam, 3 Dall. 344, 1 L. ed. 629; Mandeville v. Riddle, 1 Cranch, 290, 2 L. ed. 112; Riddle v. Mandeville, 5 Cranch, 322, 3 L. ed. 114; Telfair v. Stead, 2 Cranch, 407, 2 L. ed. 320; Patton v. Easton, 1 Wheat. 476, 4 L. ed. 139; Powell v. Harman, 2 Pet. 241, 7 L. ed. 411; Green v. Neal, 6 Pet. 292, 8 L. ed. 403; Jackson ex dem. St. John v. Chew, 12 Wheat. 153, 6 L. ed. 583; Henderson v. Griffin, 5 Pet. 151, 8 L. ed. 79; Bank of Hamilton v. Dudley, 2 Pet. 492, 7 L. ed. 496; Smith v. Kernochen, 7 How. 198, 12 L. ed. 666; Nesmith v. Sheldon, 7 How. 812, 12 L. ed. 925; Golden v. Prince, 3 Wash. C. C. 313, Fed. Cas. No. 5509; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742.

The questions involved in these cases having been firmly settled by a long and uniform line of decisions by the highest court of Illinois, and by the highest Federal court in that jurisdiction, and likewise by the United States Supreme Court, these decisions should forever foreclose further agitation of these questions in that state.

Frisby v. Ballance, 5 Ill. 287, 39 Am. Dec.

409; Bowman v. Cunningham, 78 Ill. 48; Weaver v. Weaver, 109 Ill. 225; Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27; Vogel v. Pekoc, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; Welty v. Jacobs, 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 723; East St. Louis Connecting R. Co. v. East St. Louis, 182 Ill. 433, 55 N. E. 533; Bauer v. Lumaghi Coal Co. 209 Ill. 316, 70 N. E. 634; Cleveland v. Martin, 218 Ill. 73, 3 L.R.A.(N.S.) 629, 75 N. E. 772; Bruner v. Hicks, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 200; Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25, 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429; Smith v. Guffey, 120 C. C. A. 436, 202 Fed. 106; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Rutland Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. ed. 955, 961, 3 Mor. Min. Rep. 291; Southern Exp. Co. v. Western North Carolina R. Co. 99 U. S. 191, 25 L. ed. 319; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit in equity, brought in the circuit court of the United States for the eastern district of Illinois, [109] by the holders of an oil and gas lease covering a small tract of land in Crawford county, Illinois, to enjoin operations under a later and similar lease, and to obtain a discovery and an accounting in respect of the oil and gas produced and sold in the course of operations already had. In due course the case was referred to a master, who took the evidence, reported the same with his conclusions upon questions of fact and law, and recommended a decree awarding the relief prayed, but taking no account of the gas theretofore used or sold. Exceptions to the report were filed by the defendants, and at the final hearing the circuit court overruled the exceptions, confirmed the report, and entered a decree as recommended. The decree was reversed by the circuit court of appeals with a direction that the bill be dismissed, the ground of decision being that the complainants were not entitled to relief in equity, and should be remitted to such remedy as they might have at law, because by the terms of their lease they had an option to surrender it at any time. 120 C. C. A. 436, 202 Fed. 106. Other questions in the suit were not considered by that court. The case is now here upon a writ of certiorari.

Both leases were for the same tract, and were given by James A. Smith, who owned it in fee simple. The earlier lease was given to one Walton, May 22, 1905, and by two successive assignments made in November and December following was transferred to Joseph F. Guffey and others, the complainants. It and the assignments were properly recorded June 15, 1906. The later lease was given to one Allison August 9, 1906, was assigned shortly thereafter to one Willett, and was transferred March 25, 1907, to Solley, Johnson, and Hennig, three of the defendants. There was also an intermediate lease to one Wilcox, given March 23, 1906, but as it was voluntarily surrendered and nothing is claimed thereunder, it suffices to say (a) that it contained a provision whereby the lessee [110] therein agreed to protect the lessor against any expense or damage that might arise by reason of the earlier lease, (b) that before surrendering it Wilcox drilled a well upon the premises in an effort to find oil and gas, but without success, and (c) that the complainants, upon learning of this lease, promptly served upon Wilcox and the lessor a notice asserting the rights conferred by the prior lease.

Allison and his immediate assignee, Willett, took the subsequent lease with actual notice of the earlier one, and with constructive, if not actual, notice of its transfer to the complainants, but made no inquiry of the latter respecting its status or their claim under it. Nothing was done under the subsequent lease by Allison, but after its assignment to Willett the latter entered upon the premises, with the lessor's sanction, and drilled a well which yielded a flow of gas, but no oil. Upon learning of these drilling operations the complainants, in a written notice to Willett and the lessor, again asserted their claim under the prior lease, and demanded that the operations cease.

Solley and his associates took the assignment from Willett without actual knowledge of the prior lease, but, under the local law, were constructively charged with notice of it and of its transfer to the complainants, for both were duly recorded. They acted upon the advice of an abstractor who failed to make a proper examination of the records. After receiving the assignment, Solley and his associates, with the lessor's approval, proceeded to drill other wells upon the premises and developed the presence therein of oil in paying quantities. On August 1, 1907, they were actually and fully informed of the prior lease and of the complainants' purpose to insist upon

the rights conferred by it and to obtain redress for the invasion of those rights, but they persisted in their drilling operations and produced and sold from the premises large quantities of oil. These operations were being continued when the suit was [111] brought (March 24, 1908) and when the accounting was had before the master. Most of the oil taken from the premises was extracted and sold after August 1, 1907, the date when Solley and his associates were actually and fully informed of the complainants' claim.

In its terms the prior lease of May 22, 1905, under which the complainants claim, substantially conforms to one in common use in unexplored territory, as is shown by the evidence in this case and by reported decisions in other cases. It recites that it was given in consideration of $1 paid to the lessor and the covenants and agreements of the lessee therein set forth. It contains the usual words of grant and demise; runs to the lessee, Walton, his heirs and assigns; describes the purpose for which it was given as that of mining and operating for oil and gas and laying pipe lines and building tanks and other structures to take care of those substances when produced, and defines the terms for which it was to endure as five years from its date," and as long thereafter as oil or gas or either of them is produced" from the premises. The lessee covenants and agrees therein, first, to deliver to the lessor, free of cost, in the pipe line to which the wells may be connected, the equal one-eighth part of all oil produced and saved from the premises; second, to pay $100 per year for the gas from each gas well the product of which is marketed and used off the premises; third, to locate all wells so as to interfere as little as possible with the cultivated portions of the land; and fourth, to complete a well on the premises within nine months after the date of the lease, or to pay at the rate of 25 cents per acre per year, quarterly in advance, for the additional time the completion of a well is delayed beyond the nine months, such payments to be made directly to the lessor, or deposited to his credit in the Exchange Bank, at Martinsville, Illinois. There is also a surrender clause to the effect that "upon the [112] payment of $1, at any time," the lessee, his heirs or assigns, "shall have the right to surrender this lease for cancelation, after which all payments and liabilities thereafter to accrue" thereunder "shall cease and determine."

Among the master's findings and conclusions which were approved by the circuit court were the following:

"The master further finds that the complainants have been at all times financially responsible and able to perform the covenants of their lease; that they have not drilled a well on said premises, but that they have paid all the rentals required by the terms of said lease to be paid, at the rate of 25 cents per acre, and deposited the same in the bank designated in the lease to receive the same, for the owner of the land."

"That prior to purchasing the Allison lease, Willett made inquiry by telephone of the Exchange Bank, at Martinsville, whether or not rentals had been paid on the Walton lease by the complainants, and was informed by the bank that no such payments had been made or deposited to the credit of James A. Smith, although, as a matter of fact, the master further finds that, at the time the said bank gave this information, the rental money had in fact been deposited to the credit of the said James A. Smith."

"That the Walton lease, under which complainants claim title, has never been forfeited for failure to comply with the terms thereof, and up to the time of the filing of this suit, no grounds existed whereby such a forfeiture could be declared."

In addition to Solley and his associates, the defendants to the suit included the lessor and the Ohio Oil Company, the latter having purchased the oil with knowledge of the premises from which it was produced and of the complainants' claim under the prior lease.

It is settled by the decisions of the supreme court of [113] Illinois that an oil and gas lease like that of the complainants passes to the lessee, his heirs and assigns, a present vested right—"a freehold interest"—in the premises, that this interest is taxable as real property, and that the clause giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality. Bruner v. Hicks, 230 Ill. 536, 540, 542, 120 Am. St. Rep. 332, 82 N. E. 888; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 13, 14, 122 Am. St. Rep. 144, 84 N. E. 53; Poe v. Ulrey, 233 Ill. 56, 62, 64, 84 N. E. 46; Ulrey v. Keith, 237 Ill. 284, 298, 86 N. E. 696; People ex rel. Carrell v. Bell, 237 Ill. 332, 330, 19 L.R.A. (N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511; Daughetee v. Ohio Oil Co. 263 Ill. 518, 524, 105 N. E. 308. These decisions constitute rules of property and must be accepted and applied in passing upon the complainants' rights. McGoon v. Scales, 9 Wall. 23, 27, 19 L. ed. 545, 546; Bucher v. Cheshire R. Co. 125 U. S. 555, 583, 31

L. ed. 795, 798, 8 Sup. Ct. Rep. 974; Barber v. Pittsburgh, Ft. W. & C. R. Co. 166 U. S. 83, 99, 41 L. ed. 925, 933, 17 Sup. Ct. Rep. 488.

It also is settled that in the courts of Illinois the holder of such a lease cannot maintain an action of ejectment thereon (Watford Oil & Gas Co. v. Shipman, 233 Ill. 12, 122 Am. St. Rep. 144, 84 N. E. 53; Gillespie v. Fulton Oil & Gas Co. 236 Ill. 188, 206, 86 N. E. 219), and by reason of the legislation of Congress requiring that in actions at law in the Federal courts of first instance effect shall be given to the local laws and modes of proceeding (Rev. Stat. §§ 721, 914, Comp. Stat. 1913, §§ 1538, 1537) it results that the complainants could not have maintained an action of ejectment in the circuit court. An action for damages, of course, would not have afforded a plain, adequate, and complete remedy in the circumstances, and if such a remedy was to be had, it was necessary to resort to a suit in equity for an injunction, discovery, and accounting, as was done. Joy v. St. Louis, 138 U. S. 1, 46, 34 L. ed. 843, 857, 11 Sup. Ct. Rep. 243; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 567, 36 L. ed. 537, 543, 12 Sup. Ct. Rep. 689; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 474, 36 L. ed. 776, 781, 12 Sup. Ct. Rep. 900. Thus the principal question for decision is whether such a suit could be successfully maintained in the circuit court, [114] diverse citizenship and the requisite jurisdictional amount being conceded.

The supreme court of Illinois, while fully sustaining the right to maintain such a suit in the courts of the state when the lease contains no clause giving the lessee an option to surrender it (Gillespie v. Fulton Oil & Gas Co. supra), holds that the presence of such a clause in the lease operates to prevent the lessee from directly or indirectly enforcing it in equity (Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 13, 14, 122 Am. St. Rep. 144, 84 N. E. 53, and Ulrey v. Keith, 237 Ill. 284, 298, 86 N. E. 696), the ground of distinction being that the surrender clause, although lawful in itself, and not affecting the validity of the lease, renders it so lacking in mutuality that equity will remit the lessee to his remedy at law. These decisions, it is insisted, should have been accepted and applied by the circuit court. To this we cannot assent. By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat. §§ 913, 917, Comp. Stat. 1913, §§ 1536, 1543; Neves v. Scott, 13 How. 268, 272, 14 L. ed. 140, 142; Payne v. Hook, 7 Wall. 425, 430, 19 L. ed. 260, 261; Dodge v. Tulleys, 144 U. S. 451, 457, 36 L. ed. 501, 503, 12 Sup. Ct. Rep. 728; Mississippi Mills v. Cohn, 150 U. S. 202, 204, 37 L. ed. 1052, 1053, 14 Sup. Ct. Rep. 75. As was said in the first of these cases: "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable."

It next is insisted that, according to the general principles and rules of equity administered in the Federal courts, the surrender clause constitutes an insuperable obstacle [115] to granting the relief sought, the argument being that, as the complainants have a reserved option to surrender the lease at any time, it cannot be specifically enforced against them, and therefore cannot be similarly enforced in their favor. The rule intended to be invoked has to do with the specific performance of executory contracts, is restrained by many exceptions, and has been the subject of divergent opinions on the part of jurists and text writers. Without considering it in other aspects, we think it is without present application. Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing and irreparable injury calculated to accomplish its practical destruction. The complaint is not that performance of some promised act is being withheld or refused, but that complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief. In this respect the case is not materially different from what it would be if the complainants were claiming under an absolute conveyance rather than a lease. In a practical sense the suit is one to prevent waste, and it comes with ill grace for the defendants to say that they ought not to be restrained because, perchance, the complainants may sometime exercise their option to surrender the lease. We think this option, which has

not been exercised and may never be, is not an obstacle to the relief sought.

Another contention of the defendants is that the lease is so unfair and inequitable in its terms that relief in equity should be withheld and the complainants left to seek a remedy at law; which is tantamount to saying that they must submit to the practical destruction of their leasehold and accept such reparation as may be obtained through recurring actions for damages. Whether [116] the lease is unfair and inequitable must be determined in view of the circumstances in which it was given. Willard v. Tayloe, 8 Wall. 557, 570, 571, 19 L. ed. 501, 504, 505; Rutland Marble Co. v. Ripley, 10 Wall. 339, 357, 19 L. ed. 955, 961, 3 Mor. Min. Rep. 291; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 473, 36 L. ed. 776, 781, 12 Sup. Ct. Rep. 900. They were these: Whether the leased tract contained oil or gas was not known. It was in an undeveloped district in which there was no oil or gas well and no pipe line leading to a market. Drilling wells was attended with large expense, the cost of each well being upwards of $1,000, according to the testimony of one of the defendants. No fraud, deception, or overreaching was practised in procuring the lease. The parties were competent to contract with each other, and entered into the lease because, in the circumstances, its provisions were satisfactory to them. Under its terms the cost of the drilling was to be borne by the lessee. If the undertaking was unsuccessful, he alone was to stand the loss, and if it was successful, the lessor was to share in the results by receiving substantial royalties, the reasonableness of which is not questioned. The consideration for the lease, *viz.*, $1 paid to the lessor and the covenants and agreements of the lessee, cannot be pronounced unreasonable. Similar leases, resting upon a like consideration, often have been sustained in cases not distinguishable from this.[1] The lease was to remain in force five years, and as much longer as oil or gas was being produced from the premises; in other words, it was to expire in five years unless oil or gas was produced within that time. The lessee expressly covenanted to drill a well within nine months or to pay a [117] rental of 25 cents per acre per year, quarterly, in advance, for such time as the completion of the well was delayed beyond that period, the delay, of course, not to extend beyond the primary term of five years. The terms of the covenant doubtless were suggested by the undeveloped condition of the district and by the expense and risk incident to exploring for oil and gas. They evidently were satisfactory to the lessor at the time, and the record discloses no reason for holding that, in the circumstances, they were unreasonably liberal to the lessee. Some criticism is directed against the reserved option to surrender, but it is difficult to perceive how it could be declared inequitable. If it was not exercised, the lessee would be bound by his covenants, and if exercised, the lessor would be free to deal with the premises as he chose. A surrender was not to affect any existing liability, but only to avoid those "thereafter to accrue." A like clause is in the subsequent lease, and, according to the evidence and several reported decisions, is of frequent occurrence in such instruments. We conclude that there is nothing in the terms of the lease which requires that equitable relief be withheld.

While the complainants, as found by the master, paid all the rental required by the terms of the lease, and while they paid most of it in advance of the time stipulated, the first two payments were not seasonably made, and this is urged as a ground for refusing equitable relief. The objection is not well taken. The rental was not in arrears when the subsequent lease of August 9, 1906, was given, and there was no attempt at any time to forfeit or put an end to the lease because of the omissions to pay strictly in advance. While there was no provision in the lease for a forfeiture, the subject was covered by an Illinois statute. Hurd's Rev. Stat. of 1905, chap. 80, § 8. Under it the lessor could have demanded the rent in arrears and have notified the complainants in writing that unless [118] payment was made within a time named in the notice, not less than five days thereafter, the lease would be terminated; and upon a failure to pay within that time he could have treated the lease as ended. But there was no such demand or notice, and consequently no failure to comply with either. As interpreted by the supreme court of the state, the statute confers upon a lessee who omits

[1] See Allegheny Oil Co v. Snyder, 45 C. C. A. 604, 106 Fed. 764; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Central Ohio Natural Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281; Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 104 Am. St. Rep. 773, 73 N. E. 222, 2 Ann. Cas. 444; Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762; Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; Gillespie v. Fulton Oil & Gas Co. 236 Ill. 188, 86 N. E. 219.

to pay rent at the time it is due a right to cure his default by paying at any time prior to demand and notice or within the time named in the notice. Chadwick v. Parker, 44 Ill. 326; Chapman v. Kirby, 49 Ill. 211; Woods v. Soucy, 166 Ill. 407, 47 N. E. 67. Here the default was cured in advance of any demand or notice, and thereafter the complainants' rights were the same as if the default had not occurred.

In the accounting Solley and his associates were charged with the value, in the pipe line where the same was sold, of all the oil taken by them from the premises, save the one-eighth part going to the lessor as a royalty, and error is assigned upon this because no deduction was made for the cost of the improvements and operations whereby the oil was taken from the earth and delivered at the pipe line. As respects the cost incurred prior to August 1, 1907, we think the objection is well taken, for up to that time Solley and his associates were in actual ignorance of the earlier lease, and were proceeding in the honest belief that the later lease, assigned to them by Willett, was the only one upon the premises. They paid a substantial sum for it, were let into possession by the lessor, and were not conscious that they were invading the rights of others. True, the prior lease had been properly recorded, but as they consulted an abstracter before consummating the transaction with Willett, and were advised that the title was clear, the constructive notice resulting from the recording of the prior lease was not inconsistent with an honest, though mistaken, belief on their part [119] that they had acquired a perfect right to take and dispose of the oil. But the expenses incurred after August 1, 1907, are upon a different footing. On that date Solley and his associates were actually and fully informed of the prior lease and of the complainants' purpose to insist upon the rights conferred by it and to obtain redress for the invasion of those rights, so what was done thereafter cannot be regarded as anything less than a wilful taking and appropriation of the oil which was subject to the complainants' superior right. These views are amply sustained by our decisions. E. E. Bolles Wooden-Ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 428, 434, 36 L. ed. 762, 765, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 46 L. ed. 1164, 22 Sup. Ct. Rep. 920; United States v. St. Anthony R. Co. 192 U. S. 524, 542, 48 L. ed. 548, 555, 24 Sup. Ct. Rep. 333. See also Central Coal & Coke Co. v. Penny, 97 C. C. A. 600, 173 Fed. 340; Bender v. Brooks, 103 Tex. 329, 127 S. W. 168. Ann. Cas. 1913A, 559; Gladys City Oil, Gas, & Mfg. Co. v. Right of Way Oil Co. — Tex. Civ. App. —, 137 S. W. 171, 182.

We conclude that the decree in the circuit court was right, save that the accounting should have proceeded along the lines just indicated, and those improvements the cost of which should have been deducted in the accounting, that is, those made before August 1, 1907, should have been awarded to the complainants.

The decrees below are reversed and the cause is remanded to the district court, as successor to the circuit court, with directions that the accounting and the decree be conformed to the views herein expressed.

Decree reversed.

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[120] JOSEPH F. GUFFEY et al., Petitioners,

v.

SUSANNAH SMITH et al.

(See S. C. Reporter's ed. 120.)

This case is governed by the decision in Guffey v. Smith, ante, 856.

[No. 87.]

Argued December 2 and 3, 1914. Decided April 5, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which, reversing a decree of the Circuit Court for the Eastern District of Illinois, directed the dismissal of the bill in a suit in equity by the holders of an oil and gas lease to enjoin operations under a later and similar lease, and to obtain a discovery and an accounting in respect of the oil and gas already produced and sold. Reversed and remanded to the District Court for the Eastern District of Illinois for the entry of a decree in conformity with the opinion.

See same case below, 120 C. C. A. 436, 202 Fed. 106.

Messrs Joseph W. Bailey and J. H. Beal argued the cause and filed a brief for petitioners.

Mr. Jay A. Hindman argued the cause and filed a brief for respondents.

For contentions of counsel, see their briefs as reported in Guffey v. Smith, ante, 856.

Mr. Justice Van Devanter delivered the opinion of the court:

This case is, in all material respects, like that of Guffey v. Smith, just decided [237 U. S. 101, ante, 856, 35 Sup. Ct. Rep. 526]. The two cases were argued together, and the views expressed in that are decisive of this.

The decrees below are reversed, and the case is remanded to the District Court, with like directions as in that case.

Decree reversed.

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[121] PENNSYLVANIA RAILROAD COMPANY, Plff. in Err.,
v.
PURITAN COAL MINING COMPANY.

(See S. C. Reporter's ed. 121-135.)

Federal courts — exclusive jurisdiction — case arising under interstate commerce act.

1. The express grant in the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 9, of the right of choice between complaint to the Interstate Commerce Commission by persons claiming to be damaged by any common carrier subject to the provisions of that act, and suit in a Federal court for the recovery of the damages for which such common carrier may be liable under the provisions of that act, was exclusive of any other remedy in the state courts.

[For other cases, see Courts, VI. a, in Digest Sup. Ct. 1908.]

Courts — concurrent jurisdiction — suit against interstate carrier.

2. The jurisdiction of the state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive, was not superseded by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), §§ 8, 9, giving shippers new remedies before the Interstate Commerce Commission, or in the Federal courts, since these sections must be read in connection with the provision of § 22, preserving existing rights or remedies.

[For other cases, see Courts, VI. a, in Digest Sup. Ct. 1908.]

Courts — concurrent jurisdiction — suit against interstate carrier.

3. State courts have jurisdiction concurrent with the Federal courts by reason of the provision in the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 22, preserving existing rights and remedies, of a suit by a shipper against an interstate carrier to recover the damages arising in interstate commerce out of the latter's failure to discharge its common-law duty to furnish the cars needed by the shipper.

[For other cases, see Courts, VI. a, in Digest Sup. Ct. 1908.]

Courts — concurrent jurisdiction — suit against interstate carrier — previous action by Interstate Commerce Commission.

4. State and Federal courts have concurrent jurisdiction without a preliminary finding by the Interstate Commerce Commission by virtue of the provision of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 22, preserving existing rights and remedies, of a suit by a bituminous coal mining company against an interstate carrier to recover the damages arising in interstate commerce out of the failure of the latter to furnish such company during the anthracite coal strike of 1902 with the cars to which it was entitled under the carrier's own rule that in times of shortage cars should be allotted on the basis of mine capacity, since the rule itself not being attacked, there is no administrative question involved.

[For other cases, see Courts, VI. a; Carriers, III. e, in Digest Sup. Ct. 1908.]

[No. 76.]

Argued November 11, 1914. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Clearfield County, in that state, in favor of a shipper in an action against a railway company for damages caused by the failure of the latter to furnish cars. Affirmed.

See same case below, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914B, 37.

Statement by Mr. Justice Lamar:

In March, 1908, the Puritan Coal Mining Company brought suit in the court of common pleas of Clearfield county, Pennsylvania, against the Pennsylvania Railroad Company for damages caused by the latter's failure to furnish cars needed for the transportation of coal. On November 21, 1908, the plaintiff filed a "Statement of Claim" in which it was alleged that the defendant was a common carrier of freight between points within the state of Pennsylvania, and as such bound to furnish shippers with adequate facilities for the transportation of coal, but that the carrier did not, as required by law, furnish the plaintiff with sufficient cars to enable it to transport coal mined by it. By reason of such failure to

NOTE.—On concurrent jurisdiction of Federal and state courts—see notes to Smith v. M'Iver, 6 L. ed. U. S. 152, and Copp v. Louisville & N. R. Co. 12 L.R.A. 725.

perform its duty and legal obligation, the defendant caused the plaintiff damage to the extent of $260,777.

Other paragraphs in the statement alleged that the carrier established and published the capacity of all coal mines in the region reached by its railway; that, as a common carrier it was bound to furnish cars upon the [123] basis of equality in proportion to the rated capacity of plaintiff's mines. But, disregarding its duty, under the statute of the state, the defendant did, unreasonably as well as unlawfully, refuse to furnish the plaintiff with its *pro rata* share of coal cars held for daily distribution, and did subject the plaintiff to unreasonable disadvantage in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Company by giving to the latter 500 cars before distributing any to the plaintiff. By reason of the undue and unjust discrimination against the plaintiff and the undue preference in favor of the Berwind-White Company the plaintiff was not furnished with the cars to which it was entitled, and thereby lost the profit of $260,777 which it could and would have made on coal which it could and would have shipped had it received its due proportion of cars.

On November 23, 1908, and again in April, 1911, other statements were filed which repeated and amplified the charge of unjust discrimination in the distribution of cars whereby the plaintiff received less and the Berwind-White Company more than was proper under the rule of allotment established by the carrier.

The defendant moved to dismiss the case because the state court was without jurisdiction. The court held that the motion was bad as a demurrer, bad as a plea in abatement, and dismissed it as having been prematurely made. The defendant filed no other defense except a plea of the statute of limitations as to certain items of damage claimed in an amendment to the original statement.

By consent the case was heard by the judge without a jury. He made a report of the facts from which it appears that: Ordinarily the carrier was able to furnish shippers with cars on demand; but in 1902 there was a strike in the anthracite region which cut off the usual supply of anthracite coal to eastern cities and compelled them to use bituminous coal mined along the lines of the Pennsylvania [124] Railway. The new demand for soft coal was so great that the railroad company was not able to supply the full number of cars called for by the mining companies on its line. Its established rule in such cases was that cars should be allotted to the several coal districts in proportion to their output, the cars thus allotted to the districts being then distributed to the mining companies therein in proportion to their capacity. During the anthracite coal strike, however, the carrier violated this rule and made excessive allotments to the "scalp level region," in which the Berwind mines were located, and made too small an allotment to the "mountain region," in which the Puritan mines were situated.

There was evidence that the Puritan Company had orders for coal at a price which would have netted it a large profit. The coal so ordered was to be delivered "free on board" the cars at the Puritan mines,—the purchaser and consignee paying the freight to points of destination within and without the state. There was evidence that the Puritan Company was ready, willing, and able to make such sales and deliveries, and constantly demanded cars in order to enable it to fill these orders. Sometimes the carrier for days would fail to furnish cars, with the result that the company's mining operations were seriously interrupted. Sometimes the Puritan got cars, but not the full number to which it was entitled on the basis of distribution according to mine capacity, although the Berwind-White Company during the same period received more than its proportion.

The railroad company's elaborate and detailed distribution sheets were introduced in evidence. They showed the number of cars to be allotted to mines on the basis of capacity for each day of the period during which the car shortage existed. From these sheets and the other evidence in the case it appeared that the Berwind Company received many more cars than its share, and that the [125] Puritan received several thousand less than its proportion. There was proof as to the number of tons these cars could have hauled; that the Puritan had orders for coal which it would have sold if these cars had been furnished; there was also evidence as to the royalty and cost of production, with data on which to make calculation of the damage resulting from the failure to receive cars.

The trial judge held that the state court had jurisdiction, and entered a judgment for the plaintiff, which, with interest, amounted to $74,323.88. Exceptions to the report were overruled and the case was taken to the supreme court of Pennsylvania on assignments in which complaint was made that the trial judge erred—

"(1) in holding that the state court had jurisdiction;

"(2) in failing to hold that, under the commerce act [24 Stat. at L. 379, chap.

104, Comp. Stat. 1913, § 8563], the Federal court alone had jurisdiction;

"(3) in holding that the business between the Puritan Company and the railroad was intrastate business where coal was sold F. O. B. the cars at the mines;

"(4) in holding that the plaintiff could recover damages for failure to receive cars intended for use in shipping coal outside the state;

"(5) in adopting the method for distributing cars on which the damages were collected;

(6) in failing "to take into account the private or individual cars, so-called, which were delivered to the plaintiff during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the court has found should have been allotted to the region or district in which the plaintiff's mines were located."

Mr. Francis I. Gowen argued the cause, and, with Messrs. Frederic D. McKenney and John G. Johnson, filed a brief for plaintiff in error:

Congress has prohibited undue or unlawful discriminations and preferences by a carrier in the distribution of its equipment; at least, when this is to be used for interstate transportation.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 51 L. ed. 292, 30 Sup. Ct. Rep. 164.

Section 3 of the interstate commerce act exclusively controls a distribution by a carrier of its cars for interstate shipments.

Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

Not only does § 3 of the interstate commerce act regulate to the exclusion of state regulation the distribution of cars for interstate shipments or use, but it also, under the circumstances under which the plaintiff in error made allotment and distribution of its cars, controlled, to the exclusion of state regulation, the distribution of its coal car equipment as an entirety.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Pennsylvania R. Co. v. Interstate Commerce Commission, 193 Fed. 81.

If, in making distribution, the plaintiff in error unduly discriminated against the defendant in error, the remedies of the latter were those accorded by the interstate commerce acts, and those alone, and those remedies did not embrace actions in state courts to recover damages because of injuries resulting from such discrimination.

Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 39, 165 Fed. 1; Van Patten v. Chicago, M. & St. P. R. Co. 74 Fed. 981; Sheldon v. Wabash R. Co. 105 Fed. 785; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Loomis v. Lehigh Valley R. Co. 208 N. Y. 312, 101 N. E. 907.

The car while in process of being loaded with coal to be transported outside of the state of Pennsylvania was being used or employed in interstate commerce.

Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Texas & N. O. R. Co. v. Sabine Tram. Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

It is one of the accepted rules of car distribution that while the owner of a private car is entitled to its exclusive use, the car must nevertheless be counted as a car delivered to such owner by the carrier in arriving at the number of the carrier's cars which should also be delivered.

Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. 19 Inters. Com. Rep. 356.

Messrs. A. M. Liveright and A. L. Cole argued the cause and filed a brief for defendant in error:

The cause of action in the case pending is tortious and actionable at common law.

Hutchinson, Carr. 3d ed. §§ 512, 520, pp. 557, 566; Memphis News Pub. Co. v. South-

ern R. Co. 110 Tenn. 684, 63 L.R.A. 150, 75 S. W. 941; New England Exp. Co. v. Maine C. R. Co. 57 Me. 188, 2 Am. Rep. 31; International Exp. Co. v. Grand Trunk R. Co. 81 Me. 92, 16 Atl. 370; Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 13 Am. Rep. 457.

The principles of the Larabee Mills Case, 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214, rule the one at bar.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 410, 57 L. ed. 1546, 33 Sup. Ct. Rep. 729; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133–137, 42 L. ed. 688–692, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 491, 48 L. ed. 268, 273, 24 Sup. Ct. Rep. 132; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Southern P. Co. v. Schuyler, 227 U. S. 601, 613, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 208, 55 L. ed. 183, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

The interstate commerce act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts further than its terms and recognized purposes require.

Interstate Commerce Commission v. Louisville & M. R. Co. 73 Fed. 409; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 914; Lowry v. Chicago, B. & Q. R. Co. 46 Fed. 83; Potter's Dwarr. Stat. 275, note 5; Tift v. Southern R. Co. 123 Fed. 789; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Judson, Interstate Commerce, 2d ed. § 325, p. 418; Murray v. Chicago & N. W. R. Co. 62 Fed. 24; McElvain v. St. Louis & S. F. R. Co. 151 Mo. App. 126, 131 S. W. 736; Endlich, Interpretation of Statutes, §§ 127, 237, 467, pp. 173, 315, 665; King v. Pomeroy, 58 C. C. A. 209, 121 Fed. 287; Mitchell v. Duncan, 7 Fla. 13; State v. Wilson, 43 N. H. 415, 82 Am. Dec. 163; United States v. Spohrer, 175 Fed. 440; Macoluso's Naturalization, 237 Pa. 137, 85 Atl. 149, Ann. Cas. 1914B, 226; Arthur v. Bokenham, 11 Mo. 150; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Bechtel v. United States, 101 U. S. 597, 25 L. ed. 1019; Smithmeyer v. United States, 147 U. S. 358, 37 L. ed. 200, 13 Sup. Ct. Rep. 321; Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 493, 20 L. ed. 176; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199; Johnson v. Southern P. Co. 196 U. S. 17, 49 L. ed. 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Brown v. Barry, 3 Dall. 365, 1 L. ed 638; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Davey v. Ruffel, 14 Pa. Co. Ct. 277; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508.

Independently of general principles the right of action of the Puritan Coal Mining Company for discrimination such as existed to its great prejudice was expressly preserved in the state courts by § 22.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 447, 51 L. ed. 553, 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Tennessee Coal, Iron & R. Co. v. George, 233 U. S. 354, 58 L. ed. 997, L.R.A. —, —, 34 Sup. Ct. Rep. 587.

The action is maintainable regarded as a suit under the statute of 1883 of the state of Pennsylvania.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 491, 48 L. ed. 268, 273, 24 Sup. Ct. Rep. 132; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Southern P. Co. v. Schuyler, 227 U. S. 601, 613, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 410, 57 L. ed. 1546, 33 Sup. Ct. Rep. 729; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Smith v. Alabama, 124 U. S. 465, 31

L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95; Western U. Teleg. Co. v. James, 162 U. S. 650, 660, 40 L. ed. 1105, 1108, 16 Sup. Ct. Rep. 934.

As between plaintiff in error and defendant in error, the question of the state or interstate character of the intended shipments is determined by the point of delivery of the coal, by the place where the defendant in error's relation to the coal terminated, irrespective of the fact that for someone else the plaintiff in error, had it furnished the cars, would have carried the coal to a more distant point, whether within or without Pennsylvania.

Diehl v. McCormick, 143 Pa. 584, 22 Atl. 1033; Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928; Dentzel v. Island Park Asso. 229 Pa. 403, 33 L.R.A.(N.S.) 54, 78 Atl. 935; Wright v. Baltimore & O. R. Co. 32 Pa. Super. Ct. 5; Mull v. Pennsylvania R. Co. 38 Pa. Super. Ct. 416; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The Pennsylvania Railroad Company, an interstate carrier, was sued in a state court for damages caused by its [127] failure to furnish the Puritan Company with cars in which to load coal for shipment to points within and without the state. The pleadings alleged not only that the carrier had failed to perform its duty to furnish cars, but that, in violation of a state statute, it had unjustly discriminated against the Puritan Company by failing to distribute cars in accordance with the carrier's own rule that, in time of shortage, they should be allotted to the coal companies on the basis of mine capacity.

The trial court held that the plaintiff was entitled to recover damages caused by the unjust discrimination in distribution of cars. The supreme court of Pennsylvania did likewise and affirmed the judgment in favor of the plaintiff. 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914B, 37.

The railway company then brought the case here, insisting in effect that (1) the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the power of the Interstate Commerce Commission; (2) that no court had jurisdiction of a suit against it for discriminatory allotment until after the Commission had determined that its rule for distribution was improper; and (3) that no suit for damages against an interstate carrier could be brought for damages occasioned by a failure to deliver cars, or for an unjust discrimination in distribution except in a United States court.

1. These contentions involve a consideration of the jurisdiction of the Commission, of the state courts, and of the Federal courts. But fortunately it will not be necessary to enter into an elaborate discussion of each of the questions.

Section 3 [1] of the commerce act [24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565] makes it unlawful for [128] the carrier to unduly prefer one shipper over another. Section 8 [2] gives a right of action against the carrier for damages occasioned

[1] "Sec. 3. It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[2] "Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

by his doing an act prohibited by the statute, and § 9 provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a state court; and that the Federal tribunals have exclusive jurisdiction of a certain class of cases referred to in § 9 has been recognized [**129**] in the few decisions dealing with the question. See Copp v. Louisville & N. R. Co. 43 La. Ann. 511, 12 L.R.A. 725, 26 Am. St. Rep. 198, 9 So. 441; Carlisle v. Missouri P. R. Co. 168 Mo. 656, 68 S. W. 898; Western & A. R. Co. v. White Provision Co. — Ga. —, 82 S. E. 644; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770; Puritan Coal Min. Co. v. Pennsylvania R. Co. 237 Pa. 448, 85 Atl. 426, Ann. Cas. 1914B, 37. In Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 250, 57 L. ed. 1473, 33 Sup. Ct. Rep. 916, the same view of the statute was taken in discussing another, but related, question. This construction is also supported by the legislative history of the statute. For while the Hepburn act [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563], as a convenience to shippers, permitted suits on reparation orders to be brought in the Federal court of the district where the plaintiff resided or the company had its principal office; and while the act of 1910 (36 Stat. at L. 554, chap. 309, Comp. Stat. 1913, § 8584), in further aid of shippers, permitted suits on reparation orders to be brought in state or Federal courts, it made no change in §§ 8 and 9, which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States court.

2. But §§ 8 and 9, standing alone, might have been construed to give the Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the commerce act. And, evidently, for the purpose of preventing such a result, the proviso to § 22 declared that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to [**130**] property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties, and the like. But for this proviso to § 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction. Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

Construing, therefore, §§ 8, 9, and 22 in connection with the statute as a whole, it appears that the act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. Compare Abilene Case, 204 U. S. 439-446, 51 L. ed. 558-561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; 36 Stat. at L. 551 (15), chap. 309, Comp. Stat. 1913, § 8583; 38 Stat. at L. 220, chap. 32.

In the light of these conclusions, and bearing in mind that the damages sued for here are found to have been inflicted during the anthracite strike of 1902 (before the passage of the Hepburn act of 1906), it becomes necessary to determine whether the plaintiff's suit was based on a right of ac-

tion as against an interstate carrier of which the state court had jurisdiction.

3. The difficulty in answering the question grows out of the double character of the pleadings and the construction given the facts by the state court.

The "statement" contains four counts,—one on the common-law liability for failure to furnish cars, and the [131] other three for damages occasioned by unjust discrimination. The plaintiff seems to have ignored his common-law cause of action, and the trial court entered a judgment for plaintiff for damages as for unjust discrimination. The supreme court of Pennsylvania affirmed the judgment, but said that "if the case was with the plaintiff on its facts, and it is so found," there was an offense threefold in character: (1) the offense against the common law, (2) an offense against the Pennsylvania statute of June 3, 1883, making undue and unreasonable discrimination unlawful, (3) an offense against § 3 of the Federal statute regulating interstate commerce.

There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the Federal courts. But it must be borne in mind that there are two forms of discrimination,—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in § 9.

But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is [132] no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts.

4. It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated as a suit for a breach of the carrier's common-law duty to furnish cars, or an action for damages for the carrier's unjust discrimination in allotting cars to the Berwind-White Company, while at the same time refusing to follow its own rule and furnish them to the Puritan Company on the basis of mine capacity. In either case the liability is the same. For where the carrier performs its duty to A and at the same time fails to perform its duty to B, there has been, in a sense, a discrimination against B. In those instances neither the cause of action, nor the jurisdiction of the court, is defeated because the breach of duty is also called an unjust discrimination.

In the present case the pleadings contained no reference to the commerce act. The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. The plaintiff's right and measure of recovery would have been exactly the same if the cars had been furnished to a manufacturing plant, instead of to the Berwind-White Coal Company. The plaintiff's cause of action and damages would have been the same if the failure to receive the cars had been due to the fact that the carriers negligently allowed empty cars to stand on side tracks; or if, by reason of a negligent mistake, they had been sent to the wrong point. The motive causing the short supply of cars was therefore wholly immaterial, except as corroboration of other evidence showing an actual shortage of cars; so that, if we ignore the plaintiff's characterization of the defendant's [133] conduct, and consider the nature of the case, alleged in the first count and established by the evidence, it will appear that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common-law liability to furnish it with a proper number of cars. What was a proper supply was a matter of fact.

5. Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right, and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full. The common law of old, in requiring the carrier to receive all goods and passengers,

recognized that "if his coach be full" he was not liable for failing to transport more than he could carry. Hutchinson, Carr. 146; Love v. Hobbs, 2 Shower, K. B. 127; Riley v. Horne, 5 Bing. 217, 2 Moore & P. 331, 30 Revised Rep. 576; Peet v. Chicago & N. W. R. Co. 20 Wis. 594, 91 Am. Dec. 446. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers, but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. In determining how the inadequate supply shall be distributed, it might be necessary to consider the character of the freight tendered—whether perishable or staple, and whether a necessity of life, needed in crowded cities, and the like. In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars, and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true [134] in Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 312-314, 57 L. ed. 1494, 1497, 1498, 33 Sup. Ct. Rep. 938. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory, since it took no account of private and foreign cars controlled by the mining company. The reasonableness of the rule was a matter for the Commission.

6. The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity was unfair, unreasonable, discriminatory, or preferential. But, as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's distribution sheets, showed the number of cars to which the plaintiff, the Berwind-White Company, and other coal companies in the district, were each entitled. The evidence further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial there was no administrative question as to the reasonableness of the rule, but only a claim for damages occasioned by its violation in failing to furnish cars. Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 197, 57 L. ed. 1451, 33 Sup. Ct. Rep. 893. The state and Federal courts had concurrent jurisdiction of such claim against an interstate carrier without a preliminary finding by the Commission.

7. It is, however, argued that such a question, calling for the exercise of the administrative function of the Commission, did in fact arise out of the defendant's claim and contention that the court should have taken private cars into account in determining whether the plaintiff received the number to which it was entitled. But, probably because of the carrier's own rule of distribution, there was [135] no pleading raising such an issue, and there was no sufficient evidence as to the number of private cars received by the Puritan, the Berwind-White, or other companies. The information on that subject was peculiarly within the knowledge of the carrier, and proof adequate to furnish a basis for the contention should have been offered, if, indeed, the carrier could have been heard to insist that private cars should have been counted when its own rule, as well as the general practice in the United States, was to exclude them in calculating the number of coal cars to which each mine was entitled. Neither need we inquire whether the fact that the Commission subsequently announced a rule, under which private cars had to be taken into account in making the distribution, could be given a retrospective effect. For, be that as it may be, the exception was properly disallowed, because, as held by the Supreme Court of Pennsylvania, no relevant evidence was offered to support the contention, and no point was raised during the trial, that private cars should be counted in the distribution.

Judgment affirmed.

WILLIAM CHAPMAN, Plff. in Err.,
v.
GEORGE ZOBELEIN

(See S. C. Reporter's ed. 135-139.)

Constitutional law — due process of law — tax titles.

There was no want of due process of law in the proceedings under Cal. Pol. Code,

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NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

§ 3897, by which land was forfeited for nonpayment of taxes, because the state, having become vested with the title to land worth $500 by the lapse of five years, with no offer to redeem following a sale to the state for the unpaid tax, sold the land for $166, all of which went to the state to satisfy a tax which, with penalties and costs, amounted to but $16.19, the owner having been afforded an opportunity to be heard as to the fairness of the original assessment, and given notice of the time and place at which the property would be sold to the state, subject to his right to redeem within five years, and having also been given notice of the second sale by mail and publication, his right to redeem continuing up to the time when the state actually entered or sold.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

[No. 200.]

Submitted March 11, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of California to review a decree by which that court refused to review a decree of the District Court of Appeals for the Second Appellate District, in that state, affirming a decree of the Superior Court of Los Angeles County for the dismissal of the bill in a suit to quiet title. Affirmed.

See same case below in District Court of Appeals, 19 Cal. App. 132, 124 Pac. 1021.

The facts are stated in the opinion.

Mr. Ernest E. Wood submitted the cause for plaintiff in error. Mr. Charles Lantz was on the brief:

Tax collectors cannot sell more land than is necessary to pay the amount of the charges thereon.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Martin v. Snowden, 18 Gratt. 100; Bennett v. Hunter, 9 Wall. 326, 335, 19 L. ed. 672, 675; Downey v. Nutt, 19 Gratt. 59; Slater v. Maxwell, 6 Wall. 268, 274, 18 L. ed. 796, 798; Commercial Bank v. Sanford, 99 Fed. 154; Cooley, Taxn. 3d ed. 953; Black, Tax Titles, § 18; Burroughs, Taxn. p. 305; Margraff v. Cunningham, 57 Md. 585; Stead v. Course, 4 Cranch, 403, 2 L. ed. 660; Williamson v. White, 101 Ga. 277, 65 Am. St. Rep. 302, 28 S. E. 846; Ives v. Lynn, 7 Conn. 505; 12 Cyc. 1236; Rorer, Judicial Sales, §§ 604, 606; French v. Edwards, 13 Wall. 506, 20 L. ed. 702.

Under the 14th Amendment the legislature is bound to provide a method for the assessment and collection of the taxes that shall not be inconsistent with natural justice.

Turpin v. Lemon, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20.

In the 14th Amendment the words "due process of law" refer to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

"Due process of law" implies a conformity with natural and inherent principles of justice, and forbids the taking of one man's property or right of property for another's or the state's benefit without compensation, and requires that no one shall be condemned in person or property without opportunity to be heard.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

A state cannot make "due process of law" anything which, by its own legislation, it chooses to declare such. In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law."

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Taxes must be proportional and reasonable, and in accordance with the assessed value.

Blackwell, Tax Titles, 4; Desty, Taxn. § 1119; Cooley, Taxn. 3d ed. 4, 419; Burroughs, Taxn. 61; Hilliard, Taxn. 22, 23; Cooley, Const. Lim. pp. 607 et seq.

Taxes must be equal and uniform.

Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; Newburyport v. Essex County, 12 Met. 217; High School Dist. v. Lancaster County, 60 Neb. 147, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 380; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Taylor v. Palmer, 31 Cal. 241.

Forfeiture of rights and property cannot be adjudged by legislative act, and confiscation without a judicial hearing, after due notice, is void as not being by due process of law.

Griffin v. Mixon, 38 Miss. 424; Boggs v. Com. 76 Va. 989; Dorman v. State, 34 Ala. 237.

In the absence of any statute limiting the officer's powers in this particular, a restriction to the quantity requisite to pay the sum due would be intended by the law.

27 Am. & Eng. Enc. Law, 831; Guisebert

v. Etchison, 51 Md. 478; Brinson v. Lassiter, 81 Ga. 40, 6 S. E. 468.

Mr. Edward F. Wehrle submitted the cause for defendant in error:

There is no Federal inhibition against state taxation upon the ground that it is unequal, unjust, oppressive, onerous, or ill-advised. The Federal courts cannot determine the uniformity, wisdom, justice, or policy of state legislation.

Withers v. Buckley, 20 How. 84, 15 L. ed. 816; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Memphis Gaslight Co. v. Taxing Dist. 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283–295, 42 L. ed. 1037–1043, 18 Sup. Ct. Rep. 594.

Citizens of states cannot complain of state taxation upon the ground that it is unequal, unjust, or oppressive if such taxation operates equally upon all in and under the same conditions and circumstances.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 529, 24 L. ed. 737; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

Tax proceedings may be summary, and that fact is no evidence that they lack due process of law, or deny the equal protection of the laws.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

The due process clause of the 14th Amendment is fully satisfied in tax proceedings by a law which gives the property owner an opportunity to question the validity or the amount of the tax before the tax becomes final, either by proceedings in court, or before a board of revision or equalization.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232–237, 33 L. ed. 892–895, 10 Sup. Ct. Rep. 533; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Cleveland, C. C. & St. L. R. Co. v. Porter, 210 U. S. 177, 52 L. ed. 1012, 28 Sup. Ct. Rep. 647; Hodge v. Muscatine County, 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Gallup v. Schmidt, 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; McLeod v. Receveur, 18 C. C. A. 188, 34 U. S. App. 533, 71 Fed. 455; Sandford v. Poe, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112–168, 41 L. ed. 369–392, 17 Sup. Ct. Rep. 56.

The general system of procedure for the levying and collection of taxes which is established in this country is within the meaning of the constitutional "due process of law," and the Federal courts ought not to interfere when what is complained of

amounts to the enforcement of the laws of a state, applicable to all persons in like circumstances and conditions.

Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

When the ordinary course is pursued in tax proceedings for the assessment and collection of taxes that has been continuously followed in the state, and where the party taxed has had a hearing, or an opportunity for one is provided by statute, it is not taking property without due process of law.

Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

Where the statute names the time and place for the meeting of the assessment board, it is sufficient notice to taxpayers, and personal notice is unnecessary.

Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

Mr. Justice Lamar delivered the opinion of the court:

The laws of California provide a means by which the owner of property can be heard before the board of equalizers as to the fairness of the tax assessment. If no objection is made and the taxes are not paid a delinquent list is published. If default still continues, the property, instead of being offered to the highest bidder, is sold to the state, which holds the "absolute title as of the date of the expiration of five years from the time of the sale." During that period the owner has the right to redeem by paying the original and accrued taxes, penalties, and interest. It is, however, not the policy of the state to retain separate parcels of land; and if the owner does not redeem within the five years, and if the state has not otherwise disposed of the same, the statute provides that the land, or so much thereof as the comptroller make think necessary, shall, after public advertisement and notice to the owner, be sold to the highest bidder.[1]

[137] Under these laws an assessment of $1.80 was made against a lot in Los Angeles standing in the name of Givens. It was regularly and duly sold on July 1, 1899. A certificate was made and recorded, which recited that the lot had been sold to the state for $2.51, and that its title would become absolute on July 2, 1904, unless in the meantime redeemed as provided by law. There was no offer to redeem, and in January, 1905, the comptroller, having determined that past-due and accrued taxes, penalties and costs amounted to $16.19, directed the county tax collector to sell the lot to the highest bidder for cash. After the required publication and notice by mail, the property was, on February 11, 1905, sold to Zobelein, for the sum of $166. A deed was made to him and the proceeds of the sale deposited with the treasurer for the use of the state and county, as provided by law.

On March 19, 1908, William Chapman, claiming to be the owner of the lot, made a tender of the original and accrued taxes, penalties, and interest to date. The tender having been refused, he filed a bill asking that his title be quieted and that Zobelein's tax deed be canceled. On the trial Chapman offered evidence to show that there were [138] those present at the sale who would have been willing to pay $16.19, the full amount of the tax, for a strip 10 feet off of the easterly or northern end of the lot—leaving the remainder to the owner; that the collector had not offered to sell so much of the land as would bring the amount of the tax, but, instead had sold the entire lot, 40 by 140 feet in size, and of the full value of $500, for $166, and that the excess, $149.81, had been covered into the treasury. By reason of these facts he claims that the sale was void, and that the statute, in authorizing such a sale, operated to take his property without due process of law. The bill to quiet title was dismissed, and that judgment having been affirmed, the case is here on writ of error.

The plaintiff relies upon Slater v. Maxwell, 6 Wall. 268, 18 L. ed. 796, and other like cases, in which sales under an excessive levy were held to be void. But those decisions are not applicable here, not only because an issue as to the invalidity of a levy merely because excessive does not raise a Federal question, but because the statute here, by giving a five-year period of redemption, was intended in part to afford the tax-

[1] 3897. "Whenever the state shall become the owner of any property sold for taxes and the deed to the state has been filed . . . the comptroller may thereupon by a written authorization direct the tax collector . . . to sell the property or any part thereof as in his judgment he shall deem advisable in the manner following: He must give notice of such sale by first publishing a notice for at least three suc-

payer an opportunity to protect himself against the sale of valuable property, for an insignificant sum. The statute, in providing that the state should buy in the property and hold it subject to redemption for five years, intended to furnish relief to those who, for want of ability to pay, or for want of notice of the levy, might otherwise be deprived of their property by an ordinary tax sale. Whatever the character of the title which the state acquired at the first sale,—whether legal or equitable,—it was in any event defeasible by redemption within five years.

The plaintiff in error insists, however, that at the second sale property worth $500 was sold for $166, all of which went to the state. He says that this was forfeiture pure and simple, and that there can be no valid forfeiture without a judicial determination as to the existence of the facts [139] warranting so heavy a penalty. 2 Cooley, Taxn. 3d ed. 858.

The plaintiff's contention must be limited to a consideration of the attack on the proceedings in which his lot was sold in 1905. And, without undertaking to consider the essentials of a valid forfeiture of property for nonpayment of taxes, it is sufficient to say that, in the present case, the statute gave an opportunity to be heard as to the fairness of the original assessment. It gave notice of the time and place at which the property would be sold to the state, subject to the owner's right to redeem during a period of five years. Under the California decisions the first sale, at the end of five years, vested the state with the title. King v. Mullins, 171 U. S. 417, 436, 43 L. ed. 219, 226, 18 Sup. Ct. Rep. 925. See also 2 Cooley, Taxn. 3d ed. 862. The present case is even stronger, for this is a bill attacking the title of the purchaser who bought at the second sale, after notice had been given to the owner, by publication and mail, of the time and place when it would occur—his right to redeem continuing up to the time the state actually entered or sold. Santa Barbara County v. Savings & L. Soc. 137 Cal. 463, 70 Pac. 457. Certainly such a sale, after the finding by the comptroller of the amount of taxes due, and after public and special notice to the owner, would "work the investment of the title through the public act of the government. . . . The sale was the public act which is equivalent to office found." King v. Mullins, supra. That case shows that the defendant was not deprived of his property without due process of law, in violation of the 14th Amendment. All other questions raised by the record are concluded by the decision of the state court. The judgment of the Supreme Court of California is affirmed.

cessive weeks. . . . Such notices must state specifically the place . . . the day and hour of sale . . . a description of the property . . . a detailed statement of all the delinquent taxes, penalties, costs and expenses up to the date of such sale . . . the name of the person to whom the property was assessed. . . . Said notice shall also embody a copy of the authorization received from the comptroller. It shall be the duty of the tax collector to mail a copy of said notice, postage thereon prepaid, to the party to whom the land was last assessed next before the sale, if such address be known. . . . At the time set for such sale, the tax collector must sell the property described in the comptroller's authorization and said notices, at public auction to the highest bidder for cash in lawful money of the United States. . . ." [Cal. Pol. Code.]

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[140] EASTERN RAILWAY COMPANY OF NEW MEXICO, the Pecos & Northern Texas Railway Company, et al., Plffs. in Err.,

v.

GEORGE W. LITTLEFIELD, J. P. White, and Thomas D. White, Composing the Firm of Littlefield Cattle Company.

(See S. C. Reporter's ed. 140–146.)

Courts — concurrent jurisdiction — suit against interstate carrier.

1. State courts have jurisdiction con-

NOTE.—On concurrent jurisdiction of Federal and state courts—see notes to Smith v. M'Iver, 6 L. ed. U. S. 152 and Copp v. Louisville & N. R. Co. 12 L.R.A. 725.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to questions of local practice and procedure on writ of error from Federal Supreme Court—see note to Texas & N. O. R. Co. v. Miller, 55 L. ed. U. S. 789.

current with the Federal courts by reason of the provision of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 22, preserving existing rights and remedies, of a suit by a shipper against an interstate carrier to recover the damages arising in interstate commerce out of the latter's failure to discharge its common-law duty to furnish the cars needed by the shipper.

[For other cases, see Courts, VI. a, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — how raised.

2. No Federal question calling for the exercise of the administrative function of the Interstate Commerce Commission was raised in a suit brought by a shipper in a state court to recover from an interstate carrier the damages caused by its failure to furnish cars, as it had agreed, by the carrier's insistence upon the unreasonableness of the shipper's demand for cars, and upon the impossibility of performance, based upon averments in the answer that the carrier's equipment was normally adequate, that there were unprecedented demands for transportation facilities, and that the carrier could not have furnished the cars demanded by the shipper without neglecting and discriminating against other shippers, contrary to the Federal laws regulating interstate commerce, where the answer indicates that the car shortage was known to the carrier when the shipper demanded the cars, and that timely notice thereof was not given to the shipper.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — local law.

3. Whether certain railway companies were at common law liable as forwarders of freight to be delivered to connecting carriers outside the state, and whether they were so associated as to make them jointly and severally liable, are matters concluded by the decision of the highest court of a state, and furnish no basis for a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1529-1572, in Digest Sup. Ct. 1908.]

[No. 320.]

Submitted March 1, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which affirmed a judgment of the Court of Civil Appeals for the Second Supreme Judicial district, in that state, affirming a judgment of the District Court of the County of Deaf Smith, in favor of a shipper in a suit to recover from a railway company damages caused by the failure of the latter to furnish cars. Dismissed for want of jurisdiction.

See same case below, — Tex. —, 154 S. W. 543.

The facts are stated in the opinion.

Messrs. **Gardiner Lathrop, A. H. Culwell,** and **Robert Dunlap** submitted the cause for plaintiffs in error:

When a right is given by statute, and such statute provides a remedy in a particular court, the remedy in that court is exclusive.

Wells, Jurisdiction, § 154; Endlich, Interpretation of Statutes, §§ 154, 433; Sedgw. Stat. Constr. 76; Manchester, S. & L. R. Co. v. Denaby Main Colliery Co. L. R. 14 Q. B. Div. 209, on appeal, L. R. 11 App. Cas. 113; Rhymney R. Co. v. Rhymney Iron Co. L. R. 25 Q. B. Div. 146, 59 L. J. Q. B. N. S. 414, 63 L. T. N. S. 407, 38 Week. Rep. 764; Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 838; Copp v. Louisville & N. R. Co. 43 La. Ann. 511, 12 L.R.A. 725, 26 Am. St. Rep. 198, 9 So. 441; Carlisle v. Missouri P. R. Co. 168 Mo. 652, 68 S. W. 898; Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858; Van Patten v. Chicago, M. & St. P. R. Co. 74 Fed. 981; Edmunds v. Illinois C. R. Co. 80 Fed. 79.

Uniformity in the administration of this law, and in the correct ascertainment and awarding of damages for alleged violations thereof, so as to result in harmonious and uniform application, could only be had by confining jurisdiction to the tribunals named in the act.

Adams Exp. Co. v. Croninger, 226 U. S. 505, 57 L. ed. 319, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148.

The question of proper distribution of cars and car service is just as much within the province of the Interstate Commerce Commission and that act, as is a discrimination in rates or against localities.

Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 434, 57 L. ed. 287, 46 L.R.A. (N.S.) 203, 33 Sup. Ct. Rep. 174; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 275, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

As cars for interstate transportation are only to be furnished "upon reasonable request therefor," and the act does not define what shall constitute a reasonable request, or when the same should be made, the case falls under the rule of those under the 1st and 3d sections of the act, which would require preliminary investigation and determination by the Commission before the

courts could be called upon to take jurisdiction.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 258, 57 L. ed. 1476, 33 Sup. Ct. Rep. 916; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

The question whether the railroad company failed to comply with the requirement of the act in respect to furnishing cars, and resulting damage, was for the sole and exclusive determination of the Interstate Commerce Commission and Federal courts, as provided in the act.

Van Patten v. Chicago, M. & St. P. R. Co. 74 Fed. 981; Sheldon v. Wabash R. Co. 105 Fed. 785; Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 40, 165 Fed. 1; Central Stock Yards Co. v. Louisville & N. R. Co. 112 Fed. 823; Loomis v. Lehigh Valley R. Co. 208 N. Y. 312, 101 N. E. 908; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770.

There is here drawn in question a title, right, privilege, or immunity claimed under a statute of the United States, and the decision has been against the right, title, privilege, or immunity so set up and claimed.

Illinois C. R. Co. v. McKendree, 203 U. S. 525, 51 L. ed. 303, 27 Sup. Ct. Rep. 153; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

The question at issue is one of jurisdiction, and is a question of law, and one concerning which neither evidence was offered nor was the same necessary. It arose at the threshold of the proceeding, and is a question which it would seem will be considered by this court even without a specific assignment of error.

Baltimore & O. R. Co. v. United States, 215 U. S. 492, 54 L. ed. 296, 30 Sup. Ct. Rep. 164.

On writ of error to the State court this court may examine the entire record, including the evidence, to determine whether what purports to be a finding of fact is not so involved with, and dependent upon, questions of Federal law, as to be really a decision thereof.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156.

Messrs. W. A. Dunn and D. T. Bomar submitted the cause for defendants in error. Mr. J. A. Templeton was on the brief:

To maintain the jurisdiction of this court it must appear from the transcript of the record, (1) that some right, privilege, or immunity is claimed under a statute of the United States; (2) that such right, privilege, or immunity was seasonably and specifically set up and claimed in the state courts; and, (3) that the decision of the highest court of the state was against the same.

4 Fed. Stat. Anno. p. 467, § 709, and notes.

The findings and conclusions of the state courts upon all questions of fact are binding upon this court, and the sufficiency of such facts to support the judgment rendered will not be inquired into by this court upon a writ of error.

Dower v. Richards, 151 U. S. 658–670, 38 L. ed. 305–310, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Rankin v. Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672.

Under the Texas practice, where the evidence introduced upon any issue of fact is of such cogency as to conclusively establish such fact, the trial court should, in his charge to the jury, assume the existence of such fact, and refuse to submit it to the jury for their determination.

Texas & P. R. Co. v. McCoy, 90 Tex. 264, 38 S. W. 36; Gulf, C. & S. F. R. Co. v. Rowland, 90 Tex. 365, 38 S. W. 756, 1 Am. Neg. Rep. 363; Culpepper v. International & G. N. R. Co. 90 Tex. 627, 40 S. W. 386.

The finding of the court of civil appeals to the effect that the undisputed evidence is such as to show that all the defendants in error were partners and agents of each other, and had a common agent in Deaf Smith county in such manner as to make them all subject to the jurisdiction of the court of that county, is conclusive of the fact thus found; not only on the state supreme court, but on this court as well.

Hunter v. Eastham, 95 Tex. 648, 69 S. W. 66; Schwingle v. Keifer, — Tex. Civ. App. —, 153 S. W. 1132; Western U. Teleg. Co. v. Cates, 105 Tex. 324, 148 S. W. 281; San Antonio & A. P. R. Co. v. Mertink, 101 Tex. 165, 105 S. W. 485; Hugo, S. & Co. v. Paiz, 104 Tex. 563, 141 S. W. 518.

The right, privilege, or immunity claimed

must not only be specifically set up and claimed in the state courts, but this must be done prior to the decision by the court of last resort of the state; and in the manner required by the state practice.

4 Fed. Stat. Anno. note VIII. pp. 480–482.

Such a question raised for the first time in a motion for a rehearing filed in the state supreme court, after the final decision by that court, or in the petition to this court for writ of error, comes too late, and will not confer jurisdiction on this court.

3 Foster, Fed. Pr. 5th ed. p. 2405, note 66; Texas & P. R. Co. v. Southern P. Co. 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; Turner v. Richardson, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Forbes v. State Council, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295.

Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or not noticed or relied upon in the brief or argument of counsel, will not serve as a basis of a writ of error from the Federal Supreme Court.

Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; Western Electrical Supply Co. v. Abbeville Electric Light & P. Co. 197 U. S. 299, 302, 49 L. ed. 765, 766, 25 Sup. Ct. Rep. 481; Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S. 78, 54 L. ed. 390, 30 Sup. Ct. Rep. 230; Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

This court, in an action at law, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a Federal question would or would not be presented, according to the way in which the question of fact was decided.

Dower v. Richards, 151 U. S. 658, 667, 38 L. ed. 305, 309, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

It is not enough that such right, privilege, or immunity was set up and claimed, but it must be made manifest either that the right was denied, or that the judgment could not have been rendered without denying it.

Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403.

This court will not take jurisdiction of a cause where the judgment of the state court rests on two grounds, one of which does not involve a Federal question, or where it does not appear on which of two grounds the judgment was based, and the non-Federal ground in itself is sufficient to sustain the judgment.

Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Western U. Teleg. Co. v. Wilson, 213 U. S. 53, 53 L. ed. 694, 29 Sup. Ct. Rep. 403; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130.

The plaintiffs' cause of action as declared on in their petition was based on, and grew out of, the breach by defendants of their common-law duty, to furnish at the point of origin of the shipment, after due and reasonable notice so to do, a sufficient number of suitable cars wherein to ship the cattle then and there tendered for shipment. Such a breach of duty was not such a violation of the interstate commerce act as was cognizable alone by the United States court to the exclusion of the state courts.

Re Winn, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 208, 55 L. ed. 183, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

Notwithstanding that the breach of duty on the part of the defendants, of which plaintiffs complain, and for which they seek to recover damages, may have been inhibited by, and may constitute a violation of, the interstate commerce law, the state courts are not deprived of jurisdiction over such a cause of action, but such jurisdiction is expressly recognized by § 22 of the act of February 4, 1887, and by ¶ 7 of the act of June 29, 1906, amending § 20 of the act of 1887.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 57 L. ed. 314, 320, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 208, 55 L. ed. 183, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

The plaintiffs' cause of action was predicated on the defendants' negligence in failing to discharge their common-law duty to furnish within a reasonable time after demand made therefor, a sufficient number of suitable cars for the movement of the cattle in

question. The plaintiffs were entitled to recover at common law damages occasioned by the breach of such duty, and this right of recovery was not created by the interstate commerce act.

Hutchinson, Carr. §§ 292, 293, 497; Ayres v. Chicago & N. W. R. Co. 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432; 1 Rapalje & M. Dig. of R. Law, pp. 737, 738; Cincinnati, N. O. & T. P. R. Co. v. N. K. Fairbanks & Co. 33 C. C. A. 611, 62 U. S. App. 231, 90 Fed. 467; Chicago & A. R. Co. v. Davis, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382; Loomis v. Lehigh Valley R. Co. 208 N. Y. 312, 101 N. E. 911.

The state statutes, in so far as they made it the duty of the carriers to furnish, upon reasonable notice so to do, a sufficient number of suitable cars to move the cattle, were but expressive of the common law on this subject, and such statutes are not in conflict with the interstate commerce act, and they impose no burden upon interstate commerce.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 488, 490, 56 L. ed. 516, 522, 523, 32 Sup. Ct. Rep. 205; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 208, 55 L. ed. 167, 183, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Re Winn, 213 U. S. 458, 459, 53 L. ed. 873, 874, 29 Sup. Ct. Rep. 515.

Conceding for the moment that the interstate commerce act creates the right of action which plaintiffs seek to enforce, such act does not provide either in terms or by necessary implication that such right can be enforced only by complaint made to the Interstate Commerce Commission, or by action in the United States court of the proper district.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 488, 490, 56 L. ed. 516, 522, 523, 32 Sup. Ct. Rep. 205; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56, 58, 56 L. ed. 327, 348, 349, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Robb v. Connolly, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544; United States v. Barnes, 222 U. S. 513, 56 L. ed. 291, 32 Sup. Ct. Rep. 117; Claflin v. Houseman, 93 U. S. 130, 136, 138, 23 L. ed. 833, 838, 839.

Mr. Justice **Lamar** delivered the opinion of the court:

The plaintiffs in error jointly operate the Sante Fé system of railway lines extending through Arizona, Texas, Kansas, and Oklahoma into Missouri. The Littlefield Cattle Company owns ranches near these roads, and brought suit for damages caused by their failure to furnish cars needed for the transportation of cattle from points in Texas to points in Missouri.

The Cattle Company's declaration averred that finding, in the spring of 1907, that it would need 200 cars in which to ship cattle to market, it requested the carriers' station agent in May, 1907, to furnish these cars in lots of 50, at designated places on designated dates in September and October, 1907. The defendants accepted the order, and [143] plaintiff, relying on the duty and promise, brought 3,900 head of cattle to the station at the time stated and tendered the same for shipment. The defendants refused to furnish the cars needed. Plaintiff was consequently forced to hold the cattle under herd for several weeks awaiting the arrival of cars wherein to ship the same. On October 18, 1907, plaintiff learned for the first time definitely that defendants would not furnish cars until several weeks thereafter, whereupon plaintiff was forced to abandon the shipment and return the herd to the ranch in Texas, which was distant from the station about 100 miles. By reason of the expense and loss of the market plaintiffs were damaged $35,000.

Each railway company demurred specially on the ground that it could not be required to furnish cars to go beyond its line in interstate shipment; and insisted that if plaintiff had any right of action it arose under the commerce act, and the United States courts had exclusive jurisdiction of the suit. The demurrer was overruled. There was a verdict for the plaintiff, and, the judgment thereon having been affirmed by the supreme court of Texas, the case is here on a writ of error in which the assignments are said to present two questions involving the construction of the act to regulate commerce.

1. The decision in Pennsylvania R. Co. v. Puritan Coal Min. Co. just decided [237 U. S. 121, ante, 867, 35 Sup. Ct. Rep. 484], makes it unnecessary to do more than repeat that, under the proviso to § 22 of the commerce act, the state courts, by virtue of their general jurisdiction, can determine the right of a shipper to damages for failure to supply cars in cases like that presented by the plaintiff's pleading in the present suit. There was, therefore, no error in overruling the defendant's demurrer.

2. It is claimed that a Federal question, and one calling for the exercise of the administrative function of the Commission, was raised by the contention in defendants' [144] answer that plaintiffs' demand for cars was unreasonable, and as the defendants were unable to comply with the demand, they are not liable for failure to furnish the cars within the time, as alleged.

This contention is based on the avermcnt in the answer that the defendant's lines were adequate for the needs of the sparsely settled country through which they ran "until the — day of — , 1907, when an unprecedented rush of settlers to the southwest created an unprecedented demand for transportation facilities of all kinds, including cars for live stock." It was also averred that during the year 1907 there was a car shortage throughout the country, and "it was impossible for the defendants to have furnished the cars demanded by the plaintiffs without neglecting other demands and discriminating against other persons and firms, contrary to the provisions of the Federal law regulating interstate commerce." There is complaint made of the rulings of the trial judge relating to this defense.

But, whatever may be the rights and remedies of the parties and the jurisdiction of the Commission in such cases, it is certain that the defendants' answer does not meet the issue nor set out facts which would constitute a defense against the cause of action alleged in the plaintiffs' pleading. For the answer indicates that the car shortage was known to the carriers when the plaintiffs demanded cars to be furnished in September and October. There is no allegation that in May the carrier objected that the demand was unreasonable in the time that it was made or in the number of cars that were demanded. Nor was there any claim that the want of equipment was brought to the attention of the Cattle Company, or that it was notified that conditions were such as to make it impossible for the carriers to agree to furnish cars at the time and place designated. If such information had then been given to the shipper, or promptly, upon subsequent discovery [145] that the defendants would be unable to supply the cars, a different question would have arisen. But, where, without fault on its part, a carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability, otherwise the reception of goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods, or for delay in shipment after they had been received. The evidence is not set out in the record and there are no findings of fact, but the verdict of the jury must be construed to mean that the evidence sustained the material allegations of the complaint, and showed that the defendants had negligently failed to furnish cars promised.

Thus construed it appears that the plaintiff in May gave the carriers notice that it would need 200 cars in the following September and October, to be used in the shipment of cattle from Texas to Missouri. The offer was accepted and a statement was made that the cars would be on hand at the time and place named. Relying thereon the Cattle Company drove its herd a long distance across the country, and at great expense kept them at the station until definitely notified that they could not be shipped for several weeks. In the meantime great expense had accrued, the market was lost, and the cattle had to be driven 100 miles back to the ranch.

The liability of the carriers under these facts, and in the absence of a showing of new facts establishing an excuse, became fixed when the cattle were tendered for shipment and the carrier failed to furnish the facilities needed. That liability cannot now be avoided by proof that the failure to furnish cars was occasioned by a shortage for which the carriers may not have been responsible, but as to which they failed to give timely notice to the shipper.

The question as to whether at common law these railroads were liable as forwarders of freight to be delivered [146] to connecting carriers outside the state, and whether the railways were so associated as to make them jointly and severally liable, are matters concluded by the decision of the Supreme Court of Texas. There is no merit in the Federal question relied on and the writ of error is dismissed.

UNITED STATES
v.
SHERMAN & SONS COMPANY.

(See S. C. Reporter's ed. 146-158.)

Duties — reliquidation — effect — fraud.

1. An importer is not concluded by a reliquidation on the ground of fraud, made by the collector of customs more than a year after the duty as originally liquidated has been paid and the goods removed for consumption, but, in view of the provisions of the act of June 22, 1874 (18 Stat. at L. 190, chap. 391, Comp. Stat. 1913, § 5714), § 21, making the settlement of duties in the absence of fraud conclusive upon all parties after the expiration of one year from the time of entry, and of the tariff act of August 5, 1909 (36 Stat. at L. 100, chap. 6), § 28, subsec. 14, making the decision of the collector as to the amount of duty final upon all parties unless, within fifteen days, the importer files a protest and pays the full amount of the duty as liquidated, he may, when sued for the difference between the duty assessed and paid and that fixed by reliquidation, file his plea and be heard in his defense as in other cases, although he

did not file a protest and pay the amount of the reliquidated duties.

[For other cases, see Duties, VIII. i, in Digest Sup. Ct. 1908.]

Pleading — averring fraud — suit against importer.

2. The bill in a suit by the United States to recover, because of fraud, the difference between the import duties assessed and paid and those which rightfully should have been paid, must conform to the general rule of pleading where recovery is sought on the ground of fraud.

[For other cases, see Pleading, II. j, in Digest Sup. Ct. 1908.]

[No. 541.]

Argued December 17 and 18, 1914. Decided April 5, 1915.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question as to the conclusiveness of a reliquidation of duties for fraud, made more than a year after the duty as originally assessed had been paid and the goods removed for consumption; also the question whether the complaint in a suit to recover the difference between the duty assessed and paid and that fixed by the reliquidation was sufficient, and the question as to whether the allegations as to fraud were sufficient. The first question answered by holding that the importer is not concluded by the reliquidation order, and the second and third questions answered in the negative.

Statement by Mr. Justice Lamar:

These two test cases raise the question of the power of the collector of customs to make a reliquidation more than a year after the duty on foreign merchandise has been paid and the imported goods have been removed for consumption. The cases are here on a certificate which shows that in 1909 Sherman & Sons Company imported certain laces from Syria and Egypt. The merchandise was entered at the port of New York, and the duty thereon was assessed by the collector. The amount of duty thus liquidated was paid by the importer and the goods were removed in 1909.

More than four years thereafter the collector made a new assessment or reliquidation, by which he increased the amount of duties to be paid on the laces. Notice of the reliquidation was given by the collector to Sherman & Sons Company. They filed no protest within the fifteen day period mentioned in the tariff act of 1909 (36 Stat. at L. 100, chap. 6, § 28, sub-sec. 14), and thereafter two suits were brought by the government, in the United States district court for the southern district of New York, for the recovery of the difference between the duty assessed and paid in 1909 and that fixed by the reliquidation in 1913.

The only substantial difference between the two cases is that in No. 1 the suit was on a liquidation order which contained no charge that the importer had been guilty of fraud; while in No. 2 the action is based on a reliquidation order which contained a statement that the "entries were reliquidated by the said collector, as aforesaid, pursuant to his findings and decisions that they, as well as the consular invoices presented with them, upon the basis of which the said entries were originally liquidated, as aforesaid, were false and fraudulent, and that the original [148] liquidations and the delivery of the said goods, wares, and merchandise, aforesaid, had been effected by and through the fraud of the defendant."

In both suits the district court sustained the demurrer, and the United States electing not to plead over, both actions were dismissed. The cases were then taken to the circuit court of appeals, which certified the following questions:

"(1) Can an importer of dutiable merchandise, when sued by the United States for a balance of duties found to be due upon a reliquidation of the entry, attack the validity of the reliquidation, where it appears upon the face of the complaint that the reliquidation was made more than a year after the entry, and where the complaint contains no allegation of the presence of a protest or of fraud, or is the remedy provided by the customs administrative act (act of June 10, 1890, and act of August 5, 1909, 26 Stat. at L. 136, chap. 407, Comp. Stat. 1913, § 5593, and 36 Stat. at L. 100, chap. 6), *viz.*, of protest, payment of the full amount of duties ascertained to be due upon the reliquidation, and appeal to the board of general appraisers, and thence to the courts, the only way in which he may attack the validity of the reliquidation?

"(2) Does the complaint in action No. 1 herein, all of the allegations in which, with the exception of the formal allegations of sovereignty and incorporation, are hereinabove set forth, state a good cause of action?

"(3) If the foregoing question is answered in the negative, then is it sufficient for the United States, in order to state a good cause of action, to allege the finding or decision of the collector that there was fraud, as in action No. 2 herein, without alleging in what connection the collector had made his finding or decision of fraud, *i. e.*, whether he had found fraud in the

dutiable value, or in the classification, or in the quantity of the merchandise, and without alleging the presence of fraud as a fact, or the facts constituting the fraud?"

Assistant Attorney General Warren argued the cause and filed a brief for the United States:

Customs duties become due and payable to the United States immediately upon importation. The act of importation imposes upon the importer the obligation to pay the legal duties.

Arnold v. United States, 9 Cranch, 104, 3 L. ed. 671; Meredith v. United States, 13 Pet. 486, 10 L. ed. 258; Stockwell v. United States, 13 Wall. 531, 546, 20 L. ed. 491, 494; Dumont v. United States, 98 U. S. 142, 25 L. ed. 65; United States v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647; United States v. Cobb, 11 Fed. 76; United States v. One Case Paintings, Engravings & Mfrs. of Metal, 39 C. C. A. 586, 99 Fed. 426; United States v. National Fibre Board Co. 133 Fed. 596; United States v. Shallus, 2 Ct. Cust. App. 333.

The obligation to pay taxes being an imperative one, the importer is allowed only such defenses or such methods of attacking the validity of a tax as Congress may choose to give him.

United States v. Habicht, 1 Ct. Cust. App. 53; D. M. Ferry & Co. v. United States, 29 C. C. A. 345, 54 U. S. App. 705, 85 Fed. 550; Cheatham v. United States (Cheatham v. Norvekl) 92 U. S. 85, 88, 23 L. ed. 561, 562.

The right of an importer to contest in court his liability to pay the customs tax or duty has been restricted as follows:

(a) The importer cannot replevy the goods in possession of the collector of customs.

(b) A bill in equity will not lie to restrain collection of taxes.

Andreae v. Redfield, 98 U. S. 225, 232, 25 L. ed. 158, 161. See also Snyder v. Marks, 109 U. S. 189, 27 L. ed. 901, 3 Sup. Ct. Rep. 157.

(c) The importer can contest the accuracy of the appraisal of his goods only before the special tribunal prescribed by Congress, whose decision is final and conclusive as to value when proceeding in accordance with the law. He cannot contest the correctness of the appraisal in any suit in court.

Auffmordt v. Hedden, 137 U. S. 310, 329, 34 L. ed. 674, 680, 11 Sup. Ct. Rep. 103; Hilton v. Merritt, 110 U. S. 97, 104, 28 L. ed. 83, 85, 3 Sup. Ct. Rep. 548; Oelbermann v. Merritt, 123 U. S. 356, 361, 31 L. ed. 164, 166, 8 Sup. Ct. Rep. 151; Robertson v. Frank Bros. Co. 132 U. S. 17, 24, 33 L. ed. 236, 238, 10 Sup. Ct. Rep. 5; Muser v. Magone, 155 U. S. 240, 39 L. ed. 135, 15 Sup. Ct. Rep. 77; United States v. Passavant, 169 U. S. 16, 42 L. ed. 644, 18 Sup. Ct. Rep. 219; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 339, 53 L. ed. 1013, 1022, 29 Sup. Ct. Rep. 671.

(d) Prepayment of the tax is, as a rule, a prerequisite to an attack in court upon its validity.

Cheatham v. United States (Cheatham v. Norvekl) 92 U. S. 85, 89, 23 L. ed. 561, 563; Springer v. United States, 102 U. S. 586, 26 L. ed. 253.

(e) Congress has in various successive statutes prescribed that the decision of the collector of customs as to the amount of duty payable, *i. e.*, his liquidation, shall be final and conclusive, and incontestable in a suit in court, unless protest and appeal shall be taken by the importer in the manner set forth in the statute.

The courts have uniformly held that the method provided by the statute for the testing of the legality of the collector's decision and of any error in the imposition of the tax is exclusive, and that if the importer does not follow this method, he cannot avail himself of any other legal remedy.

Nichols v. United States, 7 Wall. 122, 129–131, 19 L. ed. 125, 128; Andreae v. Redfield, 98 U. S. 225, 228, 232, 25 L. ed. 158, 160, 161; Arnson v. Murphy, 109 U. S. 238, 243, 27 L. ed. 920, 922, 3 Sup. Ct. Rep. 184; Porter v. Beard, 124 U. S. 429, 31 L. ed. 490, 8 Sup. Ct. Rep. 554; Schoenfeld v. Hendricks, 152 U. S. 691, 38 L. ed. 601, 14 Sup. Ct. Rep. 754; Gulbenkian v. United States, 108 C. C. A. 245, 186 Fed. 133; Houlder v. United States, 4 Ct. Cust. App. 247.

No statute prescribes any time within which the collector must liquidate. No statute prescribes any particular form of liquidation. The decision of the collector, fixing the duties as estimated by him, howsoever, and whenever arrived at, constitutes his liquidation.

Davies v. Miller, 130 U. S. 284, 32 L. ed. 932, 9 Sup. Ct. Rep. 560; Abner Doble Co. v. United States, 56 C. C. A. 40, 119 Fed. 152; Gandolfi v. United States, 20 C. C. A. 652, 38 U. S. App. 647, 74 Fed. 549; United States v. De Rivera, 73 Fed. 679; Pacific Creosoting Co. v. United States, 116 C. C. A. 50, 196 Fed. 35; Treasury Dec. 20350, G. A. 4309; 10530, G. A. 180; 24266, G. A. 5294; Arnson v. Murphy, 115 U. S. 579, 29 L. ed. 491, 6 Sup. Ct. Rep. 185.

The collector's decision or liquidation is not final and conclusive upon the government. He may reliquidate, *i. e.*, abandon his first decision and make a new liquida-

tion, because either of fraud, error, or mistake in his first liquidation.

United States v. Leng, 18 Fed. 15; United States v. Mexican International R. Co. 81 C. C. A. 61, 151 Fed. 545; United States v. Calhoun, 184 Fed. 499; Dickson v. United States, 131 Fed. 573; Knowles v. United States, 122 Fed. 971; United States v. Schwarz, 3 Ct. Cust. App. 24; United States v. Hawley, 3 Ct. Cust. App. 456; Robertson v. Downing, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; United States v. Campbell, 10 Fed. 816; Louisville Pillow Co. v. United States, 75 C. C. A. 324, 144 Fed. 386.

The provisions of § 14 of the tariff acts of 1890 and 1909 apply to such a reliquidation.

Louisville Pillow Co. v. United States, 75 C. C. A. 324, 144 Fed. 386; Treasury Dec. 14645, G. A. 2403; Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; United States v. Whitridge, 197 U. S. 135, 49 L. ed. 696, 25 Sup. Ct. Rep. 406.

A reliquidation is a necessary preliminary at all times to any suit by the government to recover a deficiency under a preceding erroneous liquidation, for until such reliquidation, the preceding liquidation is valid.

United States v. Campbell, 10 Fed. 816; United States v. Leng, 18 Fed. 15; United States v. McDowell, 21 Fed. 563.

The only restriction on the right of the collector to reliquidate is to be found in § 21 of the act of June 22, 1874, which made the original liquidation in certain cases final and conclusive "after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee." This act is a statute of limitations purely. It contains no grant of power of authority not previously possessed by the collector, but restricts and limits a power and authority previously held by him.

United States v. Calhoun, 184 Fed. 499, affirmed in 132 C. C. A. 87, 215 Fed. 709; United States v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; Abner Doble Co. v. United States, 56 C. C. A. 40, 119 Fed. 152; Hawley v. United States, 3 Ct. Cust. App. 456; United States v. Campbell, 10 Fed. 816; Treasury Dec. 14,689, G. A. 2411, p. 120.

The remedies provided by the tariff acts for an importer who seeks to attack the validity of a customs tax as liquidated or reliquidated by the collector are exclusive.

Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; Cary v. Curtis, 3 How. 236, 11 L. ed. 576; Curtis v. Fiedler, 2 Black, 461, 17 L. ed. 273; Nichols v. United States, 7 Wall. 122, 19 L. ed. 125; Barney v. Watson, 92 U. S. 449, 453, 23 L. ed. 730, 731; Barney v. Richard, 157 U. S. 352, 39 L. ed. 730, 15 Sup. Ct. Rep. 642; Arnson v. Murphy, 115 U. S. 579, 584, 29 L. ed. 491, 493, 6 Sup. Ct. Rep. 185; Saltonstall v. Russell, 152 U. S. 628, 633, 38 L. ed. 576, 578, 14 Sup. Ct. Rep. 733; Oelbermann v. Merritt, 123 U. S. 356, 31 L. ed. 164, 8 Sup. Ct. Rep. 151; Muser v. Magone, 155 U. S. 240, 247, 39 L. ed. 135, 137, 15 Sup. Ct. Rep. 77; United States v. Spingarn Bros. Ct. Cust. App. Dec. 15, 1913, Treasury Dec. 34002, p. 665; Schoenfeld v. Hendricks, 152 U. S. 691, 38 L. ed. 601, 14 Sup. Ct. Rep. 754; United States v. Strauss, 55 Fed. 388; Gandolfi v. United States, 20 C. C. A. 652, 38 U. S. App. 647, 74 Fed. 549; Dooley v. United States, 182 U. S. 222, 225, 45 L. ed. 1074, 1079, 21 Sup. Ct. Rep. 762; Westray v. United States, 18 Wall. 322, 21 L. ed. 763; United States v. Cousinery, 7 Ben. 251, Fed. Cas. No. 14,878; Watt v. United States, 15 Blatchf. 29, Fed. Cas. No. 17,292; United States v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; United States v. Chase, Fed. Cas. No. 14,787; United States v. Campbell, 10 Fed. 816; Chase v. United States, 9 Fed. 883; United States v. Earnshaw, 12 Fed. 283, 45 Fed. 782; United States v. Tiffany & Co. 81 C. C. A. 11, 151 Fed. 473; Louisville Pillow Co. v. United States, 75 C. C. A. 324, 144 Fed. 386; United States v. Mexican International R. Co. 81 C. C. A. 61, 151 Fed. 545; Gulbenkian v. United States, 108 C. C. A. 245, 186 Fed. 133; Gandolfi v. United States, 20 C. C. A. 652, 38 U. S. App. 647, 74 Fed. 549; United States v. Strauss, 55 Fed. 388; United States v. Bitelli, Ct. Cust. App. Feb. 10, 1914, Treasury Dec. No. 34,194.

The board of general appraisers under the act of 1890 and the act of 1909 have, as a matter of fact, actually taken jurisdiction of exactly the questions which the importers in this suit seek to raise; *viz.*, the right of a collector to liquidate after a year, and the question whether the government must prove fraud.

Cassel v. United States, 146 Fed. 146; Neresheimer v. United States, 131 Fed. 977; Klumpp v. Thomas, 89 C. C. A. 543, 162 Fed. 853; United States v. F. B. Vandergrift & Co. 99 C. C. A. 598, 175 Fed. 772; United States v. Goldberg, 2 Ct. Cust. App. 140; United States v. Schwartz, 3 Ct. Cust. App. 24; Treasury Dec. 24459, G. A. 5346.

The collector of customs, in reliquidating an entry, whether within or after a year from the date of entry, is to be presumed, like any other public officer, to have acted properly and within the law; and where his duty, imposed by statute or otherwise, is discretionary or judicial, and not mandatory or ministerial, his action or decision upon the facts is conclusive and can-

not be controlled or reviewed by the courts, unless the statute so provides, and then only in the manner provided.

United States v. Vitelli, Ct. Cust. App. Fed. 10, 1914; United States v. Arredondo, 6 Pet. 691, 729, 8 L. ed. 547, 561; Arthur v. Unkart, 96 U. S. 118, 121, 122, 24 L. ed. 768–770; Louisiana v. McAdoo, 234 U. S. 627, 58 L. ed. 1506, 34 Sup. Ct. Rep. 938; Allen v. Blunt, 3 Story, 743, Fed. Cas. No. 216; United States v. Frank, 2 Ct. Cust. App. 239; United States v. Loeb, 99 Fed. 723; United States v. Schering, 59 C. C. A. 283, 123 Fed. 65; United States v. Rosenwald, 14 C. C. A. 399, 35 U. S. App. 89, 67 Fed. 323; Earnshaw v. United States, 146 U. S. 60, 67, 36 L. ed. 887, 889, 13 Sup. Ct. Rep. 14; United States v. Bradshaw, Ct. Cust. App. 1914; Pickhardt v. United States, 14 C. C. A. 341, 35 U. S. App. 72, 67 Fed. 111; Muser v. Magone, 155 U. S. 240, 251, 39 L. ed. 135, 138, 15 Sup. Ct. Rep. 77; Erhardt v. Schroeder, 155 U. S. 124, 39 L. ed. 94, 15 Sup. Ct. Rep. 45.

Messrs. **Thomas M. Lane** and **James M. Beck** argued the cause and filed a brief for Sherman & Sons Company:

No principle is better settled than that a discretionary power vested in an administrative officer can be exercised only in the manner and under the circumstances prescribed by the statute, and that any attempted exercise thereof in any other manner or under different circumstances is a nullity; and, further, that the exercise of such power is limited to a sound legal discretion, excluding all arbitrary, capricious, inquisitorial, and oppressive proceedings.

United States v. Doherty, 27 Fed. 730; Bandler v. Hill, 84 Misc. 359, 146 N. Y. Supp. 98; Tweed's Case (Flanders v. Tweed) 16 Wall. 504, 518, 519, 21 L. ed. 389, 393, 394; United States v. Calhoun, 184 Fed. 499, affirmed in 132 C. C. A. 87, 215 Fed. 709.

Congress has always been explicit, and has in most instances enacted affirmative provisions in conferring the power of reliquidation.

21 Ops. Atty. Gen. 224; 21 Ops. Atty. Gen. 152; United States v. Leng, 18 Fed. 15; United States v. F. B. Vandegrift & Co. 99 C. C. A. 598, 175 Fed. 772; United States v. Whitridge, 197 U. S. 135, 49 L. ed. 696, 25 Sup. Ct. Rep. 406; United States v. Dickson, 71 C. C. A. 377, 139 Fed. 251.

The inference is strong that Congress intended to authorize reliquidation only in the cases where the statutes expressly provide for it. In the absence of a statute to the contrary, the general rule applicable to special statutory tribunals would seem to make the collector's decision irreviewable by himself.

United States v. Leng, 18 Fed. 15.

A number of decisions recognize some implied power or "privilege" in the collector to reliquidate an entry within the year.

United States v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; United States v. Campbell, 10 Fed. 816; United States v. Calhoun, 184 Fed. 499, affirmed in 132 C. C. A. 87, 215 Fed. 709; Louisville Pillow Co. v. United States, 75 C. C. A. 324, 144 Fed. 386; United States v. Tiffany & Co. 81 C. C. A. 11, 151 Fed. 473; United States v. Mexican International R. Co. 81 C. C. A. 61, 151 Fed. 545; Westray v. United States, 18 Wall. 322, 21 L. ed. 763.

The power to find fraud cannot be raised by implication, where it would confer upon an administrative officer the right to reopen matters which are *res judicata*, by *ex parte* administrative fiat, without limit as to time or extent.

United States v. Fisher, 2 Cranch, 358, 390, 2 L. ed. 304, 314; United States v. Federal Sugar Ref. Co. 211 Fed. 1016; West Derby Union v. Life Assur. Soc. 66 L. J. Ch. N. S. 726; People ex rel. Pierce v. Morrill, 26 Cal. 336; Clark's Appeal, 58 Conn. 207, 20 Atl. 456; Swigart v. People, 154 Ill. 284, 40 N. E. 432; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185.

In a suit against an importer to recover an alleged balance of duties due upon reliquidation of entries, he may set up the defense that the reliquidation is beyond the collector's power, and may do this by demurrer if the defect appears upon the face of the complaint.

United States v. Thurber, 28 Fed. 56; United States v. Schlesinger, 120 U. S. 109, 30 L. ed. 607, 7 Sup. Ct. Rep. 442; Clinkenbeard v. United States, 21 Wall. 65, 22 L. ed. 477; United States v. Myers, 3 Hughes, 239, Fed. Cas. No. 15,846; United States v. Bank of America, 15 Fed. 730; United States v. Nebraska Distilling Co. 25 C. C. A. 418, 46 U. S. App. 704, 80 Fed. 285; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; Gilbert v. York, 111 N. Y. 544, 19 N. E. 268.

Premising his authority to make the contested reliquidations, it is insufficient to allege the collector's conclusions as to the existence of the statutory condition which permits him to act, to wit, fraud. In other words, the existence of fraud is a jurisdictional fact, which must be alleged affirmatively as a fact, and an allegation of the officer's findings as to its existence is insufficient.

Galpin v. Page, 18 Wall. 350, 370, 371, 21 L. ed. 959, 964; Cristy v. Unwin, 3 Perry

& D. 208; Sabariego v. Maverick, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; Arnson v. Murphy, 115 U. S. 579, 29 L. ed. 491, 6 Sup. Ct. Rep. 185; De Bary v. Dunne, 162 Fed. 961; Stern v. La Compagnie Generale Transatlantique, 110 Fed. 996; United States v. Jonas, 19 Wall. 598, 22 L. ed. 177; United States v. Ross, 92 U. S. 281, 23 L. ed. 707; United States v. Carr, 132 U. S. 644, 33 L. ed. 483, 10 Sup. Ct. Rep. 182.

A collector has no power to reliquidate an entry upon a higher value for the merchandise than that found upon original appraisement, after the expiration of the sixty days in which he may appeal for reappraisement.

United States v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; United States v. Lang, 18 Fed. 15; United States v. Calhoun, 184 Fed. 499, affirmed in 132 C. C. A. 87, 215 Fed. 709; Treasury Dec. 34917, G. A. 7636; Treasury Dec. 23601, G. A. 5100; Treasury Dec. 18617, G. A. 4015; Treasury Dec. 25970, G. A. 5896; Treasury Dec. 27492, G. A. 6402; Tucker v. Kane, Taney, 146, Fed. Cas. No. 14,220; United States v. Frazer, 10 Ben. 347, Fed. Cas. No 15,161; United States v. Thurber, 28 Fed. 56; United States v. Bennet, 2 Ct. Cust. App. 249; Beard v. Porter, 124 U S. 437, 31 L. ed. 492, 8 Sup. Ct. Rep. 556; United States v. Campbell, 10 Fed. 816; United States v. McDowell, 21 Fed. 563.

The collector is without authority to reliquidate upon the basis of his own findings as to weight, after merchandise has been regularly weighed by United States weighers, and duties liquidated accordingly.

Treasury Dec. 16637, G. A. 3282; Treasury Dec. 23871, G. A. 5178; Manhattan Gaslight Co. v. Maxwell, 2 Blatchf. 405, Fed. Cas. No. 9,023; Marriott v. Brune, 9 How. 619, 634, 13 L. ed. 282, 288; Earnshaw v. Cadwalader, 145 U. S. 247, 259, 36 L. ed. 693, 697, 12 Sup. Ct. Rep. 851; United States v. Rosenthal, 126 Fed. 766.

The pleading should set forth sufficient facts to make it appear whether fraud exists in the dutiable value, or in the classification, or in the quantity of the merchandise.

Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Brown v. Keene, 8 Pet. 112, 8 L. ed. 885.

The remedy of the government for the recovery of duties withheld through fraud is complete without extending by implication the collector's powers of reliquidation to cover such cases.

United States v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647; Meredith v. United States, 13 Pet. 486, 10 L. ed. 258; Arnold v. United States, 9 Cranch, 104, 3 L. ed. 671; United States v. Boyd, 23 Blatchf. 299, 24 Fed. 690; United States v. Boyd, 24 Fed. 692; United States v. National Fibre Board Co. 133 Fed. 596; United States v. Cobb, 11 Fed. 76; United States v. Koblitz, 15 Fed. 900; United States v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; United States v. Nuckolls, 55 C. C. A. 499, 118 Fed. 1005; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; United States v. Little Miami C. & X. R. Co. 1 Fed. 700.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The questions certified by the circuit court of appeals involve an inquiry as to whether the collector of customs, after the expiration of one year, can make a finding of fraud and thereupon make a reliquidation of duties which is final unless, within fifteen days, the importer pays the amount thus [150] declared to be due so as to secure the right to a hearing (1) on the finding of fraud and (2) on the correctness of the new assessment on goods which had been removed for consumption.

On the part of the government it is claimed that this power is conferred by § 21 of the act of 1874;[1] but it is a significant fact that although the act has been in force for more than forty years, there are only two instances reported in which the collector, after the expiration of one year, has attempted to reliquidate because of the existence of fraud. Those two cases (United States v. Vitelli, customs ct. of appeals (1914) and United States v. Federal Sugar Ref. Co. 211 Fed. 1016) are of recent date and in direct conflict with each other.

The novelty of the practice, the conflict in the two decisions, and the statement that numerous suits on similar reliquidation orders are now pending, justify a somewhat detailed examination of the authority conferred upon the collector by the tariff act of 1909[2] (36 Stat. at L. p. 100,

[1] "That whenever any goods, . . . shall have been entered and passed free of duty, and whenever duties upon any imported goods, . . . shall have been liquidated and paid, and such goods, . . . shall have been delivered to the owner, . . . such entry and passage free of duty and *such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.*" Act of June 22, 1874, 18 Stat. at L. 190, chap. 391, § 21, Comp. Stat. 1913, § 5714.

[2] Sec. 14. "*The decision of the collector*

chap. 6, § 28, subsec. 14, [151] p. 98, subsec. 12); the act of 1874[1] (18 Stat. at L. 190, chap. 391, Comp. Stat. 1913, § 5714), and the customs regulations prescribing the method of liquidating duties and defining the effect of liquidation orders.

An analysis of the various provisions bearing on the subject shows, that when foreign merchandise is to be entered at a domestic port, the owner files his statutory declaration, together with the invoice, account, and list of the goods sought to be imported. United States v. Salen, 235 U. S. 237, ante, 51, 35 Sup. Ct. Rep. 51. The surveyor gives a certificate as to weight or quantity, and the appraiser issues a certificate of value. (Customs Regulations, 861, 1431, 1481, 1484.) With these documents before him,—and with the privilege of examining witnesses "touching any matter deemed material in ascertaining the dutiable value and classification of the merchandise,"—the collector determines the rate of duty to be imposed under the tariff act, and thereupon calculates, assesses, and liquidates the amount to be paid. His decision as to the amount of duty is final, unless within fifteen days the importer files a protest and pays the full amount of duty thus liquidated. In that event the collector is required to transmit the invoice and all the papers connected therewith to the board of nine general appraisers for their determination of the questions raised by the protest. From them the case can be taken to the court of customs appeals. If the decision [152] is in favor of the importer, provision is made for a refund of any overcharge assessed against him.

If, however, there is no such protest, payment, and appeal, the collector's decision is *final as to the amount of duty* (36 Stat. at L. 100, chap. 6, § 28, subsec. 14) except that for one year—certainly when the goods have not passed beyond his reach (Iasigi v. The Collector (Iasigi v. Whitney) 1 Wall. 384, 17 L. ed. 688)—the collector, like a court during the term at which a judgment is entered, has full control of the assessment, and may, on his own motion, set aside his first order and make a reliquidation (Robertson v. Downing, 127 U. S. 613, 32 L. ed. 271, 8 Sup. Ct. Rep. 1328). Where there is no such renewal or continuance of the original proceeding, but where the duty is paid, as assessed, the statute (18 Stat. at L. 190, chap. 391, § 21, Comp. Stat. 1913, § 5714) provides that the "*settlement shall, after the expiration of one year, in the absence of fraud, be final and conclusive upon all parties.*"

1. This brief review of the many and detailed provisions of the statutes will suffice to show that the government will not allow foreign goods to be brought into this country and then litigate with the importer as to the amount of duty. Neither bond, nor security, nor retention of the goods during litigation, will dispense with the necessity of payment. The duty, as assessed by the collector, must be paid in any event,—not only as a condition of the goods being entered, but also as a condition of the right to file a protest. When that has been done, Congress, in order to prevent injustice, has given the importer, who thus pays and protests, the right to bring the goods into the United States, has granted him the opportunity to review the finding of the collector, and has also given him the promise of a refund in case the collector is found to have made an overcharge. (36 Stat. at L. 103, chap. 6, § 28, subsec. 23.) But this right of review is not an appeal in ordinary course of law, and can be exercised only in the statutory method, on statutory conditions, before special statutory tribunals of limited jurisdiction.

[153] 2. This summary method of collection, and the requirement that duties be paid as assessed before the right to litigate arises, is an incident of the fact that the assessment and collection of duties is an administrative matter,—no notice or hearing being necessary, since the assessment is *in rem* and against the foreign goods

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as to the rate and amount of duties chargeable upon imported merchandise, . . . shall be final and conclusive against all persons interested therein, unless the owner, . . . shall within fifteen days after . . . ascertainment and liquidation of duties, . . . if dissatisfied with such decision, give notice in writing to the collector, . . . [of] the reasons for his objections thereto, and *if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon.* Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers for due assignment and determination . . . ; such determination shall be final . . . except in cases where an application shall be filed in the . . . court of customs appeals within the time and in the manner provided for in this act." § 28, subsec. 14, tariff act of 1909, 36 Stat. at L. 100, chap. 6.

"All notices in writing to collectors of dissatisfaction of any decision thereof as to the rate or amount of duties chargeable upon imported merchandise . . . with the invoice and all papers and exhibits shall be forwarded to the board of nine general appraisers. . . ." 36 Stat. at L. 98, chap. 6, § 28, subsec. 12, Comp. Stat. 1913, § 5593.

which are sought to be entered. The amount is determined by inspection of experts, and payment is enforced against the merchandise actually in custody of the customs officers, who cannot permit its removal until the assessed charges have been paid.

If, after the duty had been paid and the goods had been removed, it should be made to appear that they had been fraudulently entered and were still in the possession of the importer, they could be retaken and condemned in forfeiture proceedings. Or if, after the expiration of one year, it should be discovered that, as alleged in the present case, there had been false invoices, false weights, or fraud of any kind, by which the United States had been deprived of its just dues, and if the goods themselves could not be found, so as to be forfeited, the inability to proceed *in rem* would not prevent the government from bringing a suit *in personam* to enforce the importer's personal liability for the debt which accrued and which rightfully should have been paid when the foreign merchandise was entered at the domestic port.

This is illustrated by the decision in United States v. National Fiber Board Co. 133 Fed. 596, cited by the government on another branch of the argument. It there appeared that certain bales of *flax* had been fraudulently entered as *waste-paper stock*. In the suit brought in a Federal court to recover the duties that should have been paid, the importer insisted that the government was limited to the summary and statutory method of liquidation above mentioned, claiming that "as soon as property is fraudulently withdrawn the power to collect the duty [154] ceases, and fines, penalties, and forfeitures are imposed." In answering this contention the court cited Meredith v. United States, 13 Pet. 486, 10 L. ed. 258, and quoted the following correct statement of the law in United States v. Cobb, 11 Fed. 78:

"The summary proceedings which the customs officers are required by law to take against the goods are in the nature of proceedings *in rem*, but are not the sole remedies of the government for the collection of its duties. . . . The act makes the duties a personal debt or charge upon the importer, which accrues to the government immediately upon the arrival of the goods at the proper port of entry. They are due although the goods have been smuggled, or for any reason have never come to the hands of the customs officers, or the statutory proceedings have never been instituted, or through accident, mistake, or fraud no duties or short duties have been paid; and the importer is not discharged from his debt by a delivery to him of the goods without payment."

3. It is said, however, that even if the United States can bring a suit against the importer, to recover a personal judgment for the duties on goods fraudulently undervalued, that does not deprive the collector of the power to reliquidate, impliedly given by the act of 1874. And it is further argued that, where such statutory method of liquidation is adopted by the collector, only the statutory method of defense, by protest and payment, is available to the importer. As the importers here filed no protest and made no payment of the duty reliquidated in 1913, it is said that the collector's finding is as conclusive as was his original liquidation in 1909.

But while the tariff act makes the decision of the collector final as *"to the rates and amount of duties,"* and while the act of 1874 provides that when such duties have been paid *"such settlement*, after the expiration of one year, and in the absence of fraud, *shall be final and conclusive,"*—yet [155] in neither of these laws did Congress authorize the collector to make findings of fraud. Those statutes relate to a power to be exercised when the foreign merchandise was in the custody of the customs officers. By virtue of that possession they were not obliged to hear testimony, but by inspection could determine weight, value, classification, and, as experts (Re Muser, 49 Fed. 831), perform the administrative function of liquidating the amount of duty that must be paid before such foreign goods could be brought into the country.

To that judgment *in rem*, against particular goods in custody, the statute gave a certain quality of finality. But a wholly different situation, and one not provided for by statute, would arise if, after the expiration of the year, the collector—or his successor in office, who had no knowledge of the original transaction—should undertake to reliquidate duties on goods that had been removed and consumed. In such case—the merchandise not being in possession of the customs officers—the essential facts as to weight, value, and classification could not be determined by the inspection of experts, as contemplated by law, but would depend upon the testimony of witnesses. If, in addition to this new, and nonstatutory, method of fixing the amount of duty, there is to be added a jurisdiction authorizing the collector to declare that there had been fraud in the procurement of the original liquidation, it will be seen that the limited administrative power to make a quasi judgment *in rem*, against goods in possession, has grown with the

lapse of time, and that the authority claimed for the collector on reliquidation is far more extensive than that exercised when the original order was entered. For, according to the argument now made, he can, after the expiration of one year, not only hear testimony as to the value of goods not in possession, but, without notice to the importer, can declare him to have been guilty of fraud, and make that finding of fraud and value [156] conclusive unless, within fifteen days, the importer protests and pays the amount of the reassessment as the condition of the right to defend. If, within fifteen days, the importer protests, but is unable to make such payment, it is claimed that such reliquidation becomes conclusive, so that in a suit to collect the sum thus declared to be due, the government is not only relieved from the burden of proving the collector's charge of fraud, but the importer would not be permitted to defend, even to establish his innocence.

The statement of the proposition is well calculated to raise a doubt as to its correctness. Sabariego v. Maverick, 124 U. S. 261, 291-293, 31 L. ed. 430, 441-443, 8 Sup. Ct. Rep. 461. For if the collector, after one year, can determine that there had been fraud, and thereupon can make a reliquidation having such characteristics of finality as is here claimed for his finding, he can, as in the present case, do so at the end of four years; or, as in the Vitilli Case, after seven years; or, as in other pending cases referred to in the argument, after fifteen years. If, after such a lapse of time, in which parties may die, witnesses may remove, or documents be lost, the collector can make a finding of fraud which can be resisted only upon condition of paying the amount of the reliquidated duties, then there will be many instances in which the importer, and many more instances in which his heirs, will be unable to make the cash payment so as to secure the right to prove that there was no fraud either in fact or in law.

Whether such right to defend, granted on such onerous and sometimes impossible conditions, would afford due process of law to the citizen, otherwise liable to be bound *in personam* by such reliquidation, need not be discussed. For certainly such a power will not be implied and none such can be found in the tariff act of 1909 or in § 21 of the act of 1874. They provide that in the absence of protest a finding of *value* is conclusive, and that the *settlement*, [157] in accordance with that finding, is, " . . . in the absence of fraud, final, and conclusive."

But there is no provision as to the method in which, or the tribunal before which, the existence of the nullifying fraud can be determined. The silence of Congress on that subject, however, cannot be construed as the expression of an intent to enlarge the administrative function of the collector into power and jurisdiction to declare that, years before, there had been fraud in the procurement of the order liquidating duties on goods removed.

On the contrary, the failure to make special provision, as to the method of setting aside such orders for fraud was a recognition of the fact that the determination of the question as to whether there was fraud involved an exercise of the judicial rather than the executive function, and that therefore such orders were subject to the general provisions of law by which any other fraudulent judgment can be set aside by the courts in proceedings seasonably begun. Bailey v. Glover, 21 Wall. 342, 22 L. ed. 636. By such general law the party sought to be affected must be informed of the nature of the fraud which the complainant undertakes to establish, and must be given notice and opportunity to be heard in his defense, before the old order can be set aside and a new order entered.

This conclusion is not in conflict with the principle which recognizes that the government may proceed *in rem* against foreign goods sought to be entered; or, without a judicial hearing, may determine the amount of taxes due by a citizen, and make that administrative finding a lien, which can be resisted only on condition that bond and security be given to pay what is *prima facie* a valid lien on the property of the taxpayer. McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335. For it is not claimed that the reliquidation order here is a general or a special lien, but only that it forms the basis of a suit in which a judgment *in personam* can be obtained. In such a suit the fraud relied on must [158] be alleged and proved. To sustain the government's contention that the collector's finding was conclusive unless protest and payment had been made would be equivalent to saying that a charge of fraud in procuring goods, whether made by a collector or by a grand jury, could be made conclusive, unless, before the trial, the defendant restored the goods or their value.

These conclusions indicate the general nature of the answer to be given to the questions certified by the circuit court of appeals—though their form is such as to make it impossible to give a categorical answer of Yes or No.

1. As to the question marked 1, we hold that the importer is not concluded by the reliquidation order, and when suit is

brought for the amount claimed to be due he may file his plea and be heard in his defense as in other cases, even though he did not file a protest and make the payment required in the case of the original liquidation.

2. The question marked 2 we answer No.

3. To the question marked 3, we answer No, the government in such a suit being obliged to conform to the general rule of pleading where recovery is sought on the ground of fraud.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[159] AMERICAN SURETY COMPANY OF NEW YORK, Plff. in Err.,
v.
GEORGE S. SCHULTZ.

(See S. C. Reporter's ed. 159-162.)

Federal courts — jurisdiction — suit arising under Federal laws — action on supersedeas bond.

A suit on a supersedeas bond given conformably to U. S. Rev. Stat. §§ 1000, 1007, Comp. Stat. 1913, §§ 1660, 1666, to supersede the judgment in an action for a breach of contract during the pendency of a writ of error from a Federal circuit court of appeals is one which arises out of the laws of the United States within the meaning of the Judicial Code, § 24, giving the district courts jurisdiction of any suit of a civil nature at common law which "arises under the Constitution or laws of the United States."

[For other cases, see Courts, 513-538, in Digest Sup. Ct. 1908.]

[No. 643.]

Argued February 23, 1915. Decided April 5, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action on a supersedeas bond. Affirmed.

The facts are stated in the opinion.

Mr. Charles F. Carusi argued the cause, and, with Messrs. Henry C. Willcox, Walter B. Grant, and Joseph M. Gazzam, filed a brief for plaintiff in error:

A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.

Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

It is quite immaterial that there may arise or even that there is likely to arise in a suit which has its origin in a Federal statute, some question concerning the scope and validity of the statute, unless the existence of such a question appears affirmatively from the necessary allegations of the plaintiff's pleading.

Taylor v. Anderson, 234 U. S. 74, 58 L. ed. 1218, 34 Sup. Ct. Rep. 724.

This court has held that if the proceeding to enforce a judgment of a Federal court takes the form of an action on the judgment, it is an independent proceeding, and one in which the Federal court must acquire its jurisdiction upon the ground of diverse citizenship, unless some distinct question is presented as to the construction of or validity of the Constitution or a law of the United States.

Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; Metcalf v. Watertown, 128 U. S. 586, 588, 32 L. ed. 543, 544, 9 Sup. Ct. Rep. 173; Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.

A common-law action is, in the absence of statute, the only remedy upon an appeal bond.

Miller v. Hogeboom, 56 Neb. 434, 76 N. W. 888; Hadley v. Bernero, 97 Mo. App. 314, 71 S. W. 451; Willard v. Fralick, 31 Mich. 431; Stephens v. Miller, 80 Ky. 47; Cambreling v. Purton, 16 N. Y. Supp. 49; Waysman v. Updegraff, 1 Kan. Dassler's ed. 516 appx.

Even in cases arising in the equity branch of the Federal court, there has been a limit to the extent to which the Federal courts have been willing to stretch the doctrine of ancillary jurisdiction.

Kirker v. Owings, 39 C. C. A. 132, 98 Fed. 499.

And this court has held that the mere fact of the appointment of a receiver by order of a court of the United States does not create a Federal question, or give the receiver the right to take a suit against him into the Federal jurisdiction, even by writ of error to this court from the state court, so long as the litigation does not directly draw in question the validity of his authority as an officer of a Federal court.

Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316; Gableman v. Peoria, D. & E. R. Co. 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171.

The doctrine of ancillary jurisdiction cannot be invoked in this case.

Conwell v. White Water Valley Canal Co. 4 Biss. 195, Fed. Cas. No. 3148.

State courts have frequently sustained actions upon bonds given in Federal courts.

Wood v. Coman, 56 Ala. 283; Saunders v. Taylor, 6 Mart. N. S. 519; Aiken v. Leathers, 37 La. Ann. 482; Braithwaite v. Jordan, 5 N. D. 196, 31 L. R. A. 238, 65 N. W. 701; Montana Min. Co. v. St. Louis Min. & Mill Co. 19 Mont. 322, 48 Pac. 305; Rhodes v. Ashurst, 176 Ill. 351, 52 N. E. 118; United States ex rel. State v. Douglas, 113 N. C. 190, 18 S. E. 202.

A common-law action upon an appeal or supersedeas bond given in one court may be maintained in another.

Gallagher v. Flannelly, 22 Wend. 614; Curtice v. Bothamly, 8 Allen, 336; Com. use of Randall v. Gould, 48 Pa. Super. Ct. 528.

Mr. Abram J. Rose argued the cause, and, with Messrs. Alfred C. Petté and Philip M. Brett, filed a brief for defendant in error:

The action being one to enforce liability on a supersedeas bond given to procure a stay of execution on a judgment rendered in an action in the district court, pending a review on error by the circuit court of appeals, it is an action arising under the laws of the United States, of which a United States court has jurisdiction, irrespective of the citizenship of the parties.

Seymour v. Phillips & C. Constr. Co. 7 Biss. 460, Fed. Cas. No. 12,689; Crane v. Buckley, 105 Fed. 401; Egan v. Chicago G. W. R. Co. 163 Fed. 344.

In analogy to these decisions are numerous decisions in actions on bonds, other than supersedeas bonds, given under Federal statutes, *i. e.*:

(a) An action on a bond given by a United States marshal for the faithful performance of his duties.

Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677; Bachrack v. Norton, 132 U. S. 337, 33 L. ed. 377, 10 Sup. Ct. Rep. 106; Feibelman v. Packard, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289; Lawrence v. Norton, 4 Woods, 383, 13 Fed. 1; United States ex rel. De Loyne v. Davidson, 1 Biss. 433, Fed. Cas. No. 14,921; Adler v. Newcomb, 2 Dill. 45, Fed. Cas. No. 83.

(b) Likewise an action on a bond given by a contractor for the performance of public work.

Mullin v. United States, 48 C. C. A. 677, 109 Fed. 817; United States ex rel. Giant Powder Co. v. Axman, 152 Fed. 816.

(c) Also an action upon a bond given by a clerk of a court of the United States.

Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543.

(d) Also an action on the official bond of a cashier of a national bank.

Walker v. Windsor Nat. Bank, 5 C. C. A 421, 5 U. S. App. 423, 56 Fed. 76.

(e) Also an action on an attachment bond executed in a suit pending in a Federal court.

Files v. Davis, 118 Fed. 465.

(f) And likewise an action on a bond given as a condition of the granting of a temporary injunction in an action brought in a Federal court.

Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Leslie v. Brown, 32 C. C. A. 556, 61 U. S. App. 727, 90 Fed. 171; Mississippi Valley Fuel Co. v. Watson Coal Co. 120 C. C. A. 276, 202 Fed. 122; St. Louis, I. M. & S. R. Co. v. Bellamy, 211 Fed. 172.

Moreover, this action is but an offshoot of, and ancillary and incidental to, the original suit in which the bond was given, and on that ground, too, the jurisdiction of the district court may be sustained.

Seymour v. Phillips & C. Constr. Co. 7 Biss. 460, Fed. Cas. No. 12,689; Arnold v Frost, 9 Ben. 267, Fed. Cas. No. 558; Lamb v. Ewing, 4 C. C. A. 320, 12 U S. App. 11, 54 Fed. 269; Crane v Buckley, 105 Fed. 401.

Mr. Justice Lamar delivered the opinion of the court:

Schultz brought suit in a New York court against Whitcomb for breach of contract. The case was removed to the United States district court for the southern district of New York, where the plaintiff recovered a judgment for $25,000. The defendant, Whitcomb, in order to take the case to the circuit court of appeals, gave a supersedeas [160] bond for $30,000, with the American Surety Company as security. The judgment was affirmed, and not having been paid, Schultz brought suit on the bond against the surety in the United States district court for the southern district of New York.

The defendant demurred on the ground that the Federal court had no jurisdiction. The demurrer was overruled and the case was brought here by the Surety Company, where it contends that though the bond may have been given by virtue of the laws of the United States, "the suit thereon did not involve any controversy respecting the validity, construction, or effect of such law," and hence the Federal court was without jurisdiction—the parties not being citizens of different states. Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

This conclusion would be correct if the suit is to be treated as an ordinary action

on a sealed instrument voluntarily given. Lovell v. Newman, 227 U. S. 425, 57 L. ed. 582, 33 Sup. Ct. Rep. 375. But while in a sense the supersedeas bond was the contract of the Surety Company, it was not made in pursuance of any agreement with Schultz, and could have been given over his objection, since the laws of the United States (Rev. Stat. §§ 1000, 1007, Comp. Stat. 1913, §§ 1660, 1666) declared that a writ of error could be obtained by the defendant filing an approved bond with surety, conditioned to make good his appeal. Such a bond operated to stay the judgment. Conversely, when that judgment was affirmed, the same laws of the United States gave Schultz a right of action on the bond, and in the suit to enforce that right the measure of his recovery depended upon the construction to be given the Federal statute. Such a suit to enforce such a right could be brought in the United States court by virtue of § 24 of the Judicial Code [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1913, § 991], which declares that the district court has jurisdiction of any suit of a civil nature at common law which "arises under the Constitution or laws of the United States."

While there has been no ruling by this court as to [161] whether a suit on a supersedeas bond can be said to "arise out of the laws of the United States," yet there would seem to be no doubt on the subject when the source and nature of the plaintiff's cause of action are considered. If there was room for discussion, the matter is concluded by Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677, and Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233, where it was held that a suit on a United States marshal's bond was one arising under the laws of the United States, which, therefore, could be brought in the Federal court without regard to the citizenship of the parties. Compare Tullock v. Mulvane, 184 U. S. 497, 506, 46 L. ed. 657, 663, 22 Sup. Ct. Rep. 372.

The Surety Company insists, however, that those cases relate to suits on bonds intended to secure the performance of a Federal duty by Federal officers, and are not applicable to a case like this, where the suit is on a bond given to supersede a judgment which did not arise out of the laws of the United States, but was a mere evidence of a liability which arose at common law and became a security therefor. Tennessee v. Union & Planter's Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Metcalf v. Watertown, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 641, 29 L. ed. 261, 263, 5 Sup. Ct. Rep. 1104. In effect the argument is that Whitcomb's common-law liability was superseded by the judgment; the judgment was superseded by the bond, and as the judgment did not arise under the laws of the United States, neither did the right of action on the bond, which was a mere substitute for the judgment.

But the bond is not a substitute for the judgment, nor is it of the same nature. Indeed, it was given for the very purpose of preventing the plaintiff from enforcing it, and to enable the defendant, Whitcomb, to prosecute an appeal in an effort to have it set aside. The judgment and the bond were wholly distinct, and arose out of different laws,—one out of the common law, the other out of a law of the United States. When the amount of Whitcomb's liability for breach of contract had been adjudged by the Federal court, the plaintiff was entitled, at once to enforce [162] payment by levy and sale. The laws of the United States, however, intervened and gave to the defendant a means of preventing immediate collection and possibly of defeating the judgment. This delay—which was helpful to the defendant—was granted by a Federal statute on condition that he would file a bond with surety, conditioned to pay the plaintiff in the event the defendant failed to make good his appeal. If that appeal was not made good, the plaintiff's right of action likewise arose out of a Federal statute. A court of the United States had jurisdiction to determine whether there had been a breach of the condition, and, if so, the extent of plaintiff's rights and of the defendant's liability under such law. The judgment of the District Court is affirmed.

GLENN KNAPP, Plff. in Err.,
v.
ALEXANDER-EDGAR LUMBER COMPANY.

(See S. C. Reporter's ed. 162-171.)

Public lands — homestead entry — rights before patent.

1. A homesteader has, from the making of his entry, a substantial inceptive title sufficient as against third parties to support

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NOTE.—Homesteader's right to recover for injury to premises done before receiving patent.

A patentee under the homestead laws may, under the doctrine of relation, maintain an action to recover damages for injury to the premises done after the making of his entry. Peyton v. Desmond, 63 C. C. A. 651, 129 Fed.

suits in equity or at law, although he may not yet have taken actual possession of the land.

[For other cases, see Public Lands, I. f, 2, in Digest Sup. Ct. 1908.]

Public lands — patents — relation — suit against trespasser.

2. A patentee under the homestead laws may, under the doctrine of relation, maintain an action to recover damages for timber wilfully cut from his land by a trespasser after the homesteader had made his entry, but before he had taken actual possession.

[For other cases, see Public Lands, I. f, 3, b, in Digest Sup. Ct. 1908.]

Public lands — patent — relation — suit against trespasser — settlement with United States.

3. The right of a patentee under the homestead laws to maintain an action to recover damages for timber wilfully cut from the land by a trespasser after the homesteader had made his entry, but before he had actually taken possession, is not defeated by a settlement between the United States and such trespasser, made without notice to the homesteader, then in possession, and upon the basis of a report of a special agent of the government that the trespass was unintentional.

[For other cases, see Public Lands, I. f, 3, b, in Digest Sup. Ct. 1908.]

[No. 139.]

Submitted January 18, 1915. Decided April 5, 1915.

IN ERROR to the Circuit Court of Bayfield County in the State of Wisconsin to review a judgment rendered pursuant to the mandate of the Supreme Court of the state, which had reversed a judgment of the Circuit Court in favor of plaintiff in an action by a homesteader to recover damages for timber cut from his land, and had remanded the cause, with directions to enter judgment in favor of defendant. Reversed and remanded for further proceedings.

See same case below in Wisconsin Supreme Court, 145 Wis. 528, 140 Am. St. Rep. 1091, 130 N. W. 504.

The facts are stated in the opinion.

Mr. H. H. Grace submitted the cause for plaintiff in error. Messrs. C. R. Fridley and George B. Hudnall were on the brief:

The plaintiff in error had sufficient actual possession of the homestead to maintain an action of trespass against a wrongdoer.

Gerhardt v. Swaty, 57 Wis. 24, 14 N. W. 851; Rogan v. Perry, 6 Wis. 194; Woods v. Banks, 14 N. H. 101; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 17 Mor. Min. Rep. 28.

If the plaintiff in error was not in sufficient actual possession of the homestead as against a mere trespasser, he could maintain this action, because he was in the constructive possession of the homestead.

Northrup v. Trask, 39 Wis. 515; Martin v. Scofield, 41 Wis. 167; Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121, 4 Ann. Cas. 1016; 38 Cyc. 1025.

After entry, the United States has merely the naked legal title; the right of possession, the beneficial interest, and all other rights of ownership, are vested in the homesteader, except that, by U. S. Rev. Stat § 2461, Comp. Stat. 1913, § 4980, he cannot cut the timber unless it is for the purpose of improving the land.

1; Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896.

And even before receiving his patent, the homestead entryman has a sufficient right of property to enable him to maintain such an action. McGuire v. Brown, 106 Cal. 660, 30 L.R.A. 384, 39 Pac. 1060; Gulf, C. & S. F. R. Co. v. Clark, 2 Ind. Terr. 319, 51 S. W. 962 (reversed on other grounds in 41 C. C. A. 597, 101 Fed. 678); Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 125; Ellsworth, McP. N. & S. E. R. Co. v. Gates, 41 Kan. 574, 21 Pac. 632; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; Pairier v. Itasca County, 68 Minn. 297, 71 N. W. 382; Matthews v. O'Brien, 84 Minn. 505, 88 N. W. 12; Preston v. Cloquet Tie & Post Co. 114 Minn. 398, 131 N. W. 474; Hiawannee Lumber Co. v. McPhearson, 95 Miss. 589, 49 N. W. 741; Nelson v. Big Blackfoot Mill. Co. 17 Mont. 553, 44 Pac. 81; Culbertson Irrig. & Water Power Co. v. Olander, 51 Neb. 539, 71 N. W. 298; McLeod v. Spencer, 21 Okla. 165, 17 L.R.A.(N.S.) 958, 129 Am. St. Rep. 774, 95 Pac. 754; Larsen v. Oregon R. & Nav. Co. 19 Or. 240, 23 Pac. 974; Wendel v. Spokane County, 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576; Stofferan v. Okanogan County, 76 Wash. 265, 136 Pac. 484; Cloquet Lumber Co. v. Burns, 124 C. C. A. 600, 207 Fed. 40.

The right of a person who has entered upon unsurveyed land, for the purpose of acquiring a homestead under the laws of the United States, to maintain replevin against a subsequent trespasser who cut and removed standing timber therefrom, is not lost because the entryman, instead of taking the land under his homestead claim, secured title from the government by the use of scrip, where the affidavit made by him when he applied to enter the land with such scrip showed that he had not abandoned, but was then insisting, on his homestead right, the government having been benefited rather than damaged by the change in the method of acquisition. Cloquet Lumber Co. v. Burns, 124 C. C. A. 600, 207 Fed. 40.

The measure of damages may, however, not be the same as though the homesteader owned the fee. See note to McLeod v. Spencer, 17 L.R.A.(N.S.) 958.

Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 125; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 1; Shiver v. United States, 159 U. S. 493, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; Teller v. United States, 54 C. C. A. 349, 117 Fed. 577; United States v. Ball, 31 Fed. 667; Orrell v. Bay Mfg. Co. 83 Miss. 800, 70 L.R.A. 881, 36 So. 561; Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896; Olive Land & Development Co. v. Olmstead, 103 Fed. 568, 20 Mor. Min. Rep. 700; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

The government, however, has no cause of action against him, after it issues a patent, for the timber he cut and removed from the homestead after entry and prior to the issuing of the patent.

United States v. Ball, 31 Fed. 667; United States v. Freyberg, 32 Fed. 195; United States v. Ellis, 122 Fed. 1016.

If the homesteader is not in possession, he can maintain ejectment.

Whitney v. Allaire, 1 N. Y. 305.

If there were two civil causes of action, one in favor of the government, and the other in favor of the homesteader, a settlement of the former would not extinguish the latter.

Stone v. United States, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778; United States v. Scott, 39 Fed. 900.

Whether there were two civil causes of action or only one depends on the relations existing between the homesteader and the government. If that relation is analogous to that of vendor and purchaser, then there was but one cause of action, and that in favor of the homesteader. Northrup v. Trask, 39 Wis. 515; Martin v. Scofield, 41 Wis. 167; and Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121, 4 Ann. Cas. 1016. On the other hand, if the relation is analogous to that of tenant for life or years and remainderman, then there were two causes of action; one trespass *quære clausum fregit* in favor of the homesteader, for injury to his possessory right, and one trespass on the case, in favor of the government, for injury to the freehold.

18 Am. & Eng. Enc. Law, 450–453.

A patent, when issued, carries an estate in fee simple, and all the right, title, and interest which the United States had in the land at the time the entry was made; the patent, when issued, relates back to the date of the entry, and gives the patentee the right to maintain an action for trespass for any timber cut and removed from the land after entry and before patent.

Gilbert v. Auster, 135 Wis. 581, 116 N. W. 177; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 1; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Musser v. McRae, 44 Minn. 343, 46 N. W. 673; Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896; Heath v. Ross, 12 Johns. 140.

Messrs. C. B. Bird and M. B. Rosenberry submitted the cause for defendant in error. Messrs. A. L. Kreutzer and J. J. Okoneski were on the brief:

The decision of a state court upon matters of general or local law cannot be reviewed by this court.

Sylvester v. Washington, 215 U. S. 80, 54 L. ed. 101, 30 Sup. Ct. Rep. 25.

The mere fact that parties claim adversely to each other under the mining laws, or under patents of the United States, does not entitle them to a writ of error from the Supreme Court unless there be a question made as to the meaning and construction of a Federal statute, or of an authority exercised under the United States.

Avery v. Popper, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358.

Controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the state courts, and to enable the Supreme Court to review the judgment in such a case, it must appear not only that the application of a Federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties.

Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

Under U. S. Rev. Stat. § 2326, Comp. Stat. 1913, § 4623, for the trial of adverse claims to a mining patent, the right to review the judgment of a state court is to be limited to a proper case having been made clearly implying that some Federal question is involved, and the minor controversy as to the right of possession will not make such a proper case, for otherwise every case arising under § 2326 would be a proper case.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 200 U. S. 613, 50 L. ed. 620, 26 Sup. Ct. Rep. 754.

The relation of an entryman to the government is not that of a purchaser to a vendor, nor that of a holder of an option with the owner, but is unique, and, as stated by the supreme court of the state of Wisconsin, no vested right is conferred on the claimant that may not be taken away by Congress.

Frisbie v. Whitney, 9 Wall. 187, 19 L. ed.

668; Yosemite Valley Case (Hitchings v. Law) 15 Wall. 77, 21 L. ed. 82.

Mr. Justice Pitney delivered the opinion of the court:

This action was brought in the circuit court of Bayfield county, Wisconsin, by plaintiff in error, to recover damages for timber cut and removed from his land and converted into lumber by defendant. The circuit court rendered judgment for plaintiff, but the supreme court of the state reversed this (145 Wis. 528, 140 Am. St. Rep. 1091, 130 N. W. 504), and remanded [164] the cause with directions to enter judgment in favor of defendant, and this having been done, the case comes here upon questions concerning the nature of an entryman's title under the homestead laws of the United States. U. S. Rev. Stat. §§ 2289 et seq. Comp. Stat. 1913, § 4530.

The facts, as found by the trial court, whose findings were adopted by the supreme court, are as follows: Prior to February 20, 1902, the land in question, being a tract of 160 acres situate in Bayfield county, Wisconsin, was public land subject to homestead entry under the laws of the United States. On the date mentioned, pursuant to §§ 2289 et seq., plaintiff duly made application for a homestead entry of this land at the local land office, filed the proper affidavit, paid the register and receiver's fees, and obtained a certificate of the entry and a receiver's receipt. On February 26 he made and filed the nonsaline affidavit required by law. On April 5 he went upon the land temporarily, found employees of defendant cutting timber thereon, and forbade their cutting any more. On July 1, and within six months after the making of the entry, he established his actual residence in a house upon the land, and resided upon and cultivated the land continuously thereafter, in accordance with the laws of the United States, for a term of five years. On August 5, 1907, he made his final proof, and a receiver's final receipt was issued to him. On January 22, 1908, he received a patent, and ever since then has been the owner of the land in fee. On and between March 20 and April 7, 1902, defendant, by its agents, entered upon the land and cut and removed therefrom, wilfully, unlawfully, and without authority, 49,190 feet of pine timber. Thereafter a special agent of the United States investigated the trespass, and reported the amount thereof to the Secretary of the Interior, together with a proposition of settlement made by defendant after the trespass had been estimated, and accompanied by a certified check for $320.14. Upon the [165] basis of this report, which stated that the trespass was unintentional, the Secretary of the Interior, in July, 1903, treating the amount offered as the measure of damages due to the government under the ruling in E. E. Bolles Wooden-ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398, accepted the proposition of settlement, and the money was deposited in the Treasury of the United States as received "on account of depredations upon the public timber." There is nothing in the pleadings or findings to show that plaintiff was a party to this settlement, or had any notice of it, although his entry was then, and had been at the time the timber was cut, in full force. After he received his patent, he demanded said sum of $320.14 from the government, but the demand was refused. In fact, the cutting of the 49,190 feet of pine timber from the land in question by defendant was not done by mistake, and defendant did not, at or before the time of the service of its answer in the action, serve upon plaintiff an affidavit that the cutting was done by mistake, or offer to submit to judgment in any sum, as provided by § 4269, Wisconsin Stat. 1898. The stumpage value of the timber was $5 per thousand; its highest market value before the trial and while in possession of defendant was $12 per thousand; and upon the latter basis the trial judge gave judgment in favor of the plaintiff for $714.87, which included interest from the date of the patent; the court holding that defendant's settlement with the government was of no effect as against plaintiff.

Section 4269, Wisconsin Stat. 1898, provides: "In all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff or to recover damages for such trespass the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured, the same shall have been, at any time before the trial, while in the possession of the trespasser or any purchaser from [166] him with notice, shall be found or awarded to the plaintiff, if he succeed, except as in this section provided." The other provisions here referred to cover cases where the cutting was done by mistake or under bona fide claim of title. In view of the findings, they have no bearing upon the present case.

The supreme court held that since, at the time of the cutting, the plaintiff was not in actual possession of the land, his right of action, as in trespass *quare clausum fregit*, must depend upon constructive possession, to be established by showing a good title; that notwithstanding plaintiff's home-

stead entry, there was, for timber cutting prior to the time of his actual entry into possession of the land, only a single right of action, and this was for the benefit of the United States as legal owner, to the exclusion of the entryman; and that, consequently, the settlement between defendant and the government was a complete defense to plaintiff's action. The court seems to have regarded the entryman, prior to the taking of actual possession, as having no more than color of title; and, while recognizing that the equitable doctrine of relation is applicable also to proceedings at law, held that this had no effect as against the claim of the United States, and when this was satisfied all claim for damages by reason of the timber cutting became extinguished, and the issuance of a patent could not revive it.

Laying aside for the moment the effect of the settlement, it is, we think, erroneous to regard the entryman's interest prior to actual possession as being nothing more than a color of title. From the making of his entry the homesteader has the right of possession as against trespassers and all others except the United States; he has also an inchoate title, subject to be defeated only by failure on his part to comply with the requirements of the homestead law as to settlement and cultivation. So long as he complies with these laws in the course of earning a complete [167] right to the lands as against the government he has a substantial inceptive title, sufficient as against third parties to support suits in equity or at law. United States v. Buchanan, 232 U. S. 72, 76, 77, 58 L. ed. 511, 514, 515, 34 Sup. Ct. Rep. 237; Gauthier v. Morrison, 232 U. S. 452, 460-462, 58 L. ed. 680, 684-686, 34 Sup. Ct. Rep. 384; and cases cited.

The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws it must be and is held that when he has fulfilled the conditions imposed upon him, and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut off intervening claimants. Shepley v. Cowan, 91 U. S. 330, 337, 338, 23 L. ed. 424, 426, 427; Landes v. Brant, 10 How. 348, 372, 13 L. ed. 449, 459; French v. Spencer, 21 How. 228, 240, 16 L. ed. 97, 100; Beard v. Federy, 3 Wall. 478, 491, 18 L. ed. 88, 92; Grisar v. McDowell, 6 Wall. 363, 380, 18 L. ed. 863, 868; Stark v. Starr, 6 Wall. 402, 418, 18 L. ed. 925, 929; Lynch v. Bernal, 9 Wall. 315, 325, 19 L. ed. 714, 716; Gibson v. Chouteau, 13 Wall. 92, 101, 20 L. ed. 534, 537; United States v. Anderson, 194 U. S. 394, 398, 48 L. ed. 1035, 1038, 24 Sup. Ct. Rep. 716; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 334, 335, 50 L. ed. 499, 504, 505, 26 Sup. Ct. Rep. 282. In Gibson v. Chouteau, 13 Wall. 100, 20 L. ed. 536, the court, by Mr. Justice Field, said: "By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had." The present question was very fully considered by the circuit court of appeals for the eighth circuit in Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 1, 11, 13. In that case timber was severed from the land after the initiation and during the maintenance of plaintiff's homestead claim, and an action brought after patent issued was sustained, the court saying: "It does not comport with the spirit of the homestead law to say that, after the initiation [168] and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant."

Is the case altered by the fact that after the trespass, and before plaintiff received the patent, defendant settled with the representatives of the government and paid an amount agreed upon as a satisfaction of the government's claim? In considering this question it is essential to bear in mind that the trespass was in fact wilful, and not attributable to mistake; that at the time of the trespass defendant had constructive, if not actual, notice of plaintiff's homestead entry; that when it made the settlement with the government, over a year later, plaintiff was in possession of the land as a homestead settler, and defendant had actual notice of his rights; that the compromise was made without notice to him, and was voluntarily made upon the basis of a report of a special agent to the effect that the trespass was unintentional, when defendant knew the fact to be otherwise; and that whether the trespass was unintentional or wilful had a most material bearing upon the amount of damages recoverable, as well upon general principles

(E. E. Bolles Wooden-ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398) as under § 4269, Wisconsin Stat. What would have been the effect of a compromise made with the consent of plaintiff, or after notice to him and an opportunity for a hearing, we do not need to say, for no such question is presented. But we think it follows from principles well established that defendant cannot set up the settlement made under the circumstances here disclosed and without notice to plaintiff, holder of an inceptive title to the land. Although until patent issues the homestead is under the [169] control of the Land Department, which may for sufficient reasons even cancel the entry, yet this power is not unlimited or arbitrary, nor can it be exercised without notice to the homesteader with opportunity for a hearing. Cornelius v. Kessel, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122; Barden v. Northern P. R. Co. 154 U. S. 288, 326, 38 L. ed. 992, 1001, 14 Sup. Ct. Rep. 1030; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; Guaranty Sav. Bank v. Bladow, 176 U. S. 448, 453, 454, 44 L. ed. 540, 542, 543, 20 Sup. Ct. Rep. 425; Hawley v. Diller, 178 U. S. 476, 489, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986; Thayer v. Spratt, 189 U. S. 346, 351, 47 L. ed. 845, 848, 23 Sup. Ct. Rep. 576; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 338, 50 L. ed. 499, 506, 26 Sup. Ct. Rep. 282. We think there is no difference in principle that will uphold as against the entryman a release or compromise by the Land Department, without notice to him, of a substantial right of action against a trespasser, to the benefits of which the entryman is entitled. Therefore, when the patent has issued and the jurisdiction of the officers of the Land Department is thus terminated, we think it is open to the homesteader to seek redress in the courts for wrongs done to his interest by such an unwarranted compromise, as for other legal errors committed in the course of administration. Moore v. Robbins, 96 U. S. 530, 533, 24 L. ed. 848, 850; United States v. Schurz, 102 U. S. 378, 396 et seq. 26 L. ed. 167, 171; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 640, 645, 26 L. ed. 875, 876, 878, 11 Mor. Min. Rep. 673; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; Brown v. Hitchcock, 173 U. S. 473, 478, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485; Guaranty Sav. Bank v. Bladow, 176 U. S. 448, 454, 44 L. ed. 540, 542, 20 Sup. Ct. Rep. 425. And where, as here, the departmental action complained of has substantially impaired the value of the homestead entry, and has been taken wholly without notice to the entryman, it constitutes no bar to judicial proceedings otherwise properly maintainable by him against the trespasser after receipt of his patent.

It is no answer to say that the legal right of action for a trespass to unoccupied lands resides in the owner of the legal title as being constructively in possession. Defendant did not pay the government under compulsion of a suit or judgment in trespass, but, for reasons of its [170] own, voluntarily undertook to compromise the matter. In doing this, it could not properly rely upon restrictions peculiar to the action of trespass, but must take account of pertinent legal rights and obligations, however arising. Hence it was bound at its peril to recognize the beneficial nature of the homesteader's interest, at least to the extent of seeing that his rights were not cut off without notice. Defendant knew, when it made the compromise, or with proper inquiry would have known, that plaintiff was in possession under a homestead entry that antedated the trespass; that his patent, if and when issued, would relate back to the time of his entry; and that the officials of the Land Department could not lawfully take action substantially impairing the value of his entry, without notice to him and an opportunity to be heard. It results, in our opinion, that a voluntary compromise made with those officials without notice to the homesteader, and upon a basis that, as defendant knew, did not afford full legal compensation for the injury done, cannot be revoked by defendant to his detriment.

To the suggestion that plaintiff has ratified the compromise, because, after he received his patent, he unsuccessfully demanded from the government the sum of $320.14, received by it in settlement from defendant, it is sufficient to say that it is not found that he did this with full knowledge of the facts. Whether ratification could be inferred from plaintiff's mere demand, without benefit accruing to him as the result of it, we do not stop to consider.

We therefore hold that the supreme court of Wisconsin erred in denying a recovery to plaintiff, whether because of the incomplete nature of his title and his want of possession at the time of the trespass, or because of the settlement afterwards made between the government and defendant.

We are not called upon to consider whether plaintiff [171] could recover from the United States by a suit in the court of claims the amount received from defendant in the compromise (United States v. Jones, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep.

669; United States v. Anderson, 194 U. S. 394, 48 L. ed. 1035, 24 Sup. Ct. Rep. 716), because upon the facts as found plaintiff is entitled to recover a larger amount and upon a different basis of fact from that which controlled in the compromise; and defendant as the wrongdoer cannot put upon plaintiff the burden of prosecuting two actions to recover compensation for a single wrong. Our decision, however, is without prejudice to action by the Wisconsin courts requiring that plaintiff, upon obtaining judgment against defendant in accordance with the principles above declared, and as a condition to payment of that judgment by defendant, shall assign to defendant his claim against the government, or, upon being properly indemnified, shall agree to permit defendant to use his name in proceedings to recover the money. We intend no intimation respecting the effect, if any, of § 3477, U. S. Rev. Stat. (Comp. Stat. 1913, § 6383), upon such an assignment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

LOUIS REINMAN and Louis Wolfort, Partners, Doing Business under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, Plffs. in Err.,

v.

CITY OF LITTLE ROCK et al.

(See S. C. Reporter's ed. 171–180.)

Error to state court — scope of review — question of local law.

1. The decision of the highest court of a state that a certain municipal ordinance, challenged as repugnant to the Federal Constitution, is within the scope of the powers conferred by the state legislature upon a municipality, is conclusive upon the Federal Supreme court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — repugnancy of municipal ordinance to Federal Constitution.

2. A municipal ordinance which is within the scope of the powers conferred by the state legislature upon the municipality is a statute of the state within the meaning of the Judicial Code, § 237, governing writs of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1645–1663, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — police power — forbidding livery stables in designated areas.

3. A municipal ordinance passed under authority delegated by the state legislature, making it unlawful to conduct a livery stable business within a designated area, is a valid exercise of the police power, provided only that the ordinance is not so unreasonable, arbitrary, or unjustly discriminatory as to infringe upon rights granted by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. a. 5; IV. b. 5; IV. c. 3, in Digest Sup. Ct. 1908.]

Error to state court — presumption as to ground of decision.

4. The Federal Supreme Court will assume that the Arkansas supreme court, when reversing, with directions to dismiss the complaint for want of equity, a decree entered after a demurrer to the answer had been sustained and defendants had declined to plead further, by which an order restraining the enforcement of a municipal ordinance which made it unlawful to conduct a livery stable business within a designated area was made perpetual, acted upon the basis of the facts set up in the answer, *viz.*, that the restricted area was in a densely populated and busy part of the city, and that the stables in question were conducted in a careless manner, with offensive odors, and so as to be productive of disease, treating them as sufficiently substantiated by

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Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; Barbier v. Connolly, 28 L. ed. U. S. 923.

On municipal power over nuisances relating to trade or business—see note to Ex parte Lacey, 38 L.R.A. 640.

Stable for horses as a nuisance—see notes to Oehler v. Levy, 17 L.R.A.(N.S.) 1025, and Douglas v. Greenville, 49 L.R.A.(N.S.) 958.

the effect of the demurrer in admitting them to be true so far as properly pleaded, rather than upon the basis of the averments in the complaint that such stables were properly conducted and had been so conducted for a long time in the same location, and at large expense for permanent structures, and that the removal to another location would be very costly.

[For other cases, see Appeal and Error, VIII. d, 6, in Digest Sup. Ct. 1908]

[No. 153.]

Submitted January 22, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of Arkansas to review a decree which reversed, with directions to dismiss the complaint for want of equity, a decree of the Chancery Court of Pulaski County in that state, enjoining the enforcement of a municipal ordinance forbidding the conduct of a livery stable business within a designated area. Affirmed.

See same case below, 107 Ark. 174, 155 S. W. 105.

Statement by Mr. Justice Pitney:

Plaintiffs in error filed their bill of complaint in the Pulaski county chancery court, a state court of general chancery jurisdiction, praying an injunction against the city of Little Rock, its mayor and other officers, to restrain them from enforcing an ordinance passed by the city council to regulate livery stables. The ordinance recites that "the conducting of a livery stable business within certain parts of the city of Little Rock, Arkansas, is detrimental to the health, interest, and prosperity of the city;" and it is ordained that it shall be unlawful to conduct or carry on that business within the area bounded by Center, Markham, Main, and Fifth streets, under penalties prescribed. Plaintiffs include a firm that conducts a livery and sale stable business, and a corporation that carries on a general livery stable business, within the defined [173] area. It is averred that the businesses are and have been for many years conducted in brick buildings, in a proper and careful manner, and without complaint as to sanitary conditions; that plaintiffs, during the progress of their business, have been compelled to enter into leases for the grounds and improvements, and to construct brick buildings at great cost, useful for no other purpose, and that these and other large expenditures made for improvements will be lost if they are compelled to cease to do business there; that there is no other available site in the city where such business can be profitably carried on and where plaintiffs have assurance that they may remain without molestation; that these matters are matters of public notoriety, and the establishment of the business in that locality has been encouraged by the city, and upon the strength of such encouragement the buildings were constructed and expenditures made; that the passage of the ordinance was procured by named parties (not made defendants) who desired to purchase the property of plaintiffs; that plaintiffs have tried to obtain another location for their business outside of the prohibited district, but are unable to do so except with extravagant outlay which they are unable to make; and that the action of city council in prohibiting the carrying on of any livery stable business in the locality mentioned is unreasonable, discriminatory, not warranted by law or the charter of the city, and in contravention of those provisions of the 14th Amendment respecting due process of law and the equal protection of the laws. A verifying affidavit and a copy of the ordinance were attached as exhibits.

Defendants demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer and granted a temporary restraining order. Defendants answered, denying the material averments of the bill, and asserting that the ordinance was passed in good faith [174] for the purpose of promoting the health and prosperity of the citizens, and in the belief that said livery stables in said district were conducive to sickness and inconvenience and ill health to the citizens, and were damaging to the property in that vicinity; also, "that said district composes the greatest shopping district in the entire state of Arkansas; that it contains the largest and best hotels in the state, and the district encompasses the most valuable real estate in the entire state; that said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive odor coming from said stables, to the great detriment of the tenants in the property adjoining and the shoppers who go within this district, and hotel guests; that said stables being in such densely populated part of the city produce disease, making that section extremely unwholesome," etc.

Plaintiffs excepted and also demurred to the answer as insufficient in law to raise an issue of fact upon the authority assumed by the city to pass the ordinance,

and as stating no facts sufficient to constitute a defense. The cause was then heard upon the complaint and exhibits, the answer and the demurrer; the demurrer was sustained, and, defendants declining to plead further, it was decreed that the temporary restraining order be made perpetual.

Defendants appealed to the supreme court of Arkansas, which court, on February 24, 1913, made a decree reversing the decree of the lower court, with costs, and remanding the cause with directions to dismiss the complaint for want of equity. The decree of reversal recited: "This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski county, and was argued by solicitors, on consideration whereof it is the opinion of the court that there is error in the proceedings and [175] decree of said chancery court in this cause, in this: Said court erred in granting the relief prayed for in the complaint, whereas the same is without equity and should have been dismissed." It was therefore ordered and decreed that the decree of the chancery court be reversed, "and that this cause be remanded to said chancery court with directions to dismiss the complaint of the appellees for want of equity." Upon the same day an opinion was filed in the supreme court, expressing the grounds of the decision. 107 Ark. 174, 155 S. W. 105.

Thereafter, a petition for rehearing was filed, and by leave of the court was submitted at a later date with a supporting brief. Among the averments of the petition were the following: "That the effect of the ruling of this honorable court is to deprive the appellees of the opportunity of presenting evidence to sustain those of the allegations of the complaint as are denied by the said answer, for the said ruling orders the dismissal of the said complaint, and does not remand the cause so that appellees may present evidence to sustain the allegations of their bill of complaint bearing on the question whether said ordinance and permit system does or does not amount to a deprivation of property and a denial of the equal protection of the laws, within the provisions of the 14th Amendment to the Constitution of the United States, as well as the provisions of the Constitution of the state of Arkansas. That unless the appellees are given an opportunity to introduce evidence as aforesaid, the said answer may be taken as conclusive against them; that upon the finding that said demurrer was improperly sustained the cause should have been remanded to take evidence as to the said constitutional questions, including the use and abuse of the said permit system by said city." The petition for rehearing was taken under advisement, and at a later date overruled, without opinion. The present writ of error was then sued out.

Mr. Morris M. Cohn submitted the cause for plaintiffs in error:

A city council cannot legislate so as to discriminate against a business man or property owner, if the effect is to destroy or impair the value of his property.

New Orleans v. Lagasse, 114 La. 1055, 38 So. 828; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Eubank v. Richmond, 226 U. S. 137, 143, 144, 57 L. ed. 156, 158, 159, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192.

Although a law be fair on its face and impartial in its appearance, yet, if it is applied and administered with an evil eye and illegal discrimination, it is within the prohibition of the Federal Constitution.

Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550.

There is a decided difference between prohibiting livery and sales stables to be located in the future residence localities, and seeking to close up livery stables which have existed and been built up in business localities; especially where the business localities have not changed.

St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; Fisher v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Phillips v. Denver, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; Crowley v. West, 52 La. Ann. 526, 47 L.R.A. 652, 78 Am. St. Rep. 355, 27 So. 53; Everett v. Council Bluffs, 46 Iowa, 66; Los Angeles County v. Hollywood Cemetery Asso, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Grossman v. Oakland, 30 Or. 478, 36 L.R.A. 593, 60 Am. St. Rep. 832, 41 Pac. 5.

This is not like the cases where lotteries, saloons, or pool rooms have been prohibited; for in such cases the council is free to do as it pleases, since the occupations are of no practical use to society.

Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

The making the relocation of the stables depend upon a permit system, of uncertain character, subject to the caprice or malice of city officials, or those who have influence over them, is in conflict with the provisions of the 14th Amendment.

Eubank v. Richmond, 226 U. S. 137, 143, 57 L. ed. 156, 158, 42 L.R.A.(N.S.) 1123, 33

Sup. Ct. Rep. 76; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; State v. Mahner, 43 La. Ann. 496, 9 So. 480; Newton v. Belger, 143 Mass. 598, 10 N. E. 464; State v. Tenant, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470.

Mr. J. Merrick Moore submitted the cause for defendants in error. Messrs. J. W. House and J. W. House, Jr., were on the brief:

The ordinance in question is purely a regulation, and not a prohibition.

St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; State ex rel. Russell v. Beattie, 16 Mo. App. 137; Ex parte Lacey, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Boston Beer Co. v. Massachusetts, 97 U. S. 32, 24 L. ed. 991; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Chicago, B. & Q. R. Co v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The fact that the livery stable is not a nuisance *per se* does not prevent a regulation on the part of the city council. This ordinance was intended as a regulation, and not as a prohibition.

Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; Lawton v. Steele, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Powell v. Pennsylvania, 127 U S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

There can be no estoppel which would prevent the city from passing any ordinance for the protection of the public health, morals, and prosperity of the citizens.

Mugler v. Kansas, 123 U. S. 664-670, 31 L. ed. 211-213, 8 Sup. Ct. Rep. 273.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the lawmaking power of the state; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214], which confers jurisdiction upon this court. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 555, 58 L. ed. 721, 725, 34 Sup. Ct. Rep. 364, and cases cited.

Therefore the argument that a livery stable is not a nuisance *per se*, which is much insisted upon by plaintiffs in error, is beside the question. Granting that it is not a nuisance *per se*, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the 14th Amendment. For no question is made, and we think none could reasonably be made, but that the general subject of the regulation of livery stables, with respect to their location and the manner [177] in which they are to be conducted in a thickly populated city, is well within the range of the power of the state to legislate for the health and general welfare of the people. While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the lawmaking power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the 14th Amendment. Slaughter-House Cases, 16 Wall. 36, 62, 21 L. ed. 394, 404; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667, 24 L.

ed. 1036, 1038; Barbier v. Connolly, 113 U. S. 27, 30, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 708, 28 L. ed. 1145, 1146, 5 Sup. Ct. Rep. 730; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; Williams v. Arkansas, 217 U. S. 79, 87, 54 L. ed. 673, 676, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Cronin v. People, 82 N. Y. 318, 321, 37 Am. Rep. 564; Re Wilson, 32 Minn. 145, 148, 19 N. W. 723; St. Louis v. Russell, 116 Mo. 248, 253, 20 L.R.A. 721, 22 S. W. 470.

The only debatable question arises from the contention that under the particular circumstances alleged in the complaint, *viz.*, that plaintiffs in error have conducted the livery stable business for a long time in the same location, and at large expense for permanent structures, and the removal to another location would be very costly, and since (as the complaint alleges) their stables are in all respects properly conducted, this particular ordinance must be deemed an unreasonable and arbitrary exercise of the power of regulation. But these averments of fact are contradicted by the answer, and so we are confronted with the question: Upon what basis of fact is this matter to be determined? Plaintiffs in error insist that it is to be [178] decided upon the basis of the averments contained in their complaint, because the supreme court ordered the complaint to be dismissed for want of equity. But it seems that in the practice of the courts of Arkansas, as elsewhere, the expression "dismissed for want of equity" is employed to indicate a decision upon the merits, as distinguished from one based upon a formal defect or default; and that it applies as well where on final hearing it is found that the averments of the complaint are not true in fact, as where those averments do not upon their face show a sufficient basis of fact for the granting of the relief sought. Meux v. Anthony, 11 Ark. 411, 422, 424, 52 Am. Dec. 274; Smith v. Carrigan, 23 Ark. 555; McRae v. Rogers, 30 Ark. 272.

Upon the face of this record it appears that all the material averments of the bill were denied by the answer, and that the latter pleading also showed particular reasons why it was proper for the city council to prohibit the further maintenance of livery stables within the limited district described in the ordinance. It was averred that that district is in a densely populated and busy part of the city of Little Rock, and that the stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease. Plaintiffs did not contradict this, but demurred to the answer as insufficient in law, and the cause was heard in the trial court upon the complaint and exhibits, the answer, and the demurrer. The demurrer being sustained, and defendants declining to plead further, a perpetual restraining order followed in due course. Upon the removal of the cause to the supreme court on defendants' appeal, it was heard there, as appears from the decree rendered by that court, "upon the transcript of the record of the chancery court of Pulaski county." That record includes not only the complaint, but the answer and demurrer. The supreme court in its opinion made no statement of the facts upon which it proceeded [179] to judgment, and did not intimate that it ignored the effect of the answer and confined itself to the averments of the bill alone. It is true that broad reasoning was employed; but, upon familiar principles, the opinion is to be interpreted in the light of the issue as framed by the pleadings. Besides, the petition for rehearing especially set up that the effect of the ruling of the supreme court was to deprive plaintiffs of the opportunity of presenting evidence to sustain those allegations of the complaint that were denied by the answer, that unless they were given an opportunity to introduce evidence the answer might be taken as conclusive against them, and that the cause ought to have been remanded to take evidence, etc. The fact that the supreme court denied the rehearing without giving reasons is at least consistent with the theory that plaintiffs had properly interpreted the meaning of the decree as entered, and that it correctly expressed the intent and the purpose of the court.

By § 25 of the judiciary act of 1789 (1 Stat. at L. 86, chap. 20) it was provided: "No other error shall be assigned or regarded as a ground of reversal . . . than such as appears on the face of the record." Under this act, it was uniformly held that in reviewing the judgments of state courts (in states other than Louisiana, where the opinion formed a part of the record), this court could not look into the opinion to ascertain what was decided. In the amendatory act of February 5, 1867 (14 Stat. at L. 386, chap. 28, § 2), the words above quoted were omitted, and because of this it has since been held that this court is not so closely restricted as before to the face of the record to ascertain what was decided in the state court, and may examine the opinion, when properly authenticated, so far as may be useful in determining that question. This is recognized in ¶ 2 of our 8th rule. "But, after all," said Mr. Justice Miller, speaking for the court in Mur-

dock v. Memphis, 20 Wall. 590, 633, 634, 22 L. ed. 429, 443, 444, [180] "the record of the case, its pleadings, bills of exceptions, judgment, evidence,—in short, its record, whether it be a case in law or equity,—must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the Federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment. Hence, in the present case, we ought to and do assume that the Arkansas Supreme Court acted upon the basis of the facts set up in the answer of the city, treating them as sufficiently substantiated by the effect of the demurrer in admitting them to be true so far as properly pleaded. This being so there is, as we have already remarked, no reasonable question of the validity of the ordinance, and the judgment of the Supreme Court is affirmed.

JOE MALLOY, Plff. in Err.,
v.
STATE OF SOUTH CAROLINA.

(See S. C. Reporter's ed. 180–185.)

Constitutional law — ex post facto laws — changing punishment for crime.

The change in the punishment for murder, made by S. C. act Feb. 17, 1912, from death by hanging within the county jail or its inclosure, in the presence of specified witnesses, to electrocution within the penitentiary, in the presence of an increased number of invited witnesses, does not render the statute repugnant to U. S. Const. art. 1, § 10, as being *ex post facto* when applied to crimes previously committed.

[For other cases, see Constitutional Law, 986-992, in Digest Sup. Ct. 1908.]

[No. 172.]

Argued March 5, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a conviction of murder, had in the Court of General Sessions of Marlboro County in that state. Affirmed.

See same case below, 95 S. C. 441, 78 S. E. 995.

The facts are stated in the opinion.

Mr. Charles L. Prince argued the cause, and, with Mr. W. F. Stevenson, filed a brief for plaintiff in error:

A law changing the punishment for an offense committed before its passage is *ex post facto* and void under the Federal Constitution, unless the change consists in the remission of some separable portion of the punishment before prescribed, or it is referable to prison discipline or penal administration as its primary object.

Hartung v. People, 22 N. Y. 95; Shepherd v. People, 25 N. Y. 406; Ratzky v. People, 29 N. Y. 124; Kuckler v. People, 5 Park. Crim. Rep. 212; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; Green v. Shumway, 39 N. Y. 418; State v. Keith, 63 N. C. 140; Murphy v. Com. 172 Mass. 264, 43 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; People v. Nolan, 115 N. Y. 660, 21 N. E. 1060; Garvey v. People, 6 Colo. 559, 45 Am. St. Rep. 531; Lindzey v. State, 65 Miss. 542, 7 Am. St. Rep. 674, 5 So. 99; Fletcher v. Peck, 6 Cranch, 138, 3 L. ed. 178; Carter v. Burt, 12 Allen, 424; People v. Hayes, 140 N. Y. 484, 23 L.R.A. 830, 37 Am. St. Rep. 572, 35 N. E. 951; United States v. London, 176 Fed. 976; McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Anderson v. O'Donnell, 29 S. C. 355, 1 L.R.A. 632, 13 Am. St. Rep. 728, 7 S. E. 523; State v. Cooler, 30 S. C. 105, 3 L.R.A. 181, 8 S. E. 692; State v. Richardson, 47 S. C. 166, 35 L.R.A. 238, 25 S. E. 220; State v. Loftis, 49 S. C. 443, 27 S. E. 451; Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 Sup. Ct. Rep. 143; Rooney v. North Dakota, 196 U. S. 326, 49 L. ed. 497, 25 Sup. Ct. Rep. 264, 3 Ann. Cas. 76.

Mr. F. H. Dominick argued the cause, and Mr. Thomas H. Peeples, Attorney General of South Carolina, filed a brief for defendant in error:

Any statute which mitigates the rigor of

NOTE.—As to what laws are *ex post facto* —see notes to Anderson v. O'Donnell, 1 L.R.A. 632; State v. Cooler, 3 L.R.A. 181; Calder v. Bull, 1 L. ed. U. S. 648; Sturges v. Crowninshield, 4 L. ed. U. S. 529; Re Medley, 33 L. ed. U. S. 835; Otoe County v. Baldwin, 28 L. ed. U. S. 331; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime.

Rooney v. North Dakota, 196 U. S. 319, 49 L. ed. 494, 25 Sup. Ct. Rep. 264, 3 Ann. Cas. 76; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Story, Const. 1345; Cooley, Const. Lim. 267; Com. v. Gardner, 11 Gray, 443; 1 Bishop, Crim. Law, 280; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 Sup. Ct. Rep. 143.

Electrocution is a more humane method of punishment than that by hanging.

Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; 9 Enc. Britannica, 11th ed. 210.

Mr. Justice McReynolds delivered the opinion of the court:

At the summer term, 1912, court of general sessions, Marlboro county, South Carolina, Joe Malloy was found guilty without a recommendation to mercy under an indictment charging him with the murder of Moore, November 24, 1910, and sentenced to death by electrocution in conformity to the act of the legislature approved February 17, 1912 (S. C. Stat. at L. 1912, p. 702), [182] the pertinent portions of which are in the margin.[1] The judgment was affirmed by the supreme court of the state (95 S. C. 441, 78 S. E. 995); the cause is here by writ of error; and a reversal is asked solely upon the ground that the enactment of 1912 materially changed the punishment for murder, and therefore in respect of Malloy's offense is [183] *ex post facto* and in contravention of art. 1, § 10, of the Federal Constitution.

Under the South Carolina laws effective when the crime was committed the punishment for one found guilty of murder without recomendation to mercy was death by hanging within the county jail, or its inclosure, in the presence of specified witnesses. The subsequent act prescribed electrocution as the method of producing death instead of hanging, fixed the place therefor within the penitentiary, and permitted the presence of more invited witnesses than had theretofore been allowed.

In response to the meticulous objection based upon change of place for execution and increased number of witnesses it suffices to refer to what this court said through Mr. Justice Harlan in Holden v. Minnesota, 137 U. S. 483, 491, 34 L. ed. 734, 736, 11 Sup. Ct. Rep. 143, and Rooney v. North Dakota, 196 U. S. 319, 325, 326, 49 L. ed. 494, 496, 497, 25 Sup. Ct. Rep. 264, 3 Ann. Cas. 76. The constitutional inhibition of *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment.

The contention in behalf of plaintiff in error most earnestly relied on is this: Any statute enacted subsequent to the commission of a crime which undertakes to change the punishment therefor is *ex post facto* and unconstitutional unless it distinctly modifies the severity of the former penalty. "The courts cannot and will not undertake to say whether or not a change from hanging to electrocution is an increase or mitigation of punishment;" and therefore the

[1] An Act to Prescribe the Method of Capital Punishment in South Carolina.

Sec. 1. Be it enacted by the general assembly of the state of South Carolina, that after the approval of this act by the governor all persons convicted of capital crime and have imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the state penitentiary, at Columbia, under the direction of the superintendent of the penitentiary instead of by hanging.

Sec. 2. The board of directors of the state penitentiary are authorized and required to provide a death chamber and all necessary appliances for inflicting such penalty by electrocution and pay the costs thereof out of any funds in their hands. The expense of transporting any such criminal to the state penitentiary shall be borne by the county in which the offense was committed.

Sec. 3. Upon the conviction of any person in this state of a crime, the punishment of which is death, it shall be the duty of the presiding judge to sentence such convicted person to death according to the provisions of this act, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be transmitted by the clerk of the court of general sessions in which said sentence is pronounced to the superintendent of the state penitentiary, at Columbia. . . .

Sec. 4. At such execution there shall be present the executioner and at least two assistants, the penitentiary surgeon and one other surgeon, if the condemned person so desires, an electrician, the condemned person's counsel and relatives, if they so desire, ministers of the gospel, not exceeding three, if they so desire, and not less than twelve nor more than twenty-four respectable citizens of this state to be designated by the executioner.

Sec. 5. . . .

Sec. 6. . . .

Sec. 7. That all acts or parts of acts inconsistent with this act are hereby repealed.

Approved the 17th day of February, A. D. 1912.

act of 1912 cannot apply in the circumstances presented here. Hartung v. People, 22 N. Y. 95.

The often-quoted opinion of Mr. Justice Chase in Calder v. Bull, 3 Dall. 386, 390, 391, 1 L. ed. 648, 650, summarizes *ex post facto* laws within the intendment of the Constitution thus: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, [184] criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive." Further expounding the subject, he adds: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction." And to the general doctrine thus announced this court has continued to adhere.

In Mallett v. North Carolina, 181 U. S. 589, 597, 45 L. ed. 1015, 1019, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241, Mr. Justice Shiras, speaking for the court, after reviewing former opinions, applied the established principles and concluded that the impeached legislation was not *ex post facto*, since it "did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged."

Considering the above-stated settled doctrine and well-known facts of which judicial notice is taken, we think the validity of the impeached act is clear.

Impressed with the serious objection to executions by hanging, and hopeful that means might be found for taking life "in a less barbarous manner," the governor of New York brought the subject to the attention of the legislature [185] in 1885. A commission thereafter appointed to ascertain the most humane and practical method of inflicting the death sentence reported in favor of electrocution. This was adopted by the statute of 1888, and, with the approval of the courts, has been in continuous use since that time. Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930, 119 N. Y. 569, 7 L.R.A. 715, 16 Am. St. Rep. 859, 24 N. E. 6.

Influenced by the results in New York, eleven other states[2] have adopted the same mode for inflicting death in capital cases; and, as is commonly known, this result is the consequent of a well grounded belief than electrocution is less painful and more humane than hanging. Storti v. Com. 178 Mass. 549, 553, 52 L.R.A. 520, 60 N. E. 210; State v. Tomassi, 75 N. J. L. 739, 747, 69 Atl. 214.

The statute under consideration did not change the penalty—death—for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings. The punishment was not increased, and some of the odious features incident to the old method were abated.

In Hartung v. People, supra, the court had under consideration and condemned an act of the legislature which made a distinct addition to the penalty prescribed when the crime was committed; and the conclusion therein is not properly applicable in the circumstances of the present cause, where there has been no such change.

The judgment of the court below is affirmed.

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[186] DETROIT TRUST COMPANY, Trustee in Bankruptcy of the Estate of Charles Coates, Bankrupt, Appt.,

v.

PONTIAC SAVINGS BANK and Charles Coates.

(See S. C. Reporter's ed. 186-189.)

Bankruptcy — effect — lien or attachment — failure to file chattel mortgage.

1. The bankrupt act as it existed in February, 1903, did not operate as an attachment of the bankrupt's property nor itself create a lien in favor of creditors who became such after the giving of a chattel

[2] Ohio, 1896; Massachusetts, 1898; New Jersey, 1907; Virginia, 1908; North Carolina, 1909; Kentucky, 1910; South Carolina, 1912; Arkansas, Indiana, Pennsylvania, and Nebraska, 1913.

NOTE.—As to relation of bankrupt law to assignments and insolvent proceedings under state laws—see note to State ex rel. Strohl v. Superior Ct. 45 L.R.A. 178.

On necessity for filing chattel mortgage—see note to Herryford v. Davis, 26 L. ed. U. S. 160.

669; United States v. Anderson, 194 U. S. 394, 48 L. ed. 1035, 24 Sup. Ct. Rep. 716), because upon the facts as found plaintiff is entitled to recover a larger amount and upon a different basis of fact from that which controlled in the compromise; and defendant as the wrongdoer cannot put upon plaintiff the burden of prosecuting two actions to recover compensation for a single wrong. Our decision, however, is without prejudice to action by the Wisconsin courts requiring that plaintiff, upon obtaining judgment against defendant in accordance with the principles above declared, and as a condition to payment of that judgment by defendant, shall assign to defendant his claim against the government, or, upon being properly indemnified, shall agree to permit defendant to use his name in proceedings to recover the money. We intend no intimation respecting the effect, if any, of § 3477, U. S. Rev. Stat. (Comp. Stat. 1913, § 6383), upon such an assignment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

LOUIS REINMAN and Louis Wolfort, Partners, Doing Business under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, Plffs. in Err.,

v.

CITY OF LITTLE ROCK et al.

(See S. C. Reporter's ed. 171–180.)

Error to state court — scope of review — question of local law.

1. The decision of the highest court of a state that a certain municipal ordinance, challenged as repugnant to the Federal Constitution, is within the scope of the powers conferred by the state legislature upon a municipality, is conclusive upon the Federal Supreme court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — repugnancy of municipal ordinance to Federal Constitution.

2. A municipal ordinance which is within the scope of the powers conferred by the state legislature upon the municipality is a statute of the state within the meaning of the Judicial Code, § 237, governing writs of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1645–1663, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — police power — forbidding livery stables in designated areas.

3. A municipal ordinance passed under authority delegated by the state legislature, making it unlawful to conduct a livery stable business within a designated area, is a valid exercise of the police power, provided only that the ordinance is not so unreasonable, arbitrary, or unjustly discriminatory as to infringe upon rights granted by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. a. 5; IV. b. 5; IV. c. 3, in Digest Sup. Ct. 1908.]

Error to state court — presumption as to ground of decision.

4. The Federal Supreme Court will assume that the Arkansas supreme court, when reversing, with directions to dismiss the complaint for want of equity, a decree entered after a demurrer to the answer had been sustained and defendants had declined to plead further, by which an order restraining the enforcement of a municipal ordinance which made it unlawful to conduct a livery stable business within a designated area was made perpetual, acted upon the basis of the facts set up in the answer, *viz.*, that the restricted area was in a densely populated and busy part of the city, and that the stables in question were conducted in a careless manner, with offensive odors, and so as to be productive of disease, treating them as sufficiently substantiated by

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; Barbier v. Connolly, 28 L. ed. U. S. 923.

On municipal power over nuisances relating to trade or business—see note to Ex parte Lacey, 38 L.R.A. 640.

Stable for horses as a nuisance—see notes to Oehler v. Levy, 17 L.R.A.(N.S.) 1025, and Douglas v. Greenville, 49 L.R.A.(N.S.) 958.

the effect of the demurrer in admitting them to be true so far as properly pleaded, rather than upon the basis of the averments in the complaint that such stables were properly conducted and had been so conducted for a long time in the same location, and at large expense for permanent structures, and that the removal to another location would be very costly.

[For other cases, see Appeal and Error, VIII. d, 6, in Digest Sup. Ct. 1908]

[No. 153.]

Submitted January 22, 1915. Decided April 5, 1915.

IN ERROR to the Supreme Court of the State of Arkansas to review a decree which reversed, with directions to dismiss the complaint for want of equity, a decree of the Chancery Court of Pulaski County in that state, enjoining the enforcement of a municipal ordinance forbidding the conduct of a livery stable business within a designated area. Affirmed.

See same case below, 107 Ark. 174, 155 S. W. 105.

Statement by Mr. Justice Pitney:

Plaintiffs in error filed their bill of complaint in the Pulaski county chancery court, a state court of general chancery jurisdiction, praying an injunction against the city of Little Rock, its mayor and other officers, to restrain them from enforcing an ordinance passed by the city council to regulate livery stables. The ordinance recites that "the conducting of a livery stable business within certain parts of the city of Little Rock, Arkansas, is detrimental to the health, interest, and prosperity of the city;" and it is ordained that it shall be unlawful to conduct or carry on that business within the area bounded by Center, Markham, Main, and Fifth streets, under penalties prescribed. Plaintiffs include a firm that conducts a livery and sale stable business, and a corporation that carries on a general livery stable business, within the defined [173] area. It is averred that the businesses are and have been for many years conducted in brick buildings, in a proper and careful manner, and without complaint as to sanitary conditions; that plaintiffs, during the progress of their business, have been compelled to enter into leases for the grounds and improvements, and to construct brick buildings at great cost, useful for no other purpose, and that these and other large expenditures made for improvements will be lost if they are compelled to cease to do business there; that there is no other available site in the city where such business can be profitably carried on and where plaintiffs have assurance that they may remain without molestation; that these matters are matters of public notoriety, and the establishment of the business in that locality has been encouraged by the city, and upon the strength of such encouragement the buildings were constructed and expenditures made; that the passage of the ordinance was procured by named parties (not made defendants) who desired to purchase the property of plaintiffs; that plaintiffs have tried to obtain another location for their business outside of the prohibited district, but are unable to do so except with extravagant outlay which they are unable to make; and that the action of city council in prohibiting the carrying on of any livery stable business in the locality mentioned is unreasonable, discriminatory, not warranted by law or the charter of the city, and in contravention of those provisions of the 14th Amendment respecting due process of law and the equal protection of the laws. A verifying affidavit and a copy of the ordinance were attached as exhibits.

Defendants demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer and granted a temporary restraining order. Defendants answered, denying the material averments of the bill, and asserting that the ordinance was passed in good faith [174] for the purpose of promoting the health and prosperity of the citizens, and in the belief that said livery stables in said district were conducive to sickness and inconvenience and ill health to the citizens, and were damaging to the property in that vicinity; also, "that said district composes the greatest shopping district in the entire state of Arkansas; that it contains the largest and best hotels in the state, and the district encompasses the most valuable real estate in the entire state; that said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive odor coming from said stables, to the great detriment of the tenants in the property adjoining and the shoppers who go within this district, and hotel guests; that said stables being in such densely populated part of the city produce disease, making that section extremely unwholesome," etc.

Plaintiffs excepted and also demurred to the answer as insufficient in law to raise an issue of fact upon the authority assumed by the city to pass the ordinance,

delivery, and followed by an actual and continued change of possession of [188] the things mortgaged, shall be absolutely void as against the creditors of the mortgagor" unless filed for record as directed.

The circuit court of appeals declared (p. 33): "It is settled by the decisions of the supreme court of Michigan that the words 'creditors of the mortgagor' mean subsequent creditors in good faith and without notice of the mortgage, and that the statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage. Recovery can be had here on but one of two theories: First, that the bankruptcy act creates a lien in favor of the creditors under which the rights given by the Michigan statute can be enforced; or, second, that the Michigan statute creates such a lien. The bankruptcy act does not operate as an attachment of the bankrupt's property, nor itself create a lien in favor of creditors of the class before us. York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Crucible Steel Co. v. Holt, 98 C. C. A. 101, 174 Fed. 127, affirmed by the Supreme Court April 1, 1912, 224 U. S. 262, 56 L. ed. 756, 32 Sup. Ct. Rep. 414. The controlling question, therefore, is whether the rights given by the Michigan statute to the class of creditors named amount to an actually established lien, or, on the other hand, to a mere right to create a lien. . . . Since the decision below, the case of Re Huxoll, 113 C. C. A. 637, 193 Fed. 851, has been decided by this court. We there carefully reviewed and considered the Michigan decisions, and reached the conclusion that the Michigan statute does not of itself create a lien upon the mortgaged property prior to the lien of the mortgage, but gives merely a right to a lien, requiring a proceeding of some kind for its fastening. We there held that the right to lien was lost if such proceeding was not taken before bankruptcy."

Replying to the contention that an assignee for the benefit of creditors in Michigan may avoid unrecorded chattel mortgages, and that the rights of a trustee in bankruptcy [189] are not less, the circuit court of appeals further said: "As we pointed out in the Huxoll Case, the Michigan decisions mean no more than that the assignee is by the assignment given a lien upon the property which did not before exist. The mere fact that a lien is created under statutory assignment for the benefit of creditors does not give a lien under the bankruptcy act. This conclusion directly follows from the *decision* in York Mfg. Co. v. Cassell, supra."

We think the Circuit Court of Appeals properly interpreted and applied the doctrine announced in York Mfg. Co. v. Cassell, and are unable to see that it reached an incorrect conclusion concerning the pertinent laws of Michigan. Holt v. Crucible Steel Co. 224 U. S. 262, 267, 56 L. ed. 756, 758, 32 Sup. Ct. Rep. 414.

The decree is affirmed.

RIVERSIDE & DAN RIVER COTTON MILLS, Incorporated, Plff. in Err.,
v.
WILLIAMSON MENEFEE, by His Next Friend, Mrs. Emma W. Menefee.

(See S. C. Reporter's ed. 189-197.)

Constitutional law — due process of law — personal judgment against foreign corporation — service on resident director.

The courts of one state may not, without violating the due process of law clause of U. S. Const., 14th Amend., render a money judgment against a corporation organized under the laws of another state upon service on a resident director, where the corporation has not come into the former state for the purpose of doing business therein, and has done no business therein, and has no property therein, and no qualified agent therein upon whom process may be served.

[For other cases, see Constitutional Law, IV. b, 8; Judgment, III. c, 1; Writ and Process, III. c, 2, b, in Digest Sup. Ct. 1908.]

[No. 169.]

Argued March 4, 1915. Decided April 12, 1915.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Alamance County, in that state, against a foreign corporation, rendered upon service on a resident director. Reversed.

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what service of process is sufficient, generally, to constitute due process of law —see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

On service of process upon foreign corporation not doing business within the state as basis of a judgment *in personam*—see note to Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 537.

See same case below, 161 N. C. 164, 76 S. E. 741.

The facts are stated in the opinion.

Mr. F. P. Hobgood, Jr., argued the cause and filed a brief for plaintiff in error:

The state trial court was without jurisdiction of plaintiff in error for the reason that there was no proper or sufficient service upon it of process, and consequently the judgment rendered upon the verdict of the jury constitutes the taking of its property without due process of law.

Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; Kendall v. American Automatic Loom Co. 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768; State v. Georgia Co. 109 N. C. 310, 13 S. E. 861; Cooper v. Wyman, 122 N. C. 788, 65 Am. St. Rep. 731, 29 S. E. 947; Jester v. Steam Packet Co. 131 N. C. 54, 42 S. E. 447, Scott v. McNeal, 154 U. S. 34, 43, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 15, 51 L. ed. 345, 348, 27 Sup. Ct. Rep. 236; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

No counsel appeared for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

The plaintiff in error, a corporation called hereafter the Riverside Mills, was sued, in North Carolina by the defendant in error, a resident of that state, to recover for personal injuries alleged to have been suffered by him while working in Virginia as an employee in a cotton mill operated by the Riverside Mills. The summons directed to the corporation was returned by the sheriff served as follows: "By reading and leaving a copy of the within summons with Thos. B. Fitzgerald, a director of the defendant corporation." The Riverside Mills filed a special appearance and motion to dismiss in which it prayed for the striking out of the return of service for the reason that [191] "the defendant is a foreign corporation, not doing business in North Carolina, and has not been domesticated, and has no agent upon whom service can be made, and that the service of the summons is invalid and does not amount to due process of law as against this defendant." This motion was supported by an affidavit of a person styling himself secretary and treasurer of the company, stating the facts to be that the corporation was a Virginia one, had its place of business in Virginia, carried on its factory there, had never transacted business in North Carolina, had no property there, and that the person upon whom service was made, although he was a director of the corporation and was a resident of North Carolina, had never transacted any business in that state for the corporation. The motion to strike out was refused, although the court found the facts to be in accordance with the statement made in the motion and in the affidavit. The defendant answered. There was a trial to a jury, and despite the insistence upon the invalidity of the summons, there was a verdict against the Riverside Mills to which it prosecuted error to the supreme court of North Carolina. For the purpose of that review an agreed case was made in which the facts were found to be as stated in the affidavit supporting the motion to strike out, and in considering the case the court below, stating the same facts, reviewed the ruling of the trial court upon that premise.

Coming first to consider the statutes of North Carolina and various decisions of that state construing and applying them, the court held that as the plaintiff was a resident of the state, and the director upon whom the summons was served also resided in the state, the summons was authorized, wholly irrespective of whether the foreign corporation had transacted any business in the state, had any property in the state, or whether the resident director was carrying on business for the corporation in North Carolina or had done so. The court came then to [192] consider decisions of this court, which it deemed related to the question under consideration, for the purpose of testing how far the due process clause relied upon operated from a Federal point of view, that is, the Constitution of the United States, to dominate and modify, if at all, the state rule. In doing so reference was made to the ruling in Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559, and Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728, in the first of which it was held that there was no basis for asserting jurisdiction as the result of service of process on the president of a foreign corporation in a state where he was temporarily present, and where the corporation did no business, had no property, and where the president was transacting no business for the corporation in the state where he was served; and in the second of which, under like conditions, the same conclusion was reached where the service was made on a director of a foreign corporation residing in the state where the suit was brought. After briefly reviewing these cases, which were both decided in courts of the United States on removal from state courts, and directing attention to the fact that in the Goldey Case it was observed, "Whatever effect a

constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government," and that the same observation was reiterated in the opinion in the Conley Case, it was in effect decided that from the point of view of the Constitution of the United States the due process clause relied upon did not control the state law so as to prevent the taking of jurisdiction under the summons for the purpose of entering a judgment, whatever effect the due process clause might have upon the power to enforce the judgment when rendered. The court said: "Under our decisions above quoted, and upon which the plaintiff relied in bringing his action, the service is sufficient for a valid judgment, at least, within our jurisdiction." Concerning the judgment of affirmance [193] which it awarded, the court further said: "What opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration." Two members of the court dissented upon the ground that the decisions of this court, which were referred to in the opinion of the court, clearly established that there was no power to render the judgment, and that the same conclusion was required as the result of the following additional cases in this court: Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Kendall v. American Automatic Loom Co. 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36. To the judgment thus rendered (161 N. C. 164, 76 S. E. 741) this writ of error was prosecuted.

Was error committed in deciding that, consistently with the due process clause of the 14th Amendment, there was jurisdiction to enter against the defendant a money judgment, even although by implied reservation its effect was limited to the confines of the state, and the extent to which the judgment as so rendered was susceptible of being executed was left open for future consideration when the attempt to enforce the judgment would give rise to the necessity for its solution?

That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but statement. Equally well settled is it that the courts of one state cannot, without a violation of the due process clause, extend *their* authority beyond their jurisdiction so as to condemn the resident of another state when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, and has been without deviation upheld by a long line of cases, a few of the leading [194] ones being cited in the margin.[1] And that a corporation, no more than an individual, is subject to be condemned without a hearing, or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in Pennoyer v. Neff, is also established by the cases referred to and many others.

Whatever long ago may have been the difficulty in applying the principles of Pennoyer v. Neff to corporations, that is, in determining when, if at all, a corporation created by the laws of one state could be sued in the courts of another sovereignty, because of the conception that, as an ideal, being, a corporation could not migrate and its officers, in going into another sovereignty, did not take with them their power to represent the corporation, such difficulty ceased to exist with the decision of this court rendered more than thirty years ago in St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354, which, together with the leading cases which have followed it, has been already referred to. And the doctrine which they uphold with virtual unanimity has been upheld by the courts of last resort of most of the states in such a number of cases as to render their citation unnecessary. Without restating the St. Clair Case or the leading cases which have followed and applied it, we content ourselves with saying that it results from them that it is indubitably established that the courts of one state may not, without violating the due process clause of the 14th Amendment, render a judgment against a corporation organized under the laws of another state where such corporation has not come into such state for the purpose of doing business therein, or has done no business therein, or has no property therein, or

[1] St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; Wilson v. Seligman, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Caledonian Coal Co. v. Baker, 196 U. S. 432, 49 L. ed. 540 25 Sup. Ct. Rep. 375; Hadddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; Clark v. Wells, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43; Hunter v. Mutual Reserve L. Ins. Co. 218 U. S. 573, 54 L. ed. 1155, 30 L.R.A.(N.S.) 686, 31 Sup. Ct. Rep. 127.

has no [195] qualified agent therein upon whom process may be served; and that the mere fact that an officer of a corporation may temporarily be in the state or even permanently reside therein, if not there for the purpose of transacting business for the corporation, or vested with authority by the corporation to transact business in such state, affords no basis for acquiring jurisdiction or escaping the denial of due process under the 14th Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances. And this makes clear why there is no ground for assuming that there was conflict between the ruling in Goldey v. Morning News, supra, where it was held that jurisdiction could not be acquired over a corporation of one state in another and different state by service on the president of the corporation temporarily in such state, and the ruling in Conley v. Mathieson Alkali Works, supra, that jurisdiction could not be acquired under the same circumstances by service on a director permanently residing in the other state, since both cases were rested upon the basis that not the character of the residence, but the character and power of the one served as an agent of the corporation, was the test of the right to acquire jurisdiction.

It is self-evident that the application of these settled principles establishes the error of the decision of the court below unless it be that the distinction upon which the court acted be well founded; that is, that the enforcement of due process under the 14th Amendment was without influence upon the power to render the judgment, since that limitation was pertinent only to the determination of when and how the judgment, after it was rendered, could be enforced. But this doctrine, while admitting the operation of the due process clause, simply declines to make it effective. That is to say, it recognizes the right to invoke the protection of the clause, but denies its remedial [196] efficiency by postponing its operation, and thus permitting that to be done which, if the constitutional guaranty were applied, would be absolutely prohibited. But the obvious answer to the proposition is that wherever a provision of the Constitution is applicable, the duty to enforce it is imperative and all-embracing, and no act which it forbids may therefore be permitted. If the suggestion be that although, under the jurisdiction which was exerted, in form a money judgment was entered, as no harm could result until the execution, therefore no occasion for applying the due process clause arose, it suffices to say that the proposition but assumes the issue for decision, since the very act of fixing by judicial action without a hearing a sum due, even although the method of execution be left open, would be, in and of itself, a manifestation of power repugnant to the due process clause.

It is, however, unnecessary to pursue the subject from an original point of view, since in Pennoyer v. Neff, supra, among other things it was said that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law." And see Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308, where these principles were treated as self-evident. It is true that in most of the decided cases questions concerning judgments rendered without a hearing under the circumstances here disclosed have arisen from attempts to enforce such judgments in jurisdictions other than the one wherein they were rendered, presumably because the defense of want of due process was not made until the judgments had been entered and an effort to enforce them was made. But the fact that because, unobservedly or otherwise, judgments have been rendered in violation of the due process clause, and their enforcement has been refused under the full faith and credit clause, affords no ground for [197] refusing to apply the due process clause and preventing that from being done which is by it forbidden, and which, if done, would be void and not entitled to enforcement under the full faith and credit clause. The two clauses are harmonious, and because the one may be applicable to prevent a void judgment being enforced affords no ground for denying efficacy to the other in order to permit a void judgment to be rendered.

Reversed.

UNITED STATES EX REL. EDWARD L. CHOTT, Plff. in Err.,

v.

THOMAS EWING,[1] Commissioner of Patents, and Herbert Wright,[2] Primary Examiner, United States Patent Office.

(See S. C. Reporter's ed. 197-202.)

Error to District of Columbia court of appeals — patent case — Federal authority.

The jurisdiction of the Federal Su-

[1] The retirement of E. B. Moore as Commissioner of Patents, and the appointment of Thomas Ewing as his successor in office, suggested on May 25, 1914, and said Thomas Ewing substituted as a party defendant in error.

[2] Herbert Wright substituted January 4, 1915, as a party defendant in error in place of A. G. Wilkinson.

preme Court under the Judicial Code, § 250, to review judgments and decrees of the court of appeals of the District of Columbia in cases "in which the validity of an authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States, is drawn in question," cannot be deemed to extend to a case in which the question of authority arises under the patent laws of the United States, in view of the further provision of that section making the judgments and decrees of that court in all cases arising under the patent laws final except for the discretionary right to certiorari, or the power to certify questions, provided for in the next succeeding section of the Code.

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

[No. 194.]

Argued March 10 and 11, 1915. Decided April 12, 1915.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which, reversing a judgment of the Supreme Court of the District, directed the dismissal of an application for a writ of mandamus to compel the issuance of a patent. Dismissed for want of jurisdiction.

See same case below, 40 App. D. C. 591.

The facts are stated in the opinion.

Mr. Joshua R. H. Potts argued the cause and filed a brief for plaintiff in error.

Assistant Attorney General Warren argued the cause, and, with Messrs. R. F. Whitehead and W. S. Ruckman, filed a brief for defendants in error.

Mr. Chief Justice White delivered the opinion of the court:

A brief statement of the origin and nature of the controversy is essential to an understanding of the questions which we are called upon to decide. The relator applied for a patent. His claim was rejected by the primary examiner. He appealed to the Board of Examiners in Chief, and that body, disagreeing with the primary examiner, reversed his decision and sustained the claims of the patent. By authority of the Commissioner the primary examiner then made a further investigation and directed the attention of the Commissioner to additional patents which it was deemed demonstrated that the invention was not patentable. Thereupon the Commissioner, coinciding with such opinion, approved the action of the primary examiner, and decided that the invention was not patentable. The Commissioner, however, did not then formally reject the claim to patent, but wrote to the applicant, calling attention to the authority of the Commissioner to review the case personally despite the favorable action of the Board of Examiners in Chief, and assigning a day when a hearing would be afforded as to the patentability of the invention. The applicant challenged the right of the Commissioner to act in the premises, and insisted that, as a result of the conclusions of the Board of Examiners in Chief, he was [199] entitled to a patent, and that it was the plain ministerial duty of the Commissioner to direct it to issue. The Commissioner then filed an opinion insisting upon his authority, and pointing out the reasons which caused him to conclude that the invention was not patentable. The opinion concluded with the statement, "I am clearly of the opinion that the application sets forth nothing upon which a patent can properly be based. The claims are therefore rejected and the patent refused. Appeal from this decision to the court of appeals should be taken, if at all, within the time prescribed by the rules of that court."

Instead of taking the appeal as thus suggested, the relator commenced this proceeding by mandamus in the supreme court of the District to compel the issue of the patent. From a judgment in his favor ordering the mandamus as prayed the Commissioner and the primary examiner prosecuted error to the court of appeals. That court, concluding that it was without authority to control the Commissioner in the performance of his administrative duties by the writ of mandamus, reversed the action of the trial court, directed the dismissal of the application for mandamus, reserving, however, the right of the relator to seek by appeal (Rev. Stat. § 4911) the redress of any wrong which it was deemed had been committed by the Commissioner in refusing to direct the issue of the patent, and this writ of error is prosecuted to that judgment. 40 App. D. C. 591.

At the threshold our jurisdiction to review is disputed on the ground that the concluding paragraph of § 250 of the Judicial Code [36 Stat. at L. 1159, chap. 231, Comp. Stat. 1913, § 1227] upon which our jurisdiction depends provides that "except as provided in the next succeeding section, the judgments and decrees of said court of appeals [of the District of Columbia] shall be final in all cases arising under the patent laws," and that the exception embraced in the subsequent section includes [200] only

NOTE.—On appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States *ex rel.* Taylor v. Taft, 51 L. ed. U. S. 269.

the discretionary right to certiorari and the power of the court of appeals to certify a question under the circumstances provided. On the other hand, it is insisted jurisdiction obtains because of the right of this court to review the judgments and decrees of the court of appeals of the District conferred by the fifth paragraph of § 250, that is, "in cases in which the validity of any authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States is drawn in question." Our jurisdiction is therefore to be determined by fixing the meaning of these two provisions. It cannot be doubted that isolatedly considering the text of the fifth paragraph the controversy comes within its terms; that is, it involves the validity of an authority exercised under the United States, or draws in question the existence or scope of the power of an officer of the United States. So, also, it is not substantially disputable, although the contrary is argued, that, isolatedly considered, the case is excluded from our jurisdiction because it is within the last paragraph of § 250, that is, is one arising under the patent laws, since it depends upon those laws, and concerns the very right and authority to issue a patent as provided by those laws. Looked at isolatedly, therefore, there is absolute conflict between the two provisions. But even if the method of isolated considerations were not otherwise plainly a mistaken one, it follows that it cannot be adopted since it affords no possible solution of the controversy. Such solution must therefore be sought by following the elementary rules, that is, by turning primarily to the context of the section and secondarily to provisions *in pari materia* as affording an efficient means for discovering the legislative intent in enacting the statute, thereby vivifying and enforcing the remedial purposes which it was adopted to accomplish.

From the point of view of the context, as it is manifest [201] that the provisions in the concluding clause were enacted as exceptions or limitations upon the grant of jurisdiction contained in the previous passage of § 250, it clearly results that it was not contemplated that the power conferred by the fifth paragraph would extend to and embrace the cases wherein by the last paragraph the judgments or decrees of the court of appeals of the District of Columbia were made final. This being true, it hence also is necessarily true that the fifth paragraph concerning the validity of an authority confers no jurisdiction on this court to review a case where the question of authority arises under the patent laws of the United States. Indeed, it would be very unreasonable to assume that jurisdiction was conferred to review the action of the court of appeals in all cases in which its authority was exerted to direct the officials of the Patent Office, under the patent laws, to issue a patent, and yet no power was reserved to review the action of that court in determining, after the issue of a patent, whether it was or was not rightfully issued. And the cogency of this view becomes at once apparent when it is considered that, prior to the enactment of the Judicial Code, under § 233 of the District Code (31 Stat. at L. 1227, chap. 854, Comp. Stat. 1913, § 1227), jurisdiction of this court to review the judgments or decrees of the court of appeals of the District embraced cases "without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent," a provision not preserved in § 250 of the Judicial Code. But the question is hardly an open one since it has been expressly held that the power does not exist in this court to review the court of appeals of the District of Columbia in a criminal case which would obtain under § 250, but for the provisions of the last paragraph, making final the action of that court in criminal cases. Gompers v. United States, 233 U. S. 604, 58 L. ed. 1115, 34 Sup. Ct. Rep. 693. And by analogy a like consideration when applied to the sections of the statute concerning [202] the jurisdiction of this court to review the judgment of circuit courts of appeals has led to a like conclusion. Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490. Besides, when looked at comprehensively, in view of the fact that the provisions of the Judicial Code were obviously intended not to enlarge the jurisdiction of this court, but to relieve it, and considering in this light the omissions and the limitations therein expressed and the power to certiorari stated in § 251, the conclusion is irresistible that the intent and purpose of the act was, while narrowing the imperative jurisdiction, to create an equipoise by extending the voluntary or discretionary exercise of jurisdiction by means of the writ of certiorari,—a purpose which would be wholly frustrated if the contention as to jurisdiction now insisted upon were sustained.

Dismissed for want of jurisdiction.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

SOUTHERN PACIFIC COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 202–207.)

Carriers — transportation for United States — local or through rate.

The full local rate cannot be charged for the transportation of property and troops of the United States over the non-free-haul portion of a through shipment over a continuous line of railway part of which, under the act of July 25, 1866 (14 Stat. at L. 239, chap. 242), § 5, is free haul, and the remaining part non free haul, under the act of July 1, 1862 (12 Stat. at L. 489, chap. 120), § 6, but the government is entitled to have the rate measured by the lesser through rate,—especially in view of the provision of the latter section, giving the government the right to ship over the road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service."

[No. 202.]

Submitted March 11, 1915. Decided April 12, 1915.

APPEAL from the Court of Claims to review a judgment rejecting the claim of a railway company to additional compensation for transportation of troops and property of the United States. Affirmed.

See same case below, 48 Ct. Cl. 227.

The facts are stated in the opinion.

Mr. A. A. Hoehling, Jr., submitted the cause for appellant:

The position assumed by the government is one that would enable it, on the one hand, to appropriate to itself additional privileges and benefits neither intended nor authorized by the certain statutory contract effected by the act of Congress of July 25, 1866, and, on the other hand, deprive the carrier of the privileges and benefits secured to it by the certain act of Congress of July 1, 1862. This cannot lawfully be done; and it matters not that the carrier happens to be operating both of the railroad lines that form the subject-matter of the two certain acts of Congress mentioned. That is a mere coincidence that should not be permitted either to enlarge or diminish the rights of the government and carrier, respectively, so defined by those acts.

Western Maryland R. Co. v. Lynch, 82 Md. 233, 34 Atl. 40.

It would seem practically impossible to dispose of this case under the theory of a prepayment of freight charges by means of a land grant, even were the application of such theory possible, and, furthermore, the application of any such theory is not legally permissible, and this for the reason that tariff rates are based upon a money charge; and free passes in settlement of damage claims, newspaper advertisements, or in payment of railroad rights of way, etc., find no place in the tariffs authorized and required by law.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, 477, 55 L. ed. 297, 301, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265.

The exact point involved in the instant case has never been directly passed upon by the Interstate Commerce Commission, although the following rulings appear to support the theory contended for by appellant:

Conference Ruling of Commission, No. 224, adopted May 12, 1908; Beekman Lumber Co. v. St. Louis & S. F. R. Co. 21 Inters. Com. Rep. 270.

Assistant Attorney General Thompson submitted the cause for appellee:

The shipments in question were through shipments, and would have been so considered in the case of private parties.

Montpelier & W. River R. Co. v. United States, 109 C. C. A. 532, 187 Fed. 271.

Being through shipments, the rates to be applied would be through rates, and the charge for the haul from Roseville Junction to San Francisco would be such portion of the through rate as the distance from Roseville Junction to San Francisco bears to the entire distance from Portland to San Francisco.

Atchison, T & S. F. R. Co. v. United States, 15 Ct. Cl. 126.

The division of the through rate upon a mileage basis, including the land-grant haul between Portland and Roseville Junction, is reasonable and accords with long-established administrative practice, and has been generally acquiesced in by the railroads.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; State R. Tax Case, 92 U. S. 575, 23 L. ed. 663; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 595; Delaware R. Tax, 18 Wall. 206, 21 L. ed. 888; Digest 2d Comp. Dec. vol. 2, § 1070; Digest 2d Comp. Dec. vol. 3, § 1164; Digest 2d Comp. Dec. vol. 3, § 1396; Digest 2d Comp. Dec. vol. 4, § 360; 8 Comp. Dec. 334, 339; 8 Comp. Dec. 598; 17 Comp. Dec. 486; 18 Comp. Dec. 238, 949; 40 Comp. Letter bk. 4, May 1, 1909; 28 M. S. Comp. Dec. 722, Feb. 24, 1904; 47 M. S. Comp. Dec. 1209, Dec. 2, 1908; 51 M. S. Comp. Dec. 848, Nov. 19, 1909; 57 M. S. Comp. Dec. 132, Apr. 8, 1911; 58 M. S. Comp. Dec. 921, Aug. 31, 1911.

Mr. Chief Justice White delivered the opinion of the court:

The appellant, the Southern Pacific Company, operates under a lease a line of road from San Francisco, *via* Roseville Junction, to Portland. The line to Roseville Junction, a distance of 108.03 miles, was built as part of the main line extending from San Francisco to Ogden, Utah, by the Central Pacific Railroad Company under an act of Congress of July 1, 1862 (12 Stat. at L. 489, chap. 120). By § 6 of that act the land grants for the construction of the road were made "upon condition that said company . . . shall at all times . . . transport mails, troops and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service). . . ."

The line from Roseville Junction to Portland, a distance of 663.91 miles, was constructed under the act of [204] Congress approved July 25, 1866 (14 Stat. at L. 239, chap. 242). Section 5 of that act provided: "And said railroad shall be and remain a public highway for the use of the government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States."

Between August, 1897, and March, 1902, the Southern Pacific Company transported for the United States persons and property over said line *via* Roseville Junction "from points on either side thereof to points on the other side; thus, from San Francisco, Ogden, and other points . . . to Portland *via* Roseville Junction. The shipments in question did not originate at Roseville Junction nor terminate at Roseville Junction, but were carried through on one continuous transit over both the free haul and the nonfree haul portion of the road precisely as any through shipment is carried for a private shipper." (Finding VI.)

For the services thus rendered the company presented its bills to the accounting officers of the government in which, while nothing was charged for services rendered over the portion of the road which was free, the local rate was exacted between San Francisco and Roseville Junction. We say the local rate because it is certain that at the times in question the railroad had duly established and published schedules of rates embracing local rates to Roseville Junction as well as through rates to Portland and other points *via* Roseville Junction, the local rates being higher than the through rates. The accounting officers refused to allow the claims in full, insisting that the government was entitled to the benefit of the through rate. They therefore distributed the through rate over [205] the whole distance, and deducted from the aggregate of the bills the difference between the sum which had been made up by charging the local rate and the sum which would be due charging only the through rate ascertained upon the mileage basis as above stated. The sum remaining due under the operation of this method was received by the railroad company under protest and this suit was commenced in the court below to recover the difference.

Upon the finding of the facts above stated and the legal conclusion that, under the statutes, the railroad was without right to refuse to allow the through, and charge the local, rate, its claim was rejected. 48 Ct. Cl. 227. This appeal was then prosecuted.

There is no controversy concerning the method by which the sum of the applicable through rate was ascertained by the accounting officers of the government. There are, hence, as stated in the argument of appellant, no disputed facts, and the question for decision is a narrow one, since, as further stated in that argument:

"The present appeal presents but a single question of law, and that is as to the legal rate of compensation to which the railroad company is entitled for the transportation of property and troops of the United States over a continuous line of railroad, part of which is free-haul and the remaining part of which is pay line."

The entire theory upon which it is contended that the through shipments could be subjected to a local rate from San Francisco northward to Roseville Junction, and southward from Roseville Junction to San Francisco, finds clear expression in the argument on behalf of the railroad company as follows:

"While there is a continuous rail line between those two points [San Francisco and Portland], the line itself, from the standpoint of compensation or pay to the railroad company, *breaks* at Roseville Junction; *south* of that point it is 'pay' line; *north* thereof it is 'free-haul' line; and it [206] so happens that appellant company, as lessee, operates *both* lines."

1. But the error of the proposition is manifest, as it confounds cause and effect, since it assumes the unassumable; that is, that the question of whether traffic is to

have the benefit of the lesser through rate or be subjected to the higher local rate is to be determined by the sum of the compensation asked for its carriage instead of by the nature and character of the movement of the traffic; that is, whether it was a through or a local movement. In other words, the proposition is not that the character of the movement fixes the rate, but that the rate determines the character of the movement. The confusion involved in, and the destructive results which would flow from, the proposition, cannot be better illustrated than by considering that the foundation upon which a lesser charge is justified for a through shipment than is exacted for a local shipment is the less cost to the carrier of doing the through business than is incurred in doing the local business. Therefore, to adopt the proposition would require a reversal of the standards by which the character of traffic is fixed. And the terms in which the contention is stated bring out in bold relief the fallacy which it contains; since, while it admits "there is a continuous rail line between those two points" (San Francisco and Portland), it yet declares that "the line itself, from the standpoint of compensation or pay to the railway company, *breaks* at Roseville Junction;" that is, not that the continuous physical line of rail over which the through transportation moves is in any way broken, but that by a break (change) in the line of compensation an imaginary break in the physical line itself is to be assumed to the end that a shipment which is inherently through may be converted into one which is essentially local.

2. But, apart from the mere question of the abstract error in the proposition relied upon, it is clear that to [207] accept it would give rise to a plain violation of the provisions of the act of Congress governing the movement of traffic over the road from San Francisco to Roseville Junction, since that act exacts that the government shall at all times have the right to ship over the road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service." As the findings clearly establish that the schedules filed and published contained a through rate for a shipment from San Francisco to Portland *via* Roseville Junction, and *vice versa*, it would seem to be indisputable that, by the very terms of the act, such through rate, so published and filed, was open and available to the United States for its through shipments. This must be the case unless it can be said that because the United States had acquired an increased advantage concerning the movement of its shipments from Roseville Junction to Portland, therefore it had lost the right to have its through shipments treated as such from San Francisco to Roseville Junction. And it is to be observed that there is no ground for saying that the existence of the right in favor of the United States to a free haul beyond Roseville Junction to Portland subjected the road in hauling from Roseville Junction to San Francisco, or *vice versa*, to a greater cost, since the findings in express terms establish that the freight shipped through by the United States was carried by a continuous movement under exactly similar conditions as was all other through freight carried for private individuals.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[208] TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
CLARA HILL.

(See S. C. Reporter's ed. 208-215.)

Error to circuit court of appeals — Federal question.

1. The judgment of a Federal circuit court of appeals in an action against a corporation created by an act of Congress may be brought up for review in the Federal Supreme Court by writ of error.

[For other cases, see Appeal and Error, III. d, 2, e, in Digest Sup. Ct. 1908.]

Pleading — to jurisdiction — waiver.

2. Pleas to the jurisdiction of the state court may be deemed to have been waived by the defendants, where they joined in an application to remove the cause to a Federal court, made a general appearance in that court without reservation, pleading to

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NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

As to review of discretionary action of court below—see note to Barrow v. Hill, 14 L. ed. U. S. 48.

On obeying or disobeying physician as affecting remedy of injured person against one who injured him—see notes to Pearl v. West End Street R. Co. 49 L.R.A. 826; and Donovan v. New Orleans R. & Light Co. 48 L.R.A.(N.S.) 110.

On effect of intervening act or neglect on recovery for permanent injury—see note to Allison v. Fredericksburg, 48 L.R.A.(N.S.) 105.

On liability of one causing injury as affected by negligence or unskilfulness of attending physician or surgeon—see note to Hunt v. Boston Terminal Co. 48 L.R.A. (N.S.) 116.

the merits, filed a written statement in reply to a motion to remand, to the effect that the Federal court had sole jurisdiction, asked for and secured a continuance to prepare the defense, and first directed the Federal court's attention to the pleas to the jurisdiction when the case was called for trial.

[For other cases, see Pleading, I. g, in Digest Sup. Ct. 1908.]

Appeal — review of discretion below — impaneling jury — continuance.

3. The exclusion of certain jurors as the result of their preliminary examination, and the refusal to permit a postponement of the case for the production of witnesses in support of the good character of a witness, the propriety of whose conduct was attacked on cross-examination, rests in the sound discretion of the trial court.

[For other cases, see Appeal and Error, 4405-4412, 4473, in Digest Sup. Ct. 1908.]

Trial — instructions — malpractice as defense in personal-injury action.

4. The defense of malpractice upon the part of the surgeons who operated upon the plaintiff was properly presented in a suit to recover for the personal injuries received by a woman in a railway collision by a charge which excluded all liability on the part of the defendant for any injury resulting from the intervening malpractice, if such malpractice was found to exist, if she had failed to exercise reasonable care in the selection of competent surgeons, and had in any respect fallen below the standard which reasonable prudence would have exacted, not only in the employment of a reasonably competent surgeon, but in following his advice concerning the necessity of the operation to relieve from the consequences of the injury suffered from the collision, if in fact such injury was found to have been suffered.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

Appeal — excessive damages — review of verdict.

5. The refusal of the trial court to direct a remittitur because of the assumed excessive amount of the verdict is not reviewable by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 4755-4781, in Digest Sup. Ct. 1908.]

Appeal — reversible error — no opinion below.

6. The judgment of the trial court cannot be reversed in the Federal Supreme Court on writ of error to a circuit court of appeals, because the latter court affirmed the judgment without opinion.

[For other cases, see Appeal and Error, VIII. m, in Digest Sup. Ct. 1908.]

[No. 482.]

Submitted March 1, 1915. Decided April 12, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Texas in favor of plaintiff in a personal-injury action which had been removed to that court from the District Court of Frio County. Affirmed.

The facts are stated in the opinion.

Messrs. T. D. Cobbs and George Thompson submitted the cause for plaintiff in error:

The court erred in not sustaining the several pleas to the jurisdiction.

Texas & P. R. Co. v. Lynch, 97 Tex. 25, 75 S. W. 486; International & G. N. R. Co. v. Doolan, — Tex. Civ. App. —, 120 S. W. 1120; El Paso & N. E. R. Co. v. Landon, — Tex. Civ. App. —, 124 S. W. 746; Missouri, K. & T. R. Co. v. Blanks, 103 Tex. 191, 125 S. W. 313; St. Louis Southwestern R. Co. v. Wester, — Tex. Civ. App. —, 96 S. W. 773; Blanks v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 116 S. W. 380; Knoles v. Clark, — Tex. Civ. App. —, 163 S. W. 369; Behrens Drug Co. v. Hamilton, 92 Tex. 284, 48 S. W. 5; Goggan & Bros. v. Morrison, — Tex. Civ. App. —, 163 S. W. 123; Ragland v. Guarantee L. Ins. Co. — Tex. Civ. App. —, 157 S. W. 1187.

The question of jurisdiction was properly raised and preserved.

O'Connell v. Reed, 5 C. C. A. 593, 12 U. S. App. 369, 56 Fed. 531.

It was error to excuse jurors because they were opposed "to fake damage suit litigation," but were not opposed to legitimate damage cases.

1 Rose's Notes (U. S.) 521; Com. v. Brown, 9 Am. St. Rep. 746, note; Southern P. Co. v. Rauh, 1 C. C. A. 417, 7 U. S. App. 84, 49 Fed. 696.

Damages cannot be recovered for mere fright or mental shock.

St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 595, 124 Fed. 113, 14 Am. Neg. Rep. 676; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 798, 51 N. E. 1, 4 Am. Neg. Rep. 490; Snyder v. Colorado Springs & C. C. D. R. Co. 36 Colo. 288, 8 L.R.A.(N.S.) 781, 118 Am. St. Rep. 111, 85 Pac. 686, 20 Am. Neg. Rep. 23.

The instruction in favor of one defendant ousted the court of any further jurisdiction in the case on the plea and exception.

Glasscock v. Price, 92 Tex. 274, 47 S. W. 965.

It was error to charge the jury to assess damages received, to compensate plaintiff as set forth in her petition, leaving for the jury to search out the legal claim, upon some of which there was no evidence.

Memphis & C. R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699, 4 Am. Neg. Cas. 268;

National Biscuit Co. v. Nolan, 70 C. C. A. 441, 138 Fed. 6; International & G. N. R. Co. v. Butcher, 98 Tex. 462, 84 S. W. 1052; Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; Houston & T. C. R. Co. v. Shafer, 54 Tex. 641; International & G. N. R. Co. v. Simcock, 81 Tex. 503, 17 S. W. 47; Texas C. R. Co. v. Brock, 88 Tex. 310, 31 S. W. 500; Ft. Worth & D. C. R. Co. v. Measles, 81 Tex. 474, 17 S. W. 124; Texas & P. R. Co. v. Hightower, 12 Tex. Civ. App. 41, 33 S. W. 541; Champagne Lumber Co. v. Nyback, 64 C. C. A. 615, 130 Fed. 1021.

The court erred in eliminating the question of the degree of ordinary care on the part of plaintiff in the selection of a surgeon to operate on her, and whether she would have been cured without it by her other doctors, and in instructing the jury that she would not be held responsible for want of care in having the operation performed, whether necessary or not.

Texas & P. R. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237; Gulf, C. & S. F. R. Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66; Missouri, K. & T. R. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014; St. Louis Southwestern R. Co. v. Johnson, — Tex. Civ. App. —, 94 S. W. 162; Robertson v. Texas & P. R. Co. — Tex. Civ. App. —, 79 S. W. 96; Texas Portland Cement Co. v. Poe, 32 Tex. Civ. App. 469, 74 S. W. 563; Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; St. Louis Southwestern R. Co. v. Parks, — Tex. Civ. App. —, 90 S. W. 343; Texas & P. R. Co. v. White, 62 L.R.A. 90, 42 C. C. A. 86, 101 Fed. 928; Chicago City R. Co. v. Saxby, 213 Ill. 274, 68 L.R.A. 164, 104 Am. St. Rep. 218, 72 N. E. 755; Chicago, B. & Q. R. Co. v. Richardson, 121 C. C. A. 144, 202 Fed. 836; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Maynard v. Oregon R. Co. 43 Or. 63, 72 Pac. 590; Lobban v. Wabash R. Co. 159 Mo. App. 464, 141 S. W. 440; Houston & T. C. R. Co. v. Shafer, 54 Tex. 641; Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; Throckmorton v. Missouri, K. & T. R. Co. 14 Tex. Civ. App. 222, 39 S. W. 175; Waxahachie v. Connor, — Tex. Civ. App. —, 35 S. W. 692.

As the plaintiff's suit was solely predicated upon injuries received from "shock or concussion" by reason of the alleged collision, it was error not to give the requested special charge, limiting the investigation to injuries received, caused from the "shock and concussion," there being no allegation to support a recovery for a remote injury resulting from traumatism or blow or hurt of some kind.

Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Gulf, C. & S. F. R. Co v. Hayter, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; Houston & T. C. R. Co. v. Shafer, 54 Tex. 641; Throckmorton v. Missouri, K. & T. R. Co. 14 Tex. Civ. App. 222, 39 S. W. 174; Waxahachie v. Connor, — Tex. Civ. App. —, 35 S. W. 692.

It was error not to give the special charge to the effect that if plaintiff's prior sickness was the proximate cause of her condition, which would not have required an operation, for any injuries that did occur, or were the direct and proximate cause of her own negligence in having the unnecessary operation performed, the railroad would not be liable. This involved an issue of fact for the jury, arising under the pleading and evidence.

Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; Houston & T. C. R. Co. v. Shafer, 54 Tex. 641; Throckmorton v. Missouri, K. & T. R. Co. 14 Tex. Civ. App. 222, 39 S. W. 174; Waxahachie v. Connor, — Tex. Civ. App. —, 35 S. W. 692; Kirby Lumber Co. v. Cunningham, — Tex. Civ. App. —, 154 S. W. 289.

There being evidence tending to show that her doctors who first had her under treatment would have cured her, and that she was improving thereunder, it was error to withdraw the issue from the jury, and to tell them that she could recover whether she would have gotten well or not by any other treatment, if she selected a surgeon whom she believed to be competent. This involved an issue of fact that should have been submitted to the jury to be passed on. If she would have gotten well without the operation, the railway was not responsible for the consequences of that operation.

Texas & P. R. Co. v. White, 62 L.R.A. 90, note; Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Texas Portland Cement Co. v. Poe, 32 Tex. Civ. App. 469, 74 S. W. 563; Robertson v. Texas & P. R. Co. — Tex. Civ. App. —, 79 S. W. 96; Missouri, K. & T. R. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014; St. Louis Southwestern R. Co. v. Johnson, — Tex. Civ. App. —, 94 S. W. 162; Chicago City R. Co. Saxby, 213 Ill. 274, 68 L.R.A. 164, 104 Am. St. Rep. 218, 72 N. E. 755; Texas & P. R. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237; Gulf, C. & S. F. R. Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66;

Patton v. Southern R. Co. 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. 979; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 595, 124 Fed. 113, 14 Am. Neg. Rep. 676; Swift v. Langbein, 62 C. C. A. 111, 127 Fed. 111; Posener v. Harvey, — Tex. Civ. App. —, 125 S. W. 356; Houston & T. C. R. Co. v. Shafer, 54 Tex. 641; Throckmorton v. Missouri, K. & T. R. Co. 14 Tex. Civ. App. 222, 39 S. W. 174; Waxahachie v. Connor, — Tex. Civ. App. —, 35 S. W. 692.

Where a verdict is excessive, it is the duty of the trial court to reverse the case; especially if it is so excessive as to indicate passion or prejudice, as is the case here, and is admitted by the jurors; but, if not reversed, then it is the duty of the court to require a remittitur.

Felton v. Spiro, 24 C. C. A. 321, 47 U. S. App. 402, 78 Fed. 576, 2 Am. Neg. Cas. 682; Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; Farrar v. Wheeler, 75 C. C. A. 386, 145 Fed. 483; Felt v. Puget Sound Electric R. Co. 175 Fed. 477; Duke v. St. Louis & S. F. R. Co. 172 Fed. 686; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690; Burdict v. Missouri P. R. Co. 26 L.R.A. 385, note; Van Vrankin v. Kansas City Elev. R. Co. 84 Kan. 287, 114 Pac. 202.

Mr. H. C. Carter submitted the cause for defendant in error. Messrs. Magus Smith and Perry J. Lewis were on the brief:

When the plaintiff in error removed the cause from the state court to the United States district court for the western district of Texas, it thereby invoked the jurisdiction of this court to hear and determine the cause, and it could not thereafter deny the jurisdiction which it had invoked.

Re Moore, 209 U. S. 496, 52 L. ed. 907, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164.

The Texas & Pacific Railway Company, being a Federal corporation, the United States district court had jurisdiction of the subject-matter of the case, as one arising under the laws of the United States, and the question of venue, the right to be sued in a particular district, was a question which could be and was waived by the acts and conduct of the plaintiff in error.

Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368–372, 52 L. ed. 1101–1103, 28 Sup. Ct. Rep. 720; Re Moore, 209 U. S. 491–513, 52 L. ed. 904–914, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; Texas & P. R. Co. v. Cox, 145 U. S. 593–601, 36 L. ed. 829–832, 12 Sup. Ct. Rep. 905.

The complaining party must not only show that the trial court abused its discretion in setting aside the jurors, but it must also show that such error resulted in unfair or prejudiced jurors being forced upon it.

Couts v. Neer, 70 Tex. 468, 9 S. W. 40; Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; Southern P. Co. v. Rauh, 1 C. C. A. 416, 7 U. S. App. 84, 49 Fed. 702.

The continuance of a case, or the refusal to postpone or continue, rests in the sound discretion of the court in which the motion is made, and will not be reviewed on writ of error.

Barrow v. Hill, 13 How. 54, 14 L. ed. 48; Sims v. Hundley, 6 How. 1, 12 L. ed. 319; Thompson v. Selden, 20 How. 194, 15 L. ed. 1001; Texas & P. R. Co. v. Nelson, 1 C. C. A. 688, 2 U. S. App. 213, 50 Fed. 815.

It was plaintiff's duty to exercise ordinary care in the selection of a reasonably competent surgeon, and to submit her case to his judgment; and if she selected a reasonably competent surgeon, then she would not be responsible for the errors or mistakes of such surgeon.

Texas & P. R. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237; Gulf, C. & S. F. R. Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66; Selleck v. Janesville, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944; Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Missouri, K. & T. R. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014; St. Louis Southwestern R. Co. v. Johnson, — Tex. Civ. App. —, 94 S. W. 162; Texas & P. R. Co. v. White, 62 L.R.A. 90, 42 C. C. A. 86, 101 Fed. 928; Watson, Injuries, § 136; Moore, Carr. p. 882; 1 Cyc. 77; 1 Thomp. Neg. ¶ 66; Fields v. Mankato Electric Traction Co. 116 Minn. 218, 133 N. W. 577; Houston & T. C. R. Co. v. Hanks, — Tex. Civ. App. —, 124 S. W. 136; St. Louis & S. F. R. Co. v. Doyle, — Tex. Civ. App. —, 25 S. W. 461; Reed v. Detroit, 108 Mich. 224, 65 N. W. 967; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Lyons v. Erie R. Co. 57 N. Y. 489; Collins v. Council Bluffs, 32 Iowa, 329, 7 Am. Rep. 200.

The appellate courts will not review the discretion of the trial court in refusing to grant a motion for new trial on the ground that the verdict is excessive.

Duke v. St. Louis & S. F. R. Co. 172 Fed. 686; Southern Railway–Carolina Div. v. Bennett, 233 U. S. 80–86, 58 L. ed. 860–863, 34 Sup. Ct. Rep. 566.

[209] Mr. Chief Justice White delivered the opinion of the court:

As a corporation created by an act of Congress the plaintiff in error is inherently

entitled to invoke our jurisdiction. Hence the motion to dismiss is without merit.

Both the record and the argument for reversal are voluminous, the latter covering about one hundred and thirty-five printed pages. We state some of the undisputed facts out of which the controversy arose and recapitulate such of the propositions relied on in argument as we think need to be considered to make clear our disposition of the case.

On December 22, 1911, while a passenger on a train of the Texas & Pacific Railway moving between Longview and Atlanta, Texas, a collison between two trains of the road took place which, it was alleged, occasioned the injuries to the defendant in error to compensate for which she brought this suit. She was travelington a through ticket sold by the International & Great Northern Railway Company at Pearsall, Frio county, Texas, where the defendant in error resided and where she was employed as a clerk. The ticket covered a journey to Longview, where the International connected with the Texas & Pacific, and thence by that road to Atlanta. After the collision the defendant in error went to the home of her parents at Queen City near Atlanta, where she was treated by a local physician. Under his advice she went to a sanitarium at Texarkana. From there she returned to Queen City, remained under treatment a while, and went to her home at Pearsall. Under the advice of a local physician, and accompanied by him, she subsequently went to San Antonio for consultation with surgeons there. They advised an operation, but the advice was not immediately followed, as the defendant in error returned to Pearsall and remained there some time under the care of her physician. [210] Not improving, again under his advice and accompanied by him, she went to San Antonio, submitted to an operation, and after convalescence returned in an invalid condition to Pearsall, where she was living at the time this suit was commenced on August 24, 1912, in the district court of Frio county, Texas, against both the International and the Texas & Pacific, the liability of both being based on an allegation that they were partners. The International pleaded to the jurisdiction on the ground that although it operated a road and had an agent in Frio county, it was not susceptible of being sued there for an alleged injury to a passenger. It was asserted that if the jurisdiction was based on a law of Texas of 1905, which was referred to, it did not apply, and if it did, the law was void because repugnant to the state Constitution for reasons which were named. In addition, in the same paper a denial of the alleged partnership was made and the exclusive liability of the Texas & Pacific for the injury, if any injury had resulted, was asserted. On the same day the Texas & Pacific, as a corporation created by an act of Congress, joined by the International, prayed and was granted the right to remove the cause to the district court of the United States for the western district of Texas, and consequently filed the record in that court on the 14th of October, 1912. On the same day the Texas & Pacific filed a paper styled in its heading, "Answer of Defendant," but on which was indorsed the title of the case and the words, "Pleas, Demurrer, and Answer of the Defendant, T. & P. Ry. Co." The paper contained four separate paragraphs, each signed by the attorney. The first, after referring to the plea to the jurisdiction of the state court filed in that court by the International, and after alleging that the Texas & Pacific had no road and did no business in Frio county, asked that if the plea of the International should be sustained, the suit should abate as to the Texas & Pacific. The second paragraph [211] denied under oath the alleged partnership with the International. The third virtually demurred on the ground of no cause of action, and the fourth was an answer to the merits generally denying the averments of the petition, and setting up particular grounds of defense. On the 3d of January, 1913, the plaintiff moved to remand to the state court, which was resisted in writing by the Texas & Pacific in a paper in which it alleged that although it was an inhabitant of the northern district of Texas, it had the right to remove the cause to the district court of the western district. This pleading contained no reservation whatever of any question of jurisdiction of the state court, but, on the contrary, alleged that the removal was valid, had been joined in by the International, and that said road "joins in this motion, contending that the case is one under the law removable, and which controversy between the parties this court has the sole and exclusive jurisdiction by virtue of the removal therein." The motion to remand was denied. The case being at issue, and a term at which it could be tried having either commenced or being about to commence, the Texas & Pacific made a written application for a continuance to enable it to prepare its defense on the merits. The application was granted. Subsequently both the defendants, in somewhat amplified form, reiterated the pleadings previously filed by them except that the answer of the Texas & Pacific contained averments disputing the existence of the injury complained of, the necessity of the operation to which the plaintiff had sub-

mitted, the skill of the surgeon by whom it was performed, and attacking the good faith of the plaintiff on the ground that she was feigning an injury not suffered, for the purpose of recovering from the railroad damages to which she was not entitled.

When the case was called for trial on May 13, 1913, the defendants directed the court's attention to the alleged pleas in abatement concerning the jurisdiction of the [212] state court, and asked a ruling on the same. The court thereupon overruled said pleas on the ground that the parties had waived them by voluntarily submitting themselves to the jurisdiction of the court. In signing the bill of exceptions on this subject the court said:

"The suit in this cause was filed jointly against the International & Great Northern Railway Company and the Texas & Pacific Railway Company in the district court of Frio county, Texas; the International & Great Northern Railway Company joined the Texas & Pacific Railway Company in an application to remove the cause from said state court to this court; the record in said cause was filed in this court for the December term, 1912; at said term of this court both defendants made a general appearance without reservation and pleaded to the merits of the cause. The plaintiff made a motion to remand the cause to the state court. In reply to the motion to remand, which was heard at the December term of this court, defendants filed a written statement to the effect that this court had sole jurisdiction to try the case. After the motion to remand to the state court was overruled at the December term, defendants made an application in writing for a continuance upon the ground that certain witnesses were necessary for a proper defense on the merits of the case. This motion was granted, and the cause continued to the May term, 1913. When the cause was again called for trial at the May term, 1913, defendants for the first time offered the pleas in abatement mentioned in the bill and the pleas were overruled. A reference to the pleas will show that the defendant, Texas & Pacific Railway Company, only insisted upon its plea in abatement in event the plea in abatement offered by the International & Great Northern Railway Company was granted."

During the trial, when the physician in charge of the sanitarium at Texarkana was testifying as a witness for the defendants, he was asked on cross-examination as to [213] the truth of statements that there had been improper or indelicate actions or conduct on his part towards the plaintiff while she was under his treatment. The defendants, claiming surprise, asked a postponement of the case in order to produce witnesses as to the doctor's character, which was refused and objection taken. Subsequently when the bill of exceptions was presented to the court on the subject, it directed attention to the fact that the bill embodied not only the objection as made, but also referred to a later period in the trial when the plaintiff was testifying on her own behalf, and therefore the court said that, as no request was made at such later time for a postponement, the objection must be considered as confined to the subject upon which the ruling had been made.

The court instructed a verdict in favor of the International on the ground that there was no proof of its liability. There was a verdict against the Texas & Pacific, and after an unavailing effort to obtain a new trial error was prosecuted from the circuit court of appeals, seventeen grounds for reversal being assigned. The judgment was affirmed without a written opinion. This writ of error was then sued out, the assignments of error made for the circuit court of appeals being repeated with an added ground predicating error on the fact that no opinion was written by the circuit court of appeals in affirming the judgment.

After a consideration of all the assignments of error and the arguments advanced to sustain them in the light afforded by an examination of the entire record we are of opinion that there is no ground whatever for holding that reversible error was committed in the trial of the cause, and therefore our duty is to affirm. We might well content ourselves with this statement, but we proceed to refer to what we deem to be the more salient of the propositions relied upon in order in the briefest possible way to [214] point out the reasons why we consider them to be wholly devoid of merit.

(a) In so far as any or all of the contentions, as one or more of them ultimately do, rest upon the proposition that the case should have been taken from the jury because there was no proof tending to show a right to recover, we think they are wholly devoid of merit and it is unnecessary to review the tendencies of the proof to point out the reasons which lead us to this conclusion. Seaboard Air Line R. Co. v. Padgett, decided March 22d, 1915 [236 U. S. 668, ante, 777, 35 Sup. Ct. Rep. 481].

(b) Without intimating in any degree that the contention as to want of jurisdiction was well founded on its merits, we think the correctness of the action of the court in overruling it is so manifestly clear from the statement which we have reproduced, made by the court in signing the bill of exceptions, and from a consideration of the state of the record which we have re-

capitulated, that no further reference to the subject need be made.

(c) The action of the court complained of in excluding two jurors as a result of their preliminary examination, and in refusing to permit a postponement of the case under the circumstances disclosed, it is elementary, involved matters within the sound discretion of the court concerning which the record discloses no semblance of ground for predicating a contention that the limits of sound discretion were transcended.

(d) The various contentions concerning the alleged want of liability on the part of the defendant as the result of any asserted malpractice on the part of the surgeon or surgeons who operated upon the plaintiff, we are of opinion, are likewise devoid of all merit. The correctness of this conclusion is adequately demonstrated by a consideration of the text of the charge given by the court to the jury on the subject. In substance the charge, with clearness of statement, excluded all liability on the part [215] of the defendant for any injury resulting from the intervening malpractice of the surgeon or surgeons, if such malpractice was found to exist, if the plaintiff had failed to exercise reasonable care in the selection of a competent surgeon or surgeons, and had in any respect fallen below the standard which reasonable prudence would have exacted, not only in the employment of a reasonably competent surgeon, but in following his advice concerning the necessity of the operation to relieve from the consequences of the injury suffered from the collision, if in fact such injury was found to have been suffered.

In conclusion we observe that the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open (Southern Railway—Carolina Division v. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566), and it needs nothing but statement of the proposition to demonstrate the want of all foundation for the contention that there is ground for reversing the trial court because the court below affirmed the action of that court without opinion.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.
MAY MARCUS.

(See S. C. Reporter's ed. 215-219.)

Error to circuit court of appeals — Federal question.

The judgment of a Federal circuit court of appeals in an action against a corporation created by an act of Congress may be brought up for review in the Federal Supreme Court by writ of error.

[For other cases, see Appeal and Error, III. d, 2, e, in Digest Sup. Ct. 1908.]

[No. 790.]

Submitted March 1, 1915. Decided April 12, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Texas in favor of plaintiff in a personal-injury action. Affirmed.

Mr. F. H. Prendergast submitted the cause for plaintiff in error:

The mere fact that the train started with a jerk when it backed out of a station would not be negligence unless the jerk was unusual.

Boston Elev. R. Co. v. Smith, 23 L.R.A. (N.S.) 890, 94 C. C. A. 84, 168 Fed. 629; Hogan v. Chicago, M. & St. P. R. Co. 59 Wis. 150, 17 N. W. 632; Texas & P. R. Co. v. Breadow, 90 Tex. 27, 36 S. W. 410; Texas & P. R. Co. v. Staggs, 90 Tex. 458, 39 S. W. 295, 1 Am. Neg. Rep. 693.

After a passenger train has remained at a station the usual length of time, the conductor does not have to examine to see if persons not passengers, and not intending to become such, are climbing on or off the train.

Bennett v. Louisville & N. R. Co. 102 U. S. 584, 26 L. ed. 237, 7 Am. Neg. Cas. 349; Griswold v. Chicago & N. W. R. Co. 64 Wis. 652, 26 N. W. 101, 7 Am. Neg. Cas. 230; Gardner v. New Haven & N. Co. 51 Conn. 143, 50 Am. Rep. 12; Gillis v Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317, 10 Am. Neg. Cas. 61; Keller v Sioux City & St. P. R. Co. 27 Minn 178, 6 N. W. 486, 4 Am. Neg. Cas. 214; Lucas v. New Bedford & T. R. Co. 6 Gray, 64, 66 Am. Dec. 406, 3 Am. Neg. Cas. 735; Little Rock & Ft. S. R. Co. v. Lawton, 55 Ark. 428, 15 L.R.A. 434, 29 Am. St. Rep. 48, 18 S. W. 543, 2 Am. Neg. Cas. 148; McKone v. Michigan C. R. Co. 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74; Mitchell v. Chicago & G. T. R. Co. 51 Mich. 238, 38 Am. Rep. 566, 16 N. W. 388, 4 Am. Neg. Cas. 37; Central R. & Bkg. Co. v. Letcher, 69 Ala. 106, 44 Am. Rep. 505, 2 Am. Neg. Cas. 5; Missouri, K. & T. R. Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905, 6 Am. Neg.

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Cas. 688; Shearm. & Redf. Neg. 36; Sutton v. New York C. & H. R. R. Co. 66 N. Y. 248; Texas & P. R. Co. v. McGilvary, — Tex. Civ. App. —, 29 S. W. 68.

Where a train headed east opened the vestibules on the north side to allow passengers to leave the car on that side and go to another train waiting on that side, then it was not negligence to allow the vestibules to remain open until the incoming train started to back out.

Davis v. Chicago & N. W. R. Co. 58 Wis. 657, 46 Am. Rep. 667, 17 N. W. 406; Davis v. Chicago & N. W. R. Co. 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406; Gardner v. New Haven & N. Co. 51 Conn. 143, 50 Am. Rep. 12; Mitchell v. Chicago & G. T. R. Co. 51 Mich. 238, 38 Am. Rep. 566, 16 N. W. 388, 4 Am. Neg. Cas. 37.

Mr S. P. Jones submitted the cause for defendant in error:

When a passenger train blocks a public way and the vestibule openings between the coaches have, for many years, been left open as a passageway for the public, starting the train without closing the doors thereof or giving a signal raises the issue of negligence.

Chesapeake & O. R. Co. v. Steele, 29 C. C. A. 81, 54 U. S. App. 550, 84 Fed. 93; 2 Thomp. Neg. §§ 1568, 1569, 1571, 1726.

Where the public has long used the openings between coaches as a pass way, the railway company, in starting the train, owes the same duty to give signals as it would before starting the train across a public way.

Adams v. Southern R. Co. 28 C. C. A. 495, 52 U. S. App. 433, 84 Fed. 596; Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380; Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Ellsworth v. Metheney, 51 L.R.A. 389, 44 C. C. A. 484, 104 Fed. 119; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132; 17 Sup. Ct. Rep. 703, 1 Am. Neg. Rep. 763; 2 Thomp. Neg. §§ 1568, 1571, 1726.

Where the openings between coaches have been used with the acquiescence of the railway company for a number of years as a pass way, starting the train with a jerk without giving signals raises the issue of negligence, though the engineer did not know that any person was passing through the opening, for he would be charged with notice of the probability of persons being in a position to be injured.

2 Thomp. Neg. §§ 1472–1569, 1571.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

The Texas & Pacific Railway Company, a corporation created by an act of Congress, prosecutes this writ of error to reverse a judgment of the court below, affirming one of the trial court, entered on the verdict of a jury in favor of the defendant in error, awarding damages alleged to have been by her suffered through the negligence of the railway company. We pass from the motion to [218] dismiss, as there is jurisdiction. Texas & P. R. Co. v. Hill, this day decided [237 U. S. 208, ante, 918, 35 Sup. Ct. Rep. 575.]

To understand the controversy a statement of the circumstances from which it arose is essential. Immediately north of the depot of the railway company at Marshall, Texas, two tracks run east and west. At the time here in question, on the track farthest from the depot, the more northern of the two, there stood a train scheduled shortly to depart east for Shreveport, Louisiana. A party, including the defendant in error, accompanying a friend, who was leaving on such train, came to the depot and crossed over to the waiting train. While they were there a train bound west for Texarkana, which was behind time, came in and was stopped on the track immediately north of the depot, and therefore stood between the track on which the Shreveport train was standing and the platform of the depot. When the party, after bidding goodby to their friend, started to return to the depot, they found the Texarkana train barring their passage. The vestibules, however, between some or all of the cars of this train, were open, and most of the party crossed through an open vestibule to the depot platform. When, however, the defendant in error was doing so, by a sudden jerking movement of the train, made without any notice or warning, as she alleged, she was thrown down and received the injury for which she sued. It is not traversed that usually persons wishing to go from the depot platform to a train standing on the northern track crossed the open vestibules on trains standing on the track nearest the depot. It was disputed, however, whether, on coming from a train standing on the farthest track, it was usual to cross an open vestibule of an intervening train for the purpose of reaching the depot. There was dispute as to whether notice was given of the movement of the Texarkana train.

The trial court gave to the jury full instructions concerning every aspect of the case, some of which were [219] objected to on the ground that the tendency of the proof was not such as to justify the instructions. The court also refused to give certain in-

structions asked by the railway company, which either depended upon assumptions as to the condition of the proof, or were equivalent only to an expression in different form of the contention concerning the tendency of the proof which formed the basis of the exception to the charges which were given.

Examining the whole record and considering all the propositions and arguments deemed as sustaining them, pressed at bar, we are of opinion that all the contentions urged to show that reversible error exists in ultimate analysis rest upon assertions as to the existence or nonexistence of tendencies of the proof; in other words, in substance but assert that there was nothing in the case to justify its going to the jury for decision. When the case is thus resolved, we are clearly of the opinion that the propositions relied upon are without merit, and therefore that no reversible error exists, and the judgment below should be affirmed. As the grounds upon which this conclusion rests involve only a consideration of the evidence and the tendencies of the proof resulting from it, matters of no doctrinal concern, we again say that we see no necessity of doing more than announce our conclusion. Seaboard Air Line R. Co. v. Padgett, decided March 22d, 1915 [236 U. S. 668, ante, 777, 35 Sup. Ct. Rep. 481]; Texas & P. R. Co. v. Hill, supra.

Affirmed.

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[220] CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Plff. in Err.,

v.

RAILROAD COMMISSION OF WISCONSIN.

(See S. C. Reporter's ed. 220–234.)

Commerce — requiring trains to stop at designated stations.

1. The requirement that every village having 200 or more inhabitants and a post-office, and being within ¼ of a mile of a railroad, must be given by such railroad the accommodation of at least two passenger trains each way each day, if four or more passenger trains are run each way daily, which is made by Wis. Stat. § 1801, as amended by Laws 1911, chap. 483, without regard to the adequacy or inadequacy of the existing passenger service afforded such stations, amounts to an unlawful burden upon interstate commerce as applied to a railway company running only interstate trains.

[For other cases, see Commerce, 321–325, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — Federal question not raised below.

2. A contention not urged upon the highest state court will not be considered in the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2164–2174, in Digest Sup. Ct. 1908.]

[No. 198.]

Argued March 12, 1915. Decided April 12, 1915.

IN ERROR to the Supreme Court of the State of Wisconsin to review a decree which affirmed a decree of the Circuit Court of Dane County, in that state, dismissing the petition of a railway company to set aside an order of the State Railroad Commission, requiring it to stop two passenger trains each way daily at a designated station. Reversed and remanded for further proceedings.

See same case below, 152 Wis. 654, 140 N. W. 296.

The facts are stated in the opinion.

Messrs. Robert Bruce Scott and Andrew Lees argued the cause, and, with Mr. Chester M. Dawes, filed a brief for plaintiff in error:

Chapter 483, Laws of Wisconsin of 1911 (§ 1801, Wisconsin Statutes), imposes an unnecessary and unlawful burden upon interstate commerce, and is therefore invalid.

NOTE.—State regulation of stops of interstate passenger and mail trains.

This question is discussed in a note to Herndon v. Chicago, R. I. & P. R. Co. 54 L. ed. U. S. 970, and only the cases decided since the publication of that note are here considered.

If adequate and reasonable local train service is otherwise afforded, such regulations are invalid. Hence, an act requiring all passenger trains to stop at any place where there is a state penitentiary was, in Illinois C. R. Co. v. Com. 154 Ky. 332, 157 S. W. 687, held invalid as an interference with interstate commerce, so far as it requires two fast interstate night trains to stop at a place having but 1,000 inhabitants, which was afforded ample facilities for the adequate accommodation of the traveling public by three passenger trains each way every day.

It was held in Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595, that a Federal court would entertain jurisdiction to enjoin putting into effect an order of the Public Service Commission of New York, requiring the stopping of two interstate passenger trains daily at a station where ten other trains also stop.

Two passenger trains each way, making regular stops at a town in Oklahoma, together with one passenger train each way, stopping there on flag, and one freight train each way that stops there and carries passengers to and from the county seat, some 7 miles distant, are enough to invalidate

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096.

The facilities for carrying passengers at Cochrane and other stations of about the same size are adequate to supply all the reasonable needs of the public.

Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

The statute, so far as it relates to adequacy of service, is purely arbitrary and unreasonable.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465.

Mr. Walter Drew argued the cause, and, with Mr. W. C. Owen, Attorney General of Wisconsin, and Mr. Byron H. Stebbins, filed a brief for defendant in error:

The term "adequate or reasonable facilities" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost.

Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 335, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121.

It cannot be said that the carriage of

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an order of the State Corporation Commission requiring the carrier to stop on flag at that point two fast limited interstate passenger trains. St. Louis & S. F. R. Co. v. Reynolds, 26 Okla. 804, 138 Am. St. Rep. 1003, 110 Pac. 668; St. Louis & S. F. R. Co. v. Pollard, 29 Okla. 330, 116 Pac. 784.

One passenger train a day each way and one local freight train carrying passengers each way daily except Sundays afford such facilities to a town having a shipping station, a cotton gin, two section houses, and a schoolhouse, but no stores or residences, as to invalidate an order of the State Corporation Commission requiring the carrier to stop its two fast through interstate trains at that point. Missouri, K. & T. R. Co. v. Norfolk (Missouri, K. & T. R. Co. v. State) 25 Okla. 325, 29 L.R.A.(N.S.) 159, 107 Pac. 172.

If the local service is inadequate, such regulations will be upheld. Thus, an order of the State Corporation Commission requiring the stoppage of one interstate train daily, each way, at a small station where the population is 300, will be sustained when but two other trains stop there, one early in the morning and another late at night. St. Louis & S. F. R. Co. v. Troy, 25 Okla. 749, 108 Pac. 753.

And the State Corporation Commission may require the stoppage, upon flag, at a small hamlet, of its two fast interstate trains daily, where but two other passenger trains and two freight trains carrying passengers stop daily, and the local trains are so run that it requires forty-eight hours to go to and return from the county seat, 11 miles distant. Missouri, K. & T. R. Co. v. Witcher, 25 Okla. 586, 106 Pac. 852.

A county seat having 1,500 inhabitants is not afforded such adequate facilities by three passenger trains stopping daily at that point each way as to invalidate, as a regulation of commerce, an order of the State Railroad Commission requiring a carrier to stop daily at that point its two through interstate passenger trains, the latter trains being the only ones furnishing sleeping car accommodations in and out of that place. Gulf, C. & S. F. R. Co. v. State, — Tex. Civ. App. —, 169 S. W. 385.

An order of a State Corporation Commission directing the stoppage of trains, on flag, at a town of about 30 inhabitants, which was otherwise served by two passenger trains daily, which met and passed at that point, was held not unreasonable in Atchison, T. & S. F. R. Co. v. State, 28 Okla. 476, 114 Pac. 721, although they were interstate trains and carried mail, there being no evidence that they were fast trains, or that the stopping of them at that station would interfere with their schedule or with their connection with other trains.

A finding of a State Corporation Commission that the trains stopped by a carrier at a certain station for the purpose of putting off and taking on passengers do not afford adequate facilities for such purpose is prima facie correct, and until the contrary affirmatively appears will sustain an order of the Commission requiring the carrier to stop on flag at that point two additional interstate passenger trains. St. Louis & S. F. R. Co. v. Langer, 29 Okla. 691, 44 L.R.A.(N.S.) 478, 119 Pac. 126.

Generally, on the power to compel stoppage of trains at stations—see notes to St. Louis & S. F. R. Co. v. Langer, 44 L.R.A. (N.S.) 478; Missouri, K. & T. R. Co. v. State, 29 L.R.A.(N.S.) 159; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 17 L.R.A.(N.S.) 821; and Peterson v. State, 14 L.R.A.(N.S.) 293.

And on state regulation, generally, of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107 and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

passengers in a car attached to a freight train is a suitable and proper operation of the railroad, so far as the carriage of passengers is concerned.

People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 631, 52 N. E. 292; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 273, 280, 54 L. ed. 472, 477, 480, 30 Sup. Ct. Rep. 330.

The question of the adequacy and reasonableness of a particular service is primarily one for the determination of the state legislature.

Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 287, 288, 58 L. ed. 1312, 1316, 1317, 34 Sup. Ct. Rep. 829; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 296, 297, 43 L. ed. 702, 706, 707, 19 Sup. Ct. Rep. 465.

The decision of the highest court of the state, affirming the legislative determination of the question of reasonableness and adequacy of the service required, is well-nigh conclusive here.

Welch v. Swasey, 214 U. S. 91, 105, 106, 53 L. ed. 923, 929, 930, 29 Sup. Ct. Rep. 567; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301.

The determination by the Wisconsin legislature and courts is clearly correct.

St. Louis Southwestern R. Co. v. State, 97 Ark. 473, 134 S. W. 970; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 278, 279, 54 L. ed. 472, 479, 480, 30 Sup. Ct. Rep. 330; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 631, 52 N. E. 292; Gulf, C. & S. F. R. Co. v. State, — Tex. Civ. App. —, 169 S. W. 385; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 302, 303, 43 L. ed. 702, 708, 709, 19 Sup. Ct. Rep. 465; Missouri, K. & T. R. Co. v. Witcher, 25 Okla. 586, 106 Pac. 852; St. Louis & S. F. R. Co. v. Troy, 25 Okla. 749, 108 Pac. 753; State ex rel. Great Northern R. Co. v. Railroad Commission, 60 Wash. 218, 110 Pac. 1075; Atchison, T. & S. F. R. Co. v. State, 28 Okla. 476, 114 Pac. 721; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 25, 51 L. ed. 933, 944, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; Borgnis v. Falk Co. 147 Wis. 356, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

The statute may be fully complied with by running intrastate trains.

Gladson v. Minnesota, 166 U. S. 427, 431, *41 L. ed. 1064,* 1066, 17 Sup. Ct. Rep. 627; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 51 L. ed. 933, 941, 27 Sup. Ct. Rep. 585.

Even if construed to require the stoppage of interstate trains, the statute is valid.

Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 521, 522, 44 L. ed. 868, 871, 872, 20 Sup. Ct. Rep. 722; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 63, 48 L. ed. 614, 618, 24 Sup. Ct. Rep. 396; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 344, 346, 347, 51 L. ed. 209, 214–216, 27 Sup. Ct. Rep. 90; Chicago, B. & Q. R. Co. v. Railroad Commission, 152 Wis. 654, 140 N. W. 296; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121; Herndon v. Chicago, R. I. & P. R. Co. 54 L. ed. 970, and note, 218 U. S. 135, 30 Sup. Ct. Rep. 633; State v. Chicago, M. & St. P. R. Co 136 Wis. 407, 19 L.R.A. (N.S.) 326, 117 N. W. 686.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment of the supreme court of Wisconsin sustaining an order of the Railroad Commission of that state requiring under a law of the state the railroad company to stop two of its passenger trains, each way daily, at the station of Cochrane.

The statute under which the order was made is as follows:

"Every corporation operating a railroad shall maintain a station at every village, whether incorporated or not, having a post-office and containing two hundred inhabitants or more, through or within one eighth of a mile of which its line or road runs, and shall provide the necessary arrangements, receive and discharge freight and passengers, and shall stop at least one passenger train each day each way at such station, if trains are run on such road to that extent; and, if four or more passenger trains are run each way daily, at least two passenger trains each day each way shall be stopped at each such station. Every such corporation neglecting or refusing fully to comply with this section, after demand therefor by any resident of such village, shall forfeit not [223] less than twenty-five nor more than fifty dollars for each and every day such neglect or refusal shall continue, one half to the use of the person prosecuting therefor." Wisconsin Session Laws 1911, amending § 1801.

The order was made in pursuance of a petition filed with the Commission by an

inhabitant of the town, alleging the inadequacy of the passenger service, and praying for relief under the statute. The facts presented to the Commission are, as stated by the supreme court, as follows:

"The passenger service at Cochrane was as follows: Northbound train No. 91, a freight, carrying passengers, daily, except Sunday, due at 10:17 A. M.; passenger train No. 53, northbound, daily, due at 10:58 A. M.; southbound passenger train No. 54, daily, due at 0:09 A. M.; and freight train No. 92, southbound, carrying passengers, daily except Sunday, due at 1:10 A. M. It is admitted that Cochrane has a postoffice. Further facts shown by the hearing are thus stated in the decision of the Railroad Commission: 'Cochrane is an incorporated village of about 260 inhabitants. It has four general stores, two saloons, two lumber yards and planing mills. The village of Buffalo, having a population of about 250, lies a short distance west of Cochrane. Alma, the county seat of Buffalo county, having a population of 1,000, is situated 8.3 miles north of Cochrane. Fountain City, having a population of approximately 1,000, lies about 8 miles south of Buffalo. All of the limited trains on respondent's line stop at Alma. Two passenger trains each way daily stop at Fountain City. . . . The respondent's road is located on the east bank of the Mississippi river, and runs through a territory that is sparsely settled. About 90 per cent of all the passenger traffic over this line consists of people going from Chicago to St. Paul and points in Minnesota, the Dakotas, and the entire Northwest and Canada. Two trains are run each way daily between Chicago and [224] Portland and Seattle. One train leaves Chicago in the morning, and from St. Paul runs over the Northern Pacific line to the Northwest. Another train leaves Chicago in the evening, and from St. Paul goes over the Great Northern line to the Northwest. There are two corresponding trains eastbound. There is also a train each way daily between Chicago and Minneapolis, known as the Minnesota Limited, which serves the traffic to Minneapolis and St. Paul, on the one hand, and to Chicago and St. Louis, on the other. In addition to these interstate trains, there is a local train each way, running between Savanna and Minneapolis, which takes care of the traffic in the state of Wisconsin. The westbound train from Chicago to the Northwest by way of the Northern Pacific line from St. Paul is known as train No. 51, and is composed of standard Pullman and tourist cars. The number of cars in the train is 12. The corresponding eastbound train is known as No. 53, and contains the same number of cars. Similar trains routed over the Great Northern line from St Paul to and from the Northwest are known as trains 49 and 52, respectively. Trains 47 and 48 are each known as the Minnesota Limited, and each is composed of one observation car, three standard sleeping cars, one St. Louis standard sleeping car, two Chicago coaches, one combined mail and baggage car, and two baggage cars. Train No. 58 consists of two sleeping cars, and from five to eight baggage and express cars. All of these interstate trains are heavy, and run at a maximum speed of 50 miles per hour in order to make connection with trains for the East at Chicago and with trains for the West at St. Paul. As the distance between Chicago and St. Paul over respondent's line is 33 miles greater than that over the line of the Chicago & Northwestern Railway Company, and 27 miles greater than that over the line of the Chicago, Milwaukee, & St. Paul Railway Company, it becomes necessary for the respondent to [225] operate its trains at a high rate of speed in order to meet the schedule of time of its competitors' trains between such points, as well as to make the connections mentioned.'"

The Commission, expressing its view of the case presented, said: "Independent of any statutory provision on the subject, we should feel constrained to hold that the existing passenger service afforded the village of Cochrane was adequate under the circumstances, and that, therefore, interstate trains could not be required to stop at that station." And further: "This statute deprives the Commission of any discretion in the matter. It fixes the quantum of passenger service for every station coming within the classification made."

The railroad company thereupon filed a petition in the circuit court of Dane county to set aside the order of the Commission. The petition set forth the interstate character of its road, attacked the validity of the law and the order of the Commission, and represented their effect to be, if carried out, to stop two of its limited trains at thirteen additional stations in the state, and that such requirement would be an unwarrantable interference with interstate commerce.

The circuit court found that the passenger service at Cochrane was not adequate or reasonable, and that the order of the Commission was a reasonable exercise of the power vested in the Commission, and entered a judgment dismissing the petition of the railroad company.

The supreme court of the state affirmed the judgment. 152 Wis. 654, 140 N. W. 296. The court, however, disagreed with the cir-

cuit court in the view that the Commission had exercised its discretion. The supreme court decided that such power was not vested in the Commission nor exercised by it, and further decided that the trial court could not make an "order based upon the original exercise of its own discretion," and that the only jurisdiction conferred [226] upon it was "to pass upon the lawfulness or reasonableness of the Railroad Commission's order." And it was said: "In the instant case, therefore, since the Railroad Commission did not make an order based upon its discretion, but one based upon the statute, the only question presented by the action was the lawfulness of the order, which, of course, raised the question of the constitutionality of § 1801 [Stat. 1911]. And that question is the only one the appeal presents upon the merits." In other words, as we understand it, the statute expressed the legislative judgment of what facilities were necessary under the conditions described by the statute, and left no discretion to the Commission or the courts, but "deemed it best," to quote the court, "to exercise its own judgment as to what should be considered reasonably adequate passenger service for stations containing a population of 200 or more." We are brought, therefore, to a consideration of the statute and its measure.

The statute includes, necessarily, the supreme court held, interstate passenger trains, and clearly excludes accommodation freight trains; and, so viewing it, the supreme court pronounced it a proper exercise of the power of the state.

In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal [227] question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement. Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

Bearing these propositions in mind, let us consider the test of the statute. The statute expresses, it is said, the legislative judgment of the conditions of its application, and would seem to preclude a consideration of anything else. In other words, the test of the adequacy or inadequacy of the local facilities is determined by the statute, and their sufficiency as so determined becomes the question in the case. What, then, is the test? Every village having 200 inhabitants or more and a postoffice, and within one eighth of a mile of a railroad, must be given by such railroad the accommodation of one passenger train each way, each day, if trains be run to that extent, and at least two trains if four or more passenger trains be run.

The test, on first impression, is certainly quite artificial. The effect of it is that the number of trains is not necessarily determined by the local needs of a village, but, it may be, by the needs of other places; not by the demands of local travel, but, it may be, by the demands of interstate travel, and automatically to be increased as interstate travel increases. This is pointedly so in the case at bar for the railroad runs only interstate trains. It, however, is said that the population of a village is not only a fair index of its business, but also of its tributary population, and that the number of passenger trains run daily measures the amount of passenger business done, and, in a degree, the ability of the railroad to furnish additional facilities [228] to the station without financial loss or without undue interference with through traffic.

And it is urged that the statute contemplates an increase of facilities to the interstate business of the villages as well as to their local business, and a comparison of receipts from the respective businesses at Cochrane and other villages shows, it is said, that the railroad receipts from interstate passenger business is over one third that of its total passenger receipts, and therefore it is not accurate to say that the additional service required is at the expense of interstate traffic.

The record, however, contains no complaint of insufficient interstate facilities. The complaint which induced the proceeding

before the Railroad Commission was of the deficiency of local facilities. Residents of Cochrane and its vicinity, it was charged, were unable to go north or south from that village by rail and return the same day, and to display the extent of the asserted inconvenience the population tributary to Cochrane was represented to be 3,000. And this was adverted to by the supreme court as typical of the condition at other villages, though the court recognized that "the statute must stand or fall upon its main scope and upon its general application to villages throughout the state, and not upon its particular application to Cochrane."

We have seen what the "main scope" of the statute is, but to the actual population of every village must be added, it is said, a tributary population as the cause and justification of the statute. We may assume such outlying population, but we cannot assume definite transportation needs and a certain and invariable measure of accommodation for them. This must be established in each instance. In the present case it appears that the railroad runs through a sparsely settled country, that 90 per cent of its business is interstate, and that the trains assigned to intrastate business are not self-sustaining. The revenue [229] at Cochrane from the passenger traffic for the year ending July, 1911, was only $1,751.63, of which $985.87 was from intrastate and $765.76 from interstate business. And yet for the local traffic, already insufficient to defray the expense of its service, there are required under the fixed and resistless test of the statute two additional trains, the expense of which will be $84,000 a year. And in mentioning the expense we do not wish to intimate that expense is determining, but only to be considered. A railroad cannot escape a duty by pleading the expense of its performance.

But it is said that increased accommodation may bring an increase of revenue. If we may so suppose, may we further suppose that the increased receipts will defray the increased expense? It is by such generalities and inferences that the statute is attempted to be supported, and we are asked to accept their vagueness as against the actual situation. The complaint is, as we have seen, that persons residing at Cochrane cannot go north or south by rail and return the same day. Such condition might be corrected by an alteration of schedules, or, if that present difficulties on account of the length of the road or the necessities of the traffic, by the stopping of one train either on signal or regularly; and such accommodation has been ordered and held sufficient in cases cited by the Commission, as we shall presently see. But the imperative requirement of the Wisconsin statute precludes such accommodation or any accommodation short of its own measure of two additional trains a day each way, though the local needs may be satisfied with less.

Of course, there would be some convenience at times in two extra trains,—indeed, in more than two,—and they may be desired; but desire is not a test of requirement, nor is convenience, absolutely considered. There is a traffic to be considered which does not originate at Cochrane, and its convenience cannot be put out of view. Besides, as [230] said by Timlin, J., in his dissenting opinion, "'Convenience' is an elastic term, and no doubt it would be more convenient to have a train stop every hour at this village, and it would be confessedly inconvenient if no trains at all stopped there. Between these extremes there is, no doubt, a broad field of legislative discretion." This court has also felt and expressed the difficulty of giving an exact definition to "adequate and reasonable facilities." "It is a relative expression," it was said, "and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost." Atlantic Coast Line R. Co. v. Wharton, 207 U. S. p. 335, 52 L. ed. 234, 28 Sup. Ct. Rep. 121.

These, then, are the factors, and we do not put out of view the difficulties which infest the case, but, considering them all and the deference due to state legislation, we are constrained to hold the Wisconsin statute invalid. It does not determine service by the volume of the business of the villages of the state, but by the requirements of business elsewhere, and limits such requirements and, it may be, prevents them, by the imposition of conditions which preclude their fulfilment. This is illustrated by the facts of the pending case. The interstate trains of the railroad are required by the necessities of its interstate business. It is in competition with shorter roads, and the speed of its trains, which cannot be safely increased, and their schedule time, are a necessity in this competition. This conformity to conditions must be strained or embarrassed, and, it may be, prevented, in order to give greater facilities than one train a day each way to villages having a postoffice and 200 inhabitants, not necessarily because they are not properly served, but seemingly to give them a larger division of service.

[231] The supreme court conceded that it was "no doubt true" that to require the railroad to stop one of its limited interstate trains would seriously interfere with its through traffic, as competition "was keen and time was of the essence of such traffic." The court, however, said that neither the statute nor the order of the Railroad Commission requires the railroad to stop one of its limited trains, but it has the option of doing that or of putting on an extra train; and Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465, is cited to sustain the alternative. Undoubtedly the alternative can be required, but only if the local facilities be inadequate. In other words, to justify the requirement the local conditions must justify the extra facility. Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535. The alternative imposed as a condition of retaining interstate trains simply because of their number would be a burden upon interstate commerce, as we have already pointed out. And this is recognized by the cases cited by defendant in error.

In State ex rel. Great Northern R. Co. v. Railroad Commission, 60 Wash. 218, 110 Pac. 1075, an order required an additional passenger train from a town of 5,000 or 6,000 people, and having a business by the railroad, of $20,000 per month for freight and about $800 for passengers, to connect at another place. The railroad attempted to remove the complaint of want of adequate facilities by an additional service between the places, but not that required by the order. It was decided that the additional facility was not sufficient and that the order was reasonable, the railroad not showing that the service "ordered by the Commission would be unreasonably burdensome upon the railway company by being operated at a loss." There was no question of interference with interstate commerce.

Another order of the Commission in the same case was reviewed. It required a passenger train to stop on flag at a certain spur, the railway company to elect which of its trains it would stop. The court said that in view [232] of the population centered there and the very slight service required of the railway company, the order could not be pronounced by the courts to be unreasonable. And the same judgment was declared of other orders requiring a northbound train at one place and a southbound train at another to stop on flag. Against these last orders there was a charge that they would tend to lengthen the running time of the trains, which were through trains (it did not appear that they were interstate), and that other towns would demand similar service, and thus result in preventing the making of connections, and thereby inconvenience the public. To which it was replied that the evidence did not show that the stopping would result in breaking the then connections, and that it would be time enough to consider the effect of other stops when they should be ordered.

In Atchison, T. & S. F. R. Co. v. State, 28 Okla. 476, 114 Pac. 721, an order of the Railroad Commission of the state required a passenger train to stop on flag at a station called Belva. That village had a population of 30, but the country around it was thickly settled and persons could reach the county seat only by means of the railroad. The conditions were in some respects like those in the case at bar. The court said that the evidence in support of and against the order consisted of generalities and conclusions rather than of facts necessary to enable the court to determine the reasonableness and justness of the order, but the court, yielding to the presumption due to the action of the Commission, and there being no evidence that the trains were fast ones, or that the stopping of them would interfere with their schedule or connections with other trains, sustained the order. And the court gave consideration to the fact that the trains were required to stop only when there were passengers desirous of entering or leaving them, and that no pecuniary loss would be entailed on the railway, or its interstate connections hampered.

[233] In Missouri, K. & T. R. Co. v. Witcher, 25 Okla. 586, 106 Pac. 852, trains were required to stop on flag. The order was sustained, it not appearing that there would be any pecuniary loss to the railway, or that the order would "unreasonably prevent or hamper the interstate connections contemplated."

Gulf, C. & S. F. R. Co. v. State, — Tex. Civ. App. —, 169 S. W. 385, was an action for penalties imposed by a statute of the state upon any railroad failing to obey an order of the Commission of the state. The order required the railway company to stop two numbered trains at the town of Meridian, a county seat. It had a population of 1,500. The defense of the company was an attack on the order as an unlawful and direct interference with interstate commerce, the trains being interstate trains, and the local facilities, it was asserted, being adequate. The case was considered in view of the established principles which we have stated and the order was sustained, the court deciding that the local facilities were inadequate, and the order not a direct interference with interstate commerce.

Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627, sustained

a statute which required every railroad corporation to stop all regular passenger trains running wholly within the state at all county seats long enough to take on and discharge passengers. The applicable principles were discussed and it was said that an order which entailed but a trifling expense and a few minutes of time was a reasonable exercise of the police power, and could not be considered as a taking of property without due process of law, or an unconstitutional interference with interstate commerce.

The other cases cited, not being closely applicable, need no comment. In those we have reviewed, it will be observed, the orders were made after investigation by administrative officers, and the facilities required were adjusted to the local needs, not by an arbitrary formula prescribed in excess of such needs.

[234] It is contended by defendant in error that the statute is valid as an amendment to the charter of the Chicago, Burlington & Northern Railway Company, a Wisconsin corporation, and plaintiff in error's predecessor. This contention seems not to have been urged on the supreme court, and we may therefore decline to consider it; and, besides, we would be very averse to deciding that, without explicit declaration, every general law of the state applicable to corporations is enacted as an amendment to their charters. If the supreme court of the state had so thought, it would have accepted that short way to the decision of the case, and not have occupied itself with other and more complex questions. It is one thing to decide that corporations are subject to the police power of the state, and quite another to hold that every general law is an amendment to their charters. See Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

GEORGE B. CHRISTIE, Jesse Lowe, and James O. Heyworth, Surviving Partners of the Firm of Christie, Lowe, & Heyworth, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 234–250.)

United States — contracts — extra expense — misrepresentation of conditions.

1. The extra expense over what would have been necessary had the character of the materials to be penetrated and excavated been such as was represented by the government boring sheets should be allowed to the contractors for the construction of locks and dams for the United States in an alluvial stream where, the time not being sufficient for the contractors to make their own borings, they relied upon the government borings, which the specifications falsely stated represented "as far as known" the material to be excavated, although such specifications further provided that bidders must inform and satisfy themselves as to the nature of the material.

[For other cases, see United States, 319, 339–357, in Digest Sup. Ct. 1908.]

United States — contracts — extra expense — defective angle of repose.

2. The cost of the increased excavation due to the angle of repose fixed by the government engineer in charge cannot be allowed to the contractors for the construction of locks and dams for the United States, where such angle was selected from experience in other work of like kind, and would have been adequate but for the extraordinary flood conditions which developed, and which would have made any angle insufficient, and where the specifications, though requiring the excavations to conform to the lines, slopes, and grades, and making their limits and quantities to depend upon the ascertained angles of repose, admonished bidders that the judgment of the government officers would necessarily be exercised throughout the work, and they were specially informed as to what angle of repose would be selected.

[For other cases, see United States, 339–357, in Digest Sup. Ct. 1908.]

United States — contracts — liability for engineer's mistake.

3. The United States is not liable to the contractors for a public work for every mistaken exercise of judgment by its officer to whom is given direction of the work, and whose decision, honestly exercised, the contract makes final.

[For other cases, see United States, VI. d, in Digest Sup. Ct. 1908.]

United States — contracts — extra work — recovering buried concrete forms.

4. Contractors for building certain dams and locks for the United States cannot be allowed the cost of the excavation of buried concrete forms, voluntarily made by the contractors for the purpose of recovering the forms for re-use.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

United States — contracts — extra work — cofferdams.

5. The cost of constructing cofferdams made necessary by flood conditions cannot be allowed to the contractors for the construction of dams and locks for the United States under the "extra work" paragraph of the specifications, where, by other paragraphs of the specifications, all cofferdams necessary for the protection of permanent work were to be built by the contractors at their own expense.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

[No. 204.]

Argued March 16 and 17, 1915. Decided April 12, 1915.

APPEAL from the Court of Claims to review a judgment allowing a portion of the claims against the United States growing out of a contract for the construction of a public work. Reversed and remanded for further proceedings.

See same case below, 48 Ct. Cl. 293.

The facts are stated in the opinion.

Messrs. George A. King and Frank Boughton Fox argued the cause, and, with Mr. Duane E. Fox, filed a brief for appellants:

The claimants are entitled to recover damages suffered on account of the misrepresentations made in the boring sheets.

Hollerbach v. United States, 233 U. S. 165, 58 L. ed. 899, 34 Sup. Ct. Rep. 553; Pearson v. Dublin Corp. [1907] A. C. 351, [1907] 2 I. R. 537; Boyd v. Glasgow & S. W. R. Co. (1914] 1 Scot. L. T. 176, 177; Langley v. Rouss, 185 N. Y. 209, 77 N. E. 1168, 7 Ann. Cas. 210; Water Comrs. v. Robbins, 82 Conn. 623, 74 Atl. 938; Delafield v. Westfield, 77 Hun, 124, 28 N. Y. Supp. 440, affirmed in 169 N. Y. 582, 62 N. E. 1095; Sharp v. New York, 40 Barb. 256; Hingston v. L. P. & J. A. Smith Co. 52 C. C. A. 206, 114 Fed. 294; Chatham Furnace Co. v. Moffatt, 147 Mass. 404, 9 Am. St. Rep. 727, 18 N. E. 168, 16 Mor. Min. Rep. 103; Smith v. Richards, 13 Pet. 26, 36, 37, 10 L. ed. 42, 47, 48; Cooper v. Schlesinger, 111 U. S. 148, 155, 28 L. ed. 382, 384, 4 Sup. Ct. Rep. 360; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Reynell v. Sprye, 1 DeG. M. & G. 660, 21 L. J. Ch. N. S. 664; Louisville, E. & St. L. R. Co. v. Donnegan, 111 Ind. 190, 12 N. E. 153; Bayne v. United States, 115 C. C. A. 188, 195 Fed. 236.

Powers conferred by contract upon an engineer are strictly construed, and nothing is added by intendment.

Fontano v. Robbins, 22 App. D. C. 265; Central Trust Co. v. Louisville, St. L. & T. R. Co. 70 Fed. 282; Mercantile Trust Co. v. Hensey, 205 U. S. 298, 308, 309, 51 L. ed. 811, 815, 816, 27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572.

This case is one in which the engineer's action was not a construction of doubtful language of specifications, but a departure from their plain meaning. It can only be sustained by holding that the engineer can, under the guise of construction, alter materially the clearly defined obligation of the contractor, to the contractor's detriment.

Utah, N. & C. Stage Co. v. United States, 39 Ct. Cl. 439.

High water is not abnormal.

Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; Pickley v. United States, 46 Ct. Cl. 89; United States v. Garbish, 222 U. S. 257, 56 L. ed. 190, 32 Sup. Ct. Rep. 77.

The fact that a paper is on file in a particular office does not constitute notice to the public, in the absence of some recording statute providing that it shall operate as such, or in the absence of actual knowledge of the parties whose rights are claimed to be affected by the notice.

Beckwith v. New York, 148 App. Div. 658, 133 N. Y. Supp. 202; Callahan Constr. Co. v. United States, 47 Ct. Cl. 177.

It should require strong argument to show that work which was contemporaneously recognized by the engineer officer of the government to be extra and outside of the contract, and was formally ordered by him, and performed by the contractor as such, was not in fact extra work.

Richards v. May, L. R. 10 Q. B. Div. 400, 52 L. J. Q. B. N. S. 272, 31 Week. Rep. 708; Peterson v. New York, 205 N. Y. 329, 98 N. E. 501; Johnson v. Albany, 86 App. Div. 573, 83 N. Y. Supp. 1002.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

Appellants had actual and presumptive knowledge of the conditions, which was sufficient notice without indicating anything further on the drawings, and excluded charges of erroneous and deceptive representations of borings.

Slaughter v. Gerson, 13 Wall. 379, 383, 20 L. ed. 627, 628; Farnsworth v. Duffner, 142 U. S. 47, 35 L. ed. 933, 12 Sup. Ct. Rep. 164; Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259; Clapham v. Shillito, 7 Beav. 149, 6 Mor. Min. Rep. 431; Farrar v. Churchill, 135 U. S. 615, 34 L. ed. 249, 10 Sup. Ct. Rep. 771; Nesbitt v. Louisville, C. & C. R. Co. 2 Speers, L. 697.

The terms of the contract and the findings exclude the idea of a warranty.

Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212; Chicago Sanitary Dist. v. Ricker, 34 C. C. A. 91, 91 Fed. 833.

The engineer officer, being authorized to select the angle of repose, in the absence of a finding charging bad faith his selection cannot be disputed.

United States v. Gleason, 175 U. S. 602, 44 L. ed. 289, 20 Sup. Ct. Rep. 228; Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; Kihlberg v. United States, 97 U. S. 398, 24 L.

ed. 1106; United States v. Barlow, 184 U. S. 123, 46 L. ed. 463, 22 Sup. Ct. Rep. 468.

The angle of repose selected being the customary one under ordinary conditions, and not having been objected to, appellants are foreclosed from asking damages.

Bowe v. United States, 42 Fed. 778; Ripley v. United States, 223 U. S. 695, 56 L. ed. 614, 32 Sup. Ct. Rep. 352; Plumley v. United States, 226 U. S. 545, 57 L. ed. 342, 33 Sup. Ct. Rep. 139.

Appellants were only to be paid for the material within lines designated by the engineer.

Bowers Hydraulic Dredging Co. v. United States, 211 U. S. 176, 53 L. ed. 136, 29 Sup. Ct. Rep. 77.

The contractor could not recover for costs of work which, being extras, had not been ordered by the engineer officer in the manner required by the contract.

Plumley v. United States, 226 U. S. 545, 57 L. ed. 342, 33 Sup. Ct. Rep. 139.

Mr. Justice McKenna delivered the opinion of the court:

Action for damages in the sum of $207,304.50 brought by appellants against the United States, growing out of a contract with the United States on the 19th of February, 1900, for the construction of three locks and dams on the Warrior river in Alabama.

The work was completed and accepted in November, 1903.

The items of damage were: delay in permitting commencement of the work; for construction of wagon roads; greater expense of excavation and pile driving, due to misrepresentation of the materials in the specifications and drawings; increase in excavation, due to the "angle of repose" fixed by the officer in charge; extra work in the construction of additional cofferdams, and other items.

The court rendered judgment for claimants upon two items, based on findings 2 and 3, to wit, $9,391.57 for "delays in permitting the commencement of work" and $100 for "construction of wagon roads," making a total of $9,491.57.

[239] This appeal was then prosecuted, and three errors are assigned— (1) in refusing to allow for the extra expense due to the increased difficulty in pile driving and excavation on account of misrepresentation of the materials to be penetrated and excavated; (2) in refusing to allow $45,000 for excavation of material caused by defect in the "angle of repose," and in refusing to allow the further sum of $1,183 for excavation of material under which certain concrete forms were buried; and (3) in refusing to allow the cost of cofferdams built on the order of the officer in charge.

We shall take these items up in their order.

(1) This item is based on a charge of erroneous and deceptive borings and misrepresentations in the specifications and drawings.

By paragraph 48 of the specifications it is, among other things, provided: "The material to be excavated, *as far as known* [italics ours] is showing by borings, drawings of which may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material."

It is upon this paragraph the contention turns.

The allegations of the petition of claimants are to the effect that, invited by the above provision, claimants examined the drawings and they "showed gravel, sand, and clay of various descriptions, and showed no other materials."

That the material actually to be excavated "consisted largely of stumps below the surface of the earth, buried logs, of cemented sand and gravel (none of the sand or gravel being described in the said drawings as cemented), and of sandstone conglomerate," and that such materials were far more difficult and expensive to penetrate and excavate than ordinary sand and gravel such as was described in the drawings.

That the existence of the more difficult and expensive [240] material was known to the persons who made the borings and to the resident engineer of the United States under whose supervision they were made; and that the statement in the specifications was untrue in fact and misleading, causing the claimants to propose to do the work upon the basis shown by the drawings, and not upon the basis of the more difficult and expensive work, which, in point of fact, existed and was known to the officers of the United States. That claimants were forced to rely wholly upon the information furnished them, the time not being sufficient to permit them to make their own borings, and they believed the information furnished them to be accurate and reliable. That the erroneous and deceptive drawings misled claimants, and they were compelled to spend $10,510.30 over and above the rates named in their proposal and contract, which rates were based upon the materials shown by such drawings.

We think the findings substantially sustain the allegations. They establish that borings were made and that the drill met "obstructions which from the particles broken off and floating to the surface would indicate they might be logs." These obstructions, though in some instances noted

because of the formation, were not indicated on the drawings.

And this was found: "When such obstructions were met, the apparatus was moved elsewhere until a place was found where the drill would penetrate, and the result was recorded as if taken at the place staked out." And further: "The boring sheets referred to in paragraph 48 of the specifications contained only the record of completed borings and do not show any record of sunken logs, or of cemented sand and gravel, or conglomerate impenetrable by the drill."

The indications of buried logs were called to the attention of the resident engineer, and he was asked if they should be noted in the record of borings, to which he replied [241] that he did not consider them of enough importance to be noted. It was, however, found that the evidence did not establish to the satisfaction of the court that the statement of the engineer was other than an honest expression of his opinion, nor was it made to induce the omission from the records of the borings of any logs actually encountered, or for the purpose of concealing the same from or misleading subsequent bidders.

It would seem as if there could be only one conclusion from these findings. There was a deceptive representation of the material, and it misled. In opposition to the seemingly irresistible conclusion that claimants were justified in their reliance upon the drawings, it is contended that the river was alluvial and its character warned claimants of the possible conditions which existed, and that, besides, the court found "they admitted they had reason to, and did expect to, encounter some logs."

The contentions are attempted to be supported by the alluvial character of the river, as we have said, its tortuosity, its fluctuations between high and low water in winter and summer, and that for twenty years the United States had operated snag boats for the removal of stumps and sunken logs from the channel of the river. But inferences from such facts could only be general and indefinite, and were not considered by the government as superseding the necessity of special investigations and special report. It assumed both were necessary for its own purpose and subsequently would be to those whom it invited to deal with it. Knowledge of the result of such investigations would protect the government, it might be, against an extravagant price based on conjecture of conditions, and enable contractors confidently to bid upon ascertained and assured data. And how important it was to know the conditions is established by the finding that claimants were put to an expense of $6,150 over what would have been necessary "if the borings sheets [242] had represented the character of the ground with respect to logs."

It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive. Hollerbach v. United States, 233 U. S. 155, 58 L. ed. 898, 34 Sup. Ct. Rep. 553. Besides, it was admitted at the argument that time did not permit borings to be made by claimants. We think it was error, therefore, to have disallowed the damage resulting therefrom.

(2) The "angle of repose" is dealt with in the specifications as follows: "The limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose. The limits shown on the drawings and the amounts herein given are approximate, and may be greater or less as the local conditions may demand or justify."

The finding as to the "angles of repose" is that at the outset of the work, under direction of the engineer officer, "the slopes of all temporary excavation at the lock sites were staked out on an angle of 1 on 1, or 45° from horizontal." This angle, it was further found, was adopted by the engineer officer from his experience in similar work on the Mississippi river, and was "an angle at which the banks would stand for the time necessary to complete the work when not submerged from rises in the river or when in a dry condition. There was no angle or slope which could have been adopted by which the banks would remain stable when subjected to such rises of the river as were liable to happen in times of flood." And, further, that the conditions actually encountered during the work were abnormal; floods, freshets, and unlooked-for rises of the river were more numerous and of greater height and longer duration than theretofore disclosed by the official records of the engineer's office relating to the river.

[243] Other findings are as follows:

"To have sloped the banks to a flatter angle would have reduced the sloughing, but the evidence does not show to what extent. When the river rose the material in the banks became saturated and heavy with water, and as the river receded, such material, being deprived of the support afforded by the water while up, sloughed or caved off into the lock pits below, where it had to be and was removed by claimants in a wet and slimy condition at a higher cost than if excavated from its natural position in the bank. The slopes of the excavation were not

flattened by the engineer officers because, in their opinion, there was no practical angle at which the banks could have been sloped which would have caused them to remain stable under the abnormal conditions to which they were subjected, or have prevented the banks from sloughing and caving as the floods and rises in the river receded."

Claimants present a definition of an "angle of repose" from lexicons of authority as follows: "The maximum angle with the horizontal at which a mass of material, as in a cut or embankment, will lie without sliding." In addition to the definition reports of work on the Panama canal are quoted from to show the efficacy of the proper angle and the necessity of varying it to meet conditions. This and the correctness of the definition may be conceded, but the question is, What were the demands of claimants' contract in the situation described by the findings? Or, to make it more special: Was the act of the engineering officer in prescribing the slope of the work as 1 on 1 or 45° from horizontal a violation of the contract?

As we have seen, the findings show that such angle had been selected from experience in other work of like kind, that it would have been adequate but for the extraordinary conditions which developed, and no angle under such conditions would have been sufficient, and, therefore, "the [244] slopes of the excavation were not flattened by the engineer officers because, in their opinion, there was no practical angle at which the banks could have been sloped which would have caused them to remain stable under the abnormal conditions to which they were subjected, or have prevented the banks from sloughing and caving as the floods and rises in the river receded." And this judgment was honestly exercised.

We are brought, therefore, to the question whether such judgment was precluded by the contract, or did the contract impose an absolute duty on the government to anticipate and provide for all conditions to which the banks of the excavation might be subjected?

Claimants insist upon an affirmative answer and rely upon paragraph 48 of the specifications, which provides that "all dredged or excavated materials, of whatever nature, will be classified as 'excavation.' All excavations shall conform to such lines, slopes, and grades as may be given by the engineer officer, and anything taken out beyond such given limits will not be paid for by the United States. The price for excavation shall include the removal of the material to its place of deposit. . . . The limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose." There is nothing in this of definite obligation, or which prevented an exercise of judgment. The excavations, it is true, were required to conform to the lines, slopes, and grades, and their limits and quantities made to depend upon the ascertained angles of repose; but how the angles of repose were to be ascertained was not expressed. According to the findings they would depend upon the conditions, and of this a judgment had to be exercised, and the specifications pointed out by whom. "These specifications," it is provided in paragraph 89, "are intended to be full, clear, and complete. Any doubt as to their meaning, or any obscurity in the wording of them, will be explained by the [245] engineer officer, who shall also have the right to correct any errors or omissions in them whenever such errors or omissions become apparent." Paragraph 78 declares: "In all cases of dispute, the decision of the United States engineer officer in charge will be accepted as final and without appeal."

Claimants were therefore admonished that the judgment of the officers would necessarily be exercised throughout the work and they were specially informed as to what angle of repose would be selected. Mr. Justice Howry, speaking for the court of claims, said: "The letting plans did not show the slopes of the excavation. But the original cross-section sheets, from which the estimated quantities of excavation in the specifications had been calculated, show in pencil the different angles of all slopes at 1 on 1 behind structures for temporary work, and a flatter slope of 1 on 1½ to 1 on 2 during the period of the contract for all permanent work. Both angles of repose were constructed accordingly. These cross-section sheets, although not made part of the letting plans, were on file in the office of the resident engineer and were open to examination by bidders prior to submitting proposals, and were, in fact, examined by at least one of the prospective bidders. There was no concealment and plaintiffs do not say there was." [48 Ct. Cl. 338.]

We do not think, therefore, that there is anything in the contract which cast upon the government a prophecy and anticipation of abnormal conditions, or which relieved claimants from the risks of their occurrence or of whatever they might encounter in the work. It is to be supposed that contemplation and judgment were exercised not only of certainties but of contingencies, and allowance made for both at the time of bidding, with provision in the bid. Subsequent conditions could not lessen the obligation then incurred, but, we may say, in order that all of the facts bear-

ing on the claimants' contention may appear, [246] that the findings show that claimants, in July, 1900, prior to the time when any sloughing had occurred, in a letter to the resident engineer, suggested the use of sheathing to protect the slopes, and in 1902 complained that the government had not complied with the suggestion as provided for in paragraph 51 of the specifications. But it is further found that the suggestion was not yielded to because, in the opinion of the engineer officer, paragraph 51 was not intended to provide for protecting the slopes.

The paragraph reads as follows:

"51. Sheathing.—Curbing of rough planks and scantlings or poles shall be used to reduce excavation as directed by the engineer officer, and shall be paid for as 'sheathing,' poles being estimated by standard log measure. It shall be left in the excavation or taken out at the option of the engineer officer, and when used again shall be paid for at half price."

It is further found that claimants made verbal protests and complained to the resident engineer in regard to the adoption of flatter slopes, but no written protest or objection was made during the progress of the work, and no appeal from the decision of the engineer concerning the same. Such an appeal seems to be provided for. It is to be observed that the protest was made to the resident engineer, but he was subordinate to the engineer officer in charge, and it is provided in paragraph 78 that "in cases of dispute the decision" of that officer "will be accepted as final without appeal."

These findings, therefore, but exhibit the variant judgments of the resident engineer and the claimants of what action should be adopted in view of the conditions, and, we repeat, we see nothing to cast inevitable obligation upon the government for every exercise of judgment by its officer to whom was given the direction of its works and whose decision, honestly exercised, its contracts made final.

[247] It is true, it is said that the "angle of repose" was arbitrarily selected and arbitrarily adhered to, but the findings, as we have seen, do not support the charge.

It follows that the court committed no error in rejecting the item. Nor, for the same reason, in refusing to allow the sum of $1,183.41, the cost of recovering certain buried concrete forms. It is found that this "was done voluntarily by claimants for the purpose of recovering the forms to be re-used by them."

(3) The amount claimed for additional cofferdams is $8,520.24.

It is said by the court in its opinion that claimants did not claim that this part of their demands was within the contract, but that they were "entitled to recover therefor on *quantum meruit*." The item was disallowed. This action, we have seen, is assigned as error, and to support the assignment paragraphs 45 and 88 of the specifications are invoked. They are, respectively, as follows:

"45. Cofferdams.—All pumping, bailing, and temporary works needed to protect the permanent work from water, during the construction, shall be done by the contractor at his own expense, the cost of same to be included in his prices for concrete, timber, etc. It is probable that the sheet piling entering into permanent construction can, with proper banking and shoring, be made to serve the purpose of cofferdams, but the contractor must rely upon his own judgment in regard to this. Should additional cofferdams be needed they shall be built on plans approved by the engineer officer, and, where liable to interfere directly or indirectly with navigation, shall be removed when no longer needed, the building, maintaining, and removal of same to be without cost to the United States."

"88. Purchases made or work done, not specified.—If at any time it should become necessary, in the opinion of the engineer officer in charge, to do any work or to make any purchases not herein specified, for the proper [248] completion of this contract, the contractor will be required to furnish the same at the current rates existing at the time of said purchases or work. The current rates to be determined by the engineer officer in charge."

The findings state that certain hydrographs showing the gauge readings of the river, taken at Tuscaloosa, were shown claimants, and that the slope of the river indicated the duration of the winter and spring floods, and the effect of such floods upon the continuity of the work; that floods pass off rapidly at Tuscaloosa, but their duration is several days longer at the locations of locks 4, 5, and 6. The hydrographs did not show the readings at those places, nor were claimants informed of them, though the resident engineer knew of them, as they had been copied in a memorandum kept in his office at Tuscaloosa. In the court below a charge of fraudulent representation was based on those facts, but the court found adversely to it, and it is not repeated here. We shall pass, therefore, to contentions based on other considerations.

The facts found by the court may be stated narratively as follows: In order that the work might be continued during the winter the resident engineer, on November 17, 1900, directed claimants to build cofferdams at locks 4, 5, and 6, in accord-

ance with plans furnished them, and informed claimants that they would be paid for the same at their contract price for sheet piles, and $3 per thousand feet board measure for such parts of the cofferdams as they might be required to remove when no longer needed. The order was accepted by claimants in writing on November 18, 1900, and the materials ordered for the same. Three days after the receipt of the order, and before the construction of the dams had been commenced, the river rose and remained at such height that it was not possible to build them that winter. It is found that doubts subsequently came to the officer as to his authority to pay for the cofferdams, as the emergency for which they were [249] intended to provide had passed, —that is, their construction during the winter,—and he expressed those doubts in a letter to claimants dated May 4, 1901. Claimants protested, and the matter was referred to the Chief of Engineers, who referred it to the Secretary of War, and the latter officer submitted it to the Judge-Advocate-General of the Army for opinion. That officer decided that the Secretary of War had no authority to modify the contract. This view was approved by the Secretary and claimants were notified accordingly.

It will be observed that by paragraph 45 cofferdams are represented as temporary work to protect the permanent work, and the probability is expressed that the sheet piling entering into the permanent construction could serve the purpose of cofferdams, but as to this the claimants were to rely upon their own judgment. And it is also to be observed that if additional cofferdams should be needed, they were to be built on plans approved by the engineer officer, and to be built, maintained, and removed without cost to the United States.

By paragraph 46 the probability is again expressed that the dams could be built without cofferdamming, but as to this the claimants were to rely on their own judgment, and if cofferdams proved to be necessary, they were to be furnished by claimants without cost to the United States.

It seems very clear, therefore, that all cofferdams necessary for the protection of the permanent work were to be built by claimants at their own expense, and it is found that, in figuring on their bid, they allowed $2,000 for cofferdams for each of the three locks, or, in all, $6,000.

It is further found that "the cofferdams were afterwards constructed by the claimants to the heights necessary to protect the work against floods," and that their cost was $11,456.91, "of which amount the portion necessary to protect the work against a rise of more than 8 feet was $8,520.24. . . . And if claimants are entitled to [250] recover therefor on *quantum meruit* or otherwise," that amount would be due.

Claimants, however, contend that they are entitled to this cost as extra work, and invoke paragraph 88 against paragraphs 45 and 46. The paragraphs accord, or rather, each has its purpose. The extra work provided for in paragraph 88 was not intended to supersede the work provided for and contracted to be performed by claimants at their expense by paragraphs 45 and 46. Nor can we yield to the contention that claimants had a discretion to use or not use cofferdams which was taken away from them by the order of the engineer officer, and to comply with which they incurred expense that they otherwise would have not incurred.

The findings demonstrate that the flood conditions made cofferdams necessary, and to the height that they were constructed. The promise of payment made by the engineer officer was subsequently revoked before construction was commenced, and its revocation left the original contract to prevail. The court of claims, therefore, did not commit error by disallowing the demand.

For the error in not allowing the demand of the greater expense of excavation and pile driving, due to the misrepresentation of materials in the specifications and drawings, the judgment is reversed and case remanded for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[251] GREENLEAF-JOHNSON LUMBER COMPANY, Appt.,

v.

LINDLEY M. GARRISON, Secretary of War, and Henry S. Breckenridge, Assistant Secretary of War of the United States.

(See S. C. Reporter's ed. 251-276.)

Commerce — control of navigable waters — changing harbor lines — compensation.

1. Riparian owners who have erected on the water front wharves and other facilities of commerce which conform to the har-

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S.

bor line as established by the state and adopted by the Federal government have no right to compensation under U. S. Const. 5th Amend., when Congress, in the exercise of its power over commerce, establishes, through the agency of the Secretary of War, a new harbor line which requires the demolition of a portion of such structures.

[For other cases, see Commerce, II. a; Eminent Domain, II; Waters, I. d, 3, in Digest Sup. Ct. 1908.]

Harbors — changing lines — authority of Secretary of War.

2. The authority of the Secretary of War under the act of March 3, 1899 (30 Stat. at L. 1121, chap. 425), to establish harbor lines, where it is made manifest to that official that the establishment of such lines "is essential to the preservation and protection of harbors," may be exercised for the purpose of widening the Elizabeth river to permit the mooring of war vessels in front of the Norfolk Navy Yard.

[For other cases, see Harbors, in Digest Sup. Ct. 1908.]

[No. 678.]

Argued February 24 and 25, 1915 Decided April 12, 1915.

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which reversed a decree of the District Court for the Eastern District of Virginia, enjoining the Secretary of War from interfering with wharves and other facilities of commerce on a water front. Affirmed.

See same case below, 131 C. C. A. 644, 215 Fed. 576.

The facts are stated in the opinion.

Mr. J. L. Jeffries argued the cause, and, with Mr. L. D. Starke, filed a brief for appellant:

Whenever the facts upon which official discretion is to be based are not controverted, and are such as to leave no room for the exercise of discretion, and the absence of the right on the part of the officer to act is made manifest on the face of things, then his right to act becomes a matter of law and may be reviewed by the courts.

American School v. McAnnulty, 187 U. S. 107–109, 47 L. ed. 95, 96, 23 Sup. Ct. Rep. 33; Philadelphia Co. v. Stimson, 223 U. S. 605, 623, 56 L. ed. 570, 578, 32 Sup. Ct. Rep. Rep. 340.

Statutory power conferred upon public officers is confined strictly to the terms of the statute itself, and such statutes are to be strictly construed when determining what these powers are.

Mechem, Pub. Off. §§ 507–511.

If the state's authority is plenary with respect to navigation and navigable waters within its boundaries, property acquired under that authority is as stable, and rights with respect thereto are as complete and as fully protected by the 5th Amendment of the Federal Constitution, as if acquired under Federal authority, after Congress has assumed control. In either case that property is subject to the supreme right of the government for public purposes, but entitled, of course, to the protection of the 5th Amendment.

Gring v. Ives, 222 U. S. 365, 369, 56 L. ed. 235, 236, 32 Sup. Ct. Rep. 167; Prosser v. Northern P. R. Co. 152 U. S. 59, 64, 38 L. ed. 352, 355, 14 Sup. Ct. Rep. 528; Com. v. Alger, 7 Cush. 53.

The character of the property rights of riparian owners in Virginia is determined by the decisions of the Virginia courts.

1 Farnham, Waters, p. 50; 1 Lewis, Em. Dom. § 76–b; Sullivan Timber Co. v. Mobile, 110 Fed. 190; Shively v. Bowlby, 152 U. S. 40, 38 L. ed. 346, 14 Sup. Ct. Rep. 548.

The title of Virginia in the submerged lands under tide water is that of a trustee for the purposes which we have indicated, one of which is the right to construct and maintain a wharf subject to such permissions and regulations as the state may grant and prescribe. This right to so use these lands is secured to the riparian holder, and the land is held by the state for his benefit, all of which is declared to be a substantial property right, the extent of which, and the right to enjoy which, is limited and rendered uncertain only by reason and to the extent of the right of the state or of Congress, as the case may be, to regulate its use and enjoyment within constitutional limitations, one of which is that it cannot be taken without compensation.

Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 19; Shively v. Bowlby, 152 U. S. 40, 46, 47, 38 L. ed. 346, 348, 349, 14 Sup. Ct. Rep. 548; Com. v. Alger, 7 Cush. 83; Taylor v. Com. 102 Va. 768, 102 Am. St. Rep. 865, 47 S. E. 875; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Grinels v. Daniel, 110 Va. 877, 67 S. E. 534; Norfolk City v. Cooke, 27 Gratt. 435.

Wharves, when erected under state authority, are the private property of the owner, whether the fee in the submerged soil be in the state or in the owner of the adjacent land; and these structures pass by deed, de-

158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harman v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On establishment of dock lines—see note to Grand Rapids v. Powers, 14 L.R A. 498.

On the right to establish harbor lines—see note to Madison v. Mayers, 40 L.R.A. 644.

scent, and inheritance, and bear the burden of taxation as all other private property.

1 Farnham, Waters, pp. 136, 510, 511, 551, 552, 569; Sullivan Timber Co. v. Mobile, 110 Fed. 194; Horner v. Pleasants, 66 Md. 475, 7 Atl. 692; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

Whatever may be the title and ownership of the submerged lands and the rights of riparian owners with respect thereto, after such structures as these have been built under lawful authority derived from the government, state or Federal, they, as to the right to maintain them there, become private property, which, having been constructed under authority of law, can only be taken for public uses upon just compensation.

Sullivan Timber Co. v. Mobile, 110 Fed. 195; Lewis v. Portland, 25 Or. 133, 22 L.R.A. 736, 42 Am. St. Rep. 772, 35 Pac. 256; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; United States v. Lynah, 188 U. S. 445, 446, 47 L. ed. 539, 540, 23 Sup. Ct. Rep. 349; Prosser v. Northern P. R. Co. 152 U. S. 64, 38 L. ed. 355, 14 Sup. Ct. Rep. 528; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; United States v. Buffalo Pitts Co. 234 U. S. 228, 234, 58 L. ed. 1290, 1293, 34 Sup. Ct. Rep. 840.

Assistant Attorney General Underwood argued the cause and filed a brief for appellees:

The Secretary of War was authorized to establish harbor lines and to require the removal of appellant's wharf.

Juragua Iron Co. v. United States, 212 U. S. 297, 303, 53 L. ed. 520, 522, 29 Sup. Ct. Rep. 385; Gibson v. United States, 166 U. S. 269, 272, 276, 41 L. ed. 996, 1000, 1002, 17 Sup. Ct. Rep. 578; Union Bridge Co. v. United States, 204 U. S. 364, 385, 388, 51 L. ed. 523, 533, 534, 27 Sup. Ct. Rep. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 192, 54 L. ed. 435, 441, 30 Sup. Ct. Rep. 356; Philadelphia Co. v. Stimson, 223 U. S. 605, 638, 56 L. ed. 570, 584, 32 Sup. Ct. Rep. 340; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 64, 57 L. ed. 1063, 1076, 33 Sup. Ct. Rep. 667; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435; Scranton v. Wheeler, 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48.

The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law.

United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 60, 57 L. ed. 1063, 1074, 33 Sup. Ct. Rep. 667; Shively v. Bowlby, 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548.

Power over the control and improvement of navigable rivers, vested in the United States by the Constitution, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution.

Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Gilman v. Philadelphia, 3 Wall. 713, 725, 18 L. ed. 96, 99; Philadelphia Co. v. Stimson, 223 U. S. 605, 634, 56 L. ed. 570, 582, 32 Sup. Ct. Rep. 340.

Although the Federal power is absolute, the state may exercise dominion over navigable waters until the United States assumes control. The state's control, however, is merely permissive, and all authority ceases when the United States acts. Thereafter all state measures affecting future control become ineffective, and whatever has been done without the consent of the Federal government is annulled, unless continued in force with Federal approval.

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 12, 13, 31 L. ed. 629, 633, 634, 8 Sup. Ct. Rep. 811.

So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure.

Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9.

The consent of the Federal government must be evidenced by some affirmative action.

Union Bridge Co. v. United States, 204 U. S. 364, 400, 401, 51 L. ed. 523, 539, 540, 27 Sup. Ct. Rep. 367; Philadelphia Co. v. Stimson, 223 U. S. 605, 637, 56 L. ed. 570, 583, 32 Sup. Ct. Rep. 340.

To work an estoppel, there being no express authorization, it would be necessary to show some expenditure or loss sustained in reliance upon the alleged implied authority.

Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 135, 30 L. ed. 923, 928, 7 Sup. Ct. Rep. 865.

He, therefore, who, without the consent of Congress, erects a structure in a navigable stream, over which Congress has not yet assumed control, even with the express consent of the state, does so in view of and

subject to the power of Congress to annul the state's action and to require its removal, if, in the judgment of Congress, it is an obstruction to navigation. This is an implied condition of the permission granted, and just as binding as if expressly reserved.

United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 62, 63, 57 L. ed. 1063, 1075, 1076, 33 Sup. Ct. Rep. 667; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 521, 50 L. ed. 845, 851, 26 Sup. Ct. Rep. 518; Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82, 87, 88, 57 L. ed. 1083, 1085, 1086, 33 Sup. Ct. Rep. 679, Ann. Cas. 1915A, 232; Gibson v. United States, 166 U. S. 269, 276, 41 L. ed. 996, 1002, 17 Sup. Ct. Rep. 578; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Weber v. State Harbor Comrs. 18 Wall. 57, 21 L. ed. 798; Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619; South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; Hannibal Bridge Co. v. United States, 221 U. S. 194, 55 L. ed. 699, 31 Sup. Ct. Rep. 603; Jackson v. United States, 230 U. S. 1, 23, 57 L. ed. 1363, 1374, 33 Sup. Ct. Rep. 1011.

In other words, appellant was merely a licensee at will of the United States, without authority to maintain the structure after the license terminated. To require the removal of same, therefore, is not taking private property within the meaning of the 5th Amendment.

West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 526, 50 L. ed. 845, 853, 26 Sup. Ct. Rep. 518; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9.

The damage, if any, is remote or consequential, and is *damnum absque injuria*.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

An entirely different situation arises when consent to the erection of a structure has been expressly and unconditionally given by Congress. The element of contract or estoppel then enters, and the structure so erected may not be removed without payment of compensation therefor.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

Mere silence or inaction on the part of the state government when structures are being erected within its waters, perhaps in obscure and sparsely settled sections of the state, is not sufficient to show authority for their erection.

Philadelphia Co. v. Stimson, 223 U. S. 605, 629, 56 L. ed. 570, 580, 32 Sup. Ct. Rep. 340; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 523, 50 L. ed. 845, 851, 26 Sup. Ct. Rep. 518.

Mr. Justice McKenna delivered the opinion of the court:

Suit for injunction by appellant, which we shall call complainant, brought originally against Henry L. Stimson as Secretary of War and Robert Shaw Oliver as Assistant [255] Secretary of War, for whom the appellees were substituted and whom we shall refer to as defendants, to enjoin them and all persons acting under their authority from taking or removing or in any way interfering with complainant's wharf or other property "along or upon the water front of its property upon the southern branch of the Elizabeth river" in the state of Virginia. It having been constructed, it is alleged, under the authority of the state and within and upon the harbor line subsequently established by the Secretary of War, it became, it is further alleged, property lawfully owned, and could therefore be removed only upon payment of just compensation.

A preliminary injunction was granted in accordance with the prayer of the bill.

There was a demurrer to the bill, urging, among other grounds, that the court was without jurisdiction of the persons of the defendants, and also without jurisdiction of the suit because it was one against the United States. These grounds were subsequently waived and the want of equity in the bill alone relied on.

The demurrer was overruled (204 Fed. 489), and the present defendants, substituted as parties defendant, answered.

The answer, by certain denials and admissions, in effect repeated the propositions of the demurrer and asserted the control of Congress over the river, acting through the Secretary of War, adducing 30 Stat. at L. 1153, chap. 425, and concluded with a prayer that the court order the demolition of such portions of the wharf and other property as might be found to be outside the reestablished pierhead line, and that the injunction theretofore granted be dissolved and complainant's bill dismissed.

Further detail of the pleadings is unnecessary as a statement of facts was made which presents all that are necessary for a

decision. From the statement it appears that a board of harbor commissioners was created by [256] Virginia in 1875, and that in 1876, the exact date not known, the authorities of the state of Virginia established a harbor line which remained until 1890, when the same was adopted by the Secretary of War as the harbor line established by the Federal government, and it so remained until "the establishment of the present line June 12, 1911, which was so established by the Secretary of War, after notice, etc., and that until said new line was established, no part of complainant's property was outside of the same."

It appears from the statement and diagram attached that complainant had constructed two certain fills into the Elizabeth river. It made extensions into the river from two points on the shore, and connected at the outer extremities, the wall forming a continuous wharf of three sides surrounding the water they inclosed, the fourth side being the high land. The space so surrounded was called a log pond, and designed for the storage of logs for the purposes of complainant's business. The following also appears from the statement:

"That on the 22d day of July, 1911, the Navy Department wrote to the complainant, stating that that Department intended making certain improvements in the Navy Yard, and requesting the complainant to fix a price at which it would sell so much of its property or wharf and log pond as lay without the present port warden's line. The complainant, answering said letter, stated that the matter would be laid before its board of directors on July 26th 1911, and thereafter the attached correspondence was had between the Navy Department and the complainant. That while the above paragraph is admitted as a fact, it is nevertheless objected to by the defendants for the reason that the same is not relevant or material to the decision of this case, and it is claimed by said defendants, Secretary of War and Assistant Secretary of War, that this admission does not bind them.

[257] "That the water now immediately in front of complainant's property is navigable, but if the present structures are removed to the present harbor line as demanded by the government the complainant will be cut off from navigable water unless the river is dredged where the structures now are. That an act of Congress approved March 4th, 1911, entitled, 'An Act Making Appropriations for the Naval Service for the Fiscal Year Ending June 30th, 1912, and for Other Purposes' (36 Stat. at L. 1265, 1275, chap. 239), has been passed, in which act an appropriation has been made for dredging the bottom of the river at the point in controversy, pursuant to which the government proposes to widen the channel to the new port warden's line.

"It is further admitted that the fee-simple title to the high land to low-water mark adjacent to the port warden's line in question is in the Greenleaf Johnson Lumber Company, the complainant in this suit.

"The re-established or new harbor line runs along the front of complainant's wharf at the northern end of the property, cutting off approximately two [200] feet of the same."

There was some oral testimony, of which it is enough to say that it identified certain descriptive maps of the property. It also showed the purpose for which the property was constructed and used, and its present condition, the description of the new line and its relation to the old one, and that "the entire change made by the establishment of the new harbor line is immediately in front of the Navy Yard," and that "the government in recent years had used the channel of the river opposite the Navy Yard and in front of the property of complainant to a very large extent for the storage of its vessels," and a witness had seen as many as five abreast, ranging from torpedo boats to colliers.

The district court overruled the demurrer, as we have said, expressing its views in an opinion. The court also [258] denied the amendatory injunction prayed by the United States, and continued the temporary restraining order. Subsequently the court entered its decree adjudging that the Secretary of War had no authority under the law to remove or cause to be removed the structures mentioned in the pleadings, and decreed that the temporary injunction be made permanent. The decree was reversed by the circuit court of appeals. 131 C. C. A. 644, 215 Fed. 576.

Two propositions are presented: (1) The power of Congress over navigable waters. (2) Whether the acts of the Secretary of War were done in the exercise of that power.

It would seem that the existence of the power of Congress has been withdrawn from the domain of discussion by many authorities, and that little room is left for debate as to the extent of that power. But a distinction is made by complainant between structures in a river which avail of its navigability and structures which may be an obstruction to its navigation. Upon this distinction, which will be explaineed more fully hereafter, complainant contends that a right of property by the privilege granted by the state of Virginia became vested in it which can only be taken upon payment of just compensation. And this distinction,

it is further contended, explains the cases relied on by counsel for the United States, and sustains the authority of the cases adduced by complainant. A review of the cases, therefore, is worth while.

The power of Congress is expressed in a general way in Gilman v. Philadelphia, 3 Wall. 713, 731, 18 L. ed. 96, 101, in which a certain power was conceded to the states, but necessarily to be exercised, it was decided, in subordination to the supremacy of the national power. "Until the dominant power of the Constitution is awakened," it was said, "and made effective, the reserved power of the states is plenary."

In Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, there was a further expression of the principle and an application of [259] it to riparian ownership, and it was decided that "all navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." Citing, among other cases, Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548. The case was one for the recovery of damages caused by the construction of a dike in the Ohio river, by which the lands of Gibson were flooded. Relief was denied and the principle expressed that the exercise "of the dominant right of the government" over navigation subjected riparian ownership to such consequence, and it was said that an appropriation for improvement was an exercise of the power of Congress.

In Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48, access was cut off from a navigable river by improvements instituted by authority of Congress. This was said: "All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount and is unrestricted, except by the limitations upon its authority by the Constitution." The words "except by the limitations upon its authority by the Constitution" were not intended to qualify the power expressed, as is made manifest by subsequent cases.

In Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, the railway company was required to reconstruct a bridge to subserve a public work. The bridge had been constructed under lawful authority. Compensation, however, was denied, the bridge over a public highway. The latter and public waters were considered analogous.

In West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518, a tunnel was constructed by permission of Chicago under the Chicago river and was subsequently required to be lowered. It was held not a taking of property, the removal [260] of the tunnel having been required in the interest of navigation. In other words, the paramount right of navigation was decided to be superior to riparian rights or rights in the river; or, to put it more generally, to rights in the submerged lands. The case seems directly against complainant in the case at bar. Complainant asserts a right of compensation because it conformed to the harbor line as located by Virginia and by the United States; in other words, contends that it acquired a vested right. The case decides otherwise, and 200 U. S. 561, supra, so decides. The proposition announced was that the power of the sovereign, state or national, is perpetual,—not exhausted by one exercise,—and all privileges granted in public waters are subject to it; and that the exercise of the power was not a taking of private property for a public use, but "the lawful exercise of a governmental power for the common good."

Union Bridge Co. v. United States, 204 U. S. 364, 400, 51 L. ed. 523, 539, 27 Sup. Ct. Rep. 367, conspicuously displays the principles of the prior cases cited and followed by it. A bridge was required to be altered or changed, the expense of which was great. It was contended that the bridge had been erected under state authority, to the exercise of which the United States, had impliedly assented, and that, therefore, the requirement to alter it was a taking of property without compensation. The opposing contention of the United States was that the requirement was an exertion by Congress of its power to regulate commerce, and therefore navigation, upon the waterways on and over which such commerce was conducted. The latter contention was sustained upon a review of the prior cases. It was said that when the company "exerted the power conferred upon it by the state, it did so with the knowledge of the paramount authority of Congress to regulate commerce among the states," and subject to the possibility that Congress at some future time would exert its power.

[261] In Monongahela Bridge Co. v. United States, 216 U. S. 194, 54 L. ed. 442, 30 Sup. Ct. Rep. 356, again the doctrine of the other cases was repeated. A bridge erected over the navigable waters of a state by the authority of the state was declared subject to the paramount authority of Congress to

regulate commerce and its right to remove unreasonable obstructions to navigation. Congress exerted its power in a provision in the river and harbor bill of March 3, 1899, giving authority to the Secretary of War, when he had good reason to believe a bridge over navigable waterways was an unreasonable obstruction to navigation, to order it to be removed after notice and hearing. The court declined to modify its holding in Union Bridge Co. v. United States, and declared that it adhered "to what was said in that case," and sustained the Secretary without much discussion.

Hannibal Bridge Co. v. United States, 221 U. S. 194, 55 L. ed. 699, 31 Sup. Ct. Rep. 603, was another case of bridge removal. It is not so positive an authority as the preceding cases, for Congress had reserved the right to alter or amend the act under which the bridge was constructed. But the Union Bridge Case was quoted from as correctly expressing the congressional power.

Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340, is directly to the effect that Congress may establish harbor lines, and is not precluded thereby from changing them. There was action by the state and twice by the United States, and the relation of such actions and the rights derived therefrom were considered and determined. Rights under the action of the state were asserted by the Philadelphia Company and assumed to exist by the court in determining the power of Congress. It was said (page 634): "The exercise of this power [that of Congress] could not be fettered by any grant made by the state of the soil which formed the bed of the river, or by any authority conferred by the state for the creation of obstructions [262] to its navigation." And again: "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. . . . The principles applicable to this case have been repeatedly stated in recent decisions of this court." The cases which we have reviewed were cited. In speaking of the effect of the first action of the Secretary as affecting his second action, it was said: "That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And in none of the acts complained of did he exceed the power which had been conferred."

Philadelphia Co. v. Stimson is an epitome of all prior cases. Indeed, we might have relied upon it as furnishing all of the elements of decision of that at bar. It expressed the subordination of the power of the states to the power of Congress, that one exercise of the power by either does not preclude another exercise by either, and that the state can grant no right to the soil of the bed of navigable waters which is not subject to Federal regulation. There was a repetition of this doctrine in United States v. Chandler-Dunbar Water Power Co. 229 U. S. 69, 57 L. ed. 1078, 33 Sup. Ct. Rep. 667.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984, is not in antagonism to the principle announced in those cases. If it could be so regarded it would have to give way to the many cases decided since. But it cannot be so regarded. It was decided, it is true, that one of the rights of a riparian owner was that of access to a navigable river and of constructing a landing wharf or pier for his own use and that of the public, but the limitation or subordination of these rights to be regulated by the dominant power of Congress was not involved nor passed on. And certainly no limitation was implied. The case was referred to in Scranton v. Wheeler, supra, and "the point adjudged" said to be that, as there was no proof in the record that the wharf involved [263] was in fact an obstruction to navigation or a nuisance, except a declaration to that effect in the city ordinance attacked, the wharf could not be made such by a mere declaration. And it was observed that "a proper disposition of the case required nothing more to be said." See Shively v. Bowlby, 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548.

We have recognized that the states have a certain control and management over the navigable streams within their territory, but subject to be superseded by the interference of Congress. Gilman v. Philadelphia, 3 Wall. 713, 731, 18 L. ed. 96, 101; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185. When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed. In Scranton v. Wheeler, supra, the water was very shallow between the high land and the pier erected in the river by authority of Congress, and which it was contended cut off access to navigability.

But, as we have said, complainant distinguishes between the rights a riparian owner may receive,—"between those rights," to quote counsel, "which do not relate to navigation in any sense, and second, those which do relate thereto, and which contribute to the enjoyment thereof." To support the

distinction Monongahela Nav. Co. v. United States, 148 U. S. 312, 335, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622, as construed in Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82, 57 L. ed. 1083, 33 Sup. Ct. Rep. 679, Ann. Cas. 1915A, 232, is adduced. The argument is that the right or privilege which complainant received from Virginia was given by the state "in the performance of the dominant trust for the benefit of the public," and not, as in the cases urged by defendant, "in the interest of the individual riparian owners." And it is declared that the cases referred to and Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, make it clear "that when grants of rights or privileges are made within the authority of the [264] state, property acquired thereunder becomes as stable as any other property, and the rights and privileges as granted are irrevocable, and if taken for public use it must be upon the payment of just compensation." It is hence contended that when the state or Congress acts in fulfilment of its trust for the benefit of the public the structures it authorizes become fully protected under the Constitution, and in thus encouraging facilities for navigation and commerce "Congress loses none of its authority of regulation, because it can at any time exercise the right of eminent domain, and the expense will be a most profitable investment in the public interest."

The contention is plausible, but it is not supported by the cited cases, and the case relied on by complainant is reconcilable with them. It is true the instances in the cited cases were the removal of structures not facilities of commerce on the rivers. But the principle declared in the cases and which determined their decision was not dependent upon such instances, and the power of Congress was said to be analogous in its illimitable exertion to the police power. Illustrative cases were adduced. How, then, it may be asked,—indeed, is asked,—shall we account for Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, as construed in Lewis Blue Point Oyster Cultivation Co. v. Briggs, supra? It was said in the latter case that the former rested upon estoppel.

A few words of explanation become necessary. The Monongahela Company, under the express authority of the state of Pennsylvania, expended large sums of money in improving the Monongahela river by means of locks and dams, which were also built at the instance and suggestion of the United States. By means of the improvements the river, which theretofore was navigable only for boats of small tonnage and at certain seasons of the year, accommodated large steamboats at all seasons and an extensive commerce by means thereof. Subsequently [265] Congress authorized the purchase of the property, or, if its price could not be agreed on, its condemnation, but excluded from the estimate of the sum to be paid for it a consideration of the franchise to collect tolls. It was held that the franchise was a part of the property and should be paid for, notwithstanding its exclusion by Congress, and that the franchise, the right to take tolls, could "no more be taken without compensation than" could "its [the company's] tangible, corporeal property." The court said, by Mr. Justice Brewer: "This lock and dam connected the lower improvements already made by the Navigation Company with the upper improvements proposed to be made by Congress, and the appropriation by the latter [act of March 3, 1881 (21 Stat. at L. 468, chap. 136)] was conditioned on the company's undertaking their construction. This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when, in pursuance of that invitation, and under authority given by the state of Pennsylvania, the company has constructed the lock and dam, it does not lie in the power of the state or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company."

This language was quoted in Lewis Blue Point Oyster Cultivation Co. v. Briggs as sustaining the view that the case rested upon estoppel,—rested upon the fact that the lock and dam had been constructed "at the instance and implied invitation of Congress." It is true a great deal was said by Mr. Justice Brewer which seemed to be of broader import, but we are now only concerned with the explanation of the case by the later case, and we may observe that the Union Bridge Case, 204 U. S. 364, 400, 51 L. ed. 523, 539, 27 Sup. Ct. Rep 367, was referred to for comparison. It is manifest, therefore, that the Monongahela Nav. Co. Case can be distinguished from the other cases and its ruling [266] sustained upon the following grounds: (1) The lock and dam were built at the instance of Congress, not as a simple facility for the navigation of the river, but as making its navigability, enlarging its capacity from the accommodation of boats of small tonnage at certain seasons of the year to the accommodation of large steamboats at all seasons. (2) The Navigation Company was invited to make the improvements, and so far invested with the rights of sovereignty. It did

not, as did complainant in the case at bar, exercise the rights of a riparian owner, building to the harbor line and availing itself of the navigability of the river for its own interest. It, to repeat, constructed a public work, having no other power to do so but the authority conferred upon it by the state and by Congress—invited, indeed, to do so, and given as its compensation a right to take tolls for the use of the works. This court well said that such right was as much the consideration of the service rendered as the material property constructed. The case, therefore, as Mr. Justice Lurton said in the Blue Point Oyster Case, rested on estoppel. Whatever was said beyond that may be left, as it was left in the latter case, to a comparison with the Union Bridge Case, the principle it declares and the cases it cites.

Something is attempted to be made of Gring v. Ives, 222 U. S. 365, 56 L. ed. 235, 32 Sup. Ct. Rep. 167, by complainant, in support of its distinction between rights held "subject to the dominant trust in which the beds of navigable streams are held, and those conferred in the exercise and in aid of the purpose of the dominant trust under which the submerged soil is held for the benefit of the public." The case does not support the distinction. A marine railway was constructed under state authority and had been in existence for eighteen years, but projected beyond a harbor line subsequently established by Congress. It was run into recklessly and injured by a tugboat, and in defense of an action for the injury the fact of the projection beyond the harbor line was set [267] up. The defense was rejected, the lower court deciding that even if the railway had been erected illegally, even if it was a public nuisance, the tugboat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show. The case was brought here, a Federal question being based on the act of Congress under which the harbor line over which the marine railway projected was established. The question was pronounced frivolous and the writ of error was dismissed.

The contention of the tugboat owner was practically that the railway was an outlaw, subject to be destroyed by anybody, although it had been erected by authority of the state, and its existence indulged by the Secretary of War. Manifestly the contention was without any merit whatever, as was said by the court, and there was no implication of the existence of the distinction urged by complainant, nor implication of the want of power in the Secretary of War to have ordered the railway removed if he had thought it in the interest of commerce to have done so.

It is, however, contended that the jurisdiction to establish harbor lines is given by the statute only "where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors," and that it is shown by the agreed statement of facts and the correspondence attached thereto that the Secretary of War acted at the suggestion of the Navy Department for the improvement of the river opposite the Norfolk Navy Yard, and in pursuance of the act making appropriations for the naval service for the year ending June 30, 1912, 36 Stat. at L. 1265, 1275, chap. 239; and that this was "the sole purpose of the change in the harbor lines and the required removal of the company's [complainant's] property is shown by the additional fact that it appears that the United States moors abreast its war vessels, colliers, and other vessels in front of its Navy Yard, so that [268] they project out in the channel which it so uses for the storage of its vessels."

We may grant that such was the inducement and such the occasional use, but neither militates against the validity of the power exercised. The mooring of vessels is as necessary as their movement, and the navigability of a river can be maintained or increased as legally for the accommodation of war vessels as for trading vessels, those of public ownership as well as those of private ownership, and we cannot enter into a consideration of what may be necessary for either purpose.

It was said in United States v. Chandler-Dunbar Water Power Co. 229 U. S. at page 64, 57 L. ed. 1076, 33 Sup. Ct. Rep. 667: So unfettered is the "control of Congress over the navigable streams of the country, that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control." And in Scranton v. Wheeler, 179 U. S. page 162, 45 L. ed. 137, 21 Sup. Ct. Rep. 48: "Whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion." This power has been exercised by the act of March 3, 1899 [30 Stat. at L. 1121, chap. 425], delegating to the Secretary of War the power to establish harbor lines, and, necessarily, to require the removal of structures which project beyond them. Union Bridge Co. v. United States, supra.

If it can be said that arbitrary or wanton action of the Secretary of War would be subject to judicial review, it cannot be said that his action in the case at bar reached that bad degree.

Decree affirmed.

Mr. Justice **McReynolds** took no part in the consideration and decision of this case.

[269] Mr. Justice **Lamar**, dissenting:

I dissent from the judgment by which the appellant's wharf is physically taken, its existing right of access to navigable water destroyed, and its private property appropriated to public use without compensation.

At, above, and below the Norfolk Navy Yard, the navigable part of the Elizabeth river is 600 feet in width. In 1873 appellant's wharf was built opposite the Navy Yard, through shallow water out to the navigable channel of the stream. Several years afterward, under authority of the state of Virginia, the Norfolk wardens established a port line which ran along the edge of this channel and left the lumber company's wharf and logging pond outside of the harbor.

In 1890, fourteen years later, the Secretary of War established exactly the same line; and thus by city, state, and Federal authority the plaintiff's wharf was shown to be a lawful structure outside of the harbor, and not an obstruction to navigation either in law or in fact. Since that date there has been no change in the condition of the stream; and the wharf remained a lawful structure until 1911, when —having decided to widen the river at that point, as a place of storage for war vessels— Congress, in that part of the act of March 4, 1911 (36 Stat. at L. 1275, chap. 239), relating to the Navy Yard at Norfolk, made an appropriation of $80,000 "*for the purchase of land and widening the channel.*" Accordingly, on June 12, 1911, the harbor line was changed at this particular point, so as to take in the part of the river intended to be widened, but leaving the Norfolk harbor line otherwise unaffected. No one understood, however, that fixing the line 200 feet further inland at this place for this naval purpose authorized the taking of plaintiff's wharf without compensation. And the act of Congress so obviously included the property of the plaintiff, as a part of that to be *purchased*, that the Secretary [270] of the Navy on July 22, 1911, "wrote to the complainant, stating that that Department intended making certain improvements in the Navy Yard, and requesting the complainant to fix a price at which it would sell so much of its property or wharf and logging pond as lay without the present port warden's line."

The complainant named a price which the Department considered exorbitant, and—the parties failing to agree—the government began proceedings in the district court of the United States

"to acquire title by condemnation to a certain piece of land situated in the southern branch of the Elizabeth river, Virginia, held and owned by the Greenleaf Johnson Lumber Company, which is needed for public uses and purposes; that is to say, for deepening and widening the said south branch of the Elizabeth river as authorized by act of March 4, 1911 (36 Stat. at L. 1275, chap. 239)."

The statutory notice was given the owner and a jury was impaneled to assess the value of complainant's property, when, suddenly, the proceedings were dismissed, and what was a wharf, lawfully erected in a non-navigable part of the stream and outside of the old line, was declared to be "a menace to navigation."

The control which Congress has over navigable waters by virtue of the power to regulate commerce is practically unlimited, except in one particular. The 5th Amendment was passed for the purpose of restraining the exercise of that or any other power by which private property was taken. Monongahela Nav. Co. v. United States, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; McCray v. United States, 195 U. S. 61, (3), 49 L. ed. 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561. That Amendment was intended to protect the citizen against the government; and being the expression of the fundamental policy of a people, both able and willing to pay, should be given a broad and liberal construction. Congress, in directing that the Elizabeth river should be widened, distinctly indicated its intention that the private property [271] needed for that purpose should be "purchased." The Secretary of the Navy so understood the statute and began proceedings to ascertain the amount the government should pay for the property of the appellant needed for widening the river. In the absence of absolutely controlling authority, requiring a different interpretation, the complainant should receive the payment intended by Congress and demanded by the Constitution wherever private property is taken for a public use. But there is no such authority cited, for none of the decisions relied on by the government sustain the contention that, on facts like these, wharf property can be taken without compensation.

Some of the cases cited make a distinction between *taking* and *damaging*, and then

hold that the owner cannot recover for consequential damages resulting from making public improvements in navigable waters (Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48). Another holds that the title of the riparian owner to oysters in the bed of a body of public water is inferior to the right of the government to deepen the channel in the interest of commerce. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82, 57 L. ed. 1083, 33 Sup. Ct. Rep. 679, Ann. Cas. 1915A, 232. Another related to a case where a power dam had been constructed under a revocable license. It was held that the owner acquired no such right in the flow in the stream as would give him a claim for damages when the government, in the interest of navigation, caused the water to run in another channel. United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667. Another holds that where the government had constructed a dam, which raised the level of the river and backed the water beyond the old harbor line, the person who purchased *after the dam was built* could not complain because he was prevented from building a wharf inside the new harbor lines, which had been changed to conform to the new line of deep water. But the right of the person who owned the land before the dam was built was expressly left open for future [272] decision. Philadelphia Co. v. Stimson, 223 U. S. 627, 56 L. ed. 579, 32 Sup. Ct. Rep. 340. In some of the cases it appeared that bridges had been built subject to the power expressly reserved to order them removed. Hannibal Bridge Co. v. United States, 221 U. S. 194, 55 L. ed. 699, 31 Sup. Ct. Rep. 603. Several of the cases hold that those who build bridges or tunnels across the navigable channel of a stream can be required at their own expense to raise or lower the structures whenever they become obstructions to navigation. Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518.

But no case has been cited which holds that a wharf, in shallow water, outside an established harbor line, can be declared an obstruction to navigation, the property taken, and the owner ousted of possession without compensation.

On the contrary, Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984, distinctly holds that this cannot be done. There the city, by the act of 1854, had authority "by ordinance to establish dock and wharf lines and to prevent obstructions in the river and to cause it to be dredged." Thereafter Yates built a wharf, across the harbor line, through the shallow water, out to the navigable channel of the Milwaukee river. Subsequently a new line was established (p. 505), and in 1864 the city declared, as the Secretary did here, that the wharf (inside the harbor line) was an obstruction. This court said:

"The mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character" (p. 505).

Again, speaking of the landowner's right to build docks, the court said:

"This riparian right is property, and is valuable; and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed [273] or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law; and, if necessary that it be taken for the public good, upon due compensation."

There is a remarkable similarity between the facts in the Yates Case and the present. There the dock was to be "removed in pursuance of a general scheme of widening the channel and in improving the navigation of the Milwaukee river." Here Congress appropriated $80,000 "to purchase land and to widen the channel" of the Elizabeth river in the interest of the Navy Yard. But even such governmental purposes would not justify a taking without payment: for, in the Yates Case, the court concluded its opinion by the use of language which is absolutely applicable to the present controversy, saying:

"If the authorities of the city of Milwaukee deem its [the wharf's] removal necessary in the prosecution of any general scheme of widening the channel and improving the navigation of the Milwaukee river, they must first make him compensation for his property so taken for the public use."

That case has never been overruled and is a notable illustration of the meaning of the 5th Amendment, which, standing between the government and the private individual, provides a means by which the interests of the public can be secured without destruction of the rights of the citizen.

Most of the wharves in the United States were located many years before the adoption of the act conferring power upon the Secretary of War to establish harbor lines.

Congress did not intend to destroy existing rights (Montgomery v. Portland, 190 U. S. 105, 47 L. ed. 965, 23 Sup. Ct. Rep. 735), and it is inconceivable that it could have intended to vest that officer with the power to declare that these lawful structures, worth hundreds of millions of dollars, and useful agencies of commerce, were obstructions to navigation merely because [274] they were inside of a line which he might decide to run in non-navigable water.

The present case is even stronger, for the complainant's wharf is located outside of a harbor line which had been established in 1890 by the Secretary of War himself. The wharf was not an obstruction to navigation when it was built in 1873; it was not an obstruction to navigation when the Secretary established the line in 1890; it has not become an obstruction to navigation during the years it has remained in shallow water; and, under the Yates Case, cannot be made an obstruction in fact by declaring (where there has been no change in the stream) that it is such in law.

Few cases directly in point can be found, but out of the multitude which deal with the principle involved, the facts and rulings in the following tend to sustain the appellant's right to compensation for the wharf taken for public use: Dutton v. Strong, 1 Black. 23, 17 L. ed. 29; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Com. v. Alger, 7 Cush. 53, 103; Langdon v. New York, 93 N. Y. 129, 161; Kingsland v. New York, 110 N. Y. 570, 574, 18 N. E. 435; Fitchburg R. Co. v. Boston & M. R. Co. 3 Cush. 71; Hamlin v. Pairpoint Mfg. Co. 141 Mass. 57, 6 N. E. 531; Lewis v. Portland, 25 Or. 133, 167, 22 L.R.A. 736, 42 Am. St. Rep. 772, 35 Pac. 256; Baltimore & O. R. Co. v. Chase, 43 Md. 35, 36; Classen v. Chesapeake Guano Co. 81 Md. 259, 31 Atl. 808.

The power of the Secretary of War to run harbor lines may not be exhausted when once exercised, and, from time to time, they may be relocated over unused and submerged land. But, as against lawful structures, the line must be run to conform to the physical conditions of the stream and to meet changes occasioned by the washing of the water or other natural causes. But the public cannot determine to widen the river, artificially create a channel, and thus, by its own act, acquire a right to declare [275] that what was formerly a lawful structure in shallow water will be an obstruction to a storage basin to be artificially created.

In Com. v. Alger, 7 Cush. 53, 103, it is strongly intimated that the power to establish harbor lines does not confer authority to take, without compensation, existing structures lawfully built out to the navigable channel. Other cases hold that the establishment of the line is in the nature of an invitation to fill in and build out to that line. Sherman v. Sherman, 18 R. I. 506, 30 Atl. 459. So here the action of the Secretary of War in 1890 "is to be construed as a regulation of the exercise of the riparian right; it settles the line of navigability above which the state will not interfere; and is an implied concession of the right to build, possess, and occupy, . . . which amounts practically to a qualified possessory title." Miller v. Mendenhall, 43 Minn. 95, 8 L.R.A. 89, 19 Am. St. Rep. 219, 44 N. W. 1141; citing Hamlin v. Pairpoint Mfg. Co. 141 Mass. 51, 6 N. E. 531. See also Langdon v. New York, 93 N. Y. 129, 161; Brooklyn v. New York Ferry Co. 87 N. Y. 204, 206, and Williams v. New York, 105 N. Y. 429, 11 N. E. 829.

The action of the Secretary of War in 1890 in establishing a harbor line was, in effect, a declaration that wharves outside of the limits of that harbor thus marked and defined were not obstructions to navigation, and, as against existing wharves, the line could not thereafter be changed except to meet natural changes in the channel. Congress, in authorizing the Secretary of War to *establish lines*, clearly indicated an intention to secure fixity and permanency. If such was not its intention, then—as shown by the actual results in the present case—nothing could be more unstable than the tenure by which riparian owners hold docks, piers, and wharves. For, progressively, it is said that the builders cannot rely on grants from the state; they cannot rely on lines fixed by the port wardens of the state; and it is now decided that they cannot rely on a line fixed by the Secretary of War. For, under the [276] ruling in the present case, he can, by running a new line, take in 200 feet of a wharf outside of an old line, and then oust the owner from the possession and use of that property without compensation.

The wharf here involved may not be of great value, but my view of the harm done the appellant and of the possibility of like serious consequences to a multitude of persons who have built and invested in these costly and useful instrumentalities of commerce compels me to dissent from the judgment.

PEOPLE OF THE STATE OF NEW YORK EX REL. INTERBOROUGH RAPID TRANSIT COMPANY, Plff. in Err.,
v.
WILLIAM SOHMER, Comptroller of the State of New York.

(See S. C. Reporter's ed. 276–284.)

Error to state court — following decision below — contract exemption from taxation.

The Federal Supreme Court will not disturb a decision of the highest New York court that the contract exemption from taxation conferred by N. Y. Laws 1894, chap. 752, § 35, Laws 1896, chap. 729, § 4, Laws 1900, chap. 616, § 4, upon any person, firm, or corporation operating the New York city subway, in respect to his, their, or its interest therein under the construction contract, and in respect to the rolling stock and other equipment, does not exempt a corporation formed to operate the subway from a tax measured by capital stock and gross earnings, imposed under the New York tax law, §§ 182, 184, upon the right to be a corporation and to operate as such.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

[No. 129.]

Argued January 18 and 19, 1915. Decided April 12, 1915.

IN ERROR to the Supreme Court of the State of New York in and for the County of Albany, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed an order of the Appellate Division of the Supreme Court, Third Department, confirming on certiorari certain franchise tax assessments which are asserted to impair the obligation of contracts. Affirmed.

See same case below, in Appellate Division, 151 App. Div. 911, 135 N. Y. Supp. 1135; in Court of Appeals, 207 N. Y. 270, 100 N. E. 813.

The facts are stated in the opinion.

Messrs. George W. Wickersham and **Ralph Norton** argued the cause, and, with **Mr. James L. Quackenbush**, filed a brief for plaintiff in error:

Words similar to those employed in this exemption section were used in the Federal corporation tax law of August 5, 1909, making every corporation, etc., subject to pay annually "a special excise tax with respect to the carrying on or doing of business by such corporation." This language was held by this court to impose a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock associations of the character described, and it was said that as the latter organizations share many benefits of corporate organization, the tax might be described generally as a tax upon the doing of business in a corporate capacity.

Flint v. Stone Tracy Co. 220 U. S. 107, 145, 146, 55 L. ed. 389, 411, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

Franchise taxes under § 182 of the New York tax law are also taxes upon the doing of business in a corporate capacity.

New York Terminal Co. v. Gaus, 204 N. Y. 516, 98 N. E. 11.

Like the Federal corporation tax of 1909, the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax measured by the standard prescribed.

Flint v. Stone Tracy Co. 220 U. S. 107, 150, 55 L. ed. 389, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49, 71 N. E. 463; People ex rel. Wall & H. Street Realty Co. v. Miller, 181 N. Y. 328, 73 N. E. 1102; People ex rel. Fifth Ave. Bldg. Co. v. Williams, 198 N. Y. 242, 139 Am. St. Rep. 809, 91 N. E. 638.

The basis of the tax imposed under New York tax law, § 184, is the capital of the corporation employed within the state, and not the whole capital of the corporation.

People ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 387, 87 N. E. 434.

The exemption agreed upon in the contracts with the city of New York under legislative sanction protects the plaintiff in error from taxation for the privilege of carrying out those contracts served on the basis of the capital invested in the equipment of the railways or employed in their

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On writs of error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 380.

operation, or measured by the earnings derived from such operation.

New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. Rep. 714; Delaware L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

A statute which exempts the property of a railroad company from taxation exempts not only the rolling stock and the real estate owned by it, but its franchises also.

Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; Pacific R. Co. v. Maguire, 20 Wall. 36, 22 L. ed. 282.

The corporate franchise, or privilege of a railroad corporation to do business in that capacity, is property of the most valuable kind, and is, equally with other property, within any exemption from taxation which the company may possess.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Nichols v. New Haven & N. Co. 42 Conn. 103; State v. Baltimore & O. R. Co. 48 Md. 49; Grand Gulf & P. G. R. Co. v. Buck, 53 Miss. 246; Hancock v. Singer Mfg. Co. 62 N. J. L. 328, 42 L.R.A. 852, 41 Atl. 846; Worth v. Petersburg R. Co. 89 N. C. 301; Worth v. Wilmington & W. R. Co. 89 N. C. 291, 45 Am. Rep. 679; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

The case is analogous to that of other railroad companies exempted from taxation by their original charters, but which, at later periods, constructed extensions under legislative authority without immunity from taxation, or consolidated with other corporations which were not exempted from taxation. In such cases, the courts have sustained the inviolability of the contract for exemption as to the original road, while upholding the tax as to the extension or road consolidated.

Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Central R. & Bkg. Co. v. Georgia, 92 U. S. 655, 23 L. ed. 757.

Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail.

Mobile & O. R Co. v. Tennessee, 153 U. S. 486, 502, 38 L. ed. 793, 799, 14 Sup. Ct. Rep. 968; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424.

Until the effort to tax plaintiff in error on its franchises, under N. Y. Consol. Laws 1909, chap. 62, the decisions of the courts uniformly sustained its claim of immunity.

People ex rel. Interborough Rapid Transit Co. v. State Tax Comrs. 126 App. Div. 610, 110 N. Y. Supp. 577, affirmed without opinion in 195 N. Y. 618, 80 N. E. 1109; People ex rel. Interborough Rapid Transit Co. v. O'Donnel, 202 N. Y. 313, 321, 95 N. E. 762, 766.

This court will determine for itself the existence of the contract relied upon, and whether its obligation has been impaired by the action of the state.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

Mr. Franklin Kennedy argued the cause, and, with Mr. Egburt E. Woodbury, Attorney General of New York, filed a brief for defendant in error:

No Federal question is involved, because there was no law involved subsequently passed, impairing the obligation of contracts under the constitutional provision.

Gray, Limitations of Taxing Power, pp. 487, 488; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 38, 31 L. ed. 607, 614, 8 Sup. Ct. Rep. 741; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 187, 190, 56 L. ed. 156, 158, 32 Sup. Ct. Rep. 47; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 638, 639, 56 L. ed. 924, 927, 928, 32 Sup. Ct. Rep. 577; Bacon v. Texas, 163 U. S. 207, 216, 41 L. ed. 132, 136, 16 Sup. Ct. Rep. 1023.

Assuming that there is a Federal question arising under the constitutional provision as to the impairment of contracts, yet N. Y. Laws 1894, chap. 752, § 35, does not constitute a contract.

Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 386, 387, 48 L. ed. 229, 231, 232, 24 Sup. Ct. Rep. 107; Gray, Limitations of Taxing Power, p. 512; East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L ed. 611.

The assignment to the plaintiff in error of contracts 1 and 2 by McDonald and the rapid transit subway construction company did not carry with them the exemption which the assignors obtained under that section.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667–673, 39 L. ed. 573–576, 15 Sup. Ct. Rep. 413; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860.

Assuming that there was a contract under the constitutional provision, this court,

while it would have the power to determine independently, by its own interpretation and construction of the section, whether there was an impairment of obligation, will follow the construction given to the statute by the state courts unless it is clearly erroneous.

New Orleans v. Stempel, 175 U. S. 309, 316, 44 L. ed. 174, 178, 20 Sup. Ct. Rep. 110.

This is a tax not upon property or upon dividends, or upon capital stock, or upon gross earnings, but is a tax imposed upon the privilege of being a corporate entity, for the privilege of exercising corporate franchises; which in this case are those of a domestic corporation, granted by the state of New York itself, and the dividends, the gross earnings, and the capital stock are only used as a convenient measure for the purpose of valuing each year the exercise of those corporate franchises granted by the state.

People ex rel. Cornell Steamboat Co. v. Sohmer, 206 N. Y. 651, 99 N. E. 1115; People v. Home Ins. Co. 92 N. Y. 328, affirmed in 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; People ex rel. United States Aluminum Printing Plate Co. v. Knight, 174 N. Y. 475, 63 L.R.A. 87, 67 N. E. 65; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807.

So it has been held that a state may measure corporate franchise taxation by interstate commerce.

United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807; People ex rel. Pennsylvania R. Co. v. Wemple, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720.

In regard to foreign corporations, their franchises cannot be made the basis of the tax, inasmuch as this state did not grant them. They are taxed not for the exercise of their corporate franchises, but for the privilege of doing business within the jurisdiction of this state.

People v. Equitable Trust Co. 96 N. Y. 387.

The phrase, therefore, added to the section by the 1906 statute, is easily explicable. "For the privilege of doing business" refers to foreign corporations. "Exercising its corporate franchises" refers to domestic corporations.

People ex rel. American Contracting & Dredging Co. v. Wemple, 129 N. Y. 558, 29 N. E. 812.

It is important to keep in mind, in the consideration of the questions involved herein, the essential and fundamental distinction between a corporate franchise and a special or secondary franchise. The corporate franchise of a corporation is, of course, the franchise which gives it corporate entity, and is a privilege accorded by the state, revocable at pleasure. The special franchises of a railway company, on the other hand, are the franchises which permit it to operate through public streets or highways, and in the case of the plaintiff in error would be the franchises to operate in the city of New York an underground railway under the public streets and highways. A railroad's special or secondary franchises are property, and they are protected under the Constitution of the state of New York and the Constitution of the United States.

People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; New York v. Bryan, 196 N. Y. 165, 89 N. E. 467; Lord v. Equitable Life Assur. Soc. 194 N. Y. 226, 22 L.R.A.(N.S.) 420, 87 N. E. 443.

Corporate franchises have none of the incidents of property. They are inalienable, not assignable, and not mortgageable; neither do they survive dissolution. It is wholly within the power of the legislature to revoke them at any time without compensation.

People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Home Ins. Co. v. New York, 134 U. S. 601, 33 L. ed. 1030, 10 Sup. Ct. Rep. 593.

The provisions of § 35 of the rapid transit act of New York do not exempt the plaintiff in error from corporate franchise taxation.

Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 668, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625.

A tax on corporate franchises may be measured by property exempt from taxation.

People ex rel. Edison Electric Light Co. v. Campbell, 158 N. Y. 543, 20 L.R.A. 453, 34 N. E. 370; People ex rel. United States Aluminum Printing Plate Co. v. Knight, 174 N. Y. 475, 63 L.R.A. 87, 67 N. E. 65; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807.

Mr. Justice Holmes delivered the opinion of the court:

This was a certiorari to review assessments made by the comptroller after a previous assessment had been set aside by the court of appeals. 200 N. Y. 93, 93 N. E. 505. The present assessments were upheld. 207 N. Y. 270, 100 N. E. 813. The plaintiff in error alleges that the tax laws construed to authorize them impair the obligation of contracts, contrary to article I. § 10, of the Constitution of the United States.

Successive acts were passed by the legis-

lature of New York for the establishment of a rapid transit system in cities of above one million inhabitants. Under chap. 752 of the Laws of 1894, the city of New York determined to build a subway, and a pursuance of the statute made a contract with one McDonald, on February 21, 1900, by which he undertook to construct the railroad for $35,000,000. The statute required that the person, firm, or corporation so contracting should, at his or its own expense, equip, maintain, and operate the road for a term of years, paying as rent a sum equal to the interest on the bonds to be issued by the city for the construction of the road, and a certain contribution to a sinking fund. By § 35, the person, firm or corporation operating such road, shall be exempt from taxation in respect to his, their or its interest therein under said contract and in respect to the rolling stock and other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the construction or operation of said road." This section was amended by chap. 729, § 4, Laws of 1896, to specify what the equipment to be furnished by the person, firm, or corporation operating the road should include, and continued: "Such person, [282] firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road." Re-enacted without change on April 23, 1900. Laws of 1900, chap. 616, § 4. This is the contract relied upon, and the statute may be assumed to have offered a contract that was accepted, as it seems to have been assumed to have by the state courts. We may assume also that the constitutional question is open, and that the only matter for us is whether the obligation of the contract has been impaired by what was done.

The petitioner was incorporated under the statutes of New York for the purpose of equipping, maintaining, and operating the rapid transit railroad in the city of New York, and, pursuant to the rapid transit act and the contract, the operating part of the latter was transferred to it on July 10, 1902. A second contract for an extension of the road, made with an intervening corporation on July 21, 1902, also was assigned to it in like manner on August 10, 1905, since which time the petitioner has operated the road. It may be assumed that the petitioner is entitled to the benefit of the exemption recited above. The petitioner also operates under a lease the elevated railroads of the Manhattan Railway Company, and the earlier above-mentioned attempt to tax it was under § 185 of the tax laws for the years ending on June 30, 1907, 1908, and 1909. This section levied on corporations operating elevated railroads not operated by steam a franchise tax of 1 per cent of gross earnings from all sources within the state, etc., and the attempt was to tax the petitioner upon its receipts from the subway as well as from the elevated road. The court of appeals held that the words "from all sources" in the taxing act did not [283] extend to earnings from the distinct enterprise of the subway, merely because it happened to be carried on by the same corporation that operated the elevated road. But it intimated an opinion that there was nothing to hinder a franchise tax.

The present taxes are levied under §§ 182, 184, and 185 of the tax laws for the years 1907, 1908, 1909, and 1910. The petitioner does not dispute the tax under § 185 in respect of its operation of the elevated railroad, but does dispute the taxes levied under §§ 182 and 184. By the former of these a tax computed on the basis of its capital stock is levied on every corporation doing business in the state, "for the privilege of doing business or exercising its corporate franchises in this state;" and by § 184 an additional tax of $\frac{5}{10}$ of 1 per cent upon gross earnings within the state is imposed on transportation companies not liable to taxation under § 185. The petitioner contends that the contract made by the subway statute, § 35, exempts it from these taxes. It makes some preliminary argument as to the scope of the taxing acts, but we understand the court of appeals to read them as taxing the right to be a corporation and to operate as such, in the case of domestic companies (New York ex rel. Cornell S. B. Co. v. Sohmer, 235 U. S. 549, 558, 559, ante, 355, 359, 35 Sup. Ct. Rep. 162), and we see no reason for attempting to go behind its decision (New Orleans v. Stempel, 175 U. S. 309, 316, 44 L. ed. 174, 178, 20 Sup. Ct. Rep. 110). Therefore the matter for this court to consider is narrowed to whether the words of the exemption extend to a tax on the privilege to operate as a corporation under a charter from the state, in case the interested parties should decide to operate their road in corporate form. If such a tax is allowable we understand that there is no dispute as to amounts or the mode of measuring it. Whether it be admitted or not, if the franchise to operate the subway as a corporation can be taxed in this case, we can see no difference in the legitimacy of adopting as a measure of the tax property [284] that is exempted by con-

tract or property exempted by a simple law. Flint v. Stone Tracy Co. 220 U. S. 107, 165, 55 L. ed. 389, 419, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The petitioner's counsel put with great force the difficulties and apprehensions that beset the subway enterprise at the beginning, the need of attracting capital, and instances of popular understanding that the exemption was of universal scope for the time that the subway was to be run by a lessee before it went into the city's hands. But a business proposition involving the outlay of very large sums cannot be and is not taken by the parties concerned according to offhand impressions; it is scrutinized phrase by phrase and word by word. Scrutinizing it in that way the court of appeals observed that the exemption was from taxation in respect of the person's or corporation's interest under the contract. However probable and expected it may have been that a corporation would run the road, it was left possible for a natural person to do it, as in fact an individual took and held the first contract for two years. The exemption applied to one to the same extent as to the other, for either would have the same interest under the contract as the other. The right to be a corporation, even when the corporation was created and was expected to be created to carry out the purposes of the act, was not an interest under the contract, but only a very great convenience for acquiring and using that interest. For these reasons the court of appeals held that that right might be taxed. New York ex rel. Cornell S. B. Co. v. Sohmer, supra.

The construction of the statute by the Court of Appeals, although not conclusive upon its meaning as a contract, is entitled to great deference and respect. As a literal interpretation it is undeniably correct, and we should not feel warranted in overruling it because of a certain perfume of general exemption. We must accept the words used in their strict sense.

Order affirmed.

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[285] JOSEPHINE P. McGOWAN, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire, Appts.,

v.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased.

(See S. C. Reporter's ed. 285–300.)

Appeal — from District of Columbia court of appeals — extending review beyond Federal question.

1. The Federal Supreme Court, on an appeal from the court of appeals of the District of Columbia, properly taken upon a substantial ground specified in the Judicial Code, § 250, other than a question of jurisdiction covered by the first clause of that section, may determine all the questions presented by the record irrespective of the disposition that may be made of the question on which the right to appeal rests, or whether it is found necessary to decide that question at all.

[For other cases, see Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — attorneys' lien.

2. Attorneys who rendered professional services in the prosecution of a claim against the United States under contracts whereby they were to receive a certain percentage of whatever might be awarded or collected may rightfully invoke the jurisdiction of a court of equity to establish and enforce their asserted lien upon the fund made available for the payment of the claim by its final allowance, where the claimant's representatives are insolvent, and if permitted to receive the sum awarded will immediately remove the same from the jurisdiction, with the declared purpose of defeating the attorneys' claims.

[For other cases, see Equity, I. d, 6, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — adequate remedy at law — waiver.

3. Equity jurisdiction having been properly invoked, the defendant may waive his right to object because of the alleged existence of a legal remedy.

[For other cases, see Equity, I. c, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — remedy at law — waiver by consent decree.

4. A consent decree rendered in a suit in equity by attorneys who had rendered professional services in the prosecution of a claim against the United States under contracts whereby they were to receive a certain percentage of whatever might be awarded or collected, to establish and enforce their asserted lien upon the fund made available for the payment of the claim by its final allowance, by which decree a portion of such fund was paid into court, subject to its determination as to what, if any, amount was justly due such attorneys for their services, not only amounts to a waiver of jurisdictional objections, but renders irrelevant, so far as such attorneys and the claimant's representatives are concerned, all questions as to the effect of the contracts in creating a lien upon the proceeds of the claim, the effect of U. S. Rev. Stat. § 3477,

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NOTE.—On appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

As to what remedy at law will prevent remedy in equity—see note to Tyler v. Savage, 36 L. ed. U. S. 83.

As to right of attorney who takes case on contingent fee or for a certain percentage to implied or equitable lien on fund recovered—see note to De Winter v. Thomas, 27 L.R.A.(N.S.) 634; and McMicken v. Perin, 15 L. ed. U. S. 504.

Comp. Stat. 1913, § 6383, as an obstacle to such lien, the right to a lien independent of the contracts, the right to an injunction or receivership, and other questions, if any, that simply relate to the ground or occasion for coming into equity.

[For other cases, see Equity, I. c; Judgment, III. d, 2, in Digest Sup. Ct. 1908.]

Equity — doing complete justice — suit involving legal questions.

5. A cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority.

[For other cases, see Equity, 13–29, 76, 77, in Digest Sup. Ct. 1908]

Pleading — relief under prayer for general relief.

6. The ascertainment whether anything, and if so how much, was due complainants, was well within the prayer for general relief in a bill in a suit by attorneys who had rendered professional services in the prosecution of a claim against the United States under contracts whereby they were to receive a certain percentage of whatever might be awarded or collected, to establish and enforce their asserted lien upon the fund made available for the payment of the claim by its final allowance.

[For other cases, see Pleading, 93–104, in Digest Sup. Ct. 1908.]

Pleading — answer — what may be pleaded — effect of consent decree.

7. No issue other than the one previously reserved by a consent decree could be raised by the executrix of the claimant by her answer in a suit by attorneys who had rendered professional services in the prosecution of a claim against the United States under contracts whereby they were to receive a certain percentage of whatever might be awarded or collected, to establish their asserted lien upon the fund made available for the payment of the claim by its final allowance, where a decree had been entered by consent for the payment into court of a portion of such fund, subject to judicial determination as to what, if any, amount was justly due to such attorneys for their services.

[For other cases, see Pleading, II. f, in Digest Sup. Ct. 1908.]

Attorneys — compensation for prosecuting claim against United States — tender of services to executrix.

8. The failure of attorneys who rendered professional services in the prosecution of a claim against the United States under contracts whereby they were to receive a certain percentage of whatever might be awarded or collected, to make an express tender of their services to the claimant's executrix, does not defeat their right to compensation when the claim was finally allowed through the efforts of other counsel, where, with full knowledge of the general situation, and of the fact that it was the claimant's, not the attorneys', fault that *further* steps looking toward the allowance of the claim were not taken, she was unwilling that such attorneys should have any further connection with the claim, and they knew her views.

[For other cases, see Attorneys, III., in Digest Sup. Ct. 1908.]

Claims — against United States — contract for compensation of attorneys.

9. Contracts under which attorneys employed to prosecute a claim against the United States are to receive a certain percentage of whatever may be awarded or collected may be resorted to as a basis for calculating the compensation of such attorneys, irrespective of any question under U. S. Rev. Stat. § 3477, Comp. Stat. 1913, § 6383, of their effect as assignments of a claim against the United States.

[For other cases, see Claims, I. d, 2, d, in Digest Sup. Ct. 1908.]

[No. 150.]

Argued January 25 and 26, 1915. Decided April 12, 1915.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, awarding compensation to certain attorneys for their services in the prosecution of a claim against the United States. Reversed and remanded, with directions to affirm the decree of the Supreme Court of the District.

See same case below, 39 App. D. C. 184.

The facts are stated in the opinion.

Messrs. **Clarence R. Wilson and J. J. Darlington** argued the cause, and with Mr. Nathaniel Wilson, filed a brief for appellants:

It is the existence of an adequate remedy in the courts of common law, not in tribunals of special, limited, statutory existence and jurisdiction, which excludes jurisdiction in equity. The ground of the objection that an adequate remedy exists at law is to preserve to a defendant his constitutional right to a trial by jury, and no such right could be accorded him by the probate court.

It is only where a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, that the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Killian v. Ebbinghaus, 110 U. S. 573, 28 L. ed. 248, 4 Sup. Ct. Rep. 232.

If the courts of equity originally obtained and exercised jurisdiction, that jurisdiction is not overturned or impaired by legislation conferring on courts of law the remedial faculty which belongs to courts of equity;

for, unless there are prohibitory or restrictive words used, the uniform interpretation is that such enactments confer concurrent, and not exclusive, remedial authority.

1 Story, Eq. Jur. §§ 64, 80; Mississippi Mills v. Cohn, 150 U. S. 202, 205, 37 L. ed. 1052, 1053, 41 Sup. Ct. Rep. 75; Gassenheimer v. District of Columbia, 6 App. D. C. 116; Schroeder v. Loeber, 75 Md. 204, 23 Atl. 579, 24 Atl. 226; Kinnan v. Forty-second Street, M. & St. N. Ave. R. Co. 140 N. Y. 183, 35 N. E. 498; American Asso. v. Williams, 93 C. C. A. 1, 166 Fed. 17.

The objection that there is an adequate remedy at law is one which must be taken at the earliest stage of the case.

Wylie v. Coxe, 15 How. 415, 420, 14 L. ed. 753, 755; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; Brown B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 536, 33 L. ed. 1021, 1025, 10 Sup. Ct. Rep. 604; Perego v. Dodge, 163 U. S. 160, 164, 41 L. ed. 113, 116, 16 Sup. Ct. Rep. 971; Burbank v. Bigelow, 154 U. S. 558, 559, and 19 L. ed. 51, 52, 14 Sup. Ct. Rep. 1163; Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 266, 267, 54 L. ed. 757, 761, 762, 30 Sup. Ct. Rep. 505; Tyler v. Moses, 13 App. D. C. 442; McGowan v. Elroy, 28 App. D. C. 196; United States Trust Co. v. Blundon, 42 App. D. C. 500.

The objection to the jurisdiction in equity to entertain a creditors' bill on the ground that the complainants had not obtained judgment or otherwise pursued their remedy at law, while ordinarily fatal, comes too late after a consent decree appointing receivers, and an admission of the facts alleged in the bill.

Re Metropolitan R. Receivership (Re Reisenberg) 208 U. S. 90, 109, 110, 52 L. ed. 403, 412, 413, 28 Sup. Ct. Rep. 219.

Consent to a reference to an arbitrator, and that his award shall be made the basis of a decree, is a waiver of the objection that the remedy was at law, and not in equity.

Strong v. Willey, 104 U. S. 512, 26 L. ed. 642.

A further ground of equity jurisdiction, unnecessary unless the foregoing propositions are untenable, is the equitable lien of the attorneys upon the fund produced by their exertions.

Jenkins v. Stephens, 60 Ga. 216; Cowdrey v. Galveston, H. & H. R. Co. 93 U. S. 352, 23 L. ed. 950; Claflin v. Bennett, 51 Fed. 693; Brown v. Bigley, 3 Tenn. Ch. 626; Riddle v. Hudgins, 7 C. C. A. 335, 19 U. S. App. 144, 58 Fed. 490; Evans v. Silvey, 144 Ala. 401, 42 So. 62; Koons v. Beach, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587; Davies v. Lowndes, 3 C. B. 808; Irving v. Viana, 2 Younge & J. 70, 31 Revised Rep. 552; Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; Fischer-Hansen v. Brooklyn Heights R. Co. 173 N. Y. 495, 66 N. E. 395, 13 Am. Neg. Rep. 396; Justice v. Justice, 115 Ind. 201, 16 N. E. 615; Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; Spencer's Appeal, 6 Sadler (Pa.) 488, 9 Atl. 523; Boyle v. Boyle, 106 N. Y. 654, 12 N. E. 709; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92; Jones, Liens, §§ 155, 156; Wilkins v. Carmichael, 1 Dougl. K. B. 105; Brown v. Morgan, 163 Fed. 398; Warfield v. Campbell, 38 Ala. 533, 82 Am. Dec. 724; Central R. & Bkg. Co. v. Pettus, 113 U. S. 127, 28 L. ed. 919, 5 Sup. Ct. Rep. 387; Renick v. Ludington, 16 W. Va. 391; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 581, 48 Am. Rep. 821; Shapley v. Bellows, 4 N. H. 355; Tinsley v. Durfey, 99 Ill. App. 239; Boorman v. Wisconsin Rotary Engine Co. 36 Wis. 212; Lamson v. Worcester, 58 Vt. 387, 4 Atl. 145; Mosely v. Norman, 74 Ala. 424; McWilliams v. Jenkins, 72 Ala. 487; Miedreich v. Rank, 40 Ind. App. 398, 82 N. E. 117; Newbert v. Cunningham, 50 Me. 232, 79 Am. Dec. 612; McDonald v. Napier, 14 Ga. 111.

Relief is not precluded by § 3477 of the Revised Statutes of the United States, Comp. Stat. 1913, § 6383.

Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; Re Buffalo Bayou R Case, 16 Ct. Cl. 238; Bailey v. United States, 109 U. S. 432, 27 L. ed. 988, 3 Sup. Ct. Rep. 272; Erwin v. United States, 97 U. S. 392, 24 L. ed. 1065; Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; McKnight v. United States, 98 U. S. 179, 25 L. ed. 115; Freedman's Sav. & T. Co. v. Shepherd, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; Butler v. Goreley, 146 U. S. 303, 36 L. ed. 981, 13 Sup. Ct. Rep. 84; Price v. Forrest, 173 U. S. 410, 423, 424, 43 L. ed. 749, 753, 754, 19 Sup. Ct. Rep. 434; Wright v. Tebbitts, 91 U. S. 252, 23 L. ed. 320; Jernegan v. Osborn, 155 Mass. 207, 29 N. E. 520; York v. Conde, 147 N. Y. 486, 42 N. E. 193; Conde v. York, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234; Hawes v. Wm. R. Trigg Co. 110 Va. 165, 65 S. E. 538.

The appellee, by the consent to the interlocutory decree, and by her answer, invited the court below to determine, in this cause, the question of the right of the appellants to be compensated, and to what extent, out of the proceeds of the award, and was without standing in the court of appeals to appeal, or to be accorded the benefit of an appeal, from the result of that decree.

Frank v. Bruck, 4 Ill. App. 627; Manion v. Fahy, 11 W. Va. 496; Re New York, L. & W. R. Co. 98 N. Y. 447; Nashville, C. &

St. L. R. Co. v. United States, 113 U. S. 261, 266, 28 L. ed. 971, 973, 5 Sup. Ct. Rep. 460; Bristol v. Bristol & W. Waterworks, 19 R. I. 631, 35 Atl. 884; Lutcher & M. Lumber Co. v. Knight, 217 U. S. 266, 54 L. ed. 761, 30 Sup. Ct. Rep. 505; Burbank v. Bigelow, 154 U. S. 559, and 19 L. ed. 52, 14 Sup. Ct. Rep. 1163.

Amendment was unnecessary.

Finley v. Lynn, 6 Cranch, 238, 3 L. ed. 211; Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398; Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263, 25 Sup. Ct. Rep. 76; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. ed. 65; Horton v. Baptist Church, 34 Vt. 309; 5 Enc. Pl. & Pr. pp. 960–962, and notes; Gilbert v. Washington Beneficial Endowment Asso. 10 App. D. C. 316.

As between individuals, Brookshire and McGowan would have had the right to proceed with the case for the collection of the proceeds of the award in which they had an interest, not merely under the terms of the contract with McGowan, but under the authorities relating to the right of attorneys under contingent-fee contracts.

Steenburgh v. Miller, 11 App. Div. 286, 42 N. Y. Supp. 333.

The conclusion of the learned court that the failure to reply to a letter is an admission of the truth of its contents is not only not sought to be supported by the citation of authority, but is believed to be opposed by the unanimous current of authority upon the subject. Certainly the possession of an unanswered letter is not an admission of the truth of its contents.

Fairlie v. Denton, 3 Car. & P. 103, 8 Barn. & C. 395, 2 Mann. & R. 353; Sullivan v. McMillan, 26 Fla. 543, 8 So. 450; Com. v. Eastman, 1 Cush. 215, 48 Am. Dec. 596; Fearing v. Kimball, 4 Allen, 125, 81 Am. Dec. 690; Waring v. United States Teleg. Co. 44 How. Pr. 69; Meguire v. Corwine, 3 MacArth. 81; Com. v. Edgerly, 10 Allen, 187.

Where the failure to complete a professional service is due to the client's refusal to permit it to be completed, the attorney is entitled to the full compensation provided by his contract.

Kikuchi v. Ritchie, 121 C. C. A. 215, 202 Fed. 857; Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060; Crye v. O'Neal, — Tex. Civ. App. —, 135 S. W. 253; Baldwin v. Bennett, 4 Cal. 392; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; Kersey v. Garton, 77 Mo. 645; Detroit v. Whittemore, 27 Mich. 281; Genrow v. Flynn, 166 Mich. 565, 35 L.R.A.(N.S.) 960, 131 N. W. 1115, Ann. Cas. 1912D, 638; Sessions v. Warwick, 46 Wash. 165, 89 Pac. 482; Webster v. Rhodes, 49 Colo. 203, 112 Pac. 324; Eastman v. Blackledge, 171 Ill. App. 404; Majors v. Hickman, 2 Bibb, 217; Bright v. Taylor, 4 Sneed, 159; Weil v. Fineran, 78 Ark. 87, 93 S. W. 568; Cheshire v. Des Moines City R. Co. 153 Iowa, 88, 133 N. W. 324; Carter v. Baldwin, 95 Cal. 475, 31 Pac. 595; Mt. Vernon v. Patton, 94 Ill. 65; McElhinney v. Kline, 6 Mo. App. 94; Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737.

Mr. Leigh Robinson argued the cause, and, with Mr. Holmes Conrad, filed a brief for appellee:

If a party, by his silence, allows another to act upon a mistake of facts, even where there is a mistake, he is thereby estopped from setting up those facts afterwards to the prejudice of the person who has been misled. His silence binds him upon the same principles as if he had, by express misrepresentation, misled the other parties.

Freeman v. Cooke, 6 Dowl. & L. 187, 18 L. J. Exch. N. S. 114, 12 Jur. 777, 2 Exch. 663, 11 Eng. Rul. Cas. 82; Welland Canal Co. v. Hathaway, 8 Wend. 483, 24 Am. Dec. 51; Morgan v. Chicago & A. R. Co. 96 U. S. 720, 24 L. ed. 744; Kirk v. Hamilton, 102 U. S. 76, 26 L. ed. 82; Casey v. Galli, 94 U. S. 680, 24 L. ed. 170; Gregg v. Von Phul, 1 Wall. 281, 17 L. ed. 537; Lowndes v. Wicks, 69 Conn. 31, 36 Atl. 1072.

Failure to prosecute the claim to a "final determination" was a breach of contract fatal to the claim of complainants.

Stark v. Parker, 2 Pick. 267, 13 Am. Dec. 425; Cutter v. Powell, 6 T. R. 320, 3 Revised Rep. 185, 6 Eng. Rul. Cas. 627; Scoville v. Trustees of Schools, 65 Ill. 524; Marsh v. Rulesson, 1 Wend. 514; Roehm v. Horst, 178 U. S. 1–9, 44 L. ed. 953–956, 20 Sup. Ct. Rep. 780; Marks v. Van Eeghen, 30 C. C. A. 208, 57 U. S. App. 149, 85 Fed. 855; Tenney v. Berger, 93 N. Y. 529, 45 Am. Rep. 263; Holmes v. Evans, 129 N. Y. 141, 29 N. E. 233; Marsh v. Whitmore, 21 Wall. 184, 22 L. ed. 485; Landsdale v. Smith, 106 U. S. 392, 393, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328; 2 Greenl. Ev. § 142; Harris v. Osbourn, 2 Cromp. & M. 629, 4 Tyrw. 445, 3 L. J. Exch. N. S. 182; Nicholls v. Wilson, 11 Mees. & W. 106, 2 Dowl. N. S. 1031, 12 L. J. Exch. N. S. 266.

Even if the express terms of abandonment did not exist, the delay of complainants of itself justified the employment of other counsel.

Walsh v. Shumway, 65 Ill. 475.

Failure to communicate to appellee information of the contracts under which complainants now claim of itself would have worked the virtual abandonment thereof,

even had such contracts been still in existence.

Bolte v. Fichtner, 68 Hun, 148, 22 N. Y. Supp. 725; Darr v. Darr, 59 Iowa, 81, 12 N. W. 765.

If the matters set up in an answer as a defense have been previously adjudicated, it should be set up by plea or replication, upon which issue can be taken, so as to give the defendant an opportunity to present any evidence he may have on the subject.

Thrifts v. Fritz, 101 Ill. 458; Fletcher, Eq. Pl. § 356; 2 Dan. Ch. Pl. & Pr. 829–834.

The policy and purpose of interlocutory procedure is to prepare causes for hearing, upon their merits.

Western U. Teleg. Co. v. Pacific & A. Teleg. Co. 49 Ill. 93.

The consent decree does not present a case of *res judicata*.

Kingston's Case, 1 Leach, C. L. 146, 1 East, P. C. 468, 2 Smith, Lead. Cas. 784; Langmead v. Maple, 18 C. B. N. S. 270; Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 561, 562, 34 L. ed. 1008, 1009, 11 Sup. Ct. Rep. 402.

Nor does the doctrine of estoppel apply.

Eastman v. Cooper, 15 Pick. 279, 26 Am. Dec. 600; Kennedy v. Scovil, 14 Conn. 69; Hopkins v. Lee, 6 Wheat. 114, 5 L. ed. 220; White v. Sherman, 168 Ill. 612, 61 Am. St. Rep. 132, 48 N. E. 128; Texas & P. R. Co. v. Southern P. Co. 137 U. S. 56, 34 L. ed. 617, 11 Sup. Ct. Rep. 10.

But had it been the expressed intent of counsel on both sides to "eliminate" from the issues to be tried any question touching the validity of the contracts, it would have been out of their power to accomplish it, and out of the power of the court to permit it.

Wood, Mast. & S. § 901: Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699; Petrie v. Hannay, 3 T. R. 422; Vansittart v. Taylor, 4 El. & Bl. 912, 1 Bos. & P. 266; Coppell v. Hall, 7 Wall. 558, 19 L. ed. 248; Camp v. Bruce, 96 Va. 524, 43 L.R.A. 146, 70 Am. St. Rep. 873, 31 S. E. 901.

Neither the averments of the bill nor the facts offered in evidence sustain the contention, heard for the first time in the argument, of a claim based on an attorneys' lien.

Re Paschal (Texas v. White) 10 Wall. 483, 19 L. ed. 992; Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387.

Complainants cannot claim an equitable lien on the judgment recovered in an action in which they entered no appearance, assumed no responsibility, in no way took part, nor in any way assisted, at any stage. They are required to show a lien upon a judgment recovered by them in a suit conducted by them.

Re Wilson, 12 Fed. 241; Adams v. Kehlor Mill. Co. 38 Fed. 281.

A decree must be sustained by the allegations in the pleadings. A claim arising under a *quantum meruit*, and a lien based thereon, is not alleged.

Foster, Fed. Pr. § 67; Ohio & M. R. Co. v. McCarthy, 96 U. S. 267, 24 L. ed. 695; Providence Rubber Co. v. Goodyear, 9 Wall. 793, 19 L. ed. 567; Harrison v. Nixon, 9 Pet. 503, 9 L. ed. 208; Washington, A. & G. R. Co. v. Bradley (Washington, A. & G. R. Co. v. Washington) 10 Wall. 302, 19 L. ed. 895.

Interest is not recoverable on a claim for unliquidated damages, prior to the determination of the principal sum due.

Re Hartman, 13 Misc. 486, 35 N. Y. Supp. 495; Van Beuren v. Van Gaasbeck, 4 Cow. 499; Gallup v. Perue, 10 Hun, 526.

Mr. Justice Pitney delivered the opinion of the court:

This is an equity suit that was commenced in the supreme court of the District of Columbia by Jonas H. McGowan and Elijah V. Brookshire, as complainants, against appellee as executrix of Joseph W. Parish, deceased, together with the Secretary of the Treasury and the Treasurer of the United States, as defendants, in May, 1909, shortly after the decision by this court of the case of United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556, and at a time when, pursuant to that decision, a mandate was about to be issued that would have resulted in paying to appellee, as executrix, the sum of $181,358.95, the amount found by the auditor for the War Department to be due to Joseph W. Parish in his lifetime upon his claim against the government, known as the "ice claim," mentioned in the opinion of this court in the case just referred to. The object of the suit was to establish and enforce a lien upon the fund for services rendered in the prosecution of the claim. That claim had long been before the courts and [287] Congress (Parish v. United States, 12 Ct. Cl. 609, 100 U. S. 500, 25 L. ed. 763; 16 Ct. Cl. 642; act Fed. 20, 1886, 24 Stat. at L. 653, chap. 11), when, on August 4, 1900, an agreement in writing was made between Parish and McGowan whereby the former employed the latter as his attorney to prosecute and collect it, agreeing, "in consideration of the professional services rendered and to be rendered by the party of the second part [McGowan], and others whom he may employ in the prosecution of said claim," that he, Parish, would pay to McGowan a fee

equal in amount to 15 per centum of whatever might be awarded or collected. McGowan was thereby given control of the prosecution of the claim to its final determination, with power to receive and receipt for any draft or other evidence of indebtedness that might be issued in payment of it, and to retain from the proceeds the amount of the stipulated fee; Parish was to furnish the evidence required and to execute from time to time and deliver to McGowan powers of attorney or other papers necessary for the prosecution and collection of the claim and the payment of the fee; Parish agreed that he would not assign or otherwise dispose of the claim, and that the agreement should not be vacated by any revocation of the authority granted to McGowan, "nor by any services rendered or which may be rendered by others or by the party of the first part [Parish], his heirs or legal representatives, or any of them;" and McGowan agreed to diligently prosecute the claim to the best of his professional ability to its final determination.

McGowan was a lawyer engaged in practice in the District of Columbia, and after the contract was made, he rendered professional services under it, before Congress and otherwise. In December, 1902, McGowan and Parish, being desirous of securing the services of the complainant Elijah V. Brookshire as attorney in co-operation with McGowan, the latter made an agreement with Brookshire, [288] giving him an undivided one-third interest in the contract of August 4, 1900, the purpose being to give him 5 per cent of whatever amount should be awarded or collected upon the claim. A short time after this, Parish and Brookshire entered into a written agreement between themselves, by which the former agreed that he would pay to the latter an additional 5 per cent of the amount awarded or appropriated, and that Brookshire should have a lien for the amount due him upon the award when made; and Brookshire agreed to render necessary and proper legal services in the prosecution of the claim under the direction of Parish.

Thereafter McGowan and Brookshire cooperated, and unquestionably rendered services of value. Through their instrumentality, Congress was induced to pass the act of February 17, 1903 (32 Stat. at L. 1612, chap. 559), referring the claim to the Secretary of the Treasury for examination and the payment of any balance found due to Parish under the rule of damages laid down by this court in United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, after deducting payments already made. Thereafter, the Secretary of the Treasury referred it to the auditor for the War Department, who, on August 11, 1903, made a finding that there was a balance of $181,358.95 due to Parish, and notified him through McGowan. The Secretary, however, did not accept this finding, but made further investigation, with the result that on May 31, 1904, having concluded that under the rule in the Behan Case, and upon the evidence, no balance was due to Parish, he decided to refuse to pay the amount ascertained by the auditor, or any sum. Shortly after this, friction and disagreements developed between Parish and the attorneys respecting the next steps to be taken, and they continued until Parish's death, which occurred on December 26, 1904, at his residence in the city of Washington. No active steps were taken, during this period, towards pressing the claim. Parish [289] left a will, but no estate other than the claim. His daughter, Emily E. Parish, proved the will and qualified as executrix thereunder, and in the year 1905 she employed other counsel, through whom, in May, 1906, she filed in the supreme court of the District of Columbia a petition for a mandamus against the Secretary of the Treasury to require him to issue a draft in her favor for the amount of the award of the auditor for the War Department. That court dismissed the petition, and the court of appeals of the District of Columbia affirmed its action. 30 App. D. C. 45. But this court, in the case first above mentioned, reversed this judgment, and remanded the cause with directions looking to the allowance of the mandamus.

At this point, as already mentioned, McGowan and Brookshire filed the present bill of complaint against the executrix, joining the Secretary of the Treasury and the Treasurer of the United States as parties defendant. The bill set up the several contracts made between Parish and McGowan, between McGowan and Brookshire, and between Parish and Brookshire, respectively; set forth the services performed by complainants under those contracts, and the results of those services, including the passage of the act of February 17, 1903, the finding of the auditor for the War Department, ascertaining a balance of $181,358.95 due to Parish, and the adverse decision of the Secretary of the Treasury; the subsequent death of Parish; the probate of his will by Emily E. Parish, his executrix, and the proceedings taken by her in the courts. It also alleged that during Joseph W. Parish's lifetime complainants had advanced money to him for the benefit of himself and his family in sums aggregating $5,000, relying solely upon his promise to repay the loans out of what might be recovered in

respect of the claim; that except for that claim he died insolvent, and was indebted in amounts aggregating about $25,000; that the defendant, Emily E. [290] Parish, and her brother, Grant Parish, had avowed and declared that complainants should never receive any part of the money realized upon the claim, and that they were both insolvent, and if they should receive into their hands the draft about to be issued by the Secretary of the Treasury they would immediately take it out of the jurisdiction of the court for the purpose of defrauding and defeating complainants of their rightful lien and claim on the fund; and that complainants were severally the equitable owners of one-tenth part of said sum of $181,358.95, and entitled to a lien upon the award and finding in respect of that part. The prayers were, in substance, that each of the complainants should be decreed to be the equitable owner of and entitled to one-tenth part of the amount of the award; that the executrix, the Secretary of the Treasury, and the Treasurer of the United States should be enjoined from receiving or paying over the amount of the award to the detriment of complainants' interests; that a receiver should be appointed to collect the money from the United States and hold it subject to the order of the court; and for general relief. The bill was filed on May 22, 1909, and on the same day a restraining order was made enjoining the executrix from receiving, and the officers of the government from paying, the amount of the award. On June 2, with the consent of the respective solicitors for the complainants and the defendant, Emily E. Parish, executrix, an interlocutory decree was made, dissolving the restraining order and dismissing the bill of complaint as against the Secretary of the Treasury and the Treasurer of the United States, and also dissolving the restraint as against the executrix; "provided, however, and it is adjudged that in respect of the sum of forty-one thousand dollars, and in respect of any warrant, draft, or check that may be issued therefor by the Treasury Department, or any officer thereof, as being a part of the award or finding," etc., the executrix was thereby directed to make a proper [291] power of attorney authorizing the vice president of the American Surety & Trust Company to receive the warrant, draft, or check, indorse it in her name as executrix of Joseph W. Parish, deceased, collect the proceeds, and deposit them with the Trust Company "to the credit of this cause and subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount and, if so, what amount, is justly due the complainants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint." This consent decree was complied with, to the extent that the executrix collected from the Treasury Department for the use of the estate the amount of the award over and above $41,000, and the latter amount was on June 7, 1909, placed with the Trust Company to the credit of the cause, subject to the order of the court. Jonas H. McGowan died on August 2, 1909, and his executrix was substituted as a party complainant in his stead. An answer was filed in due course by the executrix of Joseph W. Parish, proofs were taken, and the cause was brought on to final hearing. The supreme court of the District of Columbia made a decree awarding to each of the complainants a sum equal to one-tenth part of the amount of the award, with interest from June 7, 1909. 39 Wash. L. Rep. 586. The court of appeals reversed this decree (39 App. D. C. 184), and the present appeal was allowed under § 250, Judicial Code [36 Stat. at L. 1159, chap. 231, Comp. Stat. 1913, § 1227], upon the ground that the construction of Rev. Stat. § 3477, Comp. Stat. 1913, § 6383, had been drawn in question by the defendant. 228 U. S. 312, 57 L. ed. 849, 33 Sup. Ct. Rep. 462.

Section 250 allows a review by this court of the final judgments or decrees of the court of appeals of the District of Columbia upon writ of error or appeal in six classes of cases. The first is: "Cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said supreme court, then the [292] question of jurisdiction alone shall be certified to said supreme court for decision." In the remaining five classes of cases the section imposes no similar restriction upon the scope of the review. In this respect the section is analogous to § 238 [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215] which regulates direct appeals and writs of error from the district courts of the United States. Under that section it is held that, in cases other than those that raise alone the question of the jurisdiction of the district court, the appellate review by this court is general. Siler v. Louisville & N. R. Co. 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 63, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 312, 316, 58 L. ed. 974, 978, 979, 34 Sup. Ct. Rep. 493. The same rule obtains in cases coming here from a district court under § 266, Judicial C[illegible] where the jurisdiction of that court [illegible] voked upon constitutional grounds s[illegible]

direct appeal is allowed. Ohio Tax Cases, 232 U. S. 576, 586, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 604, ante, 379, 382, 35 Sup. Ct. Rep. 146. A similar rule must be applied to appeals and writs of error taken under § 250, and in the present case our jurisdiction, properly invoked upon a substantial ground specified in the section, other than a question of jurisdiction covered by its first clause, extends to the determination of all questions presented by the record, irrespective of the disposition that may be made of the question respecting Rev. Stat. § 3477, or whether it is found necessary to decide that question at all.

The grounds upon which the court of appeals denied relief to complainants are, briefly: That contracts like those set out in the bill, so far, at least, as they attempt to assign or create a lien upon a claim against the United States, are prohibited by § 3477, and thereby made absolutely void; that although this court, in Nutt v. Knut, 200 U. S. 12, 21, 50 L. ed. 348, 353, 26 Sup. Ct. Rep. 216, permitted a similar contract to be employed as evidence of an agreed basis of compensation for an attorney's services in prosecuting a claim, yet that decision was rendered in a case coming from a state court, [293] where the complaint did not assert nor did the judgment establish any lien upon the fund claimed from the government, and under the procedure in the state court the question of jurisdiction in equity to entertain the action did not arise, and perhaps could not have arisen; that the present case differed, because complainants sued upon the contracts as a whole, claiming the fees as fixed thereby, and also claiming a lien, and that "had there been an amendment abandoning the lien and relying on the *quantum meruit* solely, the equity court would have been without jurisdiction;" that aside from the contracts there was no attorney's lien upon which to found jurisdiction in equity, because complainants did not themselves reduce the fund to possession, the executrix having employed other counsel to do this, as she had a right to do, although not thereby entitled to defeat complainants' right to compensation for the reasonable value of their services previously performed; that the allegation of the insolvency of the executrix, and her intention to remove the fund from the jurisdiction, furnished no foundation for a resort to equity, because relief could have been given by the supreme court of the District as a probate court, which had authority to require the executrix to give sufficient bond for the protection of creditors, or else to revoke her letters and thus prevent the collection of the judgment; that the interlocutory decree entered by consent of the parties did not help the position of complainants nor estop defendant from attacking the contracts as illegal and void, or alleging the failure of complainants to prosecute the claim to final determination; that the decree and defendant's answer furnished a ground upon which complainants might have amended their bill so as to convert the suit into a claim for compensation upon a *quantum meruit*, but that no such amendment was made, the cause being heard upon the theory that the allegations of the original bill were sufficient for the purpose, and there being no [294] evidence of the reasonable value of the services of the attorneys aside from the express stipulations of the contracts, as to which it was held that they did not furnish a measure of the reasonable value of services which were not completely performed as the contracts contemplated; and thereupon, examining the evidence with a view to determining whether the attorneys had performed the contracts so far as permitted by the claimant and his executrix, the court reached the conclusion that they had in effect abandoned the contracts during the lifetime of Joseph W. Parish, and had made no tender of further services to the executrix after his death, and hence, upon the whole case, were entitled to no compensation.

As to the effect of § 3477 Rev. Stat. Comp. Stat. 1913, § 6383,[1] it has been several times declared by this court that the statute was intended solely for the protection of the government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they, in their judg-

[1] Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

ment, deem proper. Goodman v. Niblack, 102 U. S. 556, 560, 26 L. ed. 229, 231; Bailey v. United States, 109 U. S. 432, 439, 27 L. ed. 988, 990, 3 Sup. Ct. Rep. 272; Hobbs v. McLean, 117 U. S. 567, 576, 29 L. ed. 940, 943, 6 Sup. Ct. Rep. 870; Freedman's Sav. & T. [295] Co. v. Shepherd, 127 U. S. 494, 506, 32 L. ed. 163, 168, 8 Sup. Ct. Rep. 1250; Price v. Forrest, 173 U. S. 410, 423, 43 L. ed. 749, 753, 19 Sup. Ct. Rep. 434. But see Nutt v. Knut, 200 U. S. 12, 20, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216.

In this case, the officers of the government, after the suit was commenced (the claim having already been allowed and finally adjudicated), found that they needed no protection from the statute and were safe in paying into court to the credit of the cause a sufficient amount to answer the claims of complainants. The amount being paid, the court took control of it, and, with the consent of the other parties, dismissed the Secretary of the Treasury and the Treasurer of the United States from the cause. Under these circumstances, and in view of the consent decree, we are not called upon to consider whether the present case is within the reasoning of either of the cases cited, if we decide—as we do—that in view of the contracts, and of the special facts set up in the bill of complaint, as above recited, reasonable and sufficient grounds existed for invoking the equity jurisdiction, that the subject-matter was within the cognizance of a court of equity, and that it was by no means clear that an adequate remedy existed at law. The equity jurisdiction having thus been properly invoked, the right of defendant to object because of the alleged existence of a legal remedy could be waived. Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 536, 33 L. ed. 1021, 1025, 10 Sup. Ct. Rep. 604; Re Metropolitan R. Receivership (Re Reisenberg) 208 U. S. 90, 110, 52 L. ed. 403, 412, 28 Sup. Ct. Rep. 219. It is suggested in the opinion of the court of appeals that the trial court in its discretion might, of its own motion, have dismissed the bill for want of jurisdiction. This was not done, and hence we are not called upon to pass upon the question; but we must not be understood as assenting to the suggestion.

The consent decree not only amounted to a clear and express waiver of jurisdictional objections, but it rendered irrelevant, so far as the present parties are concerned, all questions as to the effect of the contracts in creating a [296] lien upon the proceeds of the ice claim, the effect of § 3477, Rev. Stat. as an obstacle to such lien, the right to a lien independent of the contracts, the right to an injunction or receivership, and other questions, if any, that simply relate to the ground or occasion for coming into equity. These were waived when the court, with the consent of the parties, took physical control of the $41,000 for the purpose, very clearly expressed in the interlocutory decree, of holding it for the benefit of the respective parties, "subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount, and, if so, what amount, is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for and in respect of the matters described in the bill of complaint." This language excluded the idea that the determination of any other question—whether contract lien, attorney's lien, or what not—might control the ultimate disposition of the fund. The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law had it not originally been bound up with questions appropriate for decision by an equitable tribunal. But "a court of equity ought to do justice completely, and not by halves;" and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. Camp v. Boyd, 229 U. S. 530, 551, 552, 57 L. ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785, and cases cited. After the making of the consent decree and the deposit of the money in court, the situation of this case was substantially that of an interpleader suit after the making of a decree for interpleader and the dismissal of the stakeholder from the cause, with the issue as between the conflicting claimants limited by stipulation to the determination of the amount "justly due" from the one to the other. That question, [297] of course, was and is to be decided according to the equities of the claimants as between themselves, without regard to legal technicalities. Whitney v. Cowan, 55 Miss. 626, 645, 647.

We also think the ascertainment whether anything, and if so how much, was due to complainants, was well within the prayer for general relief, and cannot agree with the court of appeals that there was any necessity for amending the bill. Nor could the executrix, by her answer, raise any issue other than the simple one previously reserved by the consent decree.

The determination of that issue depends chiefly upon the disputed question of fact, whether the attorneys fairly and fully per-

formed their agreements so far as permitted to do so by Joseph W. Parish in his lifetime and his executrix after his death, as the supreme court of the District found that they had done; or whether they in effect abandoned performance and refused to complete their duties under the contracts, as the court of appeals found that they had done. This in turn depends, for the most part, upon what took place between McGowan and Brookshire and Parish during the summer and autumn of the year 1904; and since two of these were dead at the time of the hearing, and the third (Brookshire) debarred from testifying as to transactions with or declarations by defendant's testator (D. C. Code, § 1064 [31 Stat. at L. 1357, chap. 854]), the evidence bearing upon the question is fragmentary and largely circumstantial. The court of appeals laid great stress upon the fact that, so far as appeared, McGowan made no written reply to a certain letter sent to him by Parish in the month of September, while McGowan was on vacation in Canada. It contained the statement: "You will remember before you left Washington for your summer respite, you said substantially that you had done your best to get the auditor's report in my case paid by the Secretary of the Treasury, and failed, etc.; 'that you [298] turned over to me the case to be managed in the future and do whatever I deemed best, etc.' Sometime next Congress I propose to organize a practical method and resurrect the claim from its unfortunate condition, and I must have unrestricted and unrestrained control"—with other matter intimating, but not expressing, a desire that McGowan should expressly abandon the case. The letter was rambling, and its purpose not plain. There was nothing in it to require an immediate reply, or to necessitate a reply in writing. McGowan returned to Washington within two weeks after its receipt, and soon afterwards made repeated efforts to obtain a personal interview with Mr. Parish, but without success. It would serve no useful purpose to rehearse the evidence that was introduced to throw light upon the situation and to show the conduct of the parties during this period. We content ourselves with saying that we are unable to concur in the view of the court of appeals, and, on the contrary, think that the weight of the evidence shows that up to the time of Mr. Parish's death the attorneys were ready and willing to proceed, but that because of his attitude, as well as by reason of doubts naturally arising from the adverse decision of the Secretary of the Treasury, they were embarrassed about deciding upon the proper course to be followed, among several that suggested themselves: mandamus to the Secretary of the Treasury, a rehearing before him, a reference to the court of claims, or a further application to Congress. Their letter of November 19th, stating: "We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next we shall proceed as we deem best under the ample authority which we have,"—was, in view of all the circumstances, a reasonable though emphatic notice to Parish that, under the right conferred upon them by the [299] contracts, and under the power of attorney that they had, they would exercise their own judgment and discretion as to the proper mode of proceeding, unless they could have an interview with him. And Parish's reply, under date November 22d, in which, while not disputing their statement that they had sought and he had avoided an interview, he notified them that he would not submit to their proposed action, amounted in effect to a confirmation of what they already had reasonable ground to believe, that he intended to dispense entirely with their services. That they did not proceed without him, as they threatened to do, is easily explainable on the theory that his personal co-operation was practically, although not legally, indispensable.

The evidence further shows that the executrix had been fully cognizant, during her father's lifetime, of the general situation respecting the ice claim, and knew that McGowan and Brookshire were the attorneys in charge of it; she knew Mr. McGowan had advanced considerable sums to her father for her support and hers, and that these advances remained unpaid at his death; the letter of November 19th and a copy of the reply were among her father's papers and came to her knowledge not long after his death; and the circumstances show that she was not willing that McGowan or Brookshire should have anything further to do with the claim, and that they were made aware of this. We think they were not called upon to make an express offer of their services to the executrix.

Complainants are therefore entitled to compensation; and since the attorneys' services were admittedly of great value, and resulted in securing to Mr. Parish, as this court in effect held in 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556, a complete right to the payment of the money, and since it was his fault, and not theirs, that the final steps to recover it were not taken by them, no reason is shown why complainants should not receive the entire amount stipulated for in the contracts. [300]

Those instruments may be resorted to as a basis for calculating the compensation of the attorneys, irrespective of any question about their effect as assignments because of § 3477, Rev. Stat. Comp. Stat. 1913, § 6383. Nutt v. Knut, 200 U. S. 12, 21, 50 L. ed. 348, 353, 26 Sup. Ct. Rep. 216. And the first and foundation agreement in terms provides that it shall not be affected by any revocation of the authority granted to Mr. McGowan, nor by any services rendered by others, or by Parish himself.

The decree of the Court of Appeals is reversed, and the cause remanded, with directions to affirm the decree of the Supreme Court of the District of Columbia, and direct the latter court to take further proceedings thereon, if necessary, in accordance with the views above expressed.

Reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v.
WESTERN UNION TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 300-303.)

Error to circuit court of appeals — diverse citizenship case.

The jurisdiction of a Federal district court of a suit by a New York telegraph company against a Kentucky railway company to expropriate by judgment under a state statute the right of use for a telegraph line over the right of way, bridges, and property of the railway company, is none the less dependent entirely upon the diverse citizenship of the parties so as to render a judgment of the circuit court of appeals final because of an unexplained averment by the telegraph company that it had accepted the provisions of the act of July 24, 1866 (14 Stat. at L. 221, chap. 230, Comp. Stat. 1913, § 10,072), since that act gave the telegraph company no right of eminent domain, and even if such act had to be relied upon to bring the telegraph company within the benefit of the state expropriation statute, the suit would still arise under the state law.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

[No. 183.]

Argued March 8 and 9, 1915. Decided April 19, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Louisiana condemning a right of use for a telegraph line over a railway company's right of way, in a suit which had been removed to that court from a state court. Dismissed for want of jurisdiction.

See same case below, 121 C. C. A. 664, 203 Fed. 1022.

The facts are stated in the opinion.

Mr. **Victor Leovy** argued the cause, and, with Messrs. George Denegre and Henry L. Stone, filed a brief for plaintiff in error.

Mr. **John G. Johnson** also argued the cause, and, with Messrs. Victor Leovy and Henry L. Stone, filed a brief for plaintiff in error.

Mr. **Rush Taggart** argued the cause, and, with Messrs. Charles P. Fenner and George H. Fearons, filed a brief for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the telegraph company, originally in a state court, to acquire "the right of use for a telegraph line over the right of way, bridges, and property" of the railroad company, subject to the railroad's dominant right, by "judgment expropriation." By an amendment filed on May 21, 1912, the telegraph company alleged that it had accepted the provisions of the act of Congress of July 24, 1866 (chap. 230, 14 Stat. at L. 221, see Rev. Stat. §§ 5263 et seq. Comp. Stat. 1913, § 10,072), but did not disclose the purpose of the allegation. The case was removed to the district court of the United States on June 17, 1912. There was a trial, a condemnation of the right to the plaintiff upon payment of a sum fixed by verdict, and a judgment, subject to exceptions, which was affirmed without an opinion by the circuit court of appeals. This statement is sufficient, or nearly so, to show that there is a question as to the jurisdiction of this court.

[302] If the jurisdiction below was dependent entirely upon the opposite parties being citizens of different states,—the telegraph company of New York, the railroad of

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NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Generally, as to diverse citizenship as ground of Federal jurisdiction—see notes to Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; M'Donald v. Smalley, 7 L. ed. U. S. 287; and Roberts v. Lewis, 36 L. ed. U. S. 579.

Kentucky,—this writ of error must be dismissed under § 128 of the Judicial Code. Act of March 5, 1911, chap. 231, 36 Stat. at L. 1087, Comp. Stat. 1913, §§ 968, 1120. The only basis for any other ground of jurisdiction is the unexplained averment of acceptance of the act of 1866. The question is whether that averment discloses such a ground.

The jurisdiction to be exercised was to expropriate by judgment. But it was well known to the telegraph company from a series of decisions to which it was party that the act of 1866 was merely permissive, and gave no power to exercise eminent domain. The latest decision, repeating many earlier ones, was rendered a month and a half before this amendment was filed. Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449. There is not even color of jurisdiction on the ground that the taking was by force of the act of 1866. Western U. Teleg. Co. v. Ann. Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

The only other that occurs to us is that, under the statutes of Louisiana as construed, the telegraph company could not maintain this suit if, by the law creating it, it was prohibited from operating in Louisiana, and that the power given by the act of 1866 excluded such a prohibition and brought the company within the benefit of the Louisiana expropriation statute. As we have said, the purpose of the allegation is not explained, and the plaintiff did not admit the necessity of resorting to laws other than those of New York for its powers. But supposing, without implying, that the statute of 1866 had to be relied upon to bring the telegraph company within the Louisiana act; and would have that effect, still it would not be a ground of jurisdiction. If the jurisdiction of the United States court does not depend entirely upon diversity of citizenship, it is because the suit arises under the laws of the [303] United States. Judicial Code, § 24. But when, as here, the foundation of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfil. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the act of Congress, but by virtue of the Louisiana statute that allows itself to be satisfied by that act. See Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 84, 52 L. ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555.

Writ of error dismissed.

Mr. Justice McKenna and Mr. Justice Lamar dissent.

F. T. ROUNDS and S. A. Jesse, Plffs. in Err.,

v.

CLOVERPORT FOUNDRY & MACHINE COMPANY.

(See S. C. Reporter's ed. 303–309.)

Admiralty — exclusiveness of Federal jurisdiction — suit in personam.

A suit *in personam* against shipowners to recover for work and materials furnished under a contract to repair and rebuild a vessel, in which an attachment of such vessel and a direction for its sale were merely incidental to the suit against the owners, and for the purpose of securing satisfaction of the personal judgment, is not within the exclusive admiralty jurisdiction of the Federal courts, but is one which, irrespective of whether or not the contract in suit is maritime in character, may be brought in a state court under the provisions of the Judicial Code, § 24, saving to suitors the right of a common-law remedy.

[For other cases, see Admiralty, I. b, 3, in Digest Sup. Ct. 1908.]

[No. 669.]

Submitted February 23, 1915. Decided April 19, 1915.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Breckinridge County, in that state, in favor of plaintiffs in a suit against vessel owners to recover for work and materials furnished under a contract to repair and rebuild the vessel. Affirmed.

See same case below, 159 Ky. 414, 167 S. W. 384.

The facts are stated in the opinion.

Mr. William T. Ellis submitted the cause for plaintiffs in error:

Admiralty jurisdiction is not of obvious principle or very accurate history.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733; The Blackheath, 195 U. S. 365, 49 L. ed 237, 25 Sup. Ct. Rep. 46.

Note.—As to admiralty jurisdiction of contracts—see note to Baltimore Steam Packet Co. v. Patterson, 66 L.R.A. 193.

This is a suit on a contract, and this court has jurisdiction.

Philadelphia W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 10 L. ed. 433; Atlantic Transport Co. v. Imbrovek, 234 U. S. 59, 58 L. ed. 1211, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733.

The state courts had no jurisdiction.

Brookman v. Hamill, 43 N. Y. 554, 3 Am. Rep. 731; The General Smith, 4 Wheat. 438, 4 L. ed. 609; Pelham v. The B. F. Woolsey, 3 Fed. 457; Terrell v. The B. F. Woolsey, 4 Fed. 552; Knapp, S. & Co. v. McCaffrey, 177 U. S. 640, 44 L. ed. 923, 20 Sup. Ct. Rep. 824; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8.

This court is the sole judge as to whether or not a Federal question is here involved.

The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.) 205 U. S. 360, 51 L. ed. 839, 27 Sup. Ct. Rep. 509; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

Mr. Claude Mercer submitted the cause for defendant in error:

A contract for the construction of, or repairs to, or materials or supplies furnished to, a vessel, is not maritime, and in enacting laws to provide a remedy for a breach of such a contract or for the performance of such a contract, a state legislature does not invade the Federal Constitution, which has delegated to admiralty the exclusive cognizance of maritime contracts.

Edwards v. Elliott, 21 Wall. 532–558, 22 L. ed. 487–492; People's Ferry Co. v. Beers, 20 How. 393–402, 15 L. ed. 961–964; The Mary F. Chisholm, 129 Fed. 817; The Winnebago, 73 C. C. A. 295, 141 Fed. 949; Stewart v. Harry, 3 Bush, 438; The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; Sinnot v. Davenport, 22 How. 243, 16 L. ed. 247; Marshall v. Curtis, 5 Bush, 607; The Hyatt v. Reitz, 4 Bush, 395; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Roach v. Chapman, 22 How. 129–132, 16 L. ed. 294, 295; Deaney Forge & Iron Co. v. The Winnebago, 142 Mich. 88, 113 Am. St. Rep. 566, 105 N. W. 527; The San Rafael, 72 C. C. A. 188, 141 Fed. 280; Iroquois Transp. Co. v. Edwards, 205 U. S. 354–463, 51 L. ed. 836–841, 27 Sup. Ct. Rep. 509; Graham & M. Transp. Co. v. Craig Shipbuilding Co. 203 U. S. 577, 51 L. ed. 325, 27 Sup. Ct. Rep. 77.

Everything is construction until the ship is completed as a ship.

26 Cyc. 761; People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961; The Paradox, 61 Fed. 860; The Count De Lesseps, 17 Fed. 460; The Pacific, 5 Hughes, 257, 9 Fed. 120; The Iosco, 1 Brown, Adm. 495, Fed. Cas. No. 7,060; Griffenberg v. The John Laughlin, 2 W. N. C. 612, Fed. Cas. No. 5,811; Roach v. Chapman, 22 How. 129, 16 L. ed. 294; McMaster v. One Dredge, 95 Fed. 832; King v. Greenway, 71 N. Y. 413; The Ferax, 1 Sprague, 180, Fed. Cas. No. 4,737.

There is no maritime lien upon the new boat merely because some materials were used from an old ship, for work done in fitting them into the new one.

Hartuppe v. The Coal Bluff, No. 2, Fed. Cas. No. 6,172; Smith v. The Royal George, 1 Woods, 290, Fed. Cas. No. 13,102.

[305] Mr. Justice Hughes delivered the opinion of the court:

The Cloverport Foundry & Machine Company, the defendant in error, brought this suit against F. T. Rounds and S. A. Jesse, of Owensboro, Kentucky, in the Breckinridge circuit court of that state, to recover the sum of $5,668.65 for work and materials furnished under a contract to repair and rebuild a steamboat formerly known as the "R. D. Kendall," and renamed the "Golden Girl." The defendants were the owners of the vessel. A specific attachment was issued under §§ 2480 to 2486 of the Kentucky Statutes, which provided for a lien upon watercraft for work and supplies, etc., and the defendants procured a release of the boat by executing a forthcoming bond. By special demurrer, the defendants challenged the jurisdiction of the court to entertain the action upon the ground that the subject-matter was exclusively cognizable in the admiralty. The demurrer was overruled, and the defendants, reasserting the absence of authority in the court, answered, denying the allegations of the petition, and setting up a counterclaim for damages alleged to have been caused by defective work and by delay in completion. Upon the trial, the counterclaim was dismissed and the company had judgment against the defendants for the amount demanded in its petition; it was further adjudged that, by virtue of the attachment and the applicable law, the plaintiff had a lien upon the vessel for the payment of the judgment, and the vessel was ordered to be sold and the proceeds applied to the debt. The court of appeals of the state affirmed the judgment. 159 Ky. 414, 167 S. W. 384.

The question presented on this writ of error relates solely to the jurisdiction of the state court. It is contended by the plaintiffs in error that the contract in suit was for repairs on the vessel, and therefore was maritime in character; that the proceeding was *in rem* and beyond the [306] com-

petency of the local tribunal. See The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; The Belfast, 7 Wall. 624, 19 L. ed. 266; The J. E. Rumbell, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; The Glide, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; act of June 23, 1910, chap. 373, 36 Stat. at L. 604, Comp. Stat. 1913, § 7783. On the other hand, the defendant in error denies that the contract was maritime, contending that the old boat was dismantled, its identity destroyed, and a new boat built, and that the case in this aspect falls within the decisions relating to contracts for the original construction of a vessel. People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961; Roach v. Chapman, 22 How. 129, 16 L. ed. 294; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; The Winnebago (Iroquois Transp. Co. v. Delaney Forge & Iron Co.) 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509. Further, it is urged in support of the judgment that the proceeding was *in personam*, and not *in rem*; that the attachment and direction for sale were incidental to the suit against the owners and for the purpose of securing satisfaction of the personal judgment. Accordingly, it is said, the proceeding was within the scope of the "common-law remedy" saved to suitors by the judiciary act. 1 Stat. at L. 77, chap. 20; Rev. Stat. § 563, Judicial Code, § 24 [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1913, § 991].

As the last point is plainly well taken, it is unnecessary to go further. It is well settled that in an action *in personam* the state court has jurisdiction to issue an auxiliary attachment against the vessel; and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transcended its authority. The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself "seized and impleaded as the defendant, and is judged and sentenced accordingly." By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes, and not merely the title or interest of a personal defendant. [307] The Mary, 9 Cranch, 126, 144, 3 L. ed. 678, 684; The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; The Belfast, 7 Wall. 624, 19 L. ed. 266; The Glide, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; Bird v. The Josephine, 39 N. Y. 19, 27. Actions *in personam* with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. The Belfast, 7 Wall. 624, 19 L. ed. 266; Taylor v. Carryl, 20 How. 583, 598, 599, 15 L. ed. 1028, 1033, 1034; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8. And this is so not only in the case of an attachment against the property of the defendant generally, but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy *in personam*. Leon v. Galceran, 11 Wall. 185, 20 L. ed. 74; see also Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 398, 399, 30 L. ed. 447, 450, 451, 7 Sup. Ct. Rep. 254; Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 646, 648, 44 L. ed. 921, 925, 926, 20 Sup. Ct. Rep. 824.

In the case of Leon v. Galceran, supra, the suit was *in personam*, in a court of the state of Louisiana, to recover mariner's wages. Under a statute of the state the vessel was subject to a lien or privilege in favor of the mariner; and accordingly at the beginning of the suit, on the application of the plaintiff, who asserted his lien, a writ of sequestration was issued and levied upon the vessel, which was afterwards released upon the execution by the owner, the defendant in the suit, of a forthcoming bond, with surety. Judgment was recovered by the plaintiff for the amount claimed, and the vessel not being returned, suit was brought in the state court against the surety. Upon writ of error from this court to review the judgment in the latter action, it was contended, with respect to the issue and levy of the writ of sequestration, that the vessel had been seized under admiralty process in a proceeding *in rem* over which the state court had no jurisdiction *ratione materiæ*, and hence that the bond was void. The contention was overruled and the jurisdiction of the state court maintained. As this court said in Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 398, 399, 30 L. ed. 447, 450, 451, 7 Sup. Ct. Rep. 254, in reviewing Leon v. Galceran, supra, [308] it was held that "the action *in personam* in the state court was a proper one, because it was a common-law remedy, which the common law was competent to give, although the state law gave a lien on the vessel in the case, similar to a lien under the maritime law, and it was made enforceable by a writ of sequestration in advance, to hold the vessel as a security to respond to a judgment, if recovered against

her owner, as a defendant; that the suit was not a proceeding *in rem*, nor was the writ of sequestration; that the bond given on the release of the vessel became the substitute for her; that the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property; and that these views were not inconsistent with any expressed in the Moses Taylor, in the Hine v. Trevor, or in the Belfast."

The result of the decisions is thus stated in Knapp, S. & Co. Co v. McCaffrey, 177 U. S. 638, 646, 648, 44 L. ed. 921, 925, 926, 20 Sup. Ct. Rep. 824: "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (Rev. Stat. § 563) of a common-law remedy."

In the present case, as we have said, the suit was *in personam* and the attachment was in that suit. It had no other effect than to provide security for the payment of the personal judgment which was recovered, and it was [309] for the purpose of satisfying this judgment that, in the same proceeding and by the terms of the judgment, the vessel was directed to be sold. It was within the scope of the common-law remedy to sell the property of the judgment debtors to pay their debt. We are not able to find any encroachment upon the exclusive jurisdiction vested in the Federal court in admiralty.

Judgment affirmed.

LEO M. FRANK, Appt.,
v.
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

(See S. C. Reporter's ed. 309-350.)

Habeas corpus — scope of review — mere error — substitute for writ of error.

1. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus, since this writ may not be employed as a substitute for a writ of error.

[For other cases, see Habeas Corpus, II. a, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — criminal prosecution.

2. A criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Const. 14th Amend., so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Habeas corpus — Federal interference with state administration of criminal law.

3. Habeas corpus will lie in the Federal courts in behalf of a person held in custody under a conviction of crime in a state court only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings.

[For other cases, see Habeas Corpus, I. b, 2, in Digest Sup. Ct. 1908.]

Habeas corpus — in Federal courts — scope of inquiry — appellate proceedings.

4. The inquiry on an application to the Federal courts for a writ of habeas corpus in behalf of a person held in custody un-

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NOTE.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 491; Ex parte Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

On permitting hostile crowd in court room as denial of fair trial—see note to State v. Weldon, 39 L.R.A.(N.S.) 667.

On right of accused to waive presence at time of receiving verdict upon trial for felony—see notes to State v. Way, 14 L.R.A. (N.S.) 603; State v. Gorman, 32 L.R.A. (N.S.) 306; Frank v. State, L.R.A. 1915D, 817; and Lewis v. United States, 36 L. ed. U. S. 1011.

As to what laws are *ex post facto*—see notes to Anderson v. O'Donnell, 1 L.R.A. 632; State v. Cooler, 3 L.R.A. 181; Calder v. Bull, 1 L. ed. U. S. 648; Sturges v. Crowninshield, 4 L. ed. U. S. 529; Otoe County v. Baldwin, 28 L. ed. U. S. 331; Re Medley, 33 L. ed. U. S. 835; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

der a conviction of crime in a state court should not be confined to the proceedings and judgment in the state trial court, where an appeal is provided for by the state laws and the prisoner has had the benefit of it, but the proceedings in the state appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and are to be considered in determining any question of alleged deprivation of his life or liberty without due process of law, contrary to the 14th Amendment to the Federal Constitution.

[For other cases, see Habeas Corpus, IV., in Digest Sup. Ct. 1908.]

Habeas corpus — in Federal courts — review — matters outside record.

5. The courts of the United States, upon an application for a writ of habeas corpus under U. S. Rev. Stat. §§ 754–761, Comp. Stat. 1913, §§ 1282–1289, in behalf of a person held in custody under the final judgment of a state court of criminal jurisdiction, may look beyond forms, and inquire into the very truth and substance of the causes of his detention, although this may necessitate an inquiry into the judicial facts outside of the record of his conviction.

[For other cases, see Habeas Corpus, IV., in Digest Sup. Ct. 1908.]

Habeas corpus — Federal interference with state administration of criminal law.

6. Habeas corpus will not issue out of the Federal courts in behalf of a person in custody under a conviction of crime in a state court who asserts in his petition for the writ the existence at the trial of disorder, hostile manifestations, and uproar, amounting to mob domination of court and jury, and hence a denial of the due process of law guaranteed by U. S. Const., 14th Amend., where such assertions are but repetitions of allegations which the accused had a right to submit and did submit first to the trial court on motion for new trial, and afterwards in the highest state court as a ground for avoiding the consequences of the trial, and where both courts, having considered such allegations successively at times and places under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination or the like, and having examined the facts, not only upon the affidavits and exhibits submitted in behalf of the prisoner, which are embodied in his petition for habeas corpus, but also upon rebutting affidavits submitted in behalf of the state, which, for reasons not explained, he has not included in such petition, found the allegations to be groundless except in a few particulars, as to which the courts ruled that they were irregularities not harmful to defendant, and therefore insufficient in law to avoid the verdict.

[For other cases, see Habeas Corpus, I. b, 2, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — mob domination — new trial.

7. The allowance by the state of a new trial under better auspices, when the first attempt at a fair trial of a criminal cause is rendered abortive by mob domination, satisfies the due process of law clause of U. S. Const. 14th Amend., and the state need not, under such circumstances, abandon jurisdiction over the accused, and refrain from further inquiry into the question of his guilt.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — waiver of right to be present at trial.

8. There is no denial of the due process of law guaranteed by U. S. Const. 14th Amend., in the practice established in the criminal courts of Georgia that the accused may waive his right to be present when the jury renders its verdict, and that such waiver may be given after, as well as before, the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making such motion.

[For other cases, see Constitutional Law, IV. b. 9. in Digest Sup. Ct. 1908.]

Constitutional law — ex post facto laws — change of decision.

9. Erroneous or inconsistent decisions by the courts are not reached by the prohibition of U. S. Const. art. 1, § 10, against *ex post facto* laws, but such provision is directed against legislative action only.

[For other cases, see Constitutional Law, IV. f, 1, in Digest Sup. Ct. 1908.]

[No. 775.]

Argued February 25 and 26, 1915. Decided April 19, 1915.

APPEAL from the District Court of the United States for the Northern District of Georgia to review a decree denying a petition for a writ of habeas corpus in behalf of a person in custody under a conviction of crime in a court of that state. Affirmed.

Statement by Mr. Justice **Pitney**:

Leo M. Frank, the present appellant, being a prisoner in the custody of the sheriff in the jail of Fulton county, Georgia, presented to the district court of the United States for the northern district of Georgia his petition for a writ of habeas corpus under U. S. Rev. Stat. § 753, Comp. Stat. 1913, § 1281, upon the ground that he was in custody in violation of the Constitution of the United States, especially that clause of the 14th Amendment which declares that no state shall deprive any person of life, liberty, or property without due process of law. The district court, upon consideration of the petition and accompanying exhibits, deeming that, upon his own show-

ing, petitioner was not entitled to the relief sought, refused to award the writ. Whether this refusal was erroneous is the matter to be determined upon the present appeal.

From the petition and exhibits it appears that in May, 1913, Frank was indicted by the grand jury of Fulton county for the murder of one Mary Phagan; he was arraigned before the superior court of that county, and, [312] on August 25, 1913, after a trial lasting four weeks, in which he had the assistance of several attorneys, the jury returned a verdict of guilty. On the following day, the court rendered judgment, sentencing him to death, and remanding him, meanwhile, to the custody of the sheriff and jailer, the present appellee. On the same day, the prisoner's counsel filed a written motion for a new trial, which was amended about two months thereafter so as to include 103 different grounds particularly specified. Among these were several raising the contention that defendant did not have a fair and impartial trial, because of alleged disorder in and about the court room, including manifestations of public sentiment hostile to the defendant sufficient to influence the jury. In support of one of these, and to show the state of sentiment as manifested, the motion stated: "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered." But the absence of defendant at the reception of the verdict, although thus mentioned, was not specified or relied upon as a ground for a new trial. Numerous affidavits were submitted by defendant in support of the motion, including 18 that related to the allegations of disorder, and rebutting affidavits were submitted by the state. The trial court, having heard argument, denied the motion on October 31. The cause was then taken on writ of error to the supreme court of Georgia, where the review included not only alleged errors in admission and exclusion of evidence, and instructions to the jury, but also a consideration of the allegations of disorder in and about the court room and the supporting and rebutting proofs. On February 17, 1914, the judgment of conviction was affirmed. 141 Ga. 243, 80 S. E. 1016.

[313] Concerning the question of disorder, the findings and conclusions of the court were, in substance (141 Ga. 280): That the trial court, from the evidence submitted, was warranted in finding that only two of the alleged incidents occurred within the hearing or knowledge of the jury. 1. Laughter by spectators while the defense was examining one of its witnesses; there being nothing to indicate what provoked it, other than a witty answer by the witness or some other innocuous matter. The trial court requested the sheriff to maintain order, and admonished those present that if there was further disorder nobody would be permitted in the court room on the following day. The supreme court held that, in the absence of anything showing a detrimental effect, there was in this occurrence no sufficient ground for a new trial. 2. Spectators applauded the result of a colloquy between the solicitor general and counsel for the accused. The latter complained of this conduct, and requested action by the court. The supreme court said: "The [trial] court directed the sheriff to find out who was making the noise, and, presumably from what otherwise appears in the record, the action by the court was deemed satisfactory at the time, and the orderly progress of the case was resumed without any further action being requested. The general rule is that the conduct of a spectator during the trial of a case will not be ground for a reversal of the judgment, unless a ruling upon such conduct is invoked from the judge at the time it occurs. [Citing cases]. . . . The applause by the spectators, under the circumstances as described in the record, is but an irregularity not calculated to be substantially harmful to the defendant; and even if the irregularity should be regarded as of more moment than we give it, we think the action of the court, as a manifestation of the judicial disapproval, was a sufficient cure for any possible harmful effect of the irregularity, and deemed so sufficient by the counsel, who, [314] at the time, made no request for further action by the court."

As to disorder during the polling of the jury, the court said (141 Ga. p. 281): "Just before the jury was ushered into the court's presence for the purpose of rendering their verdict, the court had the room cleared of spectators. The verdict of the jury was received and published in the usual manner. A request was made to poll the jury, and just after the polling had begun loud cheering from the crowd in the streets adjacent to the courthouse was heard. This cheering continued during the polling of the jury. The plaintiff in error insists that the cheering on the outside of the court room, which was loud, and which was heard by the jury, could not have been interpreted otherwise than as expressive of gratification at the verdict which had been rendered, and of which the crowd on the outside had in some way been informed, and was so coercive in character as to affect the fairness of the poll of the jury which was taken. . . . [P. 282.] In order that the occur-

rence complained of shall have the effect of absolutely nullifying the poll of the jury, taken before they dispersed, it must appear that its operation upon the minds of the jury, or some of them, was of such a controlling character that they were prevented, or likely to have been prevented, from giving a truthful answer to the questions of the court. We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result. Under such circumstances we do not think that the occurrence complained of amounts to more than an irregularity, which was not prejudicial to the accused. There is a wide difference between an irregularity produced by the juror himself, or by a party, and the injection into a trial of an occurrence produced by someone having no connection therewith."

After this decision by the supreme court, an extraordinary [315] motion for a new trial was made under Code 1910, §§ 6089, 6092, upon the ground of newly discovered evidence; and this having been refused, the case was again brought before the supreme court, and the action of the trial court affirmed on October 14, 1914 (83 S. E. 233).

On April 16, 1914, more than six months after his conviction, Frank for the first time raised the contention that his absence from the court room when the verdict was rendered was involuntary, and that this vitiated the result. On that day, he filed in the superior court of Fulton county a motion to set aside the verdict as a nullity[1] on this ground (among others); stating that he did not waive the right to be present, nor authorize anybody to waive it for him; that on the day the verdict was rendered, and shortly before the presiding judge began his charge to the jury, the judge privately conversed with two of the prisoner's counsel, referred to the probable danger of violence to the prisoner if he were present when the verdict was rendered, in case it should be one of acquittal, or if the jury should disagree, and requested counsel to agree that the prisoner need not be present when the verdict was rendered and the jury polled; that in the same conversation the judge expressed the view that even counsel might be in danger of violence should they be present at the reception of the verdict, and under these circumstances they agreed that neither they nor the prisoner should be [316] present, but the prisoner know nothing of the conversation or agreement until after the verdict and sentence; and that the reception of the verdict during the involuntary absence of defendant and his counsel was a violation of that provision of the Constitution of the state of Georgia, guarantying the right of trial by jury, and was also contrary to the "due process of law" clause of the 14th Amendment. The motion was also based upon allegations of disorder in the court room and in the adjacent street, substantially the same as those previously submitted in the first motion for a new trial. To this motion to set aside the verdict the state interposed a demurrer, which, upon hearing, was sustained by the superior court; and upon exception taken and error assigned by Frank, this judgment came under review before the supreme court, and, on November 14, 1914, was affirmed (L.R.A.—, —, 83 S. E. 645).

The grounds of the decision were, briefly: That by the law of Georgia it is the right of a defendant on trial upon a criminal indictment to be present at every stage of the trial, but he may waive his presence at the reception of the verdict (citing Cawthon v. State, 119 Ga. 395, 412, 46 S. E. 897); that a defendant has the right by motion for a new trial to review an adverse verdict and judgment for illegality or irregularity amounting to harmful error in the trial, but where such a motion is made, it must include all proper grounds which are at the time known to the defendant or his counsel, or by reasonable diligence could have been discovered (citing Leathers v. Leathers, 138 Ga. 740, 76 S. E. 44); that objections to the reception of a verdict during the enforced absence of defendant without his consent, or to the taking by the trial court of other steps in his absence and without his consent, can be made in a motion for a new trial (citing Wade v. State, 12 Ga. 25; Martin v. State, 51 Ga. 567, 1 Am. Crim. Rep. 536; Bonner v. State, 67 Ga. 510; Wilson v. State, 87 Ga. 583, 13 S. E. 566; Tiller v. State, 96 Ga. 430, 23 S. E. 825; and Hopson v. State, 116 Ga. 90, 42 S. E. 412), [317] and in such case the verdict rendered against the defendant will not be treated as a nullity, but will be set aside and a new trial granted; and since Frank

[1] The Constitution of Georgia provides (art. 1, § 1, ¶ 8; Code 1911, § 6364): "No person shall be put in jeopardy of life, or liberty, more than once for the safe offense, *save on his or her motion for a new trial* after conviction, or in case of mistrial." In some cases a distinction has been taken *between a motion* for a new trial, and a motion to set aside the verdict as a nullity. It seems that if a motion of the latter kind is granted upon grounds such as were here urged, defendant, if again put upon trial, can plead former jeopardy. Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532; Bagwell v. State, 129 Ga 170, 58 S. E. 650.

and his counsel, when the motion for a new trial was made, were fully aware of the facts respecting his absence when the verdict of guilty was rendered against him, the failure to include this ground in that motion precluded him, after denial of the motion and affirmance of the judgment by the supreme court, from seeking upon that ground to set aside the verdict as a nullity. Respecting the allegations of disorder, the court held that the questions raised were substantially the same that were presented when the case was under review upon the denial of the first motion for a new trial (141 Ga. 243), at which time they were adjudicated adversely to the contentions of defendant, and the court therefore declined to reconsider them. The result was an affirmance of the judgment of the trial court, denying the motion to set aside the verdict.

Shortly after this decision, Frank unsuccessfully applied to the supreme court of Georgia for the allowance of a writ of error to review its judgment in this court. Thereafter he applied to several of the justices of this court, and finally to the court itself, for the allowance of such a writ. These applications were severally denied. See 235 U. S. 694, ante, 429, 35 Sup. Ct. Rep. 208.

Thereupon his application for a writ of habeas corpus was made to the district court, with the result already mentioned. The petition purports to set forth the criminal proceedings pursuant to which appellant is detained in custody, including the indictment, the trial and conviction, the motions, and the appeals above set forth. It contains a statement in narrative form of the alleged course of the trial, including allegations of disorder and manifestations of hostile sentiment in and about the court room, and states that Frank was absent at the time the verdict was rendered without his consent, pursuant to a [318] suggestion from the trial judge to his counsel to the effect that there was probable danger of violence to Frank and to his counsel if he and they were present and there should be a verdict of acquittal or a disagreement of the jury; and that under these circumstances they consented (but without Frank's authority) that neither he nor they should be present at the rendition of the verdict. From the averments of the petition it appears that the same allegations were made the basis of the first motion for a new trial, and also for the motion of April 16, 1914, to set aside the verdict. Accompanying the petition, as an exhibit, was a copy of Frank's first motion for a new trial and the supporting affidavits. The rebutting affidavits were not included, nor were they in any way submitted to the district court; therefore, of course, they have not been brought before this court upon the present appeal. The petition refers to the opinion of the Georgia supreme court, affirming the conviction and the denial of the motion for a new trial (141 Ga. 243); it also refers to the opinion upon the affirmance of the motion to set aside the verdict as a nullity (L.R.A.—, —, 83 S. E. 645), and a copy of this was submitted to the district court as an exhibit. From these opinions, and from the order of the superior court denying the motion for new trial, which is included among the exhibits, it appears that the rebutting affidavits were considered and relied upon by both of the state courts as the basis of their findings upon the questions of fact.

Mr. **Louis Marshall** argued the cause, and, with Messrs. Henry C. Peeples and Henry A. Alexander, filed a brief for appellant:

The reception by the superior court of Fulton county of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the 14th Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the court and the nullification of the verdict and judgment.

Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Ong Chang Wing v. United States, 218 U. S. 280, 54 L. ed. 1041, 31 Sup. Ct. Rep. 15; Nolan v. State, 55 Ga. 522, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532; Lewis v. United States, 146 U. S. 372, 36 L. ed. 1012, 13 Sup. Ct. Rep. 136; Rex v. Ladsingham, T. Raym. 193, 1 Vent. 97; Temple v. Com. 14 Bush, 769, 29 Am. Rep. 442; Rhodes v. State, 128 Ind. 189, 25 Am. St. Rep. 429, 27 N. E. 866; 2 Moore, Facts, §§ 991–995; Cooley, Const. Lim. 2d ed. § 452; McGehee, Due Process of Law, pp. 164, 165, 168; 1 Bishop, New Crim. Proc. 1913, ed. §§ 265–274; Diaz v. United States, 223 U. S. 442, 456, 56 L. ed. 500, 505, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Ball v. United States, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761; Schwab v. Berggren, 143 U. S. 442, 448, 36 L. ed. 218, 223, 12 Sup. Ct. Rep. 525; Dowdell v. United States, 221 U. S. 331, 55 L. ed. 757, 31 Sup. Ct. Rep. 590; Maurer v. People, 43 N. Y. 1; Wells v. Terrell, 121 Ga. 368, 49 S. E. 319; Bagwell v. State, 129 Ga. 170, 58 S. E. 650; Tiller v. State, 96 Ga. 430, 23 S. E. 825; Wade v. State, 12 Ga. 25; Hopson v. State, 116 Ga. 90, 42 S. E. 412; Martin v. State, 51

Ga. 567, 1 Am. Crim. Rep. 536; Bonner v. State, 67 Ga. 510; Wilson v. State, 87 Ga. 583, 13 S. E. 566; Nolan v. State, 53 Ga. 137; Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; Eliza v. State, 39 Ala. 693; Waller v. State, 40 Ala. 325; Slocovitch v. State, 46 Ala. 227; Cook v. State, 60 Ala. 39, 31 Am. Rep. 31, 3 Am. Crim. Rep. 304; Wells v. State, 147 Ala. 140, 41 S. W. 630; Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102; Cole v. State, 10 Ark. 318; Sweeden v. State, 19 Ark. 205; Warren v. State, 19 Ark. 214, 68 Am. Dec. 214; Brown v. State, 24 Ark. 620; Osborn v. State, 24 Ark. 629; Gore v. State, 52 Ark. 285, 5 L.R.A. 832, 12 S. W. 564; People v. Kohler, 5 Cal. 72; People v. Ebner, 23 Cal. 159; People v. Beauchamp, 49 Cal. 41; People v. Higgins, 59 Cal. 357; Green v. People, 3 Colo. 68; Smith v. People, 8 Colo. 457, 8 Pac. 920, 5 Am. Crim. Rep. 615; State v. Hurlbut, 1 Root, 90; Holton v. State, 2 Fla. 500; Gladden v. State, 12 Fla. 562; Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247, 20 So. 242; Holliday v. People, 9 Ill. 111; Harris v. People, 130 Ill. 457, 22 N. E. 826; State v. Myrick, 38 Kan. 238, 16 Pac. 330; Temple v. Com. 14 Bush, 769, 29 Am. Rep. 442; State v. Ford, 30 La. Ann. 311; State v. Bradley, 30 La. Ann. 326; State v. Christian, 30 La. Ann, 367; State v. Thomas, 128 La. Ann. 813, 55 So. 415; Com. v. Tobin, 125 Mass. 203, 28 Am. Rep. 220; Com. v. McCarthy, 163 Mass. 458, 40 N. E. 766; State v. Reckards, 21 Minn. 47; Scaggs v. State, 8 Smedes & M. 722; Price v. State, 36 Miss. 531, 72 Am. Dec. 195; Stubbs v. State, 49 Miss. 716, 1 Am. Crim. Rep. 608; Finch v. State, 53 Miss. 363; Sherrod v. State, 93 Miss. 774, 20 L.R.A.(N.S.) 509, 47 So. 554; Warfield v. State, 96 Miss. 170, 50 So. 561; Stanley v. State, 97 Miss. 860, 53 So. 497; Corbin v. State, 99 Miss. 486, 55 So. 43; State v. Buckner, 25 Mo. 172; State v. Cross, 27 Mo. 332; State v. Braunschweig, 36 Mo. 397; State v. Davis, 66 Mo. 684, 27 Am. Rep. 387; State v. Smith, 90 Mo. 37, 59 Am. Rep. 4, 1 S. W. 753; Burley v. State, 1 Neb. 385; State v. Peacock, 50 N. J. L. 34, 11 Atl. 270; People v. Perkins, 1 Wend. 91; Maurer v. People, 43 N. Y. 1; State v. Blackwelder, 61 N. C. (Phill. L.) 38; State v. Bray, 67 N. C. 283; State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643; State v. Paylor, 89 N. C. 539; State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185; State v. Cherry, 154 N. C. 624, 70 S. E. 294; Fight v. State, 7 Ohio, pt. 1, p. 180, 28 Am. Dec. 626; Sargent v. State, 11 Ohio, 472; Rose v. State, 20 Ohio, 31; Day v. Territory, 2 Okla. 409, 37 Pac. 806; Le Roy v. Territory, 3 Okla. 596, 41 Pac. 612; Humphrey v. State, 3 Okla. Crim. Rep. 504, 139 Am. St. Rep. 972, 106 Pac. 978; Dunn v. Com. 6 Pa. 384; Prine v. Com. 18 Pa. 103; Dougherty v. Com. 69 Pa. 286; State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; State v. France, 1 Overt. 434; Andrews v. State, 2 Sneed, 550; Clark v. State, 4 Humph. 254; Hutchinson v State, 3 Coldw. 95; Stewart v. State, 7 Coldw. 338; Percer v. State, 118 Tenn. 765, 103 S. W. 780; Shipp v. State, 11 Tex. App. 46; Massey v. State, 31 Tex. Crim. Rep. 371, 20 S. W. 758; Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117; Sperry v. Com. 9 Leigh, 623, 33 Am. Dec. 261; Hooker v. Com. 13 Gratt. 763; Jackson v. Com. 19 Gratt. 656; State v. Greer, 22 W. Va. 800; State v. Stevenson, 64 W. Va. 392, 19 L.R.A.(N.S.) 713, 62 S. E. 688; State v. Sutter, 71 W. Va. 371, 43 L.R.A.(N.S.) 399, 76 S. W. 811; French v. State, 85 Wis. 400, 21 L.R.A. 402, 39 Am. St. Rep. 855, 55 N. W. 566, 9 Am. Crim. Cas. 348; Weirman v. United States, 36 Ct. Cl. 236; Co. Litt. 227b; 2 Hale, P. C. 300; 4 Bl. Com. 360; 1 Chitty, Crim. Law, 636; Bacon, Abr. title "Verdict," p. 308; 2 Barbour, Crim. Law, 365; Archbold, Crim. Pr. & Pl. 23d ed. pp. 186, 214; Reg. v. St. George, 9 Car. & P. 483; Reg. v. Douglas, Car. & M. 193; Reg. v. Zulueta, 1 Car. & K. 215, 1 Cox, C. C. 20; Reg. v. Haynes [1900] 64 J. P. 441; Abbott, Trial Brief, Crim. 2d ed. 718; Hughes, Crim. Law, § 3370; Clark, Crim. Proc. p. 423; Whart. Crim. Pl. & Pr. 8th ed. § 741.

The prohibitions of the 14th Amendment refer to all of the instrumentalities of the state,—legislative, executive, and judicial,—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that Amendment against deprivation by a state, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Standard Oil Co. v. Missouri, 224 U. S. 270, 280–282, 56 L. ed. 760, 767, 768, 32 Sup. Ct. Rep. 406; Ex parte Riggins, 134 Fed. 404; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; Londoner v. Denver, 210 U. S. 385, 52 L. ed. 1112, 28 Sup. Ct. Rep. 708; Denver v. State Invest. Co. 49 Colo. 244, 33 L.R.A. (N.S.) 395, 112 Pac. 789.

Not only was the appellant deprived of due process of law, because he was, by the action of the court, kept out of the court room when the verdict was rendered, but the entire proceedings became *coram non judice*, because of mob domination, to which

the presiding judge succumbed, and which in effect wrought a dissolution of the court.

People v. Wolf, 183 N. Y. 472, 76 N. E. 592; 5 Cyc. 618; Massey v. State, 31 Tex. Crim. Rep. 371, 20 S. W. 758; State v. Weldon, 91 S. C. 29, 39 L.R.A.(N.S.) 667, 74 S. E. 43, Ann. Cas. 1913E, 801; Sanders v. State, 85 Ind. 319; People v. Fleming, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881; Myers v. State, 97 Ga. 76, 25 S. E. 252; Collier v. State, 115 Ga. 803, 42 S. E. 226, 12 Am. Crim. Rep. 608; Ex parte Riggins, 134 Fed. 404; United States v. Shipp, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 Ann. Cas. 265.

The abdication by a court of its powers, whether voluntarily or involuntarily, operates as a dissolution of the court.

Ellerbe v. State, 75 Miss. 522, 41 L.R.A. 569, 22 So. 950; Blend v. People, 41 N. Y. 604; Shaw v. People, 3 Hun, 272, affirmed in 63 N. Y. 36; Hinman v. People, 13 Hun, 266; Hayes v. State, 58 Ga. 35; O'Brien v. People, 17 Colo. 561, 31 Pac. 230; McClure v. State, 77 Ind. 287; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one which neither he nor his counsel could waive or abjure.

Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Robson v. State, 83 Ga. 171, 9 S. E. 610; Cawthon v. State, 119 Ga. 395, 46 S. E. 897; Hopt v. Utah, 110 U. S. 579, 28 L. ed. 265, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Schwab v. Berggren, 143 U. S. 449, 36 L. ed. 223, 12 Sup. Ct. Rep. 525; Lewis v. United States, 146 U. S. 373, 36 L. ed. 1013, 13 Sup. Ct. Rep. 136; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; Kepner v. United States, 195 U. S. 100, 135, 49 L. ed. 114, 126, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Cancemi v. People, 18 N. Y. 128; Ball v. United States, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761; Dickinson v. United States, 86 C. C. A. 625, 159 Fed. 801.

It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication, or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel.

Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

If, therefore, Frank's absence at the reception of the verdict constituted an infraction of due process of law, which could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial did not deprive him of his constitutional right to attack the judgment as a nullity.

Even if the decision of the supreme court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned can be raised, then we contend that such a decision, as applicable to the present case, would be in conflict with the Constitution of the United States, because it would be an *ex post facto* law.

Hopt v. Utah, 110 U. S. 579, 28 L. ed. 265, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

It follows that appellant's application for a writ of habeas corpus is squarely based on the contention that, when the verdict against him was received and judgment was rendered against him, the court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making habeas corpus the proper remedy to test the validity of his detention thereunder.

Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 16 Am. Crim. Rep. 122; Re Bonner, 151 U. S. 242, 256, 38 L. ed. 149, 151, 14 Sup. Ct. Rep. 323; Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; Valentina v. Mercer, 201 U. S. 131, 50 L. ed. 693, 26 Sup. Ct. Rep. 368; Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; Ex parte Bridges (Brown v. United States) 2 Woods, 428, Fed. Cas. No. 1,862; McClaughry v. Deming, 186 U. S. 49, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786; Oakley v. Aspinwall, 3 N. Y. 547; Kaizo v. Henry, 211 U. S. 146, 53 L. ed. 125, 29 Sup. Ct. Rep. 41; Harlan v. McGourin, 218 U. S. 442, 54 L. ed. 1101, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849; Stevens v. McClaughry, 51 L.R.A. (N.S.) 390, 125 C. C. A. 102, 207 Fed. 18.

The appellant had, before applying for a writ of habeas corpus, exhausted all of his remedies in the state courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is therefore his last resort, and he conforms in every respect to the practice which this court has pointed out as controlling in like cases.

Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; Ex parte Fonda,

117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; Re Wood, 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; Cook v. Hart, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; Re Frederich, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; New York v. Eno, 155 U. S. 89, 95, 39 L. ed. 80, 82, 15 Sup. Ct. Rep. 30; Pepke v. Cronan, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; Re Chapman, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459; Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753; Stevens v. McClaughry, 51 L.R.A.(N.S.) 390, 125 C. C. A. 102, 207 Fed. 18; Nolan v. State, 53 Ga. 137; Lyons v. State, 7 Ga. App. 50, 66 S. E. 149.

In the present case, the superior court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings being nullities, he is entitled to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial under the indictment.

Ex parte Badgley, 7 Cow. 472; Re Medley, 134 U. S. 160, 174, 33 L. ed. 835, 841, 10 Sup. Ct. Rep. 384; Re Bonner, 151 U. S. 256–259, 261, 38 L. ed. 151–153, 14 Sup. Ct. Rep. 323; Scott v. State, 70 Miss. 247, 35 Am. St. Rep. 649, 11 So. 657; People ex rel. Devoe v. Kelly, 97 N. Y. 212; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007, 9 Ann. Cas. 1181.

Messrs. **Warren Grice** and **Hugh M. Dorsey** argued the cause and filed a brief for appellee:

Appellant is asking this court to grant him a writ of habeas corpus which will virtually overturn his conviction in the state court without submitting to the United States courts important portions of the record on which the judgment is based, and on which he is being held.

Graddy v. Hightower, 1 Ga. 253; Roby v. State, 74 Ga. 812; Baker v. Johnson, 99 Ga. 374, 27 S. E 706; Mize v. Americus Mfg. & Improv. Co. 106 Ga. 140, 32 S. E. 22; Holloman v. Small, 111 Ga. 812, 35 S. E. 665; Brooks v. Proctor, 111 Ga. 835, 36 S. E.

The supreme court of Georgia is second to none in according trials free from hostile demonstrations; and has gone as far, we venture to assert, as any state in the union in setting aside verdicts where the same were influenced by hostile demonstrations on the part of spectators.

Lang v. Hopkins, 10 Ga. 37; Monroe v. State, 5 Ga. 130; Mitchum v. State, 11 Ga. 616; Anderson v. State, 14 Ga. 712; McGuffie v. State, 17 Ga. 497; Martin v. State, 38 Ga. 296; Nesbit v. State, 43 Ga. 238; Hunter v. State, 43 Ga. 516; Westmoreland v. State, 45 Ga. 279; Stewart v. State, 58 Ga. 577; Hudgins v. State, 61 Ga. 182; Moon v. State, 68 Ga. 696; Turner v. State, 70 Ga. 778; Flanagan v. State, 106 Ga. 109, 32 S. E. 80, 11 Am. Crim. Rep. 534; Turner v. State, 111 Ga. 217, 36 S. E. 686.

In Georgia it has frequently been held that where a party does not have a fair and impartial trial, in the manner contemplated by law, which is guaranteed to him by the state Constitution as well as by the Constitution of the United States, no matter how strongly the evidence shows his guilt, the verdict must, for this reason, be set aside and a new trial granted.

Daniel v. State, 56 Ga. 654, 2 Am. Crim. Rep. 421; Smith v. Lovejoy, 62 Ga. 373; Woolfolk v. State, 81 Ga. 551, 8 S. E. 724; Collier v. State, 115 Ga. 803, 42 S. E. 226, 12 Am. Crim. Rep. 608.

The decision of the supreme court of Georgia holding that Frank had not adopted the correct procedure in invoking in the state court the effect of his absence when the verdict was received was not the passage of an *ex post facto* law, but followed prior decisions.

Regopoulas v. State, 115 Ga. 232, 41 S. E. 619; Prescott v. Bennett, 50 Ga. 272; Lucas v. Lucas, 30 Ga. 206, 76 Am. Dec. 642; Mize v. Americus Mfg. & Improv. Co. 109 Ga. 359, 34 S. E. 583; Daniels v. Towers, 79 Ga. 785, 7 S. E. 120; Griffin v. Eaves, 114 Ga. 66, 39 S. E. 913; McDonald v. State, 126 Ga. 536, 55 S. E. 235; Leathers v. Leathers, 138 Ga. 740, 76 S. E. 44; Leffler v. Union Compress Co. 121 Ga. 40, 48 S. E. 710, 122 Ga. 640, 50 S. E. 483; Tietjen v. Merchants' Nat. Bank, 117 Ga. 501, 43 S. E. 730; Drought v. Poage, 3 Ga. App. 178, 59 S. E. 728; Ayers v. James, 120 Ga. 578, 48 S. E. 154; Georgia R. & Electric Co. v. Hamer, 1 Ga. App. 673, 58 S. E. 54; Moore v. Moore, 139 Ga. 597, 77 S. E. 820; Jobe v. State, 28 Ga. 235; Estes v. Ivey, 53 Ga. 54; Phillips v. Phillips, 124 Ga. 912, 53 S. E. 457; Tate v. Little, 141 Ga. 799, 82 S. E 129; Moore v. Kelly, 109 Ga. 798, 35 S. E. 168; Rawlins v. Mitchell, 127 Ga. 24, 55 S. E. 958, 124 Ga. 31, 52 S. E. 1; Ford v. Clark, 129 Ga. 292, 58 S. E. 818; Williams v. O'Neal, 119 Ga. 177,

45 S. E. 978; Sweat v. Latimer, 119 Ga. 615, 46 S. E. 835; Worthy v. Farmers' Life Confederation, 139 Ga. 81, 76 S. E. 856; Longman v. Bradford, 108 Ga. 572, 33 S. E. 916; Clark's Cove Guano Co. v. Steed, 92 Ga. 440, 17 S. E. 967; Mize v. Americus Mfg. & Improv. Co. 109 Ga. 359, 34 S. E. 583; Fannin v. Durdin, 54 Ga. 476; Franklin County v. Crow, 128 Ga. 463, 57 S. E. 784; Miller v. State, 13 Ga. App. 440, 79 S. E. 232; Benford v. Shiver, 13 Ga. App. 135, 78 S. E. 860; Dugan v. McGlann, 60 Ga. 353; Hopkins v. State, 6 Ga. App. 403, 65 S. E. 57; State v. Jones, 7 Ga. 422; Reab v. Sherman, 93 Ga. 793, 20 S. E. 642; Cawthon v. State, 119 Ga. 396, 46 S. E. 897.

If there is any such thing in the criminal law as ratification, acquiescence, and estoppel, it is applicable under the facts here presented.

Cawthon v. State, 119 Ga. 395, 46 S. E. 897; Martin v. State, 51 Ga. 567, 1 Am. Crim. Rep. 536; Tiller v. State, 96 Ga. 431, 23 S. E. 825; Nolan v. State, 53 Ga. 137, 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532; Smith v. State, 59 Ga. 514, 27 Am. Rep. 393, 81 Ga. 480, 8 S. E. 187; Wilson v. State, 87 Ga. 583, 13 S. E. 566; Wade v. State, 12 Ga. 25; Miller v. State, 13 Ga. App. 440, 79 S. E. 232; Richards v. State, 136 Ga. 67, 70 S. E. 868; Bagwell v. State, 129 Ga. 170, 58 S. E. 650; Baldwin v. State, 138 Ga. 349, 75 S. E. 324; Hopkins v. State, 6 Ga. App. 403, 65 S. E. 57; Mitchum v. State, 11 Ga. 630; Durham v. State, 70 Ga. 264; Hoye v. State, 39 Ga. 719; Lyons v. State, 7 Ga. App. 50, 66 S. E. 149; Wiggins v. Tyson, 112 Ga. 750, 38 S. E. 86; Fannin v. Durdin, 54 Ga. 476; Schumpert v. State, 9 Ga. App. 553, 71 S. E. 879; Hill v. State, 118 Ga. 24, 44 S. E. 820; Daniels v. Towers, 79 Ga. 785, 7 S. E. 120; Dean v. State, 43 Ga. 218; 22 Enc. Pl. & Pr. 929, ¶ c; Rhodes v. State, 122 Ga. 568, 50 S. E. 361.

The United States court decisions are all predicated on special statutes and a peculiar practice obtaining whereby the prisoner, immediately upon entering upon his trial, is taken into custody by the marshal. But it is very probable that this court, were this still an open question in this forum, would decide the question differently.

Garland v. Washington, 232 U. S. 642, 58 L. ed. 772, 34 Sup. Ct. Rep. 456, 78 Cent. L. J. 311.

The United States court rules are different from Georgia's in that the record must show affirmatively the prisoner's presence.

Lewis v. United States, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136.

The Federal courts, in determining the question as to cases arising in the Federal court, make their own interpretation, etc., but in determining a question of due process of law in cases arising in state courts, they apply the state's interpretation of the meaning of due process of law.

Walker v. Sauvinet, 92 U. S. 90, 93, 23 L. ed. 678, 679.

What is due process of law in the states is regulated by the law of the state.

Ibid.; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

Due process of law, within the meaning of the 14th constitutional Amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of the government.

Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Hurtado v. California, 110 U. S. 516, 558, 28 L. ed. 232, 246, 4 Sup. Ct. Rep. 111, 292; Rogers v. Peck, 199 U. S. 434, 50 L. ed. 260, 26 Sup. Ct. Rep. 87; Louisville & N. R. Co. v. Schmidt, 177 U. S. 231, 44 L. ed. 748, 20 Sup. Ct. Rep. 620.

A new trial will not be granted on an error which manifestly caused no injury to the accused. It would be trifling with justice to set aside a verdict clearly and strongly supported by the evidence, solely on the ground that such an error had been committed by the trial judge.

Miller v. State, 13 Ga. App. 444, 79 S. E. 232; Roberson v. State, 135 Ga. 654, 70 S. E. 175; Garland v. Washington, 232 U. S. 642, 58 L. ed. 772, 34 Sup. Ct. Rep. 456.

Every question presented by the application for habeas corpus having already been presented by him to the state court, and its decision invoked, and its judgment rendered adverse to him, the principle of *res judicata* applies, and for that reason alone the questions cannot be reopened here.

Moore v. Wheeler, 109 Ga. 62, 35 S. E. 116; Ex parte Siebold. 100 U. S. 371, 25 L. ed. 717; Ex parte Clarke. 100 U. S. 399, 25 L. ed. 715; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; Re Ziebold, 23 Fed. 791, 4 Am. Crim. Rep. 116; Re Tie Loy, 26 Fed. 611; Re Ah Jow, 29 Fed. 181; Re Payson, 23 Kan. 757; Ex parte Burnett, 30 Ala. 461; Ex parte Rollins, 80 Va. 314; Ex parte Rosenblatt, 19 Nev. 439, 3 Am. St. Rep. 901, 14 Pac. 298; Ex parte Mato, 19 Tex. App. 112; Brown v. Duffus, 66 Iowa, 193, 23 N. W. 396; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502; Griffin v. Eaves, 114 Ga. 67, 39 S. E. 913; Caverly v. McOwen, 126 Mass. 222; Glasgow v. Moyer, 225 U. S. 420, 430,

56 L. ed. 1147, 1150, 32 Sup. Ct. Rep. 753; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Whitten v. Tomlinson, 160 U. S. 231, 242, 40 L. ed. 406, 412, 16 Sup. Ct. Rep. 297; Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; People ex rel. Stead v. Superior Ct. 234 Ill. 186, 84 N. E. 875, 14 Ann. Cas. 753.

Where oral evidence is required to show want of jurisdiction, habeas corpus will not discharge the prisoner.

Daniels v. Towers, 79 Ga. 785, 7 S. E. 120; Bronk v. State, 43 Fla. 461, 99 Am. St. Rep. 119, 31 So. 248; Bray v. State, 140 Ala. 172, 37 So. 250; Ex parte Columbia George, 144 Fed. 985; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86; Re Clarke, 12 Cush. 320; Com. ex rel. Davis v. Lecky, 1 Watts, 66, 26 Am. Dec. 37.

The writ of habeas corpus cannot be made use of to perform the functions of a writ of error.

Re Lennon, 166 U. S. 552, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658; Re Eckart, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638; United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89; Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; Re Belt, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391; Re Schneider, 148 U. S. 162, 37 L. ed. 406, 13 Sup. Ct. Rep. 572; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Dynes v. Hoover, 20 How. 81, 15 L. ed. 844; Ex parte Reed, 100 U. S. 13, 25 L. ed. 538; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Church, Habeas Corpus, 2d ed. §§ 356, 363; Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753.

Irregularities, no matter how gross, will not be sufficient to obtain a release on habeas corpus.

15 Am. & Eng. Enc. Law, 2d ed. p. 172; Church, Habeas Corpus, 2d ed. ¶¶ 363, 364; Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304.

The incorporation of the due process clause in the 14th Amendment does not result in an overturning of well-settled principles and established usages prevailing in states, nor in depriving the states of the power to establish other systems of law and procedure, or to alter the same at their will.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Garland v. Washington, 232 U. S. 642, 58 L. ed. 772, 34 Sup. Ct. Rep. 456; 5 Michie, Enc. U. S. Sup. Ct. Rep. pp. 509, 510; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Murphey v. Massachusetts, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639; West v. Louisiana, 194 U. S. 259, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; 15 Columbia L. Rev. 166; 80 Cent. L. J. 29.

The presence of a defendant in court at the reception of the verdict does not go to the jurisdiction of the court.

Warren v. State, 19 Ark. 214, 68 Am. Dec. 214; State v. Way, 76 Kan. 928, 14 L.R.A. (N.S.) 603, 93 Pac. 159; Fight v. State, 28 Am. Dec. 626, note; Goar v. State, 5 L.R.A. 832, note.

Waivers such as were made in this case by the prisoner's counsel are binding on the prisoner.

Cawthon v. State, 119 Ga. 395, 46 S. E. 897; Robson v. State, 83 Ga. 167, 9 S. E. 610; Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Diaz v. United States, 223 U. S. 442, 56 L. ed. 500, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; Tiller v. State, 96 Ga. 430, 23 S. E. 825; Mitchum v. State, 11 Ga. 630; Sarah v. State, 28 Ga. 576; Wiggins v. Tyson, 112 Ga. 744, 38 S. E. 86; 4 Cyc. 939, 940; Bishop, Crim. Law. § 995.

Frank cannot repudiate the acts of his counsel.

Williams v. State, 107 Ga. 721, 33 S. E. 648.

The Supreme Court of the United States will not grant the relief asked by Frank in this application, in view of what has heretofore taken place in the supreme court of

Georgia and in the Supreme Court of the United States in denying him a writ of error.

Duncan v. Missouri, 152 U. S. 378, 38 L. ed. 486, 14 Sup. Ct. Rep. 570; Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; Re Spencer, 228 U. S. 662, 57 L. ed. 1013, 33 Sup. Ct. Rep. 709.

The Supreme Court of the United States will not permit Frank to do by indirection that which it already has held he cannot do directly.

Ex parte Kearney, 7 Wheat. 38, 42, 5 L. ed. 391, 392; Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650.

The supreme court of Georgia had jurisdiction to determine whether Frank's counsel could waive his presence, and even if this court should think that ruling error, habeas corpus cannot correct it.

Re Belt, 159 U. S. 97, 40 L. ed. 88, 15 Sup. Ct. Rep. 987.

The action of the court in permitting Frank's counsel to waive his presence, if erroneous, was a mere irregularity in the matter of procedure, and certainly habeas corpus cannot avail to discharge the prisoner.

State ex rel. Noonan v. Hennepin County, 24 Minn. 87; Hurd, Habeas Corpus, 2d ed. 327, 328; Church, Habeas Corpus, 2d ed. ¶ 255.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

The points raised by the appellant may be reduced to the following:

(1) It is contended that the disorder in and about the court room during the trial and up to and at the reception of the verdict amounted to mob domination, that not only [325] the jury, but the presiding judge, succumbed to it, and that this in effect wrought a dissolution of the court, so that the proceedings were *coram non judice*.

(2) That Frank's right to be present during the entire trial until and at the return of the verdict was an essential part of the right of trial by jury, which could not be waived either by himself or his counsel.

(3) That his presence was so essential to a proper hearing that the reception of the verdict in his absence, and in the absence of his counsel, without his consent or authority, was a departure from the due process of law guaranteed by the 14th Amendment, sufficient to bring about a loss of jurisdiction of the trial court, and to render the verdict and judgment absolute nullities.

(4) That the failure of Frank and his counsel, upon the first motion for a new trial, to allege as a ground of that motion the known fact of Frank's absence at the reception of the verdict, or to raise any jurisdictional question based upon it, did not deprive him of the right to afterwards attack the judgment as a nullity, as he did in the motion to set aside the verdict.

(5) And that the ground upon which the supreme court of Georgia rested its decision affirming the denial of the latter motion (L.R.A.—, —, 83 S. E. 645),—*viz.*, that the objection based upon Frank's absence when the verdict was rendered was available on the motion for new trial, and under proper practice ought to have been then taken, and because not then taken could not be relied upon as a ground for setting aside the verdict as a nullity,—was itself in conflict with the Constitution of the United States because equivalent in effect to an *ex post facto* law, since, as is said, it departs from the practice settled by previous decisions of the same court.

In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of habeas [326] corpus under § 753, Rev. Stat. Comp. Stat. 1913, § 1281. Under the terms of that section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. Rogers v. Peck, 199 U. S. 425, 434, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. Ex parte Parks, 93 U. S. 18, 21, 23 L. ed. 787, 788; Ex parte Siebold, 100 U. S. 371, 375, 25 L. ed. 717, 718; Ex parte Royall, 117 U. S. 241, 250, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; Re Frederich, 149 U. S. 70, 75, 37 L. ed. 653, 656, 13 Sup. Ct. Rep. 793; Baker v. Grice, 169 U. S. 284, 290, 42 L. ed. 748, 750, 18 Sup. Ct. Rep. 323; Tinsley v. Anderson, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76.

As to the "due process of law" that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a

law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. Walker v. Sauvinet, 92 U. S. 90, 93, 23 L. ed. 678, 679; Hurtado v. California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Andrews v. Swartz, 156 U. S. 272, 276, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389; Bergemann v. Backer, 157 U. S. 655, 659, 39 L. ed. 845, 848, 15 Sup. Ct. Rep. 727; Rogers v. Peck, 199 U. S. 425, 434, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87; United States ex rel. Drury v. Lewis, 200 U. S. 1, 7, 50 L. ed. 343, 345, 26 Sup. Ct. Rep. 229; Felts v. Murphy, 201 U. S. 123, 129, 50 L. ed. 689, 692, 26 Sup. Ct. Rep. 366; Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189.

It is therefore conceded by counsel for appellant that, [327] in the present case, we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings. And since no question is made respecting the original jurisdiction of the trial court, the contention is and must be that by the conditions that surrounded the trial, and the absence of defendant when the verdict was rendered, the court was deprived of jurisdiction to receive the verdict and pronounce the sentence.

But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the state of Georgia (as will appear from decisions elsewhere cited) provide for an appeal in criminal cases to the supreme court of that state upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases (McKane v. Durston, 153 U. S. 684, 687, 38 L. ed. 867, 868, 14 Sup. Ct. Rep. 913; Andrews v. Swartz, 156 U. S. 272, 275, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389; Rogers v. Peck, 199 U. S. 425, 435, 50 L. ed 256, 260, 26 Sup. Ct. Rep. 87; Reetz v. Michigan, 188 U. S. 505, 508, 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment.

In fact, such questions as are here presented under the due process clause of the 14th Amendment, though sometimes discussed as if involving merely the jurisdiction of some court or other tribunal, in a larger and more accurate [328] sense involve the power and authority of the state itself. The prohibition is addressed to the state; if it be violated, it makes no difference in a court of the United States by what agency of the state this is done; so, if a violation be threatened by one agency of the state, but prevented by another agency of higher authority, there is no violation by the state. It is for the state to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their several jurisdictions and authority as between themselves. And the question whether a state is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the state, until the conclusion of the course of justice in its courts. Virginia v. Rives, 100 U. S. 313, 318, 25 L. ed. 667, 669; Civil Rights Cases, 109 U. S. 3, 11, 27 L. ed. 835, 839, 3 Sup. Ct. Rep. 18; McKane v. Durston, 153 U. S. 684, 687, 38 L. ed. 867, 868, 14 Sup. Ct. Rep. 913; Dreyer v. Illinois, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; Reetz v. Michigan, 188 U. S. 505, 507, 47 L. ed. 563, 565, 23 Sup. Ct. Rep. 390; Carfer v. Caldwell, 200 U. S. 293, 297, 50 L. ed. 488, 489, 26 Sup. Ct. Rep. 264; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 53 L. ed. 417, 428, 29 Sup. Ct. Rep. 220; Re Frederich, 149 U. S. 70, 75, 37 L. ed. 653, 656, 13 Sup. Ct. Rep. 793; Whitten v. Tomlinson, 160 U. S. 231, 242, 40 L. ed. 406, 412, 16 Sup. Ct. Rep. 297; Baker v. Grice, 169 U. S. 284, 291, 42 L. ed. 748, 750, 18 Sup. Ct. Rep. 323; Minnesota v. Brundage, 180 U. S. 499, 503, 45 L. ed. 639, 641, 21 Sup. Ct. Rep. 455; Urquhart v. Brown, 205 U. S 179, 182, 51 L. ed. 760, 761, 27 Sup. Ct. Rep. 459.

It is, indeed, settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a state officer in the ordinary course of a criminal prosecution, under a

law of the state not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error. Ex parte Royall, 117 U. S. 241, 251, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; Re Frederich, 149 U. S. 70, 77, 37 L. ed. 653, 657, 13 Sup. Ct. Rep. 793; [329] Whitten v. Tomlinson, 160 U. S. 231, 242, 40 L. ed. 406, 412, 16 Sup. Ct. Rep. 297; Baker v. Grice, 169 U. S. 284, 291, 42 L. ed. 748, 750, 18 Sup. Ct. Rep. 323; Tinsley v. Anderson, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459. And see Henry v. Henkel, 235 U. S. 219, 228, ante, 203, 205, 35 Sup. Ct. Rep. 54. Such cases as Re Loney, 134 U. S. 372, 376, 33 L. ed. 949, 951, 10 Sup. Ct. Rep. 584, and Re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658, are recognized as exceptional.

It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in Ex parte Royall, 117 U. S. 241, 252, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734, applying in a habeas corpus case what was said in Covell v. Heyman, 111 U. S. 176, 182, 28 L. ed. 390, 392, 4 Sup. Ct. Rep. 355, a case of conflict of jurisdiction: "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity." And see Re Tyler, 149 U. S. 164, 186, 37 L. ed. 689, 696, 13 Sup. Ct. Rep. 785.

It is objected by counsel for appellee that the alleged loss of jurisdiction cannot be shown by evidence outside of the record; that where a prisoner is held under a judgment [330] of conviction passed by a court having jurisdiction of the subject-matter, and the indictment against him states the case and is based upon a valid existing law, habeas corpus is not an available remedy, save for want of jurisdiction appearing upon the face of the record of the court wherein he was convicted. The rule at the common law, and under the act 31 Car. II. chap. 2, and other acts of Parliament prior to that of July 1, 1816 (56 Geo. III. chap. 100, § 3), seems to have been that a showing in the return to a writ of habeas corpus that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction closed the inquiry. So it was held, under the judiciary act of 1789 (1 Stat. at L. 81, chap. 20, § 14), in Ex parte Watkins, 3 Pet. 193, 202, 7 L. ed. 650, 653. And the rule seems to have been the same under the act of March 2, 1833 (4 Stat. at L. 634, chap. 57, § 7), and that of August 29, 1842 (5 Stat. at L. 539, chap. 257). But when Congress, in the act of February 5, 1867 (14 Stat. at L. 385, chap. 28), extended the writ of habeas corpus to all cases of persons restrained of their liberty in violation of the Constitution or a law or treaty of the United States, procedural regulations were included, now found in Rev. Stat. §§ 754–761, Comp. Stat. 1913, §§ 1282–1289. These require that the application for the writ shall be made by complaint in writing, signed by the applicant and verified by his oath, setting forth the facts concerning his detention, in whose custody he is detained, and by virtue of what claim or authority, if known; require that the return shall certify the true cause of the detention; and provide that the prisoner may, under oath, deny any of the facts set forth in the return, or allege other material facts, and that the court shall proceed in a summary way to determine the facts by hearing testimony and arguments, and thereupon dispose of the party as law and justice require. The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the [331] act of 31 Car. II. chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus in order to

safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him. Re Cuddy, 131 U. S. 280, 283, 286, 33 L. ed. 154, 155, 157, 9 Sup. Ct. Rep. 703; Re Mayfield, 141 U. S. 107, 116, 35 L. ed. 635, 638, 11 Sup. Ct. Rep. 939; Whitten v. Tomlinson, 160 U. S. 231, 242, 40 L. ed. 406, 412, 16 Sup. Ct. Rep. 297; Re Watts, 190 U. S. 1, 35, 47 L. ed. 933, 944, 23 Sup. Ct. Rep. 718, 14 Am. Crim. Rep. 48.

In the light, then, of these established rules and principles: that the due process of law guaranteed by the 14th Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States, upon an application for a writ of habeas corpus, to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a state on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the state, and [332] not merely a single step in those proceedings; and that it is incumbent upon the prisoner to set forth in his application a sworn statement of the facts concerning his detention and by virtue of what claim or authority he is detained, —we proceed to consider the questions presented.

1. And first, the question of the disorder and hostile sentiment that are said to have influenced the trial court and jury to an extent amounting to mob domination.

The district court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. There is no doubt of the jurisdiction to issue the writ of habeas corpus. The question is as to the propriety of issuing it in the present case. Under § 755, Rev. Stat. Comp. Stat. 1913, § 1283, it was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it. And see Ex parte Watkins, 3 Pet. 193, 201, 7 L. ed. 650, 652; Ex parte Milligan, 4 Wall. 2, 110, 18 L. ed. 281, 292; Ex parte Terry, 128 U. S. 289, 301, 32 L. ed. 405, 407, 9 Sup. Ct. Rep. 77.

Now the obligation resting upon us, as upon the district court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it. Thus, the petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view. The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light upon the question whether the state of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his [333] life without due process of law. Dealing with the narrative, then, in its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the supreme court of the state, as a ground for avoiding the consequences of the trial; that the allegations were considered by those courts, successively, at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination, or the like; and that the facts were examined by those courts not only upon the affidavits and exhibits submitted in behalf of the prisoner which are embodied in his present petition as a part of his sworn account of the causes of his detention, but also upon rebutting affidavits submitted in behalf of the state, and which, for reasons not explained, he has not included in the petition. As appears from the prefatory statement, the allegations of disorder were found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant, and therefore insufficient in law to avoid the verdict. 141 Ga. 243, 280. And it was because the defendant was concluded by that finding that the supreme court, upon the subsequent motion to set aside the verdict,

declined to again consider those allegations. L.R.A.—, —, 83 S. E. 645, 655.

Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the supreme court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice [334] and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction over the prisoner, see Ex parte Terry, 128 U. S. 289, 305, 310, 32 L. ed. 405, 409, 410, 9 Sup. Ct. Rep. 77; Ex parte Columbia George, 144 Fed. 985, 986.

However, it is not necessary, for the purposes of the present case, to invoke the doctrine of *res judicata;* and, in view of the impropriety of limiting in the least degree the authority of the courts of the United States in investigating an alleged violation by a state of the due process of law guaranteed by the 14th Amendment, we put out of view for the present the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort.

But this does not mean that that decision may be ignored or disregarded. To do this, as we have already pointed out, would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the state, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to [335] be heard according to the usual course of law in such cases.

We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.

But the state may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial, followed by an appeal to its supreme court, not confined to the mere record of conviction, but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial. Myers v. State, 97 Ga. 76 (5), 99, 25 S. E. 252; Collier v. State, 115 Ga. 803, 42 S. E. 226, 12 Am. Crim. Rep. 608.

Such an appeal was accorded to the prisoner in the present case (Frank v. State, 141 Ga. 243 [16], 280, 80 S. E. 1016), in a manner and under circumstances already stated, and the supreme court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the states and the Federal government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial [336] through disorder and manifestations of hostile sentiment cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the matter; certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court, upon full investigation, determined them to be, will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evi-

dence upon which the determination was rested is withheld by him who attacks the finding.

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the supreme court. This, we think, embodies more than one error of reasoning. It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such disorder as to cause a loss of jurisdiction in the trial court, which should not be assumed, in the face of the decision of the reviewing court, without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter, instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the state before coming to the courts of the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed judgment upon them.

We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated. [**337**] The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the "due process of law" provision of the 14th Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the state, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused, and refrain from further inquiry into the question of his guilt.

To establish this doctrine would, in a very practical sense, impair the power of the states to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle, but is in conflict with the practice that prevails in all of the states, so far as we are aware. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court, or as rendering the proceedings *coram non judice*, in any such sense as to bar further proceedings. In Myers v. State, 97 Ga. 76, (5), 99, 25 S. E. 252; Collier v. State, 115 Ga. 803, 42 S. E. 226, 12 Am. Crim. Rep. 608; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; Massey v. State, 31 Tex. Crim. Rep. 371, 381, 20 S. W. 758; and State v. Weldon, 91 S. C. 29, 38, 39 L.R.A.(N.S.) 667, 669, 74 S. E. 43, Ann. Cas. 1913E, 801,—in all of which it was held that the prisoner's right to a fair trial had been interfered with by disorder or mob violence,—it was not held that jurisdiction over the prisoner had been lost; on the contrary, in each instance a new trial was [**338**] awarded as the appropriate remedy. So, in the cases where the trial judge abdicated his proper functions or absented himself during the trial (Hayes v. State, 58 Ga. 36 [12], 49; Blend v. People, 41 N. Y. 604; Shaw v. People, 3 Hun, 272, affirmed in 63 N. Y. 36; Hinman v. People, 13 Hun, 266; McClure v. State, 77 Ind. 287; O'Brien v. People, 17 Colo. 561, 31 Pac. 230; Ellerbe v. State, 75 Miss. 522, 41 L.R.A. 569, 22 So. 950) the reviewing court of the state in each instance simply set aside the verdict and awarded a new trial.

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.

2. We come, next, to consider the effect to be given to the fact, admitted for present purposes, that Frank was not present in the court room when the verdict was rendered, his presence having been waived by his counsel, but without his knowledge or consent. No question is made but that at the common law and under the Georgia decisions it is the right of the prisoner to be present throughout the entire trial, from the commencement of the selection of the jury until the verdict is rendered and jury discharged. Wade v. State, 12 Ga. 25, 29; Martin v. State, 51 Ga. 567, 1 Am. Crim. Rep. 536; Nolan v. State, 53 Ga. 137, s. c. 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532; Smith v. State, 59 Ga. 513, 27 Am. Rep. 393; Bonner v. State, 67 Ga. 510; Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Cawthon v. State, 119 Ga. 395, 412, 46 S. E. 897; Bagwell v. State, 129 Ga. 170, 58 S. E. 650; Lyons v. State, 7 Ga. App. 50, 66 S. E. 149. But the effect of these deci-

sions is that the prisoner may personally waive the right to be present when the verdict is rendered, and perhaps may waive it by authorized act of his counsel; and that where, without his consent, the verdict is received in his absence, he may [339] treat this as an error, and by timely motion demand a new trial, or (it seems) he may elect to treat the verdict as a nullity by moving in due season to set it aside as such. But we are unable to find that the courts of Georgia have in any case held that, by receiving a verdict in the absence of the prisoner and without his consent, the jurisdiction of the trial court was terminated. In the Nolan Case, supra, the verdict was set aside as void on the ground of the absence of the prisoner; but this was not held to deprive the trial court of its jurisdiction. On the contrary, the jurisdiction was treated as remaining, and that court proceeded to exercise it by arraigning the prisoner a second time upon the same indictment, when he pleaded specially, claiming his discharge because of former jeopardy; the trial court overruled this plea, the defendant excepted, and the jury found the defendant guilty; and, upon review, the supreme court reversed this judgment, not for the want of jurisdiction in the trial court, but for error committed in the exercise of jurisdiction. To the same effect is Bagwell v. State, 129 Ga. 170, 58 S. E. 650.

In most of the other states, where error is committed by receiving a verdict of guilty during the involuntary absence of the accused, it is treated as merely requiring a new trial. In a few cases, the appellate court has ordered the defendant to be discharged, upon the ground that he had been once in jeopardy and a new trial would be futile.

However, the Georgia supreme court in the present case (L.R.A.—, —, 83 S. E. 645) held, as pointed out in the prefatory statement, that because Frank, shortly after the verdict, was made fully aware of the facts, and he then made a motion for a new trial upon over 100 grounds, without including this as one, and had the motion heard by both the trial court and the supreme court, he could not, after this motion had been finally adjudicated against him, move to set aside the verdict as a nullity because of his absence when the verdict was rendered. There is [340] nothing in the 14th Amendment to prevent a state from adopting and enforcing so reasonable a regulation of procedure. Dreyer v. Illinois, 187 U. S. 71, 77-80, 47 L. ed. 79, 82-84, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253.

It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the Amendment, in that it took from him at a critical stage of the proceeding the right or opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the "due process" clause of the 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with. Indictment by grand jury is not essential to due process (Hurtado v. California, 110 U. S. 516, 532, 538, 28 L. ed. 232, 237, 239, 4 Sup. Ct. Rep. 111, 292; Lem Woon v. Oregon, 229 U. S. 586, 589, 57 L. ed. 1340, 1341, 33 Sup. Ct. Rep. 783, and cases cited). Trial by jury is not essential to it, either in civil cases (Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678), or in criminal (Hallinger v. Davis, 146 U. S. 314, 324, 36 L. ed. 986, 991, 13 Sup. Ct. Rep. 105; Maxwell v. Dow, 176 U. S. 581, 594, 602, 604, 44 L. ed. 597, 602, 605, 606, 20 Sup. Ct. Rep. 448, 494).

It is argued that a state may not, while providing for trial by jury, permit the accused to waive the right to be heard in the mode characteristic of such trial, including the presence of the prisoner up to and at the time of the rendition of the verdict. But the cases cited do not support this contention. In Hopt v. Utah, 110 U. S. 574, 578, 28 L. ed. 262, 264, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417 (principally relied upon), the court had under review a conviction in a territorial court after a trial subject to the local Code of Criminal Procedure, which declared: "If the indictment is for a felony, the defendant *must be* personally present at the trial." The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant, and his counsel. The ground of the decision of [341] this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement as to his personal presence was denied on the ground that his life could not be lawfully taken except in the mode prescribed by law. No other question was involved. See Diaz v. United States, 223 U. S. 442, 455, 458, 56 L. ed. 500, 505, 506, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138.

The distinction between what the common law requires with respect to trial by jury in criminal cases, and what the states may enact without contravening the "due process" clause of the 14th Amendment, is very clearly evidenced by Hallinger v. Davis, 146

U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105, and Lewis v. United States, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136, which were under consideration by the court at the same time, both opinions being written by Mr. Justice Shiras. In the Lewis Case, which was a conviction of murder in a circuit court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of a statute, this right as it existed at common law must not be abridged. But in the Hallinger Case, where a state by legislative enactment had permitted one charged with a capital offense to waive a trial by jury and elect to be tried by the court, it was held that this method of procedure did not conflict with the 14th Amendment. So in Howard v. Kentucky, 200 U. S. 164, 175, 50 L. ed. 421, 426, 26 Sup. Ct. Rep. 189,—a case closely in point upon the question now presented,—this court, finding that by the law of the state an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not [342] amount to a denial of due process within the meaning of the 14th Amendment.

In fact, this court has sustained the states in establishing a great variety of departures from the common-law procedure respecting jury trials. Thus, in Brown v. New Jersey, 175 U. S. 172, 176, 44 L. ed. 119, 121, 20 Sup. Ct. Rep. 77, a statute providing for the trial of murder cases by struck jury was sustained, notwithstanding it did not provide for twenty peremptory challenges. Simon v. Craft, 182 U. S. 427, 435, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836, while not a criminal case, involved the property of a person alleged to be of unsound mind, and it was held that an Alabama statute, under which the sheriff determined that Mrs. Simon's health and safety would be endangered by her presence at the trial of the question of her sanity, so that while served with notice she was detained in custody and not allowed to be present at the hearing of the inquisition, did not deprive her of property without due process of law. In Felts v. Murphy, 201 U. S. 123, 129, 50 L. ed. 689, 692, 26 Sup. Ct. Rep. 366, where the prisoner was convicted *of the crime of* murder, and sentenced to imprisonment for life, although he did not hear a word of the evidence given upon the trial because of his almost total deafness, his inability to hear being such that it required a person to speak through an ear trumpet close to his ear in order that such person should be heard by him, and the trial court having failed to see to it that the testimony in the case was repeated to him through his ear trumpet, this court said that this was "at most an error, which did not take away from the court its jurisdiction over the subject-matter and over the person accused." In Twining v. New Jersey, 211 U. S. 78, 101, 111, 53 L. ed. 97, 107, 111, 29 Sup. Ct. Rep. 14, it was held that the exemption of a prisoner from compulsory self-incrimination in the state courts was not included in the guaranty of due process of law contained in the 14th Amendment. In Jordan v. Massachusetts, 225 U. S. 167, 177, 56 L. ed. 1038, 1042, 32 Sup. Ct. Rep. 651, where one of the jurors was subject to reasonable doubt as to his [343] sanity, and the state court, pursuant to the local law of criminal procedure, determined upon a mere preponderance of the evidence that he was sane, the conviction was affirmed. In Garland v. Washington, 232 U. S. 642, 645, 58 L. ed. 772, 775, 34 Sup. Ct Rep. 456, it was held that the want of a formal arraignment, treated by the state as depriving the accused of no substantial right, and as having been waived, and thereby lost, did not amount to depriving defendant of his liberty without due process of law.

Our conclusion upon this branch of the case is, that the practice established in the criminal courts of Georgia that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making that motion, is a regulation of criminal procedure that it is within the authority of the state to adopt. In adopting it, the state declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and since the state may, without infringing the 14th Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it, and holding him bound by the

raiver, amounts to a deprivation of "due rocess of law."

3. The insistence that the decision of the upreme court of Georgia in affirming the lenial of the motion to set aside the verdict L.R.A.—, —, 83 S. E. 645) on the ground hat Frank's failure to raise the objection ipon the motion for a new trial amounted o a waiver of it was inconsistent with the revious practice as established in Nolan . [344] State, 53 Ga. 137, s. c. 55 Ga. 521, 1 Am. Rep. 281, 1 Am. Crim. Rep. 532, and herefore amounted in effect to an *ex post acto* law in contravention of § 10 of article of the Federal Constitution, needs but a word. Assuming the inconsistency, it is ufficient to say that the constitutional proibition: "No state shall . . . pass ny bill of attainder, *ex post facto* law, or aw impairing the obligation of contracts," s its terms indicate, is directed against egislative action only, and does not reach rroneous or inconsistent decisions by the ourts. Calder v. Bull, 3 Dall. 386, 389, 1 L. ed. 648, 649; Fletcher v. Peck, 6 Cranch, 87, 138, 3 L. ed. 162, 178; Kring v. Missouri, 107 U. S. 221, 227, 27 L. ed. 506, 508, 2 Sup. Ct. Rep. 443; Thompson v. Utah, 170 U. S. 343, 351, 42 L. ed. 1061, 1066, 18 Sup. Ct. Rep. 620; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 638, 56 L. ed. 924, 927, 32 Sup. Ct. Rep. 577; Ross v. Oregon, 227 U. S. 150, 161, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224.

4. To conclude: Taking appellant's petition as a whole, and not regarding any particular portion of it to the exclusion of the rest,—dealing with its true and substantial meaning, and not merely with its superficial import,—it shows that Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the state; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that state, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury [345] rendered its verdict has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts. In all of these proceedings the state, through its courts, has retained jurisdiction over him, has accorded to him the fullest right and opportunity to be heard according to the established modes of procedure, and now holds him in custody to pay the penalty of the crime of which he has been adjudged guilty. In our opinion, he is not shown to have been deprived of any right guaranteed to him by the 14th Amendment or any other provision of the Constitution or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under "due process of law" within the meaning of the Constitution.

The final order of the District Court, refusing the application for a writ of habeas corpus, is affirmed.

Mr. Justice Holmes, dissenting:

Mr. Justice Hughes and I are of opinion that the judgment should be reversed. The only question before us is whether the petition shows on its face that the writ of habeas corpus should be denied, or whether the district court should have proceeded to try the facts. The allegations that appear to us material are these: The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of police of Atlanta and the colonel of the Fifth Georgia Regiment, stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending [346] danger, united in a request to the court that the proceedings should not continue on that evening. Thereupon the court adjourned until Monday morning. On that morning, when the solicitor general entered the court, he was greeted with applause, stamping of feet and clapping of hands, and the judge, before beginning his charge, had a private conversation with the petitioner's counsel in which he expressed the opinion that there would be "probable danger of violence" if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from court when the verdict was brought in. At the judge's request they agreed that the petitioner and they should be absent, and they kept their word. When the verdict was rendered, and before more than one of the jurymen had been polled,

there was such a roar of applause that the polling could not go on until order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors, although he was only 10 feet from them. With these specifications of fact, the petitioner alleges that the trial was dominated by a hostile mob and was nothing but an empty form.

We lay on one side the question whether the petitioner could or did waive his right to be present at the polling of the jury. That question was apparent in the form of the trial and was raised by the application for a writ of error; and although, after the application to the full court, we thought that the writ ought to be granted, we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States. But habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

[347] The argument for the appellee in substance is that the trial was in a court of competent jurisdiction, that it retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the state court as to the fact of such domination cannot be reviewed. But the argument seems to us inconclusive. Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general, but particular, and proceeds from the control of a hostile influence.

When such a case is presented, it cannot be said, in our view, that the state court decision makes the matter *res judicata*. The state acts when, by its agency, it finds the prisoner guilty and condemns him. We have held in a civil case that it is no defense to the assertion of the Federal right in the Federal court that the state has corrective procedure of its own—that still less does such procedure draw to itself the final determination of the Federal question. Simon v. Southern R. Co. 236 U. S. 115, 122, 123, ante, 492, 497, 35 Sup. Ct. Rep. 255. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Norfolk & W. R. Co. v. Conley, [348] March 8, 1915 [236 U. S. 605, ante, 745, 35 Sup. Ct. Rep. 437]. Otherwise, the right will be a barren one. It is significant that the argument for the state does not go so far as to say that in no case would it be permissible, on application for habeas corpus, to override the findings of fact by the state courts. It would indeed be a most serious thing if this court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution. If, however, the argument stops short of this, the whole structure built upon the state procedure and decisions falls to the ground.

To put an extreme case and show what we mean, if the trial and the later hearing before the supreme court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this court would allow itself to be silenced by the suggestion that the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation, and that the supreme court of the state, on writ of error, had discovered no error in the record, we still imagine that this court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the supreme court of the state might have said. We therefore lay the suggestion that the supreme court of the state has disposed of the present question by its judgment on one side, along with the question of the appellant's right to be present. If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And notwithstanding the principle of comity and convenience (for, in our opinion, it is nothing more, United States v. Sing Tuck, 194 U. S. 161, 168, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621) that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of habeas corpus, when, as here, that resort

has been had in vain, the power to secure fundamental rights [349] that had existed at every stage becomes a duty, and must be put forth.

The single question in our minds is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command. This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot,—of the judge whose business it was to preserve not only form, but substance—to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be heard. Upon allegations of this gravity in our opinion it ought to be heard, whatever the decision of the state court may have been, and it did not need to set forth contradictory evidence, or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the state court. There is no reason to fear an impairment of the authority of the state to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are [350]of opinion that if they were before the supreme court, it sanctioned a situation upon which the courts of the United States should act; and if, for any reason, they were not before the supreme court, it is our duty to act upon them now, and to declare lynch law as little valid when practised by a regularly drawn jury as when administered by one elected by a mob intent on death.

STEWART MINING COMPANY, Plff. in Err.,
v.
ONTARIO MINING COMPANY, Stanley A. Easton, and Myron A. Folsom.

(See S. C. Reporter's ed. 350-361.)

Error to state court — decision on non-Federal ground.

1. A decision of the highest court of a state adverse to the contentions of the owner of a lode mining claim, founded upon the apex and extra-lateral-rights provisions of U. S. Rev. Stat. § 2322, Comp. Stat. 1913, § 4618, does not rest upon a non-Federal ground so as to defeat the appellate jurisdiction of the Federal Supreme Court, although the state court found that no part of the apex of the vein lay within the lines of such claim, where it further proceeded to determine the correct interpretation and application of the rule of law which should apply to the facts, and after considering the judicial precedents and analyzing the Federal statute, held that the vein could not be pursued downward at an angle of less than 45 degrees to its course.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

Mines — right to follow dip — apexing veins.

2. The right to follow a vein on its dip beyond the surface lines of a lode location exists under U. S. Rev. Stat. § 2322, Comp. Stat. 1913, § 4618, only when the apex of such vein lies inside of such lines.

[For other cases, see Mines, I. d, 2, in Digest Sup. Ct. 1908.]

Error to state court — conclusiveness of finding of fact.

3. The finding of the state courts that

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois. 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review in the Supreme Court of the United States of decisions of state courts in cases involving mining claims—see note to McMillen v. Fertum Min. Co. 49 L. ed. U. S. 784.

On the right to follow a vein or lode on its dip beyond the surface line of the location—see note to Parrot Silver & C. Co. v. Heinze, 53 L.R.A. 491.

As to review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

no part of the apex of a vein lies within the surface lines of a lode mining claim necessitates an affirmance by the Federal Supreme Court of a judgment of the highest state court adverse to the contentions of the owner of the claim, based upon the apex and extra-lateral-rights provisions of U. S. Rev. Stat. § 2322, Comp. Stat. 1913, § 4618, irrespective of what view the highest state court entertained or expressed of the angle which the downward course of the dip must be to the strike.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

[No. 205.]

Argued March 17 and 18, 1915. Decided April 26, 1915.

IN ERROR to the Supreme Court of the State of Idaho to review a decree which affirmed a decree of the District Court for the County of Shoshone, in that state, quieting title upon a cross complaint to certain bodies of ore lying beneath the surface of defendants' mining claim. Affirmed.

See same case below, 23 Idaho, 724, 132 Pac. 787.

The facts are stated in the opinion.

Messrs. Milton S. Gunn and Charles S. Thomas argued the cause, and, with Messrs. Edgar T. Brackett, Nash Rockwood, and William E. Cullen, Jr., filed a brief for plaintiff in error:

The decision of the supreme court of Idaho with reference to the meaning of the words "downward course" is erroneous. It is wholly immaterial what course is pursued with reference to the strike of the vein in the exercise of the extralateral right if the course is actually downward or below the angle of the horizon.

1 Lindley, Mines, 3d ed. pp. 727, 730, 1015, 1345; Bunker Hill & S. Min. & Concentrating Co. v. Empire State Idaho Min. & Developing Co. 108 Fed. 189, 134 Fed. 268; Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 299, 131 Fed. 579; Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253, 9 Mor. Min. Rep. 607; Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, 15 Mor. Min. Rep. 641; Iron Silver Min. Co. v. Murphy, 2 McCrary, 121, 3 Fed. 368, 1 Mor. Min. Rep. 552; Stevens v. Williams, 1 McCrary, 480, Fed. Cas. No. 13,413, 1 Mor. Min. Rep. 571; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205.

The apex is all the portion of the terminal edge of the vein from which the vein has extension downward in the direction of its dip.

Lindley, Mines, 3d ed. pp. 684–686, 688.

The apex of a vein is not necessarily a point, but often a line of great length.

Larkin v. Upton, 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, 17 Mor. Min. Rep. 465.

Where the strike of a vein forms an angle with the terminal edge of the vein above the strike line of less than 90 degrees, such edge is a top edge.

Lindley, Mines, 3d ed. p. 701.

The fact that the vein on its downward course from the apex in the northerly portion of the Senator Stewart Fraction claim extends into and through the Stewart and Lazy Jane claims does not affect the extralateral right attaching to the vein beyond and southerly of the Senator Stewart and Lazy Jane claims.

Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 52 C. C. A. 219, 114 Fed. 417, 22 Mor. Min. Rep. 104.

The apex of the vein along the Osborn fault is a subsurface apex. Such an apex will support a location, and the extralateral right attaches to a vein having a subsurface apex the same as to a vein which outcrops at the surface.

Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 469, 25 L. ed. 255, 9 Mor. Min. Rep. 607; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885, 21 Mor. Min. Rep. 381.

There is neither allegation nor proof with reference to the discovery vein in the Stewart Fraction claim, but by virtue of the patent there is a presumption that a discovery was made, and that the claim was properly located with reference to the discovery vein.

Work Min. & Mill. Co. v. Doctor Jack Pot Min. Co. 114 C. C. A. 392, 194 Fed. 620; Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, 18 Mor. Min. Rep. 661; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370.

A patent to a mining claim is conclusive against a collateral attack of every matter which the Land Department is required to determine before the patent is issued.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Lindley, Mines, 3d ed. p. 1889; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266; Lawson v. United States Min. Co. 207 U. S. 1, 52 L. ed. 65, 28 Sup. Ct. Rep. 15.

Messrs. Myron A. Folsom and John P. Gray, argued the cause, and, with Mr. James E. Gyde, filed a brief for defendants in error:

The court is without jurisdiction of this case because: The supreme court of Idaho decided that the alleged apex of the vein as described in the complaint had no existence; that the so-called apex was the side edge of the vein on the line of its dip.

(a) This involved a question of fact.

Blue Bird Min. Co. v. Largey, 49 Fed. 289; Illinois Silver Min. & Mill. Co. v. Raff, 7 N. M. 336, 34 Pac. 544; Larkin v. Upton, 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, 17 Mor. Min. Rep. 465; Mammoth Min. Co. v. Grand Central Min. Co. 213 U. S. 72, 53 L. ed. 702, 29 Sup. Ct. Rep. 413.

(b) The findings of the state court on questions of fact are binding on this court on writ of error.

Mammoth Min. Co. v. Grand Central Min. Co. 213 U. S. 72, 53 L. ed. 702, 29 Sup. Ct. Rep. 413; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468.

(c) The Idaho court having based its decision primarily upon a question of fact sufficient to uphold the judgment, it is immaterial that the court also discussed and decided other questions which are Federal in their nature.

Merced Min. Co. v. Boggs, 3 Wall. 304, 310, 18 L. ed. 245, 247; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

The burden is upon the plaintiff to show, not only that these ore bodies were part of the vein, but that the apex thereof was in plaintiff's ground, and was so located as to entitle plaintiff to the ore bodies in dispute.

Lawson v. United States Min. Co. 207 U. S. 1, 52 L. ed. 65, 28 Sup. Ct. Rep. 15.

The court below fully appreciated the meaning of the words "top" or "apex," and in effect held that the words "top" or "apex" of the vein meant the top edge of the vein, whether it outcropped or not.

Larkin v. Upton, 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, 17 Mor. Min. Rep. 465; Costigan, Min. Law, p. 105; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59; Lindley, Mines, 3d ed. §§ 306, 309.

The edge of the vein against the Osborn fault did not constitute the apex, but was the end of the vein on the line of its dip.

Stewart Min. Co. v. Bourne, 218 Fed. 327; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887; 17 Mor. Min. Rep. 59; Lindley, Mines, 3d ed. § 310; Costigan, Min. Law, p. 138.

One claiming an extralateral right must show (1) that he owns the apex, and (2) that the lines of his claim are so laid with reference to the apex that he is entitled to extralateral rights in the direction claimed.

Lawson v. United States Min. Co. 207 U. S. 1, 52 L. ed. 65, 28 Sup. Ct. Rep. 15; King v. Amy & S. Consol. Min. Co. 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510, 18 Mor. Min. Rep. 76.

To permit the pursuit of a vein on its onward course and on a level would subvert the whole system sought to be established by the law.

Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356, 17 Mor. Min. Rep. 109; Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253, 9 Mor. Min. Rep. 607; Southern Nevada Gold & S. Min. Co. v. Holmes Min. Co. 27 Nev. 107, 103 Am. St. Rep. 759, 73 Pac. 759; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370.

If a vein could be followed upon its strike or onward course there would have been no reason for the decision of this court that when a vein crosses the side lines, those side lines become the end lines.

King v. Amy & S. Consol. Min. Co. 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510, 18 Mor. Min. Rep. 76.

The supreme court of Idaho was right in denying the claim of plaintiff in error to pursue a secondary vein on its strike which was found to occupy a position at right angles to the course of the assumed discovery vein.

Walrath v. Champion Min. Co. 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909, 19 Mor. Min. Rep. 410; Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253, 9 Mor. Min. Rep. 607; Costigan, Min. Law, pp. 414, 448, 449; 2 Lindley, Mines, 3d ed. p. 1397; Cosmopolitan Min. Co. v. Foote, 101 Fed. 518, 20 Mor. Min. Rep. 497; Stewart Min. Co. v. Bourne, 218 Fed. 327.

Mr. Justice McKenna delivered the opinion of the court:

Contest between the mining companies (they were respectively plaintiff and defendants in the trial court and we shall so designate them) as to certain ore bodies lying beneath the surface of the mining claim of defendants, called the Ontario. Plaintiff asserts ownership to the ore bodies by reason of being owner in fee and in possession of a quartz lode mining claim named the Senator Stewart Fraction Lode Claim. It is alleged that within such claim there "is a certain vein or lode bearing silver, lead, and other valuable minerals, of which said vein or lode and the ore and mineral therein contained this plaintiff is the owner in possession and entitled to the possession. That the top or apex of said vein or lode crosses the easterly end line

of said claim at approximately the center thereof between corners Nos. 1 and 2, and extends within the boundaries of said claim in a westerly direction, following the general course of said claim, for a distance of seven hundred five (705) feet, more or less. That said vein or lode has a downward course and descends into the earth southerly and beyond the south boundary and side line of said claim into and beneath the surface of the Ontario quartz lode mining claim, designated as survey No. 755."

[352] Plaintiff prayed for an accounting and for an injunction against the further mining or extracting of the ore.

Defendants' answer set up opposing contentions and denied the rights alleged by plaintiff. In a cross complaint defendants asserted title and prayed that it be quieted against the claim of plaintiffs. The judgment of the trial court responded to this prayer. The judgment was affirmed by the supreme court of the state (23 Idaho, 724, 132 Pac. 787). This writ of error was then granted.

The case is not embarrassed by any dispute of facts of the title to the respective claims, or of their boundaries, or of the mining of the ore by defendants. The controversy turns entirely upon the construction of § 2322, Revised Statutes of the United States (Comp. Stat. 1913, § 4618). It provides that locators of mining locations "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It will be observed, therefore, to summarize the rights conferred by the section, that the locator of a mining claim [353] has the right to the surface included within the lines of his claim, and if a vein has its top or apex within the claim, he may *follow* such vein downward, though it may depart from a perpendicular in its downward course outside "of the vertical side lines" of the location,—that is, into adjoining grounds. The length of the side lines and the claim they bound are limited by the end lines, or, as it is expressed in the statute, by vertical planes drawn downward through the end lines. Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481; Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, 15 Mor. Min. Rep. 641.

The statute would seem to call for no effort of construction, and the distinction which obtains in the parlance of miners and in the cases, between the strike or course and the dip of a vein, is compelled by the statute, and marks accurately the linear and extralateral rights of a location. This certainly, as far as any language can do it, expresses the distinction which must be observed, however various may be the natural conditions. In other words, the strike and the dip of the vein must not be confounded nor the rights dependent upon them confused.

What, then, do they determine in the present case? The plaintiff asserts, as we have seen, that the vein has its top or apex within one of its claims (the Senator Stewart Fraction Lode), and asserts further that the vein extends downward beyond the side lines, within the limits of the end lines extended vertically, to and beneath the claim of defendants, and includes the ore bodies mined by the latter.

These are the facts as found by the trial court:

"That no part of the apex of the said ore bodies lies within the lines of the Senator Stewart Fraction lode mining claim.

"That the plaintiff is the owner, in the possession and entitled to the possession of the Senator Stewart Fraction lode mining claim described in the complaint, with the exception of that part thereof in conflict with the Quaker [354] lode mining claim, which conflict is not material to any issue involved in this case.

"That within said Senator Stewart Fraction lode mining claim there is a vein or a lode of mineral-bearing rock in place which, on its onward course, crosses the south side line of said Senator Stewart Fraction lode mining claim, and has a course about north 30° east, and the said vein on its onward course does not reach any other line of said claim. That the said vein is cut off on its onward course by a large fault near the north line of said claim, called the Osburn fault in this case. That the said vein on its downward course passes underneath the east line of said

claim, which is described in the patent as the end line of said claim, which line connects corners 1 and 2 of said claim. That the fault which cuts off said vein on its northerly end has a northwestwardly and southeastwardly course and dips southwestwardly. That the end of the vein against said fault has a course north 41° west. That the end of said vein against said fault has a steeply inclined downward course southeasterly.

"That the end of the vein as the same is terminated on the onward course of the said vein against the fault hereinbefore referred to is the end of the vein on the line of its dip, and the said vein is undercut by the said fault in such manner that if the country below the fault was eroded, it would present the appearance of an overhanging cliff.

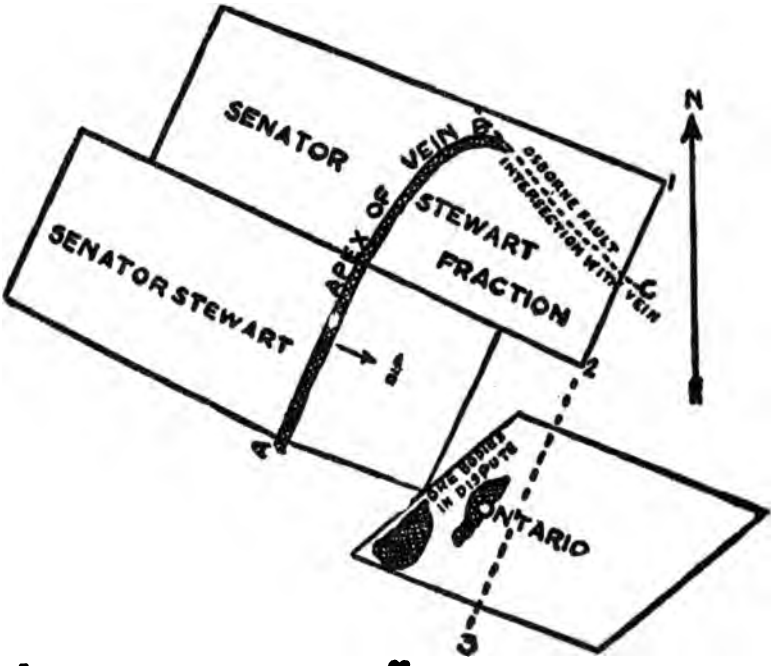
"That the said fault which terminates the said vein upon its onward course is a fault of great magnitude, and for a short distance above the fault has disturbed and broken and slightly deformed the vein and inclosing rocks in close *proximately* [proximity] to said fault in some places for a greater distance from the fault than in others. That the vein is also at various places cut by other faults which tend in places to flatten the vein somewhat upon its downward course.

"That the said vein is continuous on its onward course [355] from the line of contact with the said great fault, in this case called the Osburn fault, southerly to the ore bodies within the Ontario lode mining claim, and has been followed upon the level in the drifts by the miners from the said edge of the vein to the ore bodies in the Ontario mining claim.

"That the top or apex of said vein which, on its onward course, crosses the south side line of said claim, is practically level."

The supreme court affirmed the findings and added that the end of the vein against the Osborne fault was "turned, curled, or cupped upward, caused by the disturbanc which created the fault and cut off th vein." And also said: "It further appears that this vein is undercut by the Osborne fault in such a manner that if the fault were eroded or washed away, it would leave the vein standing out as an overhanging cliff." The following diagram exhibits the relations of the claims, the location of the vein, and the Osborne fault.

[356] The contention of plaintiff is that the vein A–B runs along the Osborne fault on the dotted line b–c and passes across the end line 1–2 at right angles. It is further contended that the apex of the vein is along the line A–B to the Osborne fault, and continues with what is asserted to be the edge of the vein along the dotted line b–c, and that, therefore, the claim is entitled to an extralateral right on the vein, measured between the vertical plane 1–2–3 and a plane parallel to that plane, drawn through the point where the vein passes through the souther-



ly side line of the claim. These planes include the ore bodies in dispute.

Defendants oppose the contention and insist that the vein terminates at the Osborne fault, and that the edge of the vein along the fault does not constitute the apex of the vein of the ore bodies. The supreme court accepted this view, as we have pointed out, and, in emphasis of it, said: "We cannot understand how an overhanging end edge of a vein, cut off as the evidence shows this has been, can in any sense be called the top or apex of the vein."

On first impression it would seem that the state courts rested their judgments solely on a question of fact; in other words, decided that no part of the apex of the vein lay within the lines of the plaintiff's claim. Or, to state the finding differently, that what plaintiff asserts to be the apex is the side edge of the vein on the line of its dip, the vein crossing the south side line of the Senator Stewart Fraction at about right angles. This finding is undoubtedly one of fact, and defendants, asserting it to be such, make a motion to dismiss the writ of error for want of jurisdiction in this court on the ground that such fact was sufficient to uphold the judgment, and contend that it is hence immaterial that the court discussed and decided other questions Federal in their nature. For this cases were cited, among others, Mammoth Min. Co. v. Grand Central Min. Co. 213 U. S. 72, 53 L. ed. 702, 29 Sup. Ct. Rep. 413.

But this is an imperfect view of the decision of the supreme [357] court. The court observed that the decisive assignment of error was lodged against the finding that the vein had not its apex in the Senator Stewart Fraction claim, and, after referring to the testimony of witnesses as to the inclination and apparent strike of the vein at certain points, said: "But, taken as a whole, the evidence supports the findings, and the controversy arising on this appeal becomes a question as to the correct interpretation and application of the rule of law that should apply to the facts of this case. The whole question rests on the correct application of the apex and extralateral rights provisions of § 2322, U. S. Revised Statutes (Comp. Stat. 1913, § 4618)." The court further observed that it would attempt no new application of the statute, but would seek and apply the construction which this court had made; and, after consideration of the decisions and an analysis of § 2322, and especially the words "downward course," said: "To pursue a vein in the direction of its strike at an angle of less than 45 degrees to the course *thereof* would clearly not be following the vein on its 'downward course' as authorized by the statute."

It is manifest, therefore, that the court did more than decide the question of fact and made its judgment to depend as well upon a question of law. The motion to dismiss, therefore, is denied.

The view expressed by the supreme court, that the angle of a vein of less than 45 degrees to its course would not be downward "'as authorized by the statute,'" is especially attacked by plaintiff as the capital error of the decision of the court.

We pretermit for the present a consideration of the ruling and go back to the statute for the elements of decision. They are simple enough in expression, but the contests of interest and ingenuity, induced or justified by physical conditions, have given rise to much litigation, and quite a body of jurisprudence has been erected in the [358] exposition of the rights conferred by the statute. The number and fullness of the cases spare us much discussion, and we may rapidly indicate the elements which determine the decision of this case.

The statute gives a right of possession to the locator of a vein, the apex of which lies within the lines of his location, not exceeding in extent 1,500 feet in length by 600 feet in width. § 2320 (Comp. Stat. 1913, § 4615). And a vein is a well-defined body of mineral within inclosed rocks. It has an onward course and a downward course, and at what angle to the former the latter may be followed in the exercise of the extralateral right has been made a question in this case and argued at much length by plaintiff. The supreme court of the state decided, as we have seen, that the vein could not be pursued downward at an angle of less than 45 degrees to its course. We, however, are not required to pass upon the question.

The findings of fact afford a simpler ground of decision. The primary condition which plaintiff, to justify a claim to the ore bodies in controversy, had to establish, was that the apex of the vein was within the Senator Stewart Fraction claim; but the fact was found the other way.

The findings are graphically represented by the diagram which we have given. It will be observed from it, and to quote the findings, that the vein on its onward course (strike) crosses the south line of the Senator Stewart Fraction claim and continues northeasterly (N. 30° E.) to the Osborne fault. It reaches no other line of the claim, being cut off by that fault. The vein on its "downward course" (dip) passes underneath the east end line (so described in the patent) of the claim. And both the

trial court and the supreme court found that the termination of the vein at the Osborne fault is not the top or apex of the vein. In other words, what plaintiff claims to be the apex of the vein is its side edge on the line of the dip.

From this it follows that no extralateral rights can be [359] predicated upon it, and we may put to one side the view expressed by the supreme court that a vein cannot be pursued along its strike at an angle of less than 45.° And the conclusion of the court that the top or apex of the vein was not within the Senator Stewart Fraction claim has the concurrence of the judgment of the circuit court of appeals of the ninth circuit in Stewart Min. Co. v. Bourne, 218 Fed. 327, where the same ore bodies were in controversy upon rights asserted to appertain to that claim. That case was submitted on the evidence in this, supplemented by an agreement as to certain facts. The court, by Circuit Judge Ross, remarked that a diagram introduced in evidence (substantially like that given above) and a certain model (not exhibited here, counsel explaining that it had been broken), the correctness of which was practically conceded, demonstrated the situation of the vein by actual development, and made it "plain . . . that this vein was not turned or bent in its course or strike at the point of its contact with the Osborne fault, and did not and does not extend from that point along that fault, but, on the contrary, came to an abrupt end there. True, further to the northeasterly and at a much greater depth the ore is shown by the model to have extended to the Osborne fault and from that point to have followed the fault northeasterly to and out of the easterly end line of the claim [the dotted line b and c of the diagram]. But we think it is manifest that such portion of the ore body cannot in any proper sense be regarded as any part of the apex of the vein."

The court also referred to the allegation of the plaintiff in that case, which is identical with the allegation in the present case, that the vein was in Senator Stewart Fraction claim, and that its apex crossed the easterly end line of the claim at approximately the center thereof, and said: "The evidence showing, as has been above pointed out, that there is no such apex, the suit of the plaintiff must necessarily fail."

[360] A like declaration may be made in the case at bar. The fact is fundamental. It is rudimentary that extralateral rights to a vein depend upon the position of its top or apex.

But principles of law are asserted by plaintiff which, it is insisted, determine against the conclusion of both courts. It is difficult to state or estimate the principles singly. An apex is, on cited authority, defined to be "all that portion of a terminal edge of a vein from which the vein has extension downward in the direction of the dip." And it is further said that the definition has been approved in Lindley on Mines, because as therein expressed it "involves the elements of terminal edge, and downward course therefrom." We may accept the definition. In its application, however, it immediately encounters a question of fact,—the locality of the terminal edge; and in this case the state courts did not find it to be where plaintiff asserted it to be.

But counsel make much of—indeed, appear to give absolute effect to—the other element of the definition, that is, "extension downward" or "downward course" from the terminal edge. But this element again has no significance whatever independently of the "terminal edge" of the vein, found, as we have said, not to be where plaintiff contended it to be. Plaintiff's contention is that the terminal edge extends 200 feet along the Osborne fault, and from thence there is a pronounced downward course to the southerly boundary of the Stewart Fraction claim, and that therefore the two elements essential to an apex in the accepted definition exist; namely, "terminal edge and downward course" within "vertical planes parallel with the vertical planes of the end lines of the claim extended downward." If it could be conceded that the apex of the vein runs along the Osborne fault, the conclusion plaintiff contends for might also be conceded; but the fact is found the other way by the state courts in this case. The finding is dominating, and, on account of it, the judgment must be [361] sustained. It is immaterial what view the court had or expressed of the angle the downward course of the dip must be to the strike.

The next contention of plaintiff is that there is neither allegation nor proof of the discovery vein in the Senator Stewart Fraction claim, but that a presumption arises from the patent that a discovery was made and the claim properly located with reference thereto. In other words, that a discovery vein existed and that the claim was located lengthwise with it, and that the first presumption is conclusive, and the other also, in the absence of anything to the contrary appearing. And it would seem to follow from the contention that the presumption includes as well the position of the apex and other attributes necessary for the assertion of extralateral rights. It would, indeed, be difficult to entertain such a presumption in view of the conduct of

the plaintiff, its pleadings and testimony and the careful investigation and consideration which the state courts gave to the case. We may omit, therefore, a detailed consideration of plaintiff's contention. The rights asserted in the pleadings and to which the testimony was directed to sustain were based upon the possession of the vein which we have described. Stewart Min. Co. v. Bourne, supra.

Judgment affirmed.

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[362] RUTH DORAN, Plff. in Err.,
v.
JOHN A. KENNEDY et al.

(See S. C. Reporter's ed. 362–368.)

Public lands — homestead — rights of heirs of entryman.

1. The heirs of a homestead entryman who had made his final proof before his death could only take the land as his heirs when thereafter a patent was issued in the entryman's name, under U. S. Rev. Stat. § 2448, Comp. Stat. 1913, § 5098, providing that where patents issue to a person who died before the date thereof the title shall inure to and become vested in his heirs, devisees, or assignees as if the patent issued to the deceased during life. They could not take under U. S. Rev. Stat. § 2291, Comp. Stat. 1913, § 4532, as the direct beneficiaries of the statute, since that section provides only for cases where the homesteader dies before final proof.

[For other cases, see Public Lands, I. e, 8, in Digest Sup. Ct. 1908.]

Public lands — rights of homestead entryman before patent — descent.

2. A homestead entryman who has made final proof upon his entry, so as to be entitled to the patent, is the equitable owner of the land, which becomes subject, therefore, upon his death, to the probate jurisdiction of the state.

[For other cases, see Public Lands, I. f, 2; Descent and Distribution, II., in Digest Sup. Ct. 1908.]

Judgment — collateral attack — jurisdiction of probate court.

3. The jurisdiction of a state probate court to order the land patented to a deceased homestead entryman who had made final proof before his death to be sold for the payment of his debts cannot be attacked collaterally because of the provision of U. S. Rev. Stat. § 2296, Comp. Stat. 1913, § 4551, that no land acquired under the homestead laws shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent.

[For other cases, see Judgment, III. i, in Digest Sup. Ct. 1908.]

[No. 224.]

Argued April 16, 1915. Decided April 26, 1915.

IN ERROR to the Supreme Court of the State of Minnesota to review a decree which reversed a decree of the District Court for the Fifteenth Judicial District in that state in favor of plaintiff in a suit to quiet title. Affirmed.

See same case below, 122 Minn. 1, 141 N. W. 851.

The facts are stated in the opinion.

Mr. John E. Samuelson argued the cause, and, with Mr. William E. Culkin, filed a brief for plaintiff in error:

The jurisdiction and power to hear and determine a case in the probate court must rest upon the basis of death and property, and the absence of either one of these elements is necessarily fatal to the exercise of power and jurisdiction.

Fitzpatrick v. Simonson Bros. Mfg. Co. 86 Minn. 146, 90 N. W. 378; Grignon v. Astor, 2 How. 319–338, 11 L. ed. 283–290.

The land involved in this case was not Norton's property.

Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. ed. 82; Hall v. Russell, 101 U. S. 503, 513, 25 L. ed. 829, 733; United States v. Steenerson, 1 C. C. A. 552, 4 U. S. App. 332, 50 Fed. 504; American Mortg. Co. v. Hopper, 56 Fed. 67, s. c. on appeal, 12 C. C. A. 293, 29 U. S. App 12, 64 Fed. 553; Guaranty Sav. Bank v. Bladow, 176 U. S. 448, 454, 44 L. ed. 540, 542, 20 Sup. Ct. Rep. 425; Shiver v. United States, 159 U. S. 491, 497, 40 L. ed. 231, 232, 16 Sup. Ct. Rep. 54; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Cutting v. Cutting, 6 Sawy. 96, 6 Fed. 259; Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; Braum v. Mathieson, 139 Iowa, 409, 116 N. W. 789; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; Chapman v. Price, 32 Kan. 446, 4 Pac. 807; Bernier v. Bernier, 72 Mich. 43, 40 N. W. 50; Haun v. Martin, 48 Or. 304, 86 Pac. 371; Wadkins v. Producers Oil Co. 227 U. S. 368, 374, 57 L. ed. 551, 555, 33 Sup. Ct. Rep. 380; McCune v. Essig, 199 U. S. 382, 389, 50 L. ed. 237, 240, 26 Sup. Ct. Rep. 78.

Norton had no title in fact and none passed by the so-called deed of the administrator.

Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; Haun v. Martin, 48 Or. 304, 86 Pac. 371; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; 1 Jones, Real Prop. in Conveyancing, § 223; Galloway v. Finley, 12 Pet. 264, 9 L. ed. 1079; Daven-

port v. Lamb, 13 Wall. 418, 20 L. ed. 655; Re Ellis, 21 Land Dec. 377.

Even if the owners made no objection to the sale, the probate court would nevertheless be without jurisdiction. The probate court had no jurisdiction of the property of third persons and could acquire none, even by consent of the parties. The Constitution and statutes of this state do not contemplate that a probate court shall hear and determine questions relating to the title to land. Such a matter is as much beyond the jurisdiction of the probate court as a suit in equity is beyond the jurisdiction of a justice of the peace. It is familiar law that consent will not vest in any tribunal power which has been withheld from it.

Gjertstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233.

The decree of the probate court, being void, is subject to collateral attack.

Culver v. Hardenbergh, 37 Minn. 231, 33 N. W. 792; Sache v. Wallace, 101 Minn. 169, 11 L.R.A.(N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 Ann. Cas. 348.

As the homestead itself could not be sold directly, it could not be sold indirectly by the process of administration, as was attempted to be done in this case.

Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50.

Even though Norton had such property rights in the land involved that it vested in his heirs, by descent, the same were exempt from sale under both state and Federal laws for debts incurred by him prior to patent.

Ash v. Eriksson, 115 Minn. 478, 132 N. W. 997; Russell v. Lowth, 21 Minn. 167, 18 Am. Rep. 389; Coleman v. McCormick, 37 Minn. 179, 33 N. W. 556; Van Doren v. Miller, 14 S. D. 264, 85 N. W. 187; Brandhoefer v. Bain, 45 Neb. 781, 64 N. W. 213; Duell v. Potter, 51 Neb. 241, 70 N. W. 932; Nash v. Farmers' & M. Bank, 3 Kan. App. 694, 44 Pac. 907; Clark v. Bayley, 5 Or. 343; State v. O'Neil, 7 Or. 141; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; Wallowa Nat. Bank v. Riley, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766; Miller v. Little, 47 Cal. 348; Gile v. Hallock, 33 Wis. 523; Newton v. Summey, 59 Ga. 398; Sprinkle v. West, 34 L.R.A. (N.S.) 404, note; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Smith v. Steele, 13 Neb. 1, 12 N. W. 830; Baldwin v. Boyd, 18 Neb. 444, 25 N. W. 580; Jean v. Dee, 5 Wash. 580, 32 Pac. 460; Sorrels v. Self, 43 Ark. 451; Miller v. Little, 47 Cal. 348.

Mr. Francis J. McPartlin argued the cause, and, with Mr. Marshall A. Spooner, filed a brief for defendants in error:

A patent that would otherwise be void because having issued to a deceased person is validated and vitalized by means of U. S. Rev. Stat. § 2448, Comp. Stat. 1913, § 5098, and the title to the land vests in the heirs, devisees, or assignees of the decedent in the same manner, and to the same extent, that it would have vested had the patent issued to him during life.

Tarver v. Smith, 38 Ala. 135; Schedda v. Sawyer, 4 McLean, 181, Fed. Cas. No. 12,443; Crews v. Burcham, 1 Black, 353, 17 L. ed. 91; Leonard v. Ross, 23 Kan. 292; Johnson v. Parcels, 48 Mo. 549; Stubblefield v. Boggs, 2 Ohio St. 216; McArthur v. Dun, 7 How. 262, 12 L. ed. 693; Trimble v. Boothby, 14 Ohio, 109, 45 Am. Dec. 526.

The word "heir" or "heirs" used in the statute is unquestionably used in its ordinary legal sense, and clearly shows the intention of Congress as directing, as far as it could, the title to former public lands to which the right of patent had accrued to the entryman, but to whom patent had not issued during life.

Bouvier's Law Dict. 941; 2 Bl. Com. 201; Rawson v. Rawson, 52 Ill. 62; Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. 387; Elliot v. Spinney, 69 Me. 31; Ward v. Stow, 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238; Merrill v. Atkin, 59 Ill. 19; Henry v. Henry, 31 N. C. (9 Ired. L.) 278; Dukes v. Faulk, 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122.

The equitable title to this land passed to Edward O. Norton on April 10, 1906, when he had complied with the terms of his contract of purchase by offering final proof and payment.

32 Cyc. 1029, 1030; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 338, 50 L. ed. 499, 506, 26 Sup. Ct. Rep. 282; Landes v. Brant, 10 How. 348, 13 L. ed. 449; Barney v. Dolph, 97 U. S. 652, 24 L. ed. 1063; Simmons v. Wagner, 101 U. S. 260, 263, 25 L. ed. 910, 911; Stark v. Starr, 6 Wall. 402, 18 L. ed. 925; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; 5 Cruise, Real Prop. pp. 510, 511; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep.

488; Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606.

The equitable title having vested in Norton prior to his death, and patent having confirmed it in his estate subsequent to his death, the probate court of Koochiching county had jurisdiction which might be invoked by the application of any person claiming an interest in the estate, or otherwise, as disclosed by the record.

Austro-Hungarian Consul v. Westphal, 120 Minn. 143, 139 N. W. 300; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; M'Pherson v. Cunliff, 11 Serg. & R. 430, 14 Am. Dec. 642; Ex parte Watkins, 3 Pet. 205, 7 L. ed. 654; J. B. Watkins Land Mortg. Co. v. Mullen, 62 Kan. 1, 84 Am. St. Rep. 372, 61 Pac. 385.

Plaintiff in error waived her rights of exemption under U. S. Rev. Stat. § 2296, Comp. Stat. 1913, § 4551, by acquiescence and failure to appeal.

Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233.

Mr. Justice McKenna delivered the opinion of the court:

Suit to quiet title to certain described lands, brought by plaintiff in error against defendants in error. The parties were respectively plaintiff and defendants in the state courts, and we shall so designate them.

The facts are as follows:

On November 12, 1904, Edward O. Norton made a homestead entry under the laws of the United States of the land in controversy. On April 10, 1906, he duly made final proof upon his entry. September 6, 1906, he died, leaving the plaintiff and four others as next of kin and sole heirs at law.

The final receipt of the Receiver of the United States Land Office was issued to and in the name of Norton on March 17, 1908, and on the 8th of September following a patent was issued in his name.

After the death of Norton the other heirs conveyed their respective rights, title, and interest to plaintiff.

On March 2, 1909, letters of administration upon the estate of Norton were issued out of the probate court of Koochiching county, Minnesota, to the defendant John A. Kennedy, and on February 11, 1910, an order of license to sell the real estate here involved for an alleged indebtedness incurred and contracted by Norton prior to his death, and for the expense of the administration, was by the court issued to John A. Kennedy as administrator.

On April 16, 1910, Kennedy, as such administrator, and by virtue of the order of license, made a public sale of the [365] land for the consideration of $650 to the defendant George N. Millard, and on the 29th of that month the court made an order confirming the sale.

On May 2, 1910, Millard conveyed the property to the defendant Paul Kennedy.

From the facts found as above the trial court concluded that plaintiff was the owner in fee simple of the land, and that the defendants had no estate or interest in it, resting the conclusion upon the fact that the indebtedness for which it was sold was contracted by Norton before the patent was issued; that under § 2296 of the Revised Statutes (Comp. Stat. 1913, § 4551), the land was protected from liability for "the satisfaction of any debt contracted prior to the issuing of the patent therefor," and that, therefore, the order of sale exceeded the jurisdiction of the probate court and was void.

Upon the appeal of the defendants, the supreme court of the state reversed the judgment. The latter court decided (1) that Norton was the equitable owner of the land at the time of his death, and that it descended according to the laws of the state, and was part of Norton's estate to be administered. (2) The probate court having jurisdiction, its order of sale could not be attacked in a collateral proceeding such as, the court said, the proceeding at bar was, and that it was unnecessary to determine whether the land was exempt from liability under § 2296 of the Revised Statutes. A member of the court dissented from the decision of the majority that the land was a part of the estate of Norton when it was sold.

To review the judgment of the supreme court this writ of error is prosecuted.

Plaintiff contends: (1) That the probate court had no jurisdiction, the land being no part of Norton's estate. (2) Even if part of his estate, it was not subject to sale for the payment of debts contracted before the patent was issued.

[366] As an element in the first contentión of plaintiff is the extent of the estate, if any, Norton had in the land. None whatever, is the assertion of plaintiff, and she adduces §§ 2289, 2290, and 2291 of the Revised statutes (Comp. Stat. 1913 §§ 4530-4532).

The first two sections provide who shall be entitled to enter land as a homestead and upon what conditions. The last section provides when a certificate shall be given or patent shall issue and to whom upon certain contingencies. It shall not be issued until the expiration of five years after entry, and may be at any time within two years thereafter, to "the person making such entry." If, however, he be dead, then to his widow, or, in case of her death,

to his heirs or devisee, upon proving the necessary settlement and qualification for the time prescribed.

This section, it is contended, made the heirs of Norton (there being no widow) the direct beneficiaries of the statute,— that is, the plaintiff and her grantors. In other words, they took directly under the statute, not from Norton; and such, it is further contended, is the effect of the decisions of this court, citing McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; Wadkins v. Producers' Oil Co. 227 U. S. 368, 57 L. ed. 551, 33 Sup. Ct. Rep. 380.

But it will be observed the cited section provides for cases where the homesteader dies before final proof, other sections applying when such proof has been made and nothing is yet to be performed to entitle to a patent.

By § 2448 (Comp. Stat. 1913, § 5098) it is provided that "where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee as if the patent had issued to the deceased person during life."

Such are the circumstances in the present case. Norton had made his final proof before his death, and had become entitled to the patent. Plaintiff and her grantors, therefore, [367] could only receive the land as his heirs, and not directly under § 2291, and as its beneficiaries.

Upon such proof Norton certainly became the equitable owner of the land. Indeed, it practically became his absolute property, subject to his disposition by assignment or by will, or to the disposition of the law (United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 328, 50 L. ed. 490, 502, 26 Sup. Ct. Rep. 282), and subject, therefore, upon his death, to the probate jurisdiction of the state.

But it is contended that even if he became such owner, the land was not subject to sale for the satisfaction of debts contracted before the patent was issued. The debt for which it was sold was so contracted.

Section 2296 provides that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The prohibition is clear and direct; but does it involve the consequences plaintiff asserts? Her contention is that it took from the probate court all jurisdiction or power over the land, and that its order of sale was absolutely void and can be collaterally attacked. The supreme court of the state decided otherwise, as we have seen. It rejected all of the contentions of plaintiff against the jurisdiction of the court, based on the laws of the state, and so far its decision is binding here. It said that there was no pretense at either pleading or proof that Norton left no other property, or that such was the fact. It decided that the probate court had jurisdiction over Norton's estate. "That court," it was said, "had the unquestioned power to authorize a sale of it to pay certain classes of obligations. It might be sold to pay liabilities arising out of torts of deceased. 32 Cyc. 1084; Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145. Had the patent issued when it should have issued, it might have been sold to pay debts incurred thereafter and before the death of deceased. Whether there were [368] facts to warrant a sale in any given case was a question which the probate court was obliged to determine, and which that court and no other had jurisdiction to determine. This question was considered by the probate court and was determined adversely to plaintiff. Then was the time for the plaintiff to present her contention in court. No fraud or artifice was practised to prevent her doing so. In fact, in her brief she claims that she did in fact appear. If the determination of the probate court was wrong, her remedy was to appeal from that determination. The heirs were entitled to one day in court, but not to two. When a probate court with jurisdiction over property for purposes of administration, and for purposes of sale in certain cases, orders and confirms a sale of the same, it is the right and duty of an heir to litigate the propriety of such orders in that proceeding. The heir cannot sit by, permit the sale to be made, and then bring another and a collateral action in another court to litigate again the propriety of the sale, and to procure a decree declaring it to be void. Such a practice would place no end to litigation." [122 Minn. 7, 141 N. W. 851.]

The court further decided that certain sections of the Revised Laws of the state accorded to the orders of the probate court in the matter of administrators' sales the same presumption as to the judgments of courts of superior common-law jurisdiction.

It would be difficult to add anything to the reasoning of the court, and it is in accord with the rulings in other states. J. B. Watkins Land Mortg. Co. v. Mullen, 62 Kan. 1, 84 Am. St. Rep. 372, 61 Pac. 385; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233. See

also Sigmond v. Bebber, 104 Iowa, 431, 73 N. W. 1027, and § 319b, Freeman on Judgments, 4th ed. and cases cited.

Judgment affirmed.

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[369] MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Plff. in Err.,

v.

MICHAEL A. POPPLAR, as Administrator of the Estate of Richard S. Popplar, Deceased.

(See S. C. Reporter's ed. 369-372.)

Trial — sufficiency of evidence to go to jury — negligence.

1. Evidence that a railway brakeman after giving the stop signal repeatedly attempted, without success, to uncouple a car which was being "kicked" to a siding by pulling the automatic coupler pin with the lifter at the end of the next car, and that then, stepping between the two cars while they were in motion, in order to effect the uncoupling by hand, he was run over and killed, together with the testimony of the train conductor who examined the coupling apparatus soon after the accident, that it worked with difficulty, and that he would have reported it as a "bad coupler" had it been brought to his attention,—is sufficient to take to the jury the question as to whether the coupler was in fact defective.

[For other cases, see Trial, VI. b, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — non-Federal question.

2. The question whether the right to recover for the negligent killing of a railway brakeman, based upon the company's noncompliance with the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), was barred as a matter of law because the brakeman, after unsuccessfully trying to work an automatic coupler, had attempted to effect the uncoupling by hand, contrary to a rule of the railway company forbidding him to step between moving cars, is not Federal in character, but is a question outside the Federal statutes, which cannot be considered by the Federal Supreme Court on a writ of error sued out under the Judicial Code, § 237, to a state court.

[For other cases, see Appeal and Error, 2072-2226, in Digest Sup. Ct. 1908.]

NOTE.—On liability of railroad for injuries to employee while coupling cars—see notes to Northern P. R. Co. v. Everett, 38 L. ed. U. S. 373, and Kohn v. McNulta, 37 L. ed. U. S. 150.

On duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri *ex rel.* Hill v. Dockery, 63 L.R.A. 571.

[No. 223.]

Argued and submitted April 14, 1915. Decided April 26, 1915.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court for the Second Judicial District in that state, in favor of plaintiff in an action for death. Affirmed.

See same case below, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914D, 383.

Mr. M. D. Munn argued the cause, and, with Messrs. A. H. Bright and J. L. Erdall, filed a brief for plaintiff in error.

Mr. Samuel A. Anderson submitted the cause for defendant in error.

Memorandum opinion by direction of the court, by Mr. Justice Hughes:

This action was brought in the state court by an administrator to recover damages for an injury causing the death of the intestate. The injury was received (September 6, 1909) by the decedent, a brakeman, while he was uncoupling [370] a car which was being "kicked" to a siding, and recovery was sought because of noncompliance with the Federal safety appliance act. 27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605, 32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613. Upon the trial a motion was made for a direction of a verdict upon the grounds that the evidence failed to show neglect on the part of the railroad company, and did establish contributory negligence. Apart from the exception to the denial of this motion, there were no exceptions to the instructions given to the jury. There was a finding for the plaintiff, and the railroad company moved for judgment notwithstanding the verdict, or for a new trial; the motions were denied. The supreme court of the state affirmed the judgment. 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914D, 383

There was testimony that the decedent, on giving the stop signal, attempted to uncouple the "head car" that was to be left to run of its own momentum on the siding; he tried repeatedly to do this by pulling the coupling pin with the lifter at the end of the next car, but without success, and then, stepping between the two cars, while they were moving at the rate of about 4 miles an hour, in order to effect the uncoupling by hand, he was run over and killed. The conductor, a witness for the company, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he would have reported it as a "bad coupler" had it been brought to his attention. Without going into the evidence in detail, it is sufficient to say that we find no ground for reversal in the ruling that there was enough to go to the jury upon the question whether, in fact, the coupler was defective. See Seaboard Air Line R. Co. v. Padgett, March 22, 1915 [236 U. S. 668, ante, 777, 35 Sup. Ct. Rep. 481].

It is urged that the right of recovery was barred by reason of the fact that the decedent disobeyed a rule of the company which forbade him from going between moving cars. The state court held that the jury might find [371] that a practical necessity existed for the disobedience of this rule, and that the course which the decedent followed in the emergency was that of a reasonably prudent man. Our power to review the judgment is controlled by § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214] (Rev. Stat. 709), and we may not consider questions which are not Federal in character. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 291, 52 L. ed. 1061, 1066, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 487, 56 L. ed. 1171, 1176, 32 Sup. Ct. Rep. 790; Seaboard Air Line R. Co. v. Padgett, supra. In the present case a Federal question could arise only under the safety appliance act; while the cars were upon a railroad which was a highway of interstate commerce, and hence this act was applicable (Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822), it is agreed that there was no evidence that the decedent at the time of the accident was engaged in interstate commerce, and no question is presented under the employers' liability act,—an enactment which has a wider field. It is apparent that the ruling referred to does not involve the construction of the Federal statute or any right or immunity from liability which is thereby conferred. The question is *dehors* the statute. True, the state court said that the rule of the company should be construed in connection with the safety appliance act, but, as the context shows, the court remarked this in pointing out that the statute was designed to prevent the necessity of going between the cars for the purpose of uncoupling them, whether they were standing or moving, and that the only way in which the decedent could uncouple the cars without going between them was to stop the train and walk around to the pin lifter on the other side. In the light of the testimony, the court concluded that it could not be said as matter of law that the decedent in the circumstances was bound to do this. The statute was concerned only in so far as it defined the duty of the company to have couplers meeting the positive requirement; it did not preclude the defense of contributory [372] negligence, as distinguished from that of assumption of risk. As this court has said:

"The defense of contributory negligence was not dealt with by the statute." Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 595, 55 L. ed. 596, 599, 31 Sup. Ct. Rep. 561. Whether the rule of the company applied in such an emergency as that in which the decedent found himself,—whether he was guilty of contributory negligence as matter of law, or could be excused upon the ground that in an exceptional situation he acted with reasonable care, were questions which the Federal act left untouched.

The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state. It cannot be said, from any point of view, that any right or immunity granted by the act was denied to the plaintiff in error.

Judgment affirmed.

DANIEL A. McDOUGAL, Plff. in Err.,
v.
EDMOND McKAY, Perry McKay, John V. McKay, and Albert W. Shulthis.

(See S. C. Reporter's ed. 372–386.)

Indians — descent — Creek allotments.

The allotment of an infant Creek Indian who was enrolled after death under the Supplemental Creek Agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), passes to his father in fee simple where

the latter is of Creek blood and the mother is not, since the allotment cannot, in view of decisions already rendered by the circuit court of appeals for the eighth circuit and by the supreme court of the state of Oklahoma, be regarded as a "new acquisition" within the meaning of the provision of Mansf. (Ark.) Dig. chap. 49, § 2531, made applicable by that agreement, that if the estate of a person dying intestate without descendants be a new acquisition, it shall pass to the father for his lifetime and then descend to the collateral kindred of the intestate, but such allotment must be treated as an ancestral estate within the meaning of the other provisions of that section that if the estate comes by the father, it shall ascend to the father and his heirs, and if from the mother, to her and her heirs.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 676.]

Argued March 12 and 15, 1915. Decided April 26, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Tulsa County, in that state, in favor of defendants in an action involving the title to an Indian allotment. Affirmed.

See same case below, 43 Okla. 261, 142 Pac. 987.

The facts are stated in the opinion.

Mr. **Malcolm E. Rosser** argued the cause, and, with Mr. William S. Cochran, filed a brief for plaintiff in error:

When the statutes of Arkansas were adopted in the Indian Territory, they were adopted with the same construction that had been placed on them by the decisions of the supreme court of Arkansas, rendered prior to the adoption of the statutes.

Robinson v. Belt, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; Sanger v. Flow, 1 C. C. A. 56, 4 U. S. App. 32, 48 Fed. 152; Blaylock v. Muskogee, 54 C. C. A. 639, 117 Fed. 125, 4 Ind. Terr. 43, 64 S. W. 609; McFadden v. Blocker, 2 Ind. Terr. 260, 58 L.R.A. 878, 48 S. W. 1043; Boyt v. Mitchell, 4 Ind. Terr. 47, 64 S. W. 610; Zufall v. United States, 1 Ind. Terr. 638, 43 S. W. 760; Randolph v. United States, 1 Ind. Terr. 705, 43 S. W. 1098; Carter v. Barton, 2 Ind. Terr. 99, 48 S. W. 1017; Lebosquet v. Myers, 7 Ind. Terr. 75, 103 S. W. 770; J. B. Bostic Co. v. Eggleton, 7 Ind. Terr. 134, 104 S. W. 566; Western Invest. Co. v. Davis, 7 Ind. Terr. 152, 104 S. W. 573, 15 Ann. Cas. 1134.

The leading cause in the state of Arkansas construing the provisions of chapter 49 of Mansfield's Digest is Kelly v. McGuire, 15 Ark. 555.

See also Hogan v. Finley, 52 Ark. 55, 11 S. W. 1035; Magness v. Arnold, 31 Ark. 103; Wheelock v. Simons, 75 Ark. 19, 86 S. W. 830.

The land was a new acquisition in Andrew J. Berryhill, and not an ancestral estate.

Sizemore v. Brady, 235 U. S. 441, ante, 308, 35 Sup. Ct. Rep. 135; Reynolds v. Fewell, 236 U. S. 58, ante, 465, 35 Sup. Ct. Rep. 230; Magness v. Arnold, 31 Ark. 103; Hogan v. Finley, 52 Ark. 55, 11 S. W. 1035; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74.

Citizenship in the Creek Nation was not a property right at all.

Cherokee Intermarriage Cases, 203 U. S. 76, 51 L. ed. 96, 27 Sup. Ct. Rep. 29; Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

The lands of the Creek Nation prior to allotment belonged to the Creek Nation as a political body, and not to the individual members.

2 Kappler, Indian Laws & Treaties, 1904 ed.; Eastern Band of Cherokee Indians v. United States, 117 U. S. 312, 29 L. ed. 887, 6 Sup. Ct. Rep. 718; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Cherokee Nation v. Journeycake, 155 U. S. 197, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16; Ligon v. Johnson, 90 C. C. A. 486, 164 Fed. 670; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Delaware Indians v. Cherokee Nation, 193 U. S. 127, 48 L. ed. 646, 24 Sup. Ct. Rep. 342; Sizemore v. Brady, 235 U. S. 441, ante, 308, 35 Sup. Ct. Rep. 135; 2 Minor, Inst. 3d ed. pp. 78, 86; 2 Lewis' Bl. Com. 569, p. 109; Kelly v. McGuire, 15 Ark. 555.

The supreme court of the state of Oklahoma erred in holding that the evidence offered to the effect that the direction of the circuit court of appeals in Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 530, had not been followed or acquiesced in by the bar of the state of Oklahoma, or by the nisi prius judges, was not admissible.

11 Cyc. 755.

The supreme court of Oklahoma erred in holding that the decision in Shulthis v. McDougal had become a rule of property.

69 Cent. L. J. p. 217; Roberts v. Underwood, 38 Okla. 376, 132 Pac. 673; Barnes v. Keys, 36 Okla. 6, 45 L.R.A.(N.S.) 178, 127 Pac. 261, Ann. Cas. 1915A, 515.

Mr. George S. Ramsey argued the cause, and, with Mr. Edgar A. De Meules, filed a brief for defendants in error:

Although the heirs of Andrew J. Berryhill did not technically inherit the land in question, yet the application of the Arkansas law of descent should be just the same in this case as if Andrew J. Berryhill had survived to receive his allotment and then died intestate.

Shulthis v. MacDougal, 162 Fed. 331, 95 C. C. A. 615, 170 Fed. 530; Washington v. Miller, 235 U. S. 422, ante, 295, 35 Sup. Ct. Rep. 119; Brown v. Belmarde, 3 Kan. 41; Mullen v. Reed, 64 Conn. 240, 24 L.R.A. 664, 42 Am. St. Rep. 174, 29 Atl. 478; Houghton v. Kendall, 7 Allen, 72; Sweet v. Dutton, 109 Mass. 589, 12 Am. Rep. 744; White v. Stanfield, 146 Mass. 424, 15 N. E. 919; Kendall v. Gleason, 152 Mass. 457, 9 L.R.A. 509, 25 N. E. 838; Bassett v. Granger, 100 Mass. 348; Rand v. Sanger, 115 Mass. 124; Holbrook v. Harrington, 16 Gray, 102; Baskin's Appeal, 3 Pa. St. 304, 45 Am. Dec. 641; Minter's Appeal, 40 Pa. 114; Dunlap's Appeal, 116 Pa. 500, 9 Atl. 936; Sheetz's Appeal, 82 Pa. 213; Lipman's Appeal, 30 Pa. 180, 72 Am. Dec. 692; France's Estate, 75 Pa. 220; Fissel's Appeal, 27 Pa. 55; Templeton v. Walker, 3 Rich. Eq. 543, 55 Am. Dec. 646; Dukes v. Faulk, 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122; Lott v. Thompson, 36 S. C. 38, 15 S. E. 278; Ruggles v. Randall, 70 Conn. 44, 38 Atl. 885; Forrest v. Porch, 100 Tenn. 391, 45 S. W. 676; Bailey v. Bailey, 25 Mich. 185; Richards v. Miller, 62 Ill. 417; Johnson v. Bodine, 108 Iowa, 594, 79 N. W. 348; Henry v. Thomas, 118 Ind. 23, 20 N. E. 519; Wood v. Robertson, 113 Ind. 323, 15 N. E. 457; Woodward v. James, 115 N. Y. 346, 22 N. E. 150; Lawton v. Corlies, 127 N. Y. 100, 27 N. E. 847.

Andrew J. Berryhill, the deceased, could not, technically speaking, be a grantee. Lands cannot be granted to a dead person.

Hall v. Russell, 101 U. S. 503, 504, 25 L. ed. 829.

Where a citizen selected his allotment during his lifetime, but died before the patent was issued, his heirs take by descent, and not by purchase.

Goat v. United States, 224 U. S. 458, 56 L. ed. 841, 32 Sup. Ct. Rep. 541; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

Where an act of the legislature or a contract says a thing shall be done "according to" or "according to law," the thing or the law referred to is by implication carried verbatim into the act or contract.

Harvey v. Beach, 38 Pa. 500; 1 Words & Phrases, pp. 84, 85; Duffy v. Hargan, 62 N. J. Eq. 588, 50 Atl. 678.

In applying the Arkansas law of descent, the land in question should be treated and considered as an ancestral estate coming from the paternal side, and therefore inherited by the father under § 2531 of Mansfield's Digest.

Kelly v. McGuire, 15 Ark. 582; Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529.

The Indians were not donees of the government, and the allotment was not made as a mere act of its bounty. It was an act of partition in severalty to individual Indians of lands the title to which the United States then and for many years had held in trust for the tribe.

Minnesota v. Hitchcock, 185 U. S. 396, 46 L. ed. 966, 22 Sup. Ct. Rep. 650; Johnson v. M'Intosh, 8 Wheat. 543, 603, 5 L. ed. 681, 695; United States v. Cook, 19 Wall. 591, 593, 22 L. ed. 210, 211; Beecher v. Wetherby, 95 U. S. 517, 525, 24 L. ed. 440, 441; Beam v. United States, 89 C. C. A. 240, 162 Fed. 260; Spalding v. Chandler, 160 U. S. 394, 402, 40 L. ed. 469, 472, 16 Sup. Ct. Rep. 360; Parr v. United States, 153 Fed. 462; Choate v. Trapp, 224 U. S. 671, 56 L. ed. 944, 32 Sup. Ct. Rep. 565; Martin v. United States, 93 C. C. A. 484, 168 Fed. 205; Fairbanks v. United States, 223 U. S. 215, 56 L. ed. 409, 32 Sup. Ct. Rep. 292, 96 C. C. A. 229, 171 Fed. 337.

Creek citizens had the right to inclose a part of the public domain, improve the same, and on their death, the right to the possession of the inclosure and the improvements thereon passed to the heirs.

See the following opinions of the supreme court of the Creek Nation:

Bellstidt v. Franklin, Oct. 10, 1890; McIntosh v. William, June 16th, 1896; Weldon v. Overton, June 18th, 1896; Jones v. Roberts, Nov. 30th, 1891; Willingham v. Yarkenha; Childers v. Drew, Nov. 3, 1894; Cobb v. Bruner, Dec. 2d. 1891; Muskogee Nation v. Grayson.

Messrs. E. G. McAdams and Norman R. Haskell filed a brief as *amici curiæ:*

No rule of property has been established by the decision of the circuit court of appeals in Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 530, and the decisions of the supreme court of Oklahoma following it.

Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 721; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885, 21 Mor. Min. Rep. 381, 27 Colo. 1, 50 L.R.A. 209, 83 Am. St. Rep. 17, 59 Pac. 607, 20 Mor. Min. Rep. 192; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 361, 54 L. ed. 228, 235, 30 Sup. Ct. Rep. 140.

If the allotment of these lands be treated

as a partition thereof among tenants in common, according to the theory of defendant in error, Andrew J. Berryhill must be treated as one of the units of allotment or partition.

Devlin, Deeds, 3d ed. § 9.

Had Andrew J. Berryhill lived to receive an allotment, he would have taken the same, not technically merely, but substantially, by purchase from the United States and the Creek Nation, and not by descent from his tribal parent.

Kelly v. McGuire, 15 Ark. 555; Hill v. Heard, 104 Ark. 23, 42 L.R.A.(N.S.) 446, 148 S. W. 254, Ann. Cas. 1914C, 403.

Had Andrew J. Berryhill lived to receive his allotment, he would have taken the same, as a new acquisition, by purchase from the United States and from the Creek Nation, even if it be assumed, for the purpose of the argument, that he took an equitable estate therein by descent from his tribal parent, because the source of the legal title is the controlling factor in determining whether an estate be a new acquisition or an ancestral estate.

Goodright ex dem. Alston v. Wells, 2 Dougl. K. B. 771; Selby v. Alston, 3 Ves. Jr. 339, 4 Revised Rep. 10; Nicholson v. Halsey, 1 John. Ch. 417; Hill v. Heard, 42 L.R.A.(N.S.) 446, note; Dudrow v. King, 39 L.R.A.(N.S.) 955, note; Sizemore v. Brady, 235 U. S. 441, ante, 308, 35 Sup. Ct. Rep. 135.

Andrew J. Berryhill having died prior to the enactment of the legislation authorizing the making of an allotment to his heirs, and no estate, therefore, having vested in him, said allotment was not an acquisition, new or otherwise, in Andrew J. Berryhill; hence the allotment did not descend to his heirs either as an ancestral estate or as a new acquisition, under § 2531 of Mansfield's Digest, but vested in his heirs, under § 2522 of Mansfield's Digest, by direct grant from the United States and the Creek Nation, becoming a new acquisition in said heirs.

Hall v. Russell, 101 U. S. 503, 25 L. ed. 829.

Mr. John B. Meserve also filed a brief as *amicus curiæ:*

The lands allotted, and with which we are concerned in this case, were allotted and conveyed by the United States and the Creek Nation directly to the "heirs of Andrew J. Berryhill, deceased," and such heirs acquired title to said lands by purchase, and not by descent.

Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Gould v. Tucker, 18 S. D. 281, 100 N. W. 427, 20 S. D. 226, *105 N. W.* 624; McCune v. Essig, 59 C. C. A. 429, 122 Fed. 588; Warnell v. Finch, 15 Tex. 163; 2 Bl. Com. pp. 209, 240; 3 Washb. Real Prop. p. 4; Tate v. Townsend, 61 Miss. 319; Johnson v. Morton, 10 Pa. 245; Borgner v. Brown, 133 Ind. 391, 33 N. E. 92; Starr v. Hamilton, Deady, 268, Fed. Cas. No. 13,314; Sizemore v. Brady, 235 U. S. 441, ante, 308, 35 Sup. Ct. Rep. 135; Hayes v. Barringer, 93 C. C. A. 507, 168 Fed. 221; Malissa Wiley Case; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Hershberger v. Blewett, 55 Fed. 170; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Franklin v. Lynch, 233 U. S. 269, 58 L. ed. 954, 34 Sup. Ct. Rep. 505; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302.

George Franklin Berryhill, as the father of Andrew J. Berryhill, and as the heir nearest in the line of succession to Andrew J. Berryhill, acquired, under the laws of descent of the state of Arkansas, an estate in fee simple in the lands in controversy.

Auman v. Auman, 21 Pa. 348; Kelly v. McGuire, 15 Ark. 555; Brown v. Belmarde, 3 Kan. 41; Ward v. Stow, 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 239; Cooper v. Wilder, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591; Braun v. Mathieson, 139 Iowa, 409, 116 N. W. 789; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; Aspey v. Barry, 13 S. D. 220, 83 N. W. 91.

[380] Mr. Justice McReynolds delivered the opinion of the court:

The solution of this controversy requires ascertainment of the *heirs* of an infant who was enrolled after death, within the intendment of the Supplemental Creek Agreement—act of June 30, 1902 (32 Stat. at L. 500, chap. 1323).

Andrew J. Berryhill, born in May, 1901, died during the following November, leaving his father, George Franklin Berryhill, an enrolled Creek Indian, his mother, a noncitizen of that Nation, and seven paternal uncles and aunts. His name was duly placed on the tribal rolls in October, 1902, and during the years 1904 and 1905 the land presently in controversy (with others) was allotted and patented to his heirs. The father, claiming to be Andrew's sole heir,—the mother joining,—conveyed it June 5, 1906, to defendants in error, Edmond and Perry McKay. Afterwards the paternal uncles and aunts undertook to convey the fee subject to a life estate in the father to McDougal, plaintiff in error. The McKays and parties claiming under them being in possession of the property and extracting oil and gas therefrom, McDougal instituted this proceeding to re-

strain them and to have his remainder interest declared and confirmed.

The supreme court of Oklahoma (43 Okla. 261, 142 Pac. 987) held the land must be treated as an ancestral estate in Andrew J. Berryhill, and declared the father sole heir. Plaintiff in error maintains that it passed as a new acquisition, and the father took a life estate with remainder over to the uncles and aunts. Counsel, appearing as *amici curiæ*, insist Andrew J. Berryhill had no estate therein, and that the word *heirs* designates persons who themselves took as purchasers.

Under treaty stipulations with the United States the Creek Tribe of Indians as a community for a long time owned and occupied large areas now within the borders of [381] Oklahoma and maintained there an organized government. Congress finally assumed complete control over them and undertook to terminate their government and distribute the tribal lands among the individuals. Washington v. Miller, 235 U. S. 422, ante, 295, 35 Sup. Ct. Rep. 119.

The act of March 1, 1901,—Original Creek Agreement (31 Stat. at L. 861, 870, chap. 676),—effective June 25, 1901 (32 Stat. at L. 1971), provided for the enrolment of members living on April 1, 1899, and their children born up to July 1, 1900, and also for allotment of tribal lands. It prescribed further (§ 28) that "if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

The Supplemental Creek Agreement—act of June 30, 1902 (32 Stat. at L. 500, 501, chap. 1323), effective August 8, 1902 (32 Stat. at L. 2021)—repealed that portion of the Original one establishing descent and distribution under the Creek law, and directed that thereafter these "shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49." It also extended the right of enrolment to children born after July 1, 1900, and up to May 25, 1901, and declared, "if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly."

[382] The pertinent sections of Mansfield's Digest are copied in the margin.[1] They sharply distinguish between an estate [383] which came to a decedent by a parent and a new acquisition, and prescribe different rules of inheritance.

In Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529, decided June 3, 1909, by the circuit court of appeals for the eighth circuit, title to another portion of the Andrew J. Berryhill allotment was involved and it became necessary to ascertain his heirs. Having carefully considered the whole subject, that court summed up its conclusions thus (pp. 620, 621):

"So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner.

[1] Section 2522. When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children, or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts.

Section 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in

Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he [384] derived his right, and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question." An appeal to this court was dismissed June 7, 1912, for lack of jurisdiction (225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704).

The supreme court of Oklahoma in Pigeon v. Buck, 38 Okla. 101, 131 Pac. 1083 (April 23, 1913), determined the heirs of a full-blooded Creek citizen who, having been duly enrolled, received a patent to her allotment and then died intestate, without descendants, leaving father, mother, brothers, sister, and her husband. After reference to the above-quoted portions of Mansfield's Digest it said (pp. 103, 104): "That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the circuit court of appeals for the eighth circuit in Shulthis v. McDougal, supra. . . . Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there (Dewalt v. Cline, 35 Okla. 197, 128 Pac. 121; MaHarry v. Eatman, 29 Okla. 46, 116 Pac. 935; Duff v. Keaton, 33 Okla. 92, 42 L.R.A.(N.S.) 472, 124 Pac. 291). We hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moities, and that plaintiffs in error, plaintiffs below, have no interest therein."

We recognize the unusual difficulties surrounding the problem presented upon the record, and appreciate the very forceful arguments offered in support of the conflicting theories. The circumstances are novel, and the canons [385] of descent contained in Mansfield's Digest are not precisely applicable thereto; but these rules must be accommodated to the facts, and the great purpose of Congress effectuated as nearly as may be. And not only would it be improper for us to disregard the effect of the decisions already announced by the circuit court of appeals and the supreme court of Oklahoma, which are supported by cogent reasoning, but, considering the peculiar and rapidly changing conditions within that state, especial consideration must be accorded to them. We accordingly accept the doctrine announced therein and hold: (1) The property must be treated as an ancestral estate which passed in accordance with the applicable provisions of chapter 49, Mansfield's Digest. (2) As the father, George Franklin Berryhill, was of Creek Blood, and the mother not, he took a fee-simple title to all the land in question. If both parents had been of Creek blood and duly enrolled, each would have taken one half.

Sizemore v. Brady, 235 U. S. 441, ante, 308, 35 Sup. Ct. Rep. 135, has been referred to as in conflict with the doctrine herein approved. In that case lands were allotted

default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided.

Section 2532. The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation.

Section 2533. Relations of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Section 2534. In all cases not provided for by this act, the inheritance shall descend according to the course of the common law.

Section 2543. The expression used in this act, "where the estate shall have come to the intestate on the part of the father," or "mother," as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent.

and patented after August 8, 1902, to the heirs of Grayson, an enrolled Creek, who died March 1, 1901, and a contest arose between a paternal cousin and cousins on the maternal side. The former—Brady—claimed descent should be determined according to Mansfield's Digest, and that he was sole heir. The latter—Sizemore and Newberry—maintained the Creek law applied and that they were the only heirs. The supreme court of Oklahoma decided in favor of Brady (33 Okla. 169, 124 Pac. 615), and in this court the plaintiffs in error expressly admitted that he should prevail "in event the court should hold said lands passed under chapter 49 of Mansfield's Digest of the Laws of Arkansas, in accordance with the act of Congress known as the Creeks' Supplemental Agreement." We concluded the Arkansas statute controlled, and of course did not undertake to decide the [386] question here presented. Moreover, it is not possible from the record in the cause accurately to trace the blood of the maternal relatives.

The judgment of the court below must be affirmed.

LENA PIGEON, Jimmy Larney, and Joseph Pigeon and Jakeman Pigeon, Minors, by John Pusley, as Their Next Friend, Plffs. in Err.,

v.

WILLIAM BUCK, Willie Harjo, John Pigeon, and Mate Pigeon. (No. 199.)

ELIAS ROBERTS, by His Guardian, E. I. Wakeman, Plff. in Err.,

v.

WILLIAM UNDERWOOD and Emma Byrd. (No. 275.)

(See S. C. Reporter's ed. 386, 387.)

Indians — descent — Creek allotments.

1. The estate of an enrolled full-blooded Creek citizen who died intestate without descendants after receiving a patent to her allotment must be regarded as an ancestral estate within the meaning of the applicable provisions of Mansf. (Ark.) Dig. § 2531, under which, on the death of an intestate without descendants, the estate, if it comes from the father, shall ascend to the father and his heirs, and if from the mother, to her and her heirs.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — descent — Chickasaw allotments.

2. Land allotted and patented to a full-blooded Chickasaw Indian who thereafter died intestate without descendants must be regarded as an ancestral estate within the meaning of the provisions of Mansf. (Ark.) Dig. § 2531, made applicable by the act of April 28, 1904 (33 Stat. at L. 573, chap. 1824), § 2, that on the death of an intestate without descendants, the estate, if it comes through the father, shall ascend to the father and his heirs, and if from the mother, to her and her heirs.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[Nos. 199 and 275.]

Argued and submitted March 12 and 15, 1915. Decided April 26, 1915.

TWO WRITS of Error to the Supreme Court of the State of Oklahoma to review judgments which affirmed, respectively, judgments of the District Court for Hughes County, and of the District Court of Pontotoc County, in favor of defendants in actions involving the title to Indian allotments. Affirmed.

See same case below, No. 199, 38 Okla. 101, 131 Pac. 1083; No. 275, 38 Okla. 376, 132 Pac. 673.

The facts are stated in the opinion.

Mr. Lewis C. Lawson submitted the cause for plaintiffs in error in No. 199:

The allotment of a full blooded citizen of the Creek Nation, duly enrolled as such, who died on July 12, 1905, after receiving her certificates and patents thereto, was a new acquisition.

Gritts v. Fisher, 224 U. S. 641, 56 L. ed. 931, 32 Sup. Ct. Rep. 580.

The decision in Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529, is not a rule of property.

Gritts v. Fisher, supra; Bledsoe, Indian Land Laws, 2d ed. § 244; Labadie v. Smith, 41 Okla. 773, 140 Pac. 427; Kelly v. McGuire, 15 Ark. 555; Loftis v. Glass, 15 Ark. 680; Scull v. Vaugine, 15 Ark. 695; Galloway v. Robinson, 19 Ark. 396; Byrd v. Lipscomb, 20 Ark. 19; Moss v. Ashbrooks, 20 Ark. 128; Campbell v. Ware, 27 Ark. 65; Beard v. Mosely, 30 Ark. 519; Magness v. Arnold, 31 Ark. 103; Bozeman v. Browning, 31 Ark. 376; Oliver v. Vance, 34 Ark. 564; Kountz v. Davis, 34 Ark. 596; Hogan v. Finley, 52 Ark. 55, 11 S. W. 1035; Sanger v. Flow, 1 C. C. A. 56, 4 U. S. App. 32, 48 Fed. 152; Appolos v. Brady, 1 C. C. A. 299, 4 U. S. App. 209, 49 Fed. 401; Rainwater-Boogher Hat Co. v. Malcolm, 2 C. C. A. 476, 10 U. S. App. 249, 51 Fed. 734; Blaylock v. Muskogee, 54 C. C. A. 639, 117 Fed. 125; Willis v. Eastern Trust & Bkg. Co. 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347; McFaddin v. Evans-Snider-Buel Co. 185 U. S. 505, 46 L. ed. 1012, 22 Sup. Ct. Rep. 758; Robinson v. Belt, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 45 L. ed. 1200, 2 Sup. Ct. Rep.

885, 21 Mor. Min. Rep. 381; 26 Am. & Eng. Enc. Law, 163, 173.

The judgment below is repugnant to and in conflict with the 14th Amendment to the Constitution of the United States and two acts of Congress, *viz.*, the Supplemental Creek Agreement (32 Stat. at L. 500) and act of April 28, 1904.

4 Kent, Com. 11th ed. 395; 2 Bl. Com. 212; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; Middleton v. McGrew, 23 How. 45, 16 L. ed. 403; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Levy v. M'Cartee, 6 Pet. 102, 8 L. ed. 334; Gardner v. Collins, 2 Pet. 58, 7 L. ed. 347; National Live Stock Commission Co. v. Taliaferro, 20 Okla. 177, 93 Pac. 983; Sanger v. Flow, 1 C. C. A. 56, 4 U. S. App. 32, 48 Fed. 152; Appolos v. Brady, 1 C. C. A. 299, 4 U. S. App. 209, 49 Fed. 401; Rainwater-Boogher Hat Co. v. Malcolm, 2 C. C. A. 476, 10 U. S. App. 249, 51 Fed. 734; Blaylock v. Muskogee, 54 C. C. A. 639, 117 Fed. 125; Willis v. Eastern Trust & Bkg. Co. 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347; Robinson v. Belt, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; Labadie v. Smith, 41 Okla. 773, 140 Pac. 427; United States v. Moore, 95 U. S. 760, 24 L. ed. 588; United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; Magness v. Arnold, 31 Ark. 103; Hogan v. Finley, 52 Ark. 55, 11 S. W. 1035.

Mr. Henry H. Rogers argued the cause, and, with Messrs. J. L. Skinner and George C. Crump, filed a brief for defendants in error:

The Shulthis-McDougal Case is a rule of property.

Iowa Land & Trust Co. v. Dawson, 37 Okla. 593, 134 Pac. 39; Gillum v. Anglin, — Okla. —, 145 Pac. 1145; McDougal v. McKay, 43 Okla. 261, 142 Pac. 987; 2 Enc. L. & P. 755.

State courts, such as we have in Oklahoma, have a right to pass upon and settle such questions as are involved in this action.

Best v. Polk, 18 Wall. 112, 21 L. ed. 805; Francis v. Francis, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129; Patterson v. Jenks, 2 Pet. 216, 7 L. ed. 402; Rhode Island v. Massachusetts, 12 Pet. 746, 9 L. ed. 1269; Lattimer v. Poteet, 14 Pet. 18, 10 L. ed. 335.

Mr. H. A. Ledbetter submitted the cause for plaintiff in error in No. 275. Messrs. Winfield S. Farmer and Gordon Fryer were on the brief:

The father is not nominated as an heir under the Arkansas statute in this case, and therefore if he had been living, absolutely would not have acquired any estate or interest of any kind or character in the land in controversy.

Kelly v. McGuire, 15 Ark. 555; Hogan v. Finley, 52 Ark. 55, 11 S. W. 1035; Scull v. Vaugine, 15 Ark. 698; Galloway v. Robinson, 19 Ark. 399; Oliver v. Vance, 34 Ark. 564; Campbell v. Ware, 27 Ark. 67; Wheelock v. Simons, 75 Ark. 19, 86 S. W. 830; Byrd v. Lipscomb, 20 Ark. 19; Sanger v. Flow, 1 C. C. A. 56, 4 U. S. App. 32, 48 Fed. 152; Blaylock v. Muskogee, 54 C. C. A. 639, 117 Fed. 125; De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; Ballard v. Hunter, 204 U. S. 265, 51 L. ed. 476, 27 Sup. Ct. Rep. 261; Robinson v. Belt, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16.

The land allotted to Johnie Underwood was a new acquisition, and not an estate of inheritance.

Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 672; Stephens v. Cherokee Nation, 174 U. S. 488, 43 L. ed. 1056, 19 Sup. Ct. Rep. 722; Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580; Delaware Indians v. Cherokee Nation, 193 U. S. 127, 48 L. ed. 646, 24 Sup. Ct. Rep. 342; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Eastern Band of Cherokee Indians v. United States, 117 U. S. 312, 29 L. ed. 887, 6 Sup. Ct. Rep. 718; Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16; Landes v. Brant, 10 How. 348, 13 L. ed. 449; Irvine v. Irvine, 9 Wall. 617, 19 L. ed. 800; Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Morrison v. Faulkner, — Tex. Civ. App. —, 21 S. W. 984; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Sanders v. Sanders, 28 Okla. 59, 117 Pac. 338; Chapman v. Price, 32 Kan. 446, 4 Pac. 807; Towner v. Rodegeb, 33 Wash. 159, 99 Am. St. Rep. 936, 74 Pac. 50; Shurte v. Fletcher, 111 Mich. 84, 69 N. W. 233; 69 Cent. L. J. 217; Bledsoe, Land Laws, 1st ed. § 62.

Mr. James R. Wood submitted the cause for defendants in error. Messrs. George A. Fooshee and D. D. Brunson were on the brief:

The rule laid down in the case of Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529, has become a rule of property.

Pigeon v. Buck, 38 Okla. 101, 131 Pac. 1083; Iowa Land & Trust Co. v. Dawson, 37 Okla. 593, 134 Pac. 39; Gillum v. Anglin, — Okla. —, 145 Pac. 1145; McDougal v. McKay, 43 Okla. 261, 142 Pac. 987; Roberts v. Underwood, 38 Okla. 376, 132 Pac. 673; Thorn v. Cone, — Okla. —, 150

Pac. 701; Reynolds v. Fewell, 236 U. S. 58, ante, 465, 35 Sup. Ct. Rep. 230.

[387] Mr. Justice McReynolds delivered the opinion of the court:

The opinion in McDougal v. McKay (No. 676) [237 U. S. 372, ante, 1001, 35 Sup. Ct. Rep. 605], announced to-day, considers and decides the questions involved in these writs of error and necessitates affirmation of the judgments of the supreme court of Oklahoma in both causes.

In No. 199, Pigeon v. Buck, all parties were enrolled full-blooded Creek Indians. The allottee, Lowiney Harjo, having received a patent to certain land, died July 12, 1905, intestate, without descendants, leaving father, mother, brothers, sister, and her husband. Thereafter the father and mother,—John and Mate Pigeon,—claiming the land must be treated as an ancestral estate which passed to them in fee, conveyed their interest therein to Buck. The brothers and sister, maintaining that it was a new acquisition in the deceased, and the father and mother took only a life estate with remainder in themselves, instituted suit to have their rights declared. The supreme court of Oklahoma (38 Okla. 101, 131 Pac. 1083) held the estate was ancestral, and went half to the father and half to the mother, according to the applicable provisions of chapter 49, Mansfield's Digest, Statutes of Arkansas.

In No. 275, Roberts v. Underwood, the land in question was allotted and patented to a full-blooded Chickasaw Indian who thereafter and in 1907 died intestate, leaving no descendants. A contest arose between his paternal relatives, Underwood and Byrd, and a maternal relative, Roberts, concerning their respective interests in the property. Under the act of April 28, 1904 (33 Stat. at L. 573, chap. 1824), § 2, the devolution depended upon chapter 49, Mansfield's Digest, Statutes of Arkansas. The supreme court of Oklahoma (38 Okla. 376, 132 Pac. 673) adjudged the estate must be treated as ancestral, and that half passed to the paternal relatives and half to the maternal one.

Affirmed.

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[388] EXPORT & IMPORT LUMBER COMPANY, Appt.,
v.
PORT BANGA LUMBER COMPANY.

(See S. C. Reporter's ed. 388-391.)

Appeal — amount in dispute — counterclaim.

The amount in dispute on an appeal to the Federal Supreme Court from the supreme court of the Philippine Islands is less than the jurisdictional amount prescribed by the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369, Comp. Stat. 1913, § 3804), § 10, where the amount of the judgment in favor of the appellee, who has not appealed, added to the greatest sum for which the appellant could have recovered judgment against the appellee on its counterclaim, is less than such jurisdictional amount.

[For other cases, see Appeal and Error, I. f, in Digest Sup. Ct. 1908.]

[No. 686.]

Submitted March 15, 1915. Decided April 26, 1915.

APPEAL from the Supreme Court of the Philippine Islands to review a judgment which modified, and affirmed as modified, a judgment of the Court of First Instance of the District of Zamboanga in favor of plaintiff in an action to annul a written contract and to enforce a previous oral contract between the parties. Dismissed for want of jurisdiction.

See same case below, 26 Philippine, 602; 28 Philippine, —.

Mr. A. D. Gibbs submitted the cause for appellant:

The amount of the counterclaim should be added to the amount of the judgment against appellant to make up the jurisdictional amount.

Block v. Darling, 140 U. S. 234, 35 L. ed. 476, 11 Sup. Ct. Rep. 832; Harten v. Löffler, 212 U. S. 397, 53 L. ed. 568, 29 Sup. Ct. Rep. 351; Buckstaff v. Russell & Co. 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696.

Interest on the amount of the counterclaim may be added to the date of the judgment appealed from, in order to complete the jurisdictional amount.

Linsangan v. Linsangan, 11 Philippine, 521; Gutierrez Hermanos v. Fuentebella, 13 Philippine, 74; Massachusetts Ben. Asso. v. Miles, 137 U. S. 689, 692, 34 L. ed. 834, 835, 11 Sup. Ct. Rep. 234; Holden v. Freedman's Sav. & T. Co. 100 U. S. 72, 25 L. ed. 567; Ohio v. Frank, 103 U. S. 697, 26 L. ed. 531.

There is no conflict as to the general rule that where interest antecedent to the judg-

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NOTE.—As to amount necessary to give the United States Supreme Court jurisdiction—see notes to Schunk v. Moline, M. & S. Co. 37 L. ed. U. S. 256, and Commercial Bank v. Buckingham, 12 L. ed. U. S. 169.

On appellate jurisdiction of Federal Supreme Court over supreme court of Philippine Islands—see note to Martinez v. International Bkg. Corp. 55 L. ed. U. S. 438.

ment appealed from is or must be included in such judgment, and the amount, with the added interest, exceeds the necessary amount, jurisdiction will attach.

The Patapsco, 12 Wall. 451, 20 L. ed. 457; The Rio Grande, 19 Wall. 178, 22 L. ed. 60; Zeckendorf v. Johnson, 123 U. S. 617, 618, 31 L. ed. 277, 278, 8 Sup. Ct. Rep. 261; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; Bank of United States v. Daniel, 12 Pet. 32, 9 L. ed. 989.

The rule that the jurisdiction of this court depends upon the amount of the judgment, exclusive of interest thereon, refers to interest accruing after the judgment appealed from, that accruing before judgment being properly included.

New York Elev. R. Co. v. Fifth Nat. Bank, 118 U. S. 608, 30 L. ed. 259, 7 Sup. Ct. Rep. 23.

Messrs. **Clement L. Bouvé** and **James Ross** submitted the cause for appellee:

Where the jurisdiction of this court depends upon the amount in controversy, the value giving jurisdiction must be established by a preponderance of evidence.

Enriquez v. Enriquez, 222 U. S. 123, 127, 56 L. ed. 122, 124, 32 Sup. Ct. Rep. 62.

Memorandum opinion by Mr. Justice **McReynolds**, by direction of the court:

This is an appeal from the supreme court of the Philippine Islands, allowed May 13, 1914. Our jurisdiction depends [389] on the amount involved; and a motion to dismiss must be sustained unless, from a consideration of the whole record, it fairly appears that "the value in controversy exceeds twenty-five thousand dollars." Act of July 1, 1902, chap. 1369, § 10, 32 Stat. at L. 691, 695, Comp. Stat. 1913, §§ 3804, 1225. What is actually in dispute here is the criterion. Bowman v. Chicago & N. W. R. Co. 115 U. S. 611, 613, 29 L. ed. 502, 503, 6 Sup. Ct. Rep. 192; Martinez v. International Bkg. Corp. 220 U. S. 214, 221, 55 L. ed. 438, 442, 31 Sup. Ct. Rep. 408.

To avoid possible confusion their United States currency equivalents are used herein instead of the Philippine peso and centavo.

The Port Banga Lumber Company instituted a proceeding November 14, 1910, and afterwards filed an amended complaint, against appellant, the Export & Import Lumber Company, wherein it alleged that in March or April, 1910, the two companies entered into an oral arrangement to sell logs in the China trade upon joint account, —the proceeds to be appropriated first to expenses and then equally divided; appellant, on May 6, 1910, agreed to furnish to the China Import & Export Lumber Company logs at 90 cents per cubic foot; thereafter, falsely pretending such stipulated price was 27½ cents, appellant induced complainant to consent to an annulment of the oral arrangement between them and enter into a written one, dated June 10, 1910, under which the latter agreed to supply the logs for 20 cents per cubic foot; and that at an expense of $7,211.43 it delivered 32,032 cubic feet, and appellant collected therefor 90 cents per foot,—$28,828.80. The complainant accordingly asked that the writing of June 10th be annulled; the oral contract be declared in force; and, in harmony therewith, judgment for $18,020.12.

The Export & Import Lumber Company denied the allegations in the complaint, except as specifically admitted, but said the written contract of June 10th was in [390] force and $2,500 had been paid thereunder and accepted by complainant. It further set up that by the contract of May 6th it became obligated to furnish the China Import & Export Lumber Company designated logs within a specified time; on June 10th it transferred this duty to the complainant, which failed fully to comply therewith; and as a consequence $8,750 had to be deducted from the sale price which otherwise would have been received. It therefore claimed damages to that extent and asked judgment accordingly.

Counsel admitted of record that 32,032 cubic feet of logs were delivered by complainant to the China Import & Export Lumber Company; and unquestionably appellant collected therefor 90 cents per foot, $28,828.80, less $8,750.

The court below held (26 Philippine, 602; 28 Philippine, —) the contract of June 10th was procured by fraud; the rights of the parties depended upon the oral agreement; the deduction of $8,750 from stipulated sale price should be taken into consideration; complainant was entitled to its expenses of $7,211.43; and that the balance of amount actually collected by appellant should be equally divided. A certain credit of $450, explanation of which is now unnecessary, having been allowed, judgment was entered April 3, 1914, against appellant for $13,195.12, together with $2,683.01 interest from November 14, 1910, when the original complaint was filed,—in all, $15,878.13. The Port Banga Lumber Company has not appealed, and this is the maximum recovery which appellant can suffer.

According to appellant's theory the written contract of June 10th remained in force. A settlement thereunder would require a debit against it for logs delivered—32,032 cubic feet at 20 cents—of $6,406.40, and necessitate credits of $2,500, alleged pay-

ment on account, and $8,750, damages sustained. The resulting balance of $4,843.60, with interest from November 14, 1910, to [391] April 3, 1914, $984.87, or $5,828.47, is the greatest sum for which it could have recovered judgment.

The maximum amount fairly in dispute is therefore the judgment of $15,878.13 against appellant, plus $5,828.47, which it sought to recover from appellee,—a total of $21,706.60. Dushane v. Benedict, 120 U. S. 630, 636, 30 L. ed. 810, 811, 7 Sup. Ct. Rep. 696; Buckstaff v. Russell & Co. 151 U. S. 626, 628, 38 L. ed. 292, 14 Sup. Ct. Rep. 448; Harten v. Löffler, 212 U. S. 397, 403, 53 L. ed. 568, 571, 29 Sup. Ct. Rep. 351; Keller v. Ashford, 133 U. S. 610, 617, 33 L. ed. 667, 671, 10 Sup. Ct. Rep. 494; Philippine Code Civ. Proc. § 510.

The value in controversy being under $25,000, the appeal must be dismissed.

HARRY C. BOOTH, Plff. in Err.,
v.
STATE OF INDIANA.

(See S. C. Reporter's ed. 391-399.)

Constitutional law — due process of law — equal protection of the laws — police power — requiring washhouses for employees.

Neither due process of law nor the equal protection of the laws is denied by the provisions of Ind. act of March 8, 1907, requiring the owners and operators of coal mines, collieries, or other places where laborers employed are surrounded by, or affected by, similar conditions as employees in coal mines, to provide suitable washhouses or wash rooms for their employees upon the request in writing of twenty or more of such employees, or in case there are not so many employed, upon the written request of one third of the employees; but such statute is a proper exercise of the police power in the interest of the public health.

[For other cases, see Constitutional Law, IV. a. 5; IV. b, 7; IV. c, 3, in Digest Sup. Ct. 1908.]

[No. 231.]

Argued April 19, 1915. Decided May 3, 1915.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a conviction in the Sullivan Circuit Court, in that state, for a violation of a statute requiring washhouses or wash rooms for mine employees. Affirmed.

See same case below, 179 Ind. 405, L.R.A. 1915B, 420, 100 N. E. 563.

The facts are stated in the opinion.

Mr. Henry W. Moore argued the cause, and, with Messrs. Ulric Z. Wiley and T. J. Moll, filed a brief for plaintiff in error:

Under the 14th Amendment, all citizens of the United States and of the several states of the Union, are guaranteed the equal protection of the laws.

Santa Clara Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The police power of the state does not, by any means, confer upon the lawmaking body of the state unlimited power, but such power must be within constitutional limits, and consequently its exercise is subject to judicial review; and when exercised in an arbitrary or oppressive manner, laws may be annulled as violative of rights protected by the Constitution of the United States.

McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

The very idea that one man may be compelled to hold his life or means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Any law which permits or authorizes the infliction of injury, or the abolishment of property rights, or places burdens upon one class of citizens and exempts another class from such burdens, beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation and violates the principles of abstract justice as they have been developed under our republican institutions.

Tiedeman, Pol. Power, § 1.

Under the police power, to justify the state in thus interposing its authority in behalf of the public, it must appear first,

NOTE.—On the constitutionality and construction of statute requiring mine owner or operator to furnish wash room or similar conveniences for employees—see note to the decision of the Indiana supreme court in this case as reported in L.R.A. 1915B, 420.

that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and are not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

There are acts which the Federal and state legislatures cannot do without exceeding their authority. There are certain vital principles in our free, republican government which will determine and overrule such an apparent and flagrant abuse of legislative powers as authorizes manifest injustice by positive law, or takes away that security for personal liberty or private property for the protection whereof the government was established.

Tiedeman, Pol. Power, § 2.

The act does not serve the purpose for which it was intended.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Re Ryers, 72 N. Y. 1, 28 Am. Rep. 88; People v. Arensberg, 103 N. Y. 399, 57 Am. Rep. 741, 8 N. E. 736; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; People ex rel. Nechamcus v. Warden, 144 N. Y. 535, 27 L.R.A. 718, 39 N. E. 686; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833.

In this statute we have another example of class legislation, where the legislature has attempted improperly to interfere with the private rights of the citizens. This species of class legislation has been frequently condemned by the courts.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; People v. Arensberg, 103 N. Y. 399, 57 Am. Rep. 741, 8 N. E. 736; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; Tiedeman, Pol. Power, §§ 1, 2.

The business of mining coal is not different in kind from the business of any large mercantile or manufacturing company whose capital, experience, and facilities may enable it to have a widely extended patronage. But such characteristics do not make the business one which is affected with a public interest, nor is such business of coal mining, as such, recognized and regarded as unwholesome to miners.

State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91.

The purpose of the 14th Amendment to the Constitution of the United States was and is, among other things, to protect the rights of those engaged in private business, and protect them in the use of their own property, and prohibit unjust interference therewith by any person not entitled to share in the control or management thereof.

American Surety Co. v. Shallenberger, 183 Fed. 636; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 S. E. 895.

Any law which undertakes to abolish rights the exercise of which does not involve infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions.

Starne v. People, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61.

The act under consideration goes beyond what is necessary to provide for the public welfare and the general security, and hence it infringes upon private rights, without any corresponding benefits to the public welfare and public health. If a mine owner and operator makes reasonable provision for the personal safety and protection of the miner while he is actually engaged in his occupation, that is as far as he should be required to go.

State ex rel. Star Pub. Co. v. Associated Press, supra.

The purpose of the 14th Amendment to the Constitution of the United States is, among other things, to protect the rights of those engaged in private business, and protect them in the use of their own property, and prohibit unjust interference therewith by any person not entitled to share in the control or management thereof.

Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; American Surety Co. v. Shallenberger, 183 Fed. 636; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 S. E. 895.

The act under consideration deprives the owner of property without compensation, and hence contravenes the 14th Amendment.

Starne v. People, supra; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Eden v. People, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624.

If there are other classes of laborers surrounded by like conditions, and they are equally in need of the provisions of the statute under consideration, then the act is invalid both under the Federal and state Constitutions.

Starne v. People, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395.

A law administered with an unequal hand that discriminates between persons equally entitled to its protection is unconstitutional.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The constitutional authority delegated to the legislature to make laws cannot be delegated to another body or person.

Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109; Cooley, Const. Lim. 7th ed. p. 163; 6 Am. & Eng. Enc. Law, 2d ed. 1021; Arms v. Ayer, 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851; People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; 8 Cyc. 831; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Owensboro & N. R. Co. v. Todd, 91 Ky. 175, 11 L.R.A. 285, 15 S. W. 56; People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; Fogg v. Union Bank, 1 Baxt. 435; Winters v. Hughes, 3 Utah, 443, 24 Pac. 759.

The legislature cannot abdicate its functions except to lawful public agencies.

People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; 8 Cyc. 831; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Owensboro & N. R. Co. v. Todd, 91 Ky. 175, 11 L.R.A. 285, 15 S. W. 56; Fogg v. Union Bank, 1 Baxt. 435; Winters v. Hughes, 3 Utah, 443, 24 Pac. 759.

A police regulation, under the police power of the state, cannot be established except directly by the state through its law-making power, or by some public body acting under its sanction.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470, 24 L. ed. 539.

The act is in the nature of a "referendum," for it leaves to a limited number of persons, not necessarily citizens, to determine whether it shall be enforced.

Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425; Schwartz v. People, 46 Colo. 239, 104 Pac. 92; Opinion of Justices, 160 Mass. 586, 23 L.R.A. 113, 36 N. E. 488.

The act in question is an arbitrary exercise of police power of the state, as applied to plaintiff in error.

Duncan v. Missouri, 152 U. S. 377, 380, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The legislature of a state cannot divest itself of the police power by any grant or concession to any individual or group of individuals.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Shreveport Traction Co. v. Shreveport, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; State ex rel. Laclede Gaslight Co. v. Murphy, 130 Mo. 10, 31 L.R.A. 798, 31 S. W. 594; Chicago, St. P. M. & O. R. Co. v. Douglas County, 134 Wis. 197, 14 L.R.A. (N.S.) 1074, 114 S. W. 511; Petersburg v. Petersburg Aqueduct Co. 102 Va. 654, 47 S. E. 848.

Police power possessed by a state is for the purpose of legislating in the interest of public safety, health, or welfare; and to justify an exercise of this power, it must appear that the interests of the public generally, as distinguished from those of a few individuals, or of a particular class, require such interference.

State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Com. v. Campbell, 133 Ky. 50, 24 L.R.A. (N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159.

Messrs. **Richard M. Milburn** and **Leslie R. Naftzger** argued the cause, and Mr. Thomas M. Honan, Attorney General of Indiana, and Mr. Thomas H. Branaman, filed a brief for defendant in error:

The 5th Amendment operates exclusively in restriction of Federal power, is a limitation on Congress, and has no application to state legislation.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Thorington v. Montgomery, 147 U. S. 490, 492, 37 L. ed. 252, 253, 13 Sup. Ct. Rep. 394; Fallbrook Irrig. Dist. v. Bradley, 164

U. S. 112, 158, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 245, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; Barrington v. Missouri, 205 U. S. 483, 486, 51 L. ed. 890, 894, 27 Sup. Ct. Rep. 582.

That the act is in violation of the Constitution of Indiana is a question not reviewable by this court.

Medberry v. Ohio, 24 How. 413, 415, 16 L. ed. 739; Porter v. Foley, 24 How. 415, 420, 16 L. ed. 740; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Brooks v. Missouri, 124 U. S. 394, 397, 31 L. ed. 454, 457, 8 Sup. Ct. Rep. 443; Miller v. Cornwall R. Co. 168 U. S. 131, 134, 42 L. ed. 409, 410, 18 Sup. Ct. Rep. 34; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Lombard v. West Chicago Park, 181 U. S. 33, 43, 45 L. ed. 731, 737, 21 Sup. Ct. Rep. 507; Rasmussen v. Idaho, 181 U. S. 198, 200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594; Manley v. Park, 187 U. S. 547, 551, 47 L. ed. 296, 299, 23 Sup. Ct. Rep. 208; West v. Louisiana, 194 U. S. 258, 261, 48 L. ed. 965, 968, 24 Sup. Ct. Rep. 650; Howard v. Fleming, 191 U. S. 126, 135, 48 L. ed. 121, 124, 24 Sup. Ct. Rep. 49; Barrington v. Missouri, 205 U. S. 483, 487, 51 L. ed. 890, 894, 27 Sup. Ct. Rep. 582; Smiley v. Kansas, 196 U. S. 447, 455, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289; Leeper v. Texas, 139 U. S. 462, 467, 35 L. ed. 225, 226, 11 Sup. Ct. Rep. 577.

The 14th Amendment does not interfere with the police power of a state to prescribe regulations to promote the health, safety, peace, morals, education, good order, and general welfare of its people.

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 666, 31 L. ed. 205, 212, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 449, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Jones v. Brim, 165 U. S. 180, 182, 41 L. ed. 677, 678, 17 Sup. Ct. Rep. 282.

The police power of a state is not unlimited, and is subject to judicial review. The question arising for the judiciary is whether the exercise of that power is arbitrary or oppressive, or in violation of some right protected by the Constitution.

McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206.

If a law has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may differ with the legislature in its views of the policy, wisdom, or expediency of the law. With these questions the courts are not concerned. The question for the court is merely one of power.

Ibid.; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

Where an act embraces all persons under substantially like circumstances, and is not an arbitrary exercise of power, it does not deny the equal protection of the laws.

Barbier v. Connolly, 113 U. S. 27, 31, 32, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357; Jones v. Brim, 165 U. S. 180, 184, 41 L. ed. 677, 679, 17 Sup. Ct. Rep. 282; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 209, 210, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; Mallett v. North Carolina, 181 U. S. 589, 598, 45 L. ed. 1015, 1020, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594.

The test is not whether the scope of the law is limited either as to territory or persons affected, but whether all persons brought under its influence are treated alike under similar circumstances and conditions.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

Plaintiff in error contends that there are other classes of business not within the scope of the law. This is never just ground of complaint.

Barbier v. Connolly, 113 U. S. 27, 31, 32, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 709, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114.

The fact that a special burden is placed upon a certain class does not render it class legislation or deny the equal protection of the law, as special burdens are often necessary for the general welfare.

Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114.

The question is whether such regulation is reasonable, as applied to this class.

Holden v. Hardy, 169 U. S. 366, 398, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383.

The act of Indiana purports to apply to all coal mines within the jurisdiction of the state. It therefore applies alike to all members of this class, and does not deny the equal protection of the law.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; McLean v. Arkansas, 211 U. S. 539, 552, 53 L. ed. 315, 321, 29 Sup. Ct. Rep.

206; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 466, 55 L. ed. 290, 296, 31 Sup. Ct. Rep. 275.

Whether the same restriction or burden should be applied to another business is a question of legislative discretion.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 210, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114.

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.

Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

Regulations respecting the pursuit of a lawful trade or business, if made in the interest of, and are conducive to, the safety, health, peace, good order, and morals of the community, are a valid exercise of the police power of a state, and form no subject for Federal interference.

Barbier v. Connolly, 113 U. S. 27, 31, 32, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 709, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; Lochner v. New York, 198 U. S. 45, 66, 49 L. ed. 937, 945, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; McLean v. Arkansas, 211 U. S. 539, 546, 547, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206.

What regulations are necessary in the exercise of the police power, and to what business, trade, or occupation they shall apply, is a question for the legislative branch of the government to determine, and every presumption is to be indulged in favor of the validity of such a statute.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Lochner v. New York, 198 U. S. 45, 66, 67, 49 L. ed. 937, 945, 946, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; McLean v. Arkansas, 211 U. S. 539, 549–551, 53 L. ed. 315, 320, 321, 29 Sup. Ct. Rep. 206.

Reasonable regulation in the exercise of the police power is not a denial of due process of law either as to special occupations or general classes of business.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

The act does not deprive plaintiff in error of his property, but impresses upon it a regulation which the legislature, in its discretion, has deemed wise.

Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 101, 102, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

The provisions of the 14th Amendment do not impair the police powers of the state or analogous powers.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

In determining the validity of a statute courts may only look to the statute itself.

Soon Hing v. Crowley, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730.

The preservation of the health of the people is a proper object of the police power of a state.

Holden v. Hardy, 169 U. S. 366, 395, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383.

Mr. Justice **McKenna** delivered the opinion of the court:

Error to review a judgment of conviction for the violation of a statute of Indiana entitled, "An Act Requiring the Owners and Operators of Coal Mines and Other Employers of Labor to Erect and Maintain Washhouses at Certain Places where Laborers Are Employed, for the Protection of the Health of the Employees, and Providing a Penalty for Its Violation." Section 1 reads as follows:

"Coal Mining—Washhouses for Laborers.

"Section 1. Be it enacted by the general assembly of the state of Indiana, That for the protection of the health of the employees hereinafter mentioned, it shall be the duty of the owner, operator, lessee, superintendent of, or other person in charge of every coal mine or colliery, or other place where laborers employed are surrounded by or affected by similar conditions as employees in coal mines, at the request in writing of twenty (20) or more employees of such mine or place, or in event there are less than twenty (20) men employed, then upon the written request of one third (⅓) of the number of employees employed, to provide a suitable wash room or washhouse for the

use of persons employed, so that they may change their clothing before beginning work, and wash themselves, and change their clothing after working. That said building or room shall be a separate building or room from the engine or boiler room, and shall be maintained in good order, be properly lighted and heated, and be supplied with clean cold and warm water, and shall be provided with all necessary facilities for persons to wash, and also provided with suitable lockers for the safe-keeping of clothing. Provided, however, that the owner, operator, lessee, superintendent [394] of or other person in charge of such mine or place as aforesaid, shall not be required to furnish soap or towels."

It is provided in § 2 that a violation of the act shall be a misdemeanor and punished by a fine, to which may be added imprisonment.

The prosecution was started by an affidavit charging Booth, he being the superintendent of a mine belonging to the Indiana Coal Company in one of the counties of the state, with a violation of the act for failure to provide a washhouse or wash room as required by the statute after request in writing from twenty of the employees of the mine.

A motion to quash the affidavit and dismiss the charge was made on the grounds, stated with elaborate specifications, that the affidavit did not state an offense against the state of Indiana or the United States, and that the statute violated both the Constitution of the state and the Constitution of the United States.

The motion having been overruled, upon trial Booth was found guilty and fined $1 and costs. He made a motion in arrest of judgment, repeating without details the grounds that he had charged in his motion to dismiss. The conviction was affirmed by the supreme court of the state.

The record contains seventeen assignments of error. Plaintiff in error, however, waives five of them, and is content to present his contentions in the other twelve. These contentions are, stated in broad generality, that the statute under review is in violation of the 5th and 14th Amendments to the Constitution of the United States and certain articles of the Constitution of the state of Indiana.

We are concerned only with the contention based on the 14th Amendment, as the 5th Amendment is not applicable to the states, and the conformity of the [395] statute to the Constitution of the state of Indiana has been adjudged by the supreme court of the state.

The specifications under the 14th Amendment are: (1) That the statute deprives plaintiff in error of his property without due process of law; and (2) denies him the equal protection of the law.

The supreme court rejected both contentions, deciding that the statute was a legal exercise of the police power of the state, and the specific objection that the statute was invalid because it only applies to coal mines, and not to other classes of business, the court said was disposed of by Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, and Soon Hing v. Crowley, 113 U. S. 703, 709, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730. The court quoted from the latter case as follows: "The specific regulation of one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind."

Plaintiff in error, to sustain his contentions and to combat the conclusions of the supreme court, enters into a wide consideration of the police power. It has been so often discussed that we may assume that both its extent and limitations are known. Their application in the present case can best be determined by considering the objections to it.

The first objection in the case at bar seems to be that the statute "applies solely and specifically to a particular class, engaged in a particular business, and is not in the interest of the public generally, as distinct from a particular class." And it is further said that "it is a matter of common knowledge, of which courts take judicial notice, that the 'class' to which the act applies constitutes a very small percentage of population, and this being true, the act could not possibly be in the interest of the public health of the commonwealth."

The objection is answered by the cases already cited, by [396] Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, and McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, and further comment is unnecessary.

But a distinction is sought to be made between what a legislature may require for the safety and protection of a miner while actually in service below ground, and that which may be required when he has ceased or has not commenced his labors. Cases are cited which, upon that distinction, have decided that when a miner has ceased his work and has reached the surface of the earth his situation is not different from that of many other workmen, and that, therefore, his rights are not greater than theirs, and will not justify a separate classification.

We are unable to concur in this reasoning, or to limit the power of the legislature by

the distinctions expressed. Having the power, in the interest of the public health, to regulate the conditions upon which coal mining may be conducted, it cannot be limited by moments of time and differences of situation. The legislative judgment may be determined by all of the conditions and their influence. The conditions to which a miner passes or returns from are very different from those which an employee in work above ground passes to or returns from, and the conditions of actual service in the cases are very different, and it cannot be judicially said that a judgment which makes such differences a basis of classification is arbitrarily exercised; certainly not in view of the wide discretion this court has recognized, and necessarily has recognized, in legislation to classify its objects.

It is further said that the act "is inoperative in itself for the reason that it can only be put into operation by the will and election of a specific number of the 'class' to which it applies, and consequently it fastens a burden upon the owners and operators of coal mines, which is 'a manifest injustice by positive law.'" The purpose of the comment, other than to give accent to the contention that the act has special operation, is part of the view elsewhere [397] urged that the provision is a delegation of legislative power. But with this objection we are not concerned. The supreme court of the state decided that the law could be called into operation by petition, and in the decision no Federal question is involved.

It is, however, further objected that the law discriminates because it may be applied to one mine, and not to another, all other conditions being the same but the desire of the miners,—indeed, discriminates upon a distinction more arbitrary than that, upon the desire of twenty in one mine as against a lesser number, nineteen, it may be, in another. The objection is a familiar one and has an instance and answer in McLean v. Arkansas, supra. It is the usual ground of attack upon a distinction based on degree, and seems to have a special force when the distinction depends upon a difference in numbers.

But there are many practical analogies. The jurisdiction of a court is often made to depend upon amounts apparently arbitrarily fixed. For instance, the jurisdiction of the district court of the United States (formerly the circuit court) is limited to civil suits in law and equity in certain instances in which the amount in controversy is $3,000. It could be objected, as it is here objected, that the amount is arbitrary, and that there cannot be any difference in principle between suits for $3,000 and suits for $2,999, —a distinction dependent upon $1. Indeed, in more acute illustration, the distinction may be made of 1 cent only. And so might there be objection to any amount which might be selected, as it might be also to any number of petitioning miners which the legislature of Indiana might have selected. Indeed, would not an objection have the same legal strength if the law had been made to depend upon anything less than unanimity of desire? To require that, it might well have been thought by the legislature, would render the legislation nugatory, and that a lesser number would call it into exercise and [398] attain its object. The conception, no doubt, was that a lesser number—indeed, the number selected—would be fairly representative of the desire and necessity of the miners, and that use would breed a habit, example induce imitation, and a healthful practice starting with a limited number might become that of all. And such consummation justified the effort, the manner adopted attaining the end sought as well as, if not better than, a direct and peremptory requirement of the miners and mine owners. The choice of manner was, under the circumstances, for the legislature, and its choice was legal if it had the power to enact the law at all. Plaintiff in error disputes such power, and thereby presents in its most general form his contention against the validity of the statute.

The contention seems to be independent of the objections that we have considered, and yet in counsel's discussion those objections and others are so mingled that it is impossible to discern which they consider especially vitiate the law and take it out of the power of government to enact.

The charge of its special application to coal mines and its other features of discrimination we have passed upon. The charge that it has no relation to health, we are not disposed to dwell upon. Counsel seem to think if the washing places were required to be put underground in connection with or in proximity to the working places, the law would be relieved from some criticism.

There remains to be considered only the contention that the law "is, within itself, a dead letter." And it is said that "it would forever lie dormant if not called into exercise and activity by the request of private persons." Or, as plaintiff in error otherwise expresses what he thinks to be the evil of the law, "it is not enforceable by any power which the state government possesses, under its Constitution, or its laws enacted thereunder, but it is enforceable only upon the demand, the whim, or the election [399] of a limited number of employees in the coal mining business." And it is de-

clared that "this is the exercise of an arbitrary power, for an arbitrary private right, and against a private business."

We have quoted counsel's language in order to give them the strength of their own expressions of what they consider the vice of the law; but manifestly it is but a generalization from the particular objections which we have considered, and those objections we have sufficiently discussed.

Judgment affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plff. in Err.,
v.
WILLIAM H. GRAY.

(See S. C. Reporter's ed. 399–402.)

Appeal — harmless error — rejection of evidence — employers' liability.

The rejection of evidence as to the interstate character of the railway and of the employment, offered for the purpose of making the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), applicable to a personal-injury action brought by an employee against a railway company, if error, does not require the reversal of a judgment in favor of the employee, where the railway company's position was made no worse because the case was tried upon the hypothesis that the state law governed.

[For other cases, see Appeal and Error, 4960–4996, 5051–5065, in Digest Sup. Ct. 1908.]

[No. 232.]

Argued April 19 and 20, 1915. Decided May 3, 1915.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Municipal Court of Outagamie County, in that state, in favor of a railway employee in a personal-injury action. Affirmed.

See same case below, 153 Wis. 637, 142 N. W. 505.

The facts are stated in the opinion.

Mr. **Edward M. Smart** argued the cause and filed a brief for plaintiff in error.

Mr. **Stephen J. McMahon** argued the cause and filed a brief for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for personal injuries. The plaintiff, Gray, was a hostler at Antigo, Wisconsin, having various duties as to receiving and preparing engines for departure, including the emptying of their ashes into the cinder pit, and seeing that the coals in the pit were wet down. Just before the accident he had visited the cinder pit, to see whether the cinder-pit man was doing his work, and had walked northward a short distance along a path between the track and a coal shed to a point opposite a rest house where he would await his next call to duty. He started to cross the track to the rest house, and was struck by an engine coming from the south. The defendant offered evidence showing that it was an interstate road, and that the roundhouse and cinder pit served indifferently engines that passed the state line and those moving within the limits of the state, but did not attempt to show how the engine that struck the plaintiff was engaged. The evidence was rejected, and the supreme court of the state sustained the rejection on the ground that it did not appear that the plaintiff's entire work consisted in the despatching of engines engaged in interstate commerce, or that he was employed in such commerce at the moment. It may be assumed that the railway company sufficiently saved its rights. The plaintiff got a large verdict, the jury finding specially that the engine that hit the plaintiff went north of the cinder pit, in violation of the order of the defendant, that the engineer's negligence was the proximate cause of the injury, and that the plaintiff was guilty of no negligence that proximately contributed to the harm.

[401] Of course, the argument for the railway company is that Gray's employment on the cinder pit was employment upon an instrument of interstate commerce, and so an employment in interstate commerce as fully as that of the track repairer in Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779. See also St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; and that he was on duty at the time when he was struck as much as the fireman in North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159. But we find it unnecessary to express an opinion upon this argument, since, if there was an error, it seems to have done the railway company no harm.

There are differences and similarities between the Wisconsin and Federal statutes, but we do not perceive that there is any

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NOTE.—On the constitutionality, application, and effect of the Federal employers' liabilty act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. C, 47.

difference that made the railway company's position worse if tried on the hypothesis that the state law governed. It is suggested that under the law of the United States the defendant could have argued that the plaintiff assumed the risk of this kind of negligence because he knew that it was a common occurrence for engines to run north of the cinder pit, not giving the proper signals. Without considering whether the testimony at all warranted a finding that Gray assumed the risk of a fellow servant's negligence, we deem it enough to say that by the Wisconsin law assumption of risk is merely a case of contributory negligence, and that the finding of the jury that the plaintiff was not guilty of contributory negligence excludes the possibility that he assumed the risk. It also makes it unnecessary to consider differences between state and United States law that would have assumed importance had the finding upon contributory negligence been the other way. It is enough to add that the finding of the jury was warranted by the evidence. The plaintiff in error suggests that the special verdict required under the state law was improper under the United States law, but we see no ground for complaint in that. We need go no [402] farther as to the rest of the case than to say that no plain error appears. Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 378, ante, 277, 278, 35 Sup. Ct. Rep. 130.

Judgment affirmed.

UNITED STATES, Plff. in Err.,
v.
ERIE RAILROAD COMPANY.

(See S. C. Reporter's ed. 402–409.)

Master and servant — safety appliances —air brakes — switching operations.

1. The yards of an interstate railway carrier at Jersey City, Weehawken, and Bergen cannot be regarded as a single yard, so that the movements of trains between them may be regarded as switching operations not governed by the air-brake provisions of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and its amendments, where they lie from 2 to 3½ miles apart, and are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intrayard movements, and where in actual practice they are treated as separate yards.

[For other cases, see Master and Servant, 36–40, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — air brakes — transfer trains.

2. Transfer trains of freight cars which move over main tracks and over switches leading to other tracks, and through a dark tunnel, and across passenger tracks in their operation by an interstate railway company between its yards in Jersey City and Weehawken and its yard in Bergen, which lie from 2 to 3½ miles apart, and are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intrayard movements, and which are in actual practice treated as separate yards, are "trains" within the meaning of the provisions of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and its amendments, forbidding the operation of trains in which less than the requisite number of cars are controlled by air brakes.

[For other cases, see Master and Servant, 36–40, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — moving defective cars for repairs.

3. Cars with defective couplers or without grab irons or hand holds, which can be repaired at the place where they are found to be defective, are expressly excluded by the safety appliance act of April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), § 4, from the permission therein granted to haul defective cars from the place where the defects are discovered to the nearest available point for making repairs.

[For other cases, see Master and Servant, 36–40, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — moving defective cars for repairs.

4. The hauling of defective cars by means of chains instead of drawbars, in association with other cars in commercial use, from the place where the defects are discovered to the nearest available point for making repairs, is expressly prohibited by the safety appliance act of April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), § 4, unless the defective cars contain live stock or perishable freight.

[For other cases, see Master and Servant, 36–40, in Digest Sup. Ct. 1908.]

[No. 580.]

Argued December 18, 1914. Decided May 3, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment by which a judgment of the District Court for the District of New Jersey in favor of defendant in an action founded on alleged violations of the

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Note.—On the duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 40.

safety appliance acts was affirmed. Reversed and remanded for a new trial.

See same case below, 129 C. C. A. 307, 212 Fed. 853.

The facts are stated in the opinion.

Assistant Attorney General Underwood argued the cause and filed a brief for plaintiff in error:

The hauling of these cars, in association with other cars commercially used, from one switching yard, where the repairs could have been made, over defendant's main line in transfer trains of the character described, to another switching yard, where the repairs might also have been made, was a violation of the safety appliance acts.

Chicago, B. & Q. R. Co. v. United States, 127 C. C. A. 438, 211 Fed. 12; United States v. Chesapeake & O. R. Co. 130 C. C. A. 262, 213 Fed. 751; United States v. Pere Marquette R. Co. 211 Fed. 222; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 589, 55 L. ed. 590, 596, 31 Sup. Ct. Rep. 617; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Atchison, T. & S. F. R. Co. v. United States, 117 C. C. A. 341, 198 Fed. 637.

Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used, according to its true and obvious meaning.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740.

These transfer trains certainly fall within the meaning of the word "train" as commonly understood and as defined by the courts.

Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; Dacey v. Old Colony R. Co. 153 Mass. 112, 26 N. E. 437.

The primary object of the safety-appliance act is to promote the public welfare by securing the safety of employees and travelers.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

This court has held that whether the car be on the main line or switch track, the statute imposes a positive and absolute duty upon the carrier to maintain in good condition at all times the safety appliances required by the act.

Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Chicago, B. & B. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg Rep. 464.

A survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category.

Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 577, 55 L. ed. 582, 589, 31 Sup. Ct. Rep. 612; United States v. Atchison, T. & S. F. R. Co. 90 C. C. A. 327, 163 Fed. 517.

The statutory requirement concerning the use, connection, and operation of train brakes should not be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car coupling apparatus.

United States v. Pere Marquette R. Co. 211 Fed. 223.

The statute was intended to lessen the danger incident to such service, to avert collsions, to control train movements on grades, to obviate as far as possible the danger to men of working hand brakes on icy footings, and other dangers incident to road conditions.

Erie R. Co. v. United States, 116 C. C. A. 649, 197 Fed. 290.

Mr. Gilbert Collins argued the cause and filed a brief for defendant in error:

When it appears that a statute applies to a particular business and directly affects that business, and that the words may have a technical meaning, the statute is then to be so construed as to give those words their technical meaning. It will be presumed that Congress intended words to have the meaning that they are ordinarily given by the business that is directly affected by the statute.

United States v. 112 Casks of Sugar, 8 Pet. 277, 8 L. ed. 944; Curtis v. Martin, 3 How. 106, 11 L. ed. 516; United States v. Breed, 1 Sumn. 163, Fed. Cas. No. 14,638; 2 Lewis's Sutherland, Stat. Constr. 2d ed. §§ 395 (254), pp. 753, 754; United States v. Patterson, 150 U. S. 68, 37 L. ed. 1000, 14 Sup. Ct. Rep. 20; Arthur v. Morrison, 96 U. S. 108, 24 L. ed. 764; Lawrence v. Allen, 7 How. 785, 12 L. ed. 914; United States v. Weise, 2 Wall. Jr. 72, Fed. Cas. No. 16,659; Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; State v. Murlin, 137 Mo. 306, 38 S. W. 923; State v. Missouri P. R. Co. 219 Mo. 156, 117 S. W. 1173.

The word "train" does not include these transfer trains.

Chicago & E. I. R. Co. v. Maloney, 77 Ill. App. 191; Harris v. Rex, 9 Can. Exch. 206; McNealy v. State, 94 Ga. 592, 21 S. E. 581; Rosney v. Erie R. Co. 68 C. C. A. 155, 135 Fed. 311; Chicago, B. & Q. R. Co. v.

United States, 127 C. C. A. 438, 211 Fed. 12; United States v. New York C. & H. R. R. Co. 205 Fed. 428.

A carrier may move defective cars so far as such movement is reasonably necessary for the purpose of making repairs.

United States v. Southern P. Co. 154 Fed. 897; United States v. Louisville & N. R. Co. 156 Fed. 195; United States v. Chicago G. W. R. Co. 162 Fed. 775; Chicago & N. W. R. Co. v. United States, 21 L.R.A. (N.S.) 690, 93 C. C. A. 450, 168 Fed. 236; United States v. Southern P. Co. 94 C. C. A. 629, 169 Fed. 407; United States v. Rio Grande Western R. Co. 98 C. C. A. 293, 174 Fed. 399; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372; Siegel v. New York C. & H. R. R. Co. 178 Fed. 873; Southern R. Co. v. Snyder, 109 C. C. A. 344, 187 Fed. 492; United States v. Baltimore & O. R. Co. Kent Index Dig. p. 264; United States v. Colorado Midland R. Co. 121 C. C. A. 194, 202 Fed. 732.

Mr. **George S. Hobart** also argued the cause for defendant in error.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was a civil action by the United States to recover from the Erie Railroad Company a penalty for each of [**403**] several alleged violations of the safety appliance act of March 2, 1893, 27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605, as amended and supplemented by the acts of April 1, 1896, 29 Stat. at L. 85, chap. 87, Comp. Stat. 1913, § 8610; March 2, 1903, 32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613; and April 14, 1910, 36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617.

The declaration contained twenty-six counts. The first seven were based upon the use of that number of cars having defective couplers, the eighth upon the use of a car without grab irons or hand holds at one end, and the remaining eighteen upon the operation of that number of transfer trains in which less than eighty-five per cent of the cars were controlled by air brakes. All of these acts were charged as having occurred in January and February, 1911, on the defendant's railroad while it was being used and operated in moving interstate traffic. The plea interposed was the general issue.

The case was tried twice. The first trial resulted in a judgment for the government which was reversed by the circuit court of appeals, 116 C. C. A. 640, 197 Fed. 287. At the second trial there was a directed verdict for the defendant and the judgment thereon was affirmed by that court. 120 C. C. A. 307, 212 Fed. 853. This writ of error challenges the judgment of affirmance.

There was no real conflict in the evidence, the material facts being as follows: The defendant operates an interstate railroad extending from New York city *via* New Jersey to Buffalo and Chicago. In that connection it maintains railroad yards, with docks for ferries and floats, on the west bank of the Hudson river, at Jersey City and Weehawken, where cars are received from and forwarded to various points around New York harbor; and it maintains another yard at Bergen,—inland 2 miles from Jersey City and 3½ miles from Weehawken,—where cars are received from and forwarded to western points. In the Jersey City yard there are 60 tracks, in the Weehawken yard 80, and in the Bergen [**404**] yard 115. Between the Bergen yard and the others is a hill about 250 feet high, which is pierced by a tunnel almost a mile in length. The three yards are connected by double tracks extending from Jersey City and Weehawken to the eastern portal of the tunnel, and then passing through the tunnel to Bergen. The situation may be illustrated by treating the three yards as located at the outer points of the letter Y,—Weehawken and Jersey City at the upper points and Bergen at the base,—and connected by tracks conforming to the lines of that letter, the tunnel being along part of the lower line. The connecting tracks are not used by passenger trains, but are the main tracks over which freight is moved from and to points around New York harbor. Jersey City, Weehawken, and Bergen are all stations at which freight, both local and interstate, is accepted and delivered, and are so shown in the defendant's tariff schedules. While the yards at these places are all used for receiving, storing, handling, and forwarding cars, the work of classifying, distributing, and assembling the cars preparatory to sending them to their ultimate destinations, west and east, is principally done in the Bergen yard. Most of the regular west-bound freight trains are made up and started in that yard, and most of the regular east-bound freight trains are stopped and broken up there. Some regular trains carrying high-class freight pass Bergen without more than a temporary stop, but the greater part of the traffic is moved between the yards at Jersey City and Weehawken, and the one at Bergen in transfer trains which run only between those yards and are operated over the double tracks before described. These transfer trains usually have about twenty-five cars, do not carry a caboose, are drawn and operated by engines and crews specially engaged in that service, and have flags and signal lights differing somewhat from those on other trains,

but answering the same purpose. They are not [405] run according to fixed schedules, but at irregular intervals under the orders of yard masters and according to block signals. Their speed is from 7 to 18 miles an hour and they move great numbers of cars in each direction every day. All go through the tunnel, which is admitted to be very dark, and upon each trip they pass over several switches leading to other tracks, traverse part of the same line over which fifteen regular through and local freight trains are moved each day, and cross at grade tracks which are in daily use by approximately thirty-five passenger trains.

The cars named in the first eight counts of the declaration were defective in the particulars charged, and while thus defective were hauled—six from Jersey City to Bergen and two from Weehawken to Bergen—in transfer trains along with other cars in commercial use. All of the defects were discovered in the yards from which the cars were moved, and those in six of the cars could have been readily repaired in those yards by the local force of car repairers, consisting of seven men at Jersey City and five at Weehawken. The defects in two of the cars were serious, and as to them Bergen may have been the nearest available point for making the necessary repairs. These cars were hauled by means of chains instead of drawbars, and there was no claim that they contained live stock or perishable freight.

The transfer trains named in the remaining eighteen counts were hauled—nine from Jersey City to Bergen, two from Weehawken to Bergen, one from Bergen to Jersey City, and six from Bergen to Weehawken—without the requisite number of air brakes being in use or connected for use. On fourteen of these trains there was no attempt to connect any of the air brakes, and on the remaining four less than 55 per cent were connected. Brakemen were required to be on the cars, and in some instances rode on the tops of box cars pursuant to a rule [406] of the defendant. No cars were switched out of or into these trains while they were on the way from one yard to the other.

The circuit court of appeals rested its judgment upon the conclusions (a) that the three yards are not separate or distinct, but with the connecting tracks constitute a single and extensive yard; (b) that the movements of the transfer trains from Jersey City and Weehawken to Bergen and *vice versa* were mere switching operations, and therefore not within the air-brake provision in the statute; and (c) that it was permissible under the statute to haul the cars with defective equipment in the circumstances disclosed.

We cannot assent to the view that the yards at Jersey City, Weehawken, and Bergen are but a single yard. They doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from 2 to 3½ miles apart, are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intrayard movements, and are in actual practice treated as separate yards.

The original safety appliance act is entitled, "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes and Their Locomotives with Driving-wheel Brakes, and for Other Purposes." The 1st section makes it unlawful, among other things, for a railroad company engaged in interstate commerce "to run any train" in such commerce without having a sufficient number of the cars so equipped with train brakes—commonly spoken of as air brakes—that the engineer on the locomotive can control the speed of the train "without requiring brakemen to use the common hand brake for that purpose." The 2d section prohibits [407] such a carrier from hauling or using on its line in moving interstate traffic any car not equipped with couplers which can be coupled and uncoupled automatically "without the necessity of men going between the ends of the cars;" and the 4th section forbids the use in interstate commerce of any car not provided with secure grab irons or hand holds in the ends and sides of the car "for greater security to men in coupling and uncoupling cars." The 6th section imposes for every violation of the act a penalty of $100, to be recovered by suit. The act of 1903, by its 1st section, provides that the requirements of the original act respecting train brakes, automatic couplers, and grab irons shall be held to apply to "all trains" and cars "used on any railroad engaged in interstate commerce," unless falling within a minor exception without bearing here. By its 2d section this act requires that not less than 50 per cent of the cars in a train shall have their train brakes used and operated by the engineer on the locomotive, confers upon the Interstate Commerce Commission authority to increase this minimum percentage to the end that the objects intended may be more fully accomplished, and makes the penal provision before named applicable to violations of the requirement as enlarged by the Commission. By an order promulgated June 6, 1910, and becoming effective September 1 following, the Commission increased the minimum

number of cars whose train brakes must be under the engineer's control to 85 per cent.

It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the [408] air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars. Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, s. c. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Southern R. Co. v. United States, 222 U. S. 22, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 397; Minneapolis, St. P. & S. Ste. M. R. Co. v. Popplar, 237 U. S. 369, ante, 1000, 35 Sup. Ct. Rep. 609.

We are persuaded that the transfer trains moving from Jersey City and Weehawken to Bergen and *vice versa* came within the purview of the air-brake provision. They were made up in yards like other trains, and then proceeded to their destinations over main-line tracks used by other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main-line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks, and across passenger tracks whereon trains were frequently moving. Thus it is plain that in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements. The original act prescribed that these appliances should consist of air brakes controlled by the engineer on the locomotive, and the act of 1903 declared that this requirement should [409] "be held to apply to all trains." We therefore conclude and hold that it embraced these transfer trains. Its applicability to this class of trains was considered and sustained in Atchison, T. & S. F. R. Co. v. United States, 117 C. C. A. 341, 198 Fed. 637; United States v. Grand Trunk R. Co. 203 Fed. 775; United States v. Pere Marquette R. Co. 211 Fed. 220; and La Mere v. Railway Transfer Co. 125 Minn. 159, 145 N. W. 1068.

The hauling of the cars with defective equipment was clearly in contravention of the statute. While § 4 of the act of 1910 permits such cars to be hauled, without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars "by means of chains instead of drawbars" in association with other cars in commercial use, unless the defective cars "contain live stock or perishable freight." Six of the cars that were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of drawbars in association with other cars in commercial use, and it is not claimed that they contained live stock or perishable freight.

It follows that the District Court erred in directing a verdict for the defendant, and the Circuit Court of Appeals erred in sustaining that ruling. The judgments of both courts must therefore be reversed and the case remanded to the District Court for a new trial.

It is so ordered.

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[410] UNITED STATES, Petitioner,

v.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY.

(See S. C. Reporter's ed. 410–413.)

Master and servant — railway operation — air brakes — transfer trains.

The term "trains," as used in the

provisions of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and its amendments, forbidding the operation of trains in which less than the requisite number of cars are controlled by air brakes, includes transfer trains of freight cars carrying no caboose or markers, which are operated by yard or switching crews between two freight yards of an interstate railway company on opposite sides of the Missouri river over a considerable stretch of main line track which intersects at grade the tracks of other railway companies.

[For other cases, see Master and Servant, 36–40, in Digest Sup. Ct. 1908.]

[No. 630.]

Argued January 7 and 8, 1915. Decided May 10, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the District Court for the Western District of Missouri in favor of the United States in an action to recover penalties under the safety appliance acts. Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

See same case below, 127 C. C. A. 438, 211 Fed. 12.

The facts are stated in the opinion.

Assistant Attorney General Underwood argued the cause and filed a brief for petitioner:

The safety appliance acts are not to be strictly construed.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; Pennell v. Philadelphia & R. R. Co. 231 U. S. 675, 58 L. ed. 430, 34 Sup. Ct. Rep. 220; Southern R. Co. v. Crockett, 234 U. S. 725, 735, 58 L. ed. 1564, 1568, 34 Sup. Ct. Rep. 897; United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740.

Transfer trains certainly fall within the meaning of the word "train" as commonly understood and as defined by the courts.

Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; Dacey v. Old Colony R. Co. 153 Mass. 112, 26 N. E. 437; United States v. Pere Marquette R. Co. 211 Fed. 220; Erie R. Co. v. United States, 116 C. C. A. 649, 197 Fed. 287; Chicago, B. & Q. R. Co. v. United States, 127 C. C. A. 438, 211 Fed. 12; Atchison, T. & S. F. R. Co. v. United States, 117 C. C. A. 341, 198 Fed. 637.

The primary object of the safety appliance act is to promote the public welfare by securing the safety of employees and travelers.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Erie R. Co. v. United States, 116 C. C. A. 649, 197 Fed. 287.

This court has held that whether the car be on the main line or switch track, the statute imposes a positive and absolute duty upon the carrier to maintain in good condition at all times such safety appliances as automatic couplers, grab irons, drawbars, etc.

Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

This court has also held, in the language used by Mr. Justice Van Devanter in the case of United States v. Atchison, T. & S. F. R. Co. 90 C. C. A. 327 163 Fed. 517, that "a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty."

Appropriately, therefore, the argument may proceed in the following words of Judge Sessions: "Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisons relating to car-coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed, in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required; the only difference being that in the one the unit is a train or combination of cars, and in the other a single car."

United States v. Pere Marquette R. Co 211 Fed. 220.

The length of the haul is immaterial where a car with a defective coupler is being hauled by a carrier.

United States v. Denver & R. G. R. Co. 90 C. C. A. 329, 163 Fed. 521.

Federal courts may take judicial notice of rules and regulations of executive de-

NOTE.—On duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A. (N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A. (N.S.) 49.

partments promulgated by authority of acts of Congress.

Caha v. United States, 152 U. S. 211, 222, 38 L. ed. 415, 419, 14 Sup. Ct. Rep. 513; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 309, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692.

Where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act.

Knox County v. Ninth Nat. Bank, 147 U. S. 91, 97, 37 L. ed. 93, 95, 13 Sup. Ct. Rep. 267; Nofire v. United States, 164 U. S. 657, 660, 41 L. ed. 588, 589, 17 Sup. Ct. Rep. 212.

Mr. H. M. Langworthy argued the cause, and, with Messrs. O. M. Spencer, William Warner, O. H. Dean, and W. D. McLeod, filed a brief for respondent:

The transfers of cars referred to in the evidence do not come within the specific terms and provisions of the air brake provisions of the safety appliance act, nor do they come within the language and terms of the act as a whole.

Erie R. Co. v. United States, 116 C. C. A. 649, 197 Fed. 288; Atchison, T. & S. F. R. Co. v. United States, 117 C. C. A. 341, 198 Fed. 637; United States v. Erie R. Co. 129 C. C. A. 307, 212 Fed. 860.

It has repeatedly been held, in the interpretation of the tariff acts, that the words used in those acts, which have acquired a technical meaning in the commercial world, will be given that meaning, because it will be presumed that Congress intended words to have the meaning which they are ordinarily given by the trade or profession which is directly affected by the statute, and which must give it practical application.

United States v. 112 Casks of Sugar, 8 Pet. 277, 8 L. ed. 944; Curtis v. Martin, 3 How. 106, 11 L. ed. 516; United States v. Breed, 1 Sumn. 159, Fed. Cas. No. 14,638; 2 Lewis's Sutherland, Stat. Constr. 2d ed. §§ 395 (254), pp. 753, 754. See also United States v. Patterson, 150 U. S. 68, 37 L. ed. 1000, 14 Sup. Ct. Rep. 20; Arthur v. Morrison, 96 U. S. 108, 24 L. ed. 764; Lawrence v. Allen, 7 How. 785, 12 L. ed. 914; United States v. Weise, 2 Wall. Jr. 72, Fed. Cas. No. 16,659; Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; State v. Murlin, 137 Mo. 306, 38 S. W. 823; State v. Missouri P. R. Co. 219 Mo. 156, 117 S. W. 1173.

In other cases where the meaning of the word "train" has come before the court for consideration, where the application of the word must be made by railroad men, the court has given the word "train" the meaning understood and applied by railroad men.

Chicago & E. I. R. Co. v. Maloney, 77 Ill. App. 191; Lynch v. Great Northern R. Co. 112 Minn. 382, 128 N. W. 457; Jones v. Pere Marquette R. Co. 168 Mich. 1, 133 N. W. 993.

The intention of the legislative body may be deduced from the statute as a whole and from the subject-matter thereof.

Kohlsaat v. Murphy, 96 U. S. 153, 159, 160, 24 L. ed. 844, 846; Brewer v. Blougher, 14 Pet. 178, 198, 10 L. ed. 408, 417; Petri v. Commercial Nat. Bank, 142 U. S. 644, 650, 35 L. ed. 1144, 1146, 12 Sup. Ct. Rep. 325; United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. ed. 37, 42.

One of the well-recognized principles of the interpretation of statutes is that courts will not construe them in such a way as to lead to results which are absurd, oppressive, and unjust, and beyond the scope and the purpose of the statute, when a different construction would accomplish the purpose of the act and would avoid such unreasonable results.

Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 37, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508; Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. 160 U. S. 77, 101, 40 L. ed. 346, 355, 16 Sup. Ct. Rep. 231; Interstate Drainage & Invest. Co. v. Freeborn County, 85 C. C. A. 532, 158 Fed. 273.

The statute not only requires that a certain percentage of the cars in a train shall have the air brakes used and operated, but provides further that all power-braked cars in such train associated with said percentage shall also have their brakes used and operated, so that if any train which comes within the provisions of the act has all of its cars equipped with power brakes, then all of them must have the air brakes used and operated. Otherwise there will be a violation of the act.

Re Power or Train Brakes, 11 Inters. Com. Rep. 429.

Where the meaning of a statute is in doubt, and it has been given practical construction by the executive officers charged with the duty of enforcing it, such practical construction is entitled to great weight and consideration in the determination of the true meaning of such statute.

United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Hahn v. United States, 107 U. S. 402, 27 L. ed. 527, 2 Sup. Ct. Rep. 494; Schell v. Fauché, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376;

United States v. Cerecedo Hermanos y Compañia, 209 U. S. 338, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; Pennell v. Philadelphia & R. R. Co. 231 U. S. 680, 58 L. ed. 434, 34 Sup. Ct. Rep. 220.

Not only has the Interstate Commerce Commission uniformly construed the act not to apply to ordinary switching movements, but in the hearings that were held at the time that the percentage of air brakes required to be used and operated was increased, the Interstate Commerce Commission considered main line movements only, and has never considered the conditions and circumstances which exist in connection with movements within terminal yards.

Re Power or Train Brakes, 11 Inters. Com. Rep. 429.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action for penalties under the law of Congress relating to safety appliances. Four violations were charged. One consisted in using a car with a defective coupler and the others in running certain transfer trains without having the requisite percentage of air brakes so connected that they could be operated by the engineer. [411] The first is no longer in controversy. As to the others, the controverted question at the trial was not whether the air-brake requirement, if applicable, was violated, but whether it applied to such trains. The district court, deeming the requirement applicable, directed a verdict and entered a judgment for the government, and the circuit court of appeals, being of a different opinion, reversed the judgment, one judge dissenting. 127 C. C. A. 438, 211 Fed. 12. A writ of certiorari granted under § 262 of the Judicial Code [36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1239] brings the case here.

The facts disclosed by the evidence are these: The defendant operates a railroad which passes through Kansas City, Missouri, and is used largely in interstate commerce. Among its terminal facilities at that point are two freight yards known as the Twelfth street yard and the Murray yard. These yards are on opposite sides of the Missouri river, the distance between their nearest points being about 2 miles. The track connecting them is one by which passenger and freight trains enter and leave the city; in other words, a main-line track. For a distance of 3,000 feet it is upon a single-track bridge spanning the river, and off the bridge it intersects at grade twelve or fifteen tracks of other companies and passes through the Union Depot tracks. Besides its use by the defendant's trains, a considerable portion of it is also the line by which the passenger trains and some of the freight trains of the Rock Island and Wabash railroads enter and leave the city.

Both yards are used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing, and distributing cars. To reach their ultimate destinations, whether on the defendant's road or on those of other carriers, a large proportion of the cars have to be moved from one yard to the other, and this is accomplished by transfer trains which are run over the main-line track connecting the yards. These [412] trains usually consist of an engine and about thirty-five cars, are operated by what are termed yard or switching crews, and carry no caboose or markers. They have no fixed schedules and are not controlled by a train despatcher, but by block signals, as are all other trains moving over the same track. Each train is moved as a unit from one yard to the other, and not infrequently is both preceded and followed by other trains, passenger and freight.

The three trains, the running of which is charged to have been violative of the statute, were transfer trains of the class just described. They were run from one yard to the other on August 9, 1910, and were composed respectively of 42, 36, and 39 cars, of which only 9 in one train and 10 in each of the others had their air brakes connected for use by the engineer. At that time air brakes were required to be used on 75 per cent of the cars in a train. Re Power or Train Brakes, 11 Inters. Com. Rep. 429, 437.

Giving effect to the views quite recently expressed in United States v. Erie R. Co. 237 U. S. 402, ante, 1019, 35 Sup. Ct. Rep. 621, we think these trains came within the air-brake requirement, which the amendatory act of 1903 [32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613] declares "shall be held to apply to all trains . . . on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track,—one that was a busy thoroughfare for interstate passenger and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the

safety of other trains which the statute was equally designed [413] to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it.

The judgment of the Circuit Court of Appeals must therefore be reversed and that of the District Court affirmed.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration and decision of this cause.

HENRY L. COE, Plff. in Err.,
v.
ARMOUR FERTILIZER WORKS.

(See S. C. Reporter's ed. 413–426.)

Error to state court — final judgment.

1. Until the judgment rendered by the state trial court pursuant to the mandate from the state court of last resort, which, on reversing a prior judgment, remanded the cause for further proceedings, had been affirmed by the latter court upon a second writ of error, there was no final judgment in that court such as might be brought up to the Federal Supreme Court under the Judicial Code, § 237, for review.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Error to state court — decision of Federal question — law of case.

2. The Federal question relied upon to sustain the appellate jurisdiction of the Federal Supreme Court over a state court cannot be said not to have been open for discussion or consideration in the state court of last resort because of a prior decision in the same case, which was the law of the case, where that court did consider that question when the case came before it for the second time, with the result that the state law and the authority exercised under it were upheld as valid, and not repugnant to the Constitution of the United States, and the immunity specially set up and claimed by plaintiff in error under that Constitution was overruled.

[For other cases, see Appeal and Error, 1351–1430, in Digest Sup. Ct. 1908.]

Error to state court — decision of Federal question.

3. A statement in the opinion of the state court of last resort that the attack upon the validity of a state statute under the Federal Constitution was "by a proceeding unknown to our practice" does not mean that the court did not necessarily pass upon the Federal question, so as to defeat the appellate jurisdiction of the Federal Supreme Court.

[For other cases, see Appeal and Error, 1351–1430, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing.

4. The failure to afford the notice, hearing, or opportunity to be heard essential under the due process of law clause of U. S. Const., 14th Amend., renders invalid the provisions of Fla. Gen. Stat. 1906, § 2677, as amended by Laws 1909, chap. 5892, under which, upon the return *nulla bona* of an execution against a corporation, an execution may issue against a stockholder for the amount of the unpaid subscription to the stock he holds, without notice to him or other preliminary steps, he having the right, in case he is not in fact the holder of stock upon which there is an unpaid subscription, or in case the amount of the execution is in excess of the unpaid subscription, to appropriate relief under the provisions of §§ 1624, 1625, for testing the legality of the execution after issuance, and the execution, in the absence of such objections, being enforceable, although there may have been only a formal levy, without even such notice as might be implied from a forcible seizure or interference with the possession.

[For other cases, see Constitutional Law, 696–773, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

5. A person is not precluded from complaining that the taking of his property conformably to state legislation, to satisfy an alleged debt or obligation, was without the notice and hearing essential under the due process of law clause of U. S. Const.,

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NOTE.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302, and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

On notice and hearing required, generally, to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; Ulman v. Baltimore, 11 L.R.A. 225.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On conclusiveness of prior decisions on subsequent appeals—see note to Hastings v. Foxworthy, 34 L.R.A. 321.

14th Amend., because, in his particular case, due process of law would lead to the same result, because he had no adequate defense on the merits.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing.

6. Extra-official or casual notice, or a hearing granted as a matter of favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation, is not a substantial substitute for the due process of law which U. S. Const., 14th Amend., requires.

[For other cases, see Constitutional Law, 696–773, in Digest Sup. Ct. 1908.]

[No. 140.]

Submitted January 20, 1915. Decided May 3, 1915.

IN ERROR to the Supreme Court of the State of Florida to review a judgment by which, on a second writ of error, a judgment of the Circuit Court of Manatee County, in that state, denying a motion to quash an execution issued against a stockholder of a corporation, was affirmed. Reversed and remanded for further proceedings.

See same case below, on first appeal, 63 Fla. 64, 58 So. 231.

The facts are stated in the opinion.

Mr. W. A. Carter submitted the cause for plaintiff in error:

Before a man's goods can be seized under an execution against a corporation, the person whose property is seized must receive some notice, and there must be a judicial determination of the fact that such person is a stockholder.

Re Rosser, 41 C. C. A. 497, 101 Fed. 562; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; Rouse, H. & Co. v. Donovan, 104 Mich. 234, 27 L.R.A. 577, 53 Am. St. Rep. 457, 62 N. W. 359; Lauder v. Tillia, 117 Pa. 304, 11 Atl. 86; Lauder v. Logan, 123 Pa. 34, 16 Atl. 44; Wilson v. Seligman, 36 Fed. 154; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Notice to a stockholder is necessary to charge him for corporate debts.

Thomp. Corp. §§ 3591, 3596, 3598, 3602.

Mr. O. K. Reaves submitted the cause for defendant in error:

The first decision of the supreme court of Florida has become the law of this case and cannot be changed by this writ of error from the second decision of said supreme court.

Valdosta Mercantile Co. v. White, 56 Fla. 704, 47 So. 961; Anderson v. Northrop, 44 Fla. 472, 33 So. 419; McKinnon v. Johnson, 57 Fla. 120, 48 So. 910; Knight v. State, 44 Fla. 94, 32 So. 110; Clark v. Keith, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; Wayne County v. Kennicott, 94 U. S. 499, 24 L. ed. 260; Browder v. McArthur, 7 Wheat. 58, 5 L. ed. 397; Ogden v. Saunders, 12 Wheat. 332, 6 L. ed. 647; Bell v. Niles, 61 Fla. 114, 55 So. 392; Hoopes v. Crane, 56 Fla. 395, 47 So. 992; Dunnellon Phosphate Co. v. Crystal River Lumber Co. 63 Fla. 131, 58 So. 787.

The statute in question does not contravene 14th Amendment to the Federal Constitution.

10 Cyc. 670; Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751; Stanley v. Stanley, 26 Me. 191; Penniman's Case (Vial v. Penniman) 103 U. S. 714, 26 L. ed. 602; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Hampson v. Weare, 4 Iowa, 13, 66 Am. Dec. 116; Armour Fertilizer Works v. Parrish Vegetable & Fruit Co. 63 Fla. 64, 58 So. 231; Bank of Columbia v. Okely, 4 Wheat. 233, 4 L. ed. 559; Cooley, Const. Lim. 7th ed. p. 506; Dutton Phosphate Co. v. Priest, — Fla. —, 65 So. 282; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep 229; Blanchard v. Raines, 20 Fla. 467; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; State ex rel. Andreu v. Canfield, 40 Fla. 36, 42 L.R.A. 72, 23 So. 591; Barnett v. Hickson, 52 Fla. 457, 41 So. 606; Ex parte Scudamore, 55 Fla. 211, 46 So. 279.

Mr. Justice Pitney delivered the opinion of the court:

The Armour Fertilizer Works, having recovered in the circuit court for Manatee county, Florida, a judgment for about $3,000 against the Parrish Vegetable & Fruit Company, a corporation, sued out a writ of execution against the goods and lands of that company, and placed it in the hands of the sheriff, who returned that he was unable to find any property of the judgment debtor whereon to levy. Thereupon, pursuant to § 2677 Gen. Stat. (Fla.) 1906, as amended by act of 1909, chap. 5892, the Fertilizer Works sued out an execution against the goods and lands of the plaintiff in error, Henry L. Coe, as a stockholder of the Vegetable Company. This writ set forth the recovery of the judgment by the Fertilizer Works against the company, mentioning the date, the amount, and the court in which it was recovered, the issuing of execution against that company and the return thereon, and commanded that there be made of the property of Coe, as one of the stockholders of the Company, "an amount equal to the amount remaining unpaid upon the subscription of the said

Henry L. Coe to the stock of said corporation." A formal levy was made upon a parcel of land, the property of Coe, but there was no interference with his possession, nor had any step been taken towards selling the land, when Coe filed in the circuit court a petition to quash the execution as issued [417] illegally, alleging that it had been issued without notice to him, and amounted to the taking of his property without due process of law, and that the statute permitting it was void under the Constitution of Florida, and was also repugnant to the "due process" and "equal protection" clauses of the 14th Amendment. The circuit court entered judgment in the following words: "The execution is quashed, but not on the ground of unconstitutionality of the statute. The statute is constitutional, but the execution cannot issue until some preliminary steps are taken." The Fertilizer Works removed the cause by writ of error to the supreme court of Florida, and that court reversed the judgment (63 Fla. 64, 58 So. 231), holding that the statute required no preliminary step to be taken before an execution might be issued against a stockholder, and that there was no general law or rule requiring previous notice to him. The court further said:

"A stockholder of a corporation becomes such charged with knowledge that under the statute, upon the return of *nulla bona* upon an execution issued against the corporation, an execution may be issued against him for the unpaid subscription to the stock he holds. . . . The statute above quoted [§ 2678, Gen. Stat. 1906, set forth below] affords the means by which the officer holding the execution may obtain definite information as to the stockholders and the unpaid subscriptions on the stock. If the person against whom the execution is issued is not in fact a holder of stock upon which there is unpaid subscription, or if the amount of the execution is in excess of the unpaid subscription, the stockholder may have appropriate relief under the statute providing for the testing of the legality of executions. See §§ 1624 and 1625, Gen. Stat. of 1906."

The case went back to the circuit court with a mandate "that such further proceedings be had in said cause as, according to right, justice, the judgment of said supreme [418] court, and the laws of the state of Florida, ought to be had." It was again brought on for hearing before the circuit court, when, without further pleadings or evidence on either side, judgment was rendered denying the motion to quash. Upon Coe's writ of error, the supreme court affirmed this judgment, for reasons expressed as follows:

"Coe does not claim that he was [not] in fact a stockholder, nor that there remains no balance due upon his stock, nor seek to interpose any of the defenses pointed out as open to him upon the former hearing, but stands boldly on his attack upon the constitutionality of the act, and by a proceeding unknown to our practice. There does not appear to have been any forcible seizure of any property of the said Coe, other than the formal levy upon realty, which does not interfere with the owner's possession. The statute presents many difficulties that may arise as to others not similarly situated, and may as such be beyond the power of the legislature; but the party now before this court has not brought himself within the class who may justly complain, and the judgment as to him, upon the authority of our former holding, is therefore affirmed."

The present writ of error was then sued out.

Defendant in error moves to dismiss, upon the ground that, according to the local practice, the opinion delivered by the supreme court upon the first writ of error decided the question involved and became the law of the case, so that plaintiff in error, having failed to take a writ of error upon that judgment, was thereafter concluded by it. But, as appears from what has been stated, the first decision did not conclude the litigation; it called for further proceedings in the circuit court; and not until the judgment rendered by that court on the going down of the mandate had been affirmed upon the second writ of error did there exist a final judgment in the court of last resort of the state, such as might be brought under [419] the review of this court by virtue of § 237, Judicial Code, act of March 3, 1911, 36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214. Besides, the contention that, by the local practice, the Federal question was not open for discussion or consideration upon the second writ of error is conclusively disposed of by the fact that the supreme court did, on that occasion, again consider it, with the result that the state law and the authority exercised under it were upheld as valid and not repugnant to the Constitution of the United States, and the immunity especially set up and claimed by plaintiff in error under that Constitution was overruled. North Carolina R. Co. v. Zachary, 232 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, and cases cited. The statement in the second opinion, that the attack of plaintiff in error upon the constitutionality of the act was "by a proceeding unknown to our practice," does not, we take it, mean that the court did not necessarily pass upon the con-

stitutional question. We are not sure we clearly comprehend the meaning of the expression quoted, in view of the effect attributed to §§ 1624 and 1625 in this case and in earlier decisions cited below. It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed "due process of law." The constitutional guaranty is not to be thus evaded, and we cannot believe there was any purpose to evade it in this case. Upon the whole, the right of review in this court is clear, and the motion to dismiss the writ of error must be denied.

The Florida statutes upon which the controversy turns are set forth in the margin.[1] That we may not [420] misapprehend the construction placed upon them by the state court of last resort, or the ground of its opinion that they afforded due process of law to plaintiff in error, [421] it will be well to briefly review their history. Sections 2677 and 2678 trace their origin to §§ 22 and 23 of an act of 1868 (Laws, p. 123, chap. 1639), which followed the model of § 36 of the companies clause consolidation act 1845 (8 & 9 Vict. chap. 16), except that they permitted execution against the stockholder to an extent "equal in amount to the amount of stock by him owned, together with any amount unpaid thereon." There was a proviso, as in the English act, that no such execution should issue except upon an order of the court, "made upon motion in open court after good and sufficient notice in writing to the person upon whom execution is desired." These sections were repealed in 1874 (Laws, p. 95, chap. 2016), and reenacted in 1879, with insignificant verbal modifications (Laws, p. 118, chap. 3165, §§ 9 and 10). By an act of 1887 (Laws, p. 96, chap. 3729), the liability of stockholders to the creditors of the corporation was limited to "so much as may remain unpaid upon his or her subscription." In the Revision of 1892 this limitation of the liability was engrafted upon the act of 1868, as re-enacted in 1879, and at the same time the provision for notice to the stockholder prior to the issuing of the execution was omitted. The result appeared as §§ 2152 and 2153 of that Revision, found as §§ 2677 and 2678 in the General Statutes of 1906. The amendment of 1909 was apparently passed for the pur-

[1] Gen. Stat. Florida 1906.

Sec. 2677. (2152.) May Issue Against Stockholders.—If any execution shall issue against the property or effects of any corporation, and there cannot be found whereon to levy, then such execution may be issued against any of the stockholders to an extent equal in amount for so much as may remain unpaid upon the subscription and no further; and all property whether real or personal of any stockholder in any corporation aforesaid shall be exempt from the debts and liabilities of such corporation contracted in its corporate capacity, except the stock of said stockholder of or in said corporation to the extent mentioned aforesaid.

(Amended by Florida Laws 1909, chap. 5892, to read as follows:

2677. (2152.) May Issue Against Stockholders.—If any execution shall issue against the property or effects of any corporation, and there cannot be found whereon to levy, then such execution may be issued against any of the stockholders to an extent equal in amount for so much as may remain unpaid upon their subscription to capital stock and no further.)

2678. (2153.) Custodian of Records to Give Sheriff Necessary Information.—The clerk or other officer having charge of the books, records and papers of any corporation, on demand of any officer holding execution against the same, shall furnish such officer with the name, places of residence and the amount of liability of every person liable as aforesaid, and if such officer refuses so to do he shall, upon complaint thereof, be liable to a fine not exceeding $500.

1624. (1195.) Upon Affidavit of Illegality and Bond.—If any execution shall issue illegally, the defendant in execution, his agent or attorney, may procure a stay of the same by making and delivering to the officer having the execution an affidavit stating the illegality and whether any part of the execution be due, and a bond payable to the plaintiff with two good and sufficient sureties in double the amount of the execution or the part of which a stay is sought. Upon receipt of such affidavit and bond the officer shall stay any proceeding on the execution and return the bond and affidavit to the court from which the execution issued, and such court shall pass upon the question of illegality as soon as possible. If the execution be adjudged illegal in any part the court shall make an order staying it as to such part, but if it be adjudged legal in whole or in part, the court shall (or if it has a clerk, shall direct such clerk to) enter up judgment against the principal and sureties on such bond for the amount of so much of the execution as shall be adjudged to be legal, and execution shall forthwith issue thereon.

1625. (1196.) Upon Motion.—The court before which an execution is returnable may, on a motion and notice to the adverse party, for good cause, upon such terms as the court may impose, direct a stay of the same, and the suspension of proceedings thereon.

pose of bringing the phraseology of the section into conformity with the judicial construction, as declared in Knight & W. Co. v. Tampa Sand Line Brick Co. 55 Fla. 728, 743, 744, 46 So. 285.

Meanwhile, and from an early period, the laws of Florida [422] have contained provisions for testing the legality of any writ of execution upon application of the defendant, made after its issue. Sections 1624 and 1625, Gen. Stat. 1906, referred to in the opinion of the supreme court above quoted, originated in acts of 1834 (Laws, p. 13, chap. 742), and of 1844 (Laws, p. 54, § 6), concerning which the court has repeatedly held that they provide separate, consistent, and independent remedies; the one by proceeding before the sheriff, the other before the court or a judge in vacation; and that the courts of law have full power to revoke, correct, restrain, or quash their own process in the course of their ordinary jurisdiction, so that no recourse to a court of equity is necessary. Mitchell v. Duncan, 7 Fla. 13, 19; Robinson v. Yon, 8 Fla. 350, 354; Mathews v. Hillyer, 17 Fla. 498, 500; Barnett v. Hickson, 52 Fla. 457, 460, 41 So. 606.

We understand, therefore, that in the present case the court held that under § 2677, as amended in 1909, on a return of "no property" upon an execution against a corporation, an execution may be issued against any stockholder without notice to him or other preliminary step; that the writ is to be enforced against his property to the extent of his unpaid subscription to the stock that he holds in the company, and this amount the officer ascertains from the custodian of the records of the corporation, in accordance with § 2678; that if the person against whom the execution is issued is not in fact a holder of stock upon which there is an unpaid subscription, or if the amount of the execution exceeds the unpaid subscription, he may have relief under §§ 1624 or 1625; and that, in the absence of such objection on his part, the execution is enforced, although there may have been only a formal levy, without even such notice to the owner of the property as might be implied from a forcible seizure or an interference with his possession.

Thus construed, and as applied in this case, we think § 2677 [423] is repugnant to the "due process of law" provision of the 14th Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect.

It may be conceded that a judgment recovered against a corporation, without fraud or collusion, in a court having jurisdiction over the subject-matter and the party, may, consistently with the 14th Amendment, be treated as concluding the stockholder respecting the existence and amount of the indebtedness so adjudged. Sanger v. Upton, 91 U. S. 56, 59, 23 L. ed. 220, 221; Hawkins v. Glenn, 131 U. S. 319, 329, 33 L. ed. 184, 191, 9 Sup. Ct. Rep. 739; Glenn v. Liggett, 135 U. S. 533, 544, 34 L. ed. 262, 267, 10 Sup. Ct. Rep. 867; Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 337, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810. But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself. See Great Western Teleg. Co. v. Purdy, ubi supra; Bernheimer v. Converse, 206 U. S. 516, 528, 532, 51 L. ed. 1163, 1173, 1175, 27 Sup. Ct. Rep. 755; Converse v. Hamilton, 224 U. S. 243, 256, 56 L. ed. 749, 754, 32 Sup. Ct. Rep. 415; Selig v. Hamilton, 234 U. S. 652, 660, 58 L. ed. 1518, 1523, 34 Sup. Ct. Rep. 926.

The suggestion that because, under §§ 1624 and 1625, a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues, and before interference with his possession or his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not "within the class who may justly complain," will not withstand critical analysis.

The statute mentions no classes, and the state court [424] merely distinguished between those who complain and those who do not. Against one and all, execution may be issued without notice or hearing; the judgment against the corporation, and the record of stockholdings and stock subscriptions found upon the books of the corporation, being treated as conclusive against those named as stockholders. If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or, receiving it, makes no objection, his property is taken in satisfaction of the corporation's debt,—manifestly without due process of law. But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions

upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123, 22 L. ed. 72, 77.

Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity [425] to be heard." The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute" (citing the New York case). So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: "This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." In Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." And in Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: "The law itself must save the parties' rights, and not leave them to *the discretion of* the courts as such."

The writ of execution cannot of itself be treated as equivalent to a writ of attachment, establishing a lien upon the stockholder's property, but going no further until he has had an opportunity to show cause why that property should not be applied to the payment of the corporation's debt. Not only is such a purpose wholly unexpressed in the writ, but such is not its normal function or effect; no "day in court" is named, and there is no provision for notice or monition by service, publication, mailing, or otherwise. Windsor v. McVeigh, 93 U. S. 274, 279, et seq., 23 L. ed. 914, 916; Grannis v. Ordean, 234 U. S. 385, 393, 58 L. ed. 1363, 1368, 34 Sup. Ct. Rep. 779.

This case bears no proper analogy to York v. Texas, 137 U. S. 15, 21, 34 L. ed. 604, 605, 11 Sup. Ct. Rep. 9; Kauffman v. Wootters, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298; and Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 272, ante, 220, 224, 35 Sup. Ct. Rep. 37; [426] where it was held that a state, without violence to the due process clause of the 14th Amendment, may so regulate its practice that a person who voluntarily enters one of its courts to contest any question in a pending action—even a person appearing specially to object that the court has not acquired jurisdiction over him—may be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and hence be bound by its determination of the merits if his objection to the jurisdiction be overruled. For in this case there was no pending action or issue; plaintiff in error came into court to object, on jurisdictional grounds, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state Constitution and the 14th Amendment, into a tender of an issue of fact respecting his status as a stockholder and the amount of his unpaid subscription, if any, and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice. Reynolds v. Stockton, 140 U. S. 254, 268, 269, 35 L. ed. 464, 468, 469, 11 Sup. Ct. Rep. 773.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

[427] ERIE RAILROAD COMPANY, Plff. in Err.,
v.
JOSEPH SOLOMON.

(See S. C. Reporter's ed. 427–431.)

Error to state court — frivolous Federal question.

1. The contention that error, to the prejudice of an interstate railway carrier concerning the Federal safety appliance act, if that act applied, was committed by instructing the jury that it exacted a usual and ordinary degree of care in the appliances to which it relates, is too clearly lacking in merit to serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

2. No substantial Federal question which will sustain a writ of error from the Federal Supreme Court to a state court is presented by a contention that a state safety appliance act, if applicable, is repugnant to the due process of law clause of U. S. Const., 14th Amend., because it is construed by the state court to exact a usual and ordinary degree of care in the appliances to which it relates.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

3. A Federal question which is unsubstantial and frivolous cannot be made substantial so as to serve as the basis of the exercise of appellate jurisdiction of the Federal Supreme Court over a state court by asserting another proposition of the ame character.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

[No. 559.]

Argued February 24, 1915. Decided May 10, 1915.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Mahoning County, in that state, affirming a judgment of the Court of Common Pleas of that county in favor of plaintiff in a personal-injury action. Dismissed for want of jurisdiction.

See same case below, 89 Ohio St. 406, 106 N. E. 1055.

The facts are stated in the opinion.

Mr. Leroy Manchester argued the cause, and Mr. C. D. Hine filed a brief for plaintiff in error:

A right, privilege, and immunity from liability was asserted and denied under the provisions of the safety appliance act of the United States of March 2, 1893, as amended by the act of March 2, 1903.

16 Cyc. 861; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

A right, privilege, and immunity from liability was asserted and denied under chap. 1 of the 14th Amendment of the Constitution of the United States.

These Federal questions were properly raised.

Rector v. City Deposit Bank Co. 200 U. S. 405, 412, 50 L. ed. 527, 529, 26 Sup. Ct. Rep. 289; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 63, 53 L. ed. 695, 698, 29 Sup. Ct. Rep. 397; Carlson v. Washington, 234 U. S. 103, 58 L. ed. 1237, 34 Sup. Ct. Rep. 717; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; Pennywit v. Eaton (Scott v. Eaton) 15 Wall. 380, 21 L. ed. 72; Louisville & N. R. Co. v. Higdon, 234 U. S. 592, 58 L. ed. 1484, 34 Sup. Ct. Rep. 948; Missouri P. R. Co. v. Larabee, 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979; Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384; Illinois C. R. Co. v.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the necessity of color of merit in a Federal question to sustain a writ of error to a state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On duty and liability under Federal and state safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A. (N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A. (N.S.) 49.

Chicago, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; Meyer v. Richmond, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. ed. 596, 27 Sup. Ct. Rep. 391; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 Sup. Ct. Rep. 309; Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 Sup. Ct. Rep. 779; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Louisville & N. R. Co. v. Higdon, 234 U. S. 592, 58 L. ed. 1484, 34 Sup. Ct. Rep. 949.

Mr. **Emil J. Anderson** argued the cause and filed a brief for defendant in error:

A Federal question cannot be raised for the first time in the petition for a writ of error from this court and the accompanying assignment of errors.

Montana ex rel. Haire v. Rice, 204 U. S. 301, 51 L. ed. 495, 27 Sup. Ct. Rep. 281; Wabash R. Co. v. Flannigan, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224; Dewey v. Des Moines, 173 U. S. 198, 43 L. ed. 666, 19 Sup. Ct. Rep. 379; California Nat. Bank v. Thomas, 171 U. S. 441, 43 L. ed. 231, 19 Sup. Ct. Rep. 4; Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; Osborne v. Clark, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319.

A petition for a writ of error forms no part of the record on which it is to be ascertained whether the state court decided a Federal question.

Manning v. French, 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; Clark v. Pennsylvania, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

A writ of error from a state court will be dismissed in the absence of a Federal question on the record.

Davidson v. Connelly, 154 U. S. 589, 38 L. ed. 1088, 14 Sup. Ct. Rep. 1200; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Clark v. Pennsylvania, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811.

The briefs or arguments of counsel cannot be looked to as raising a Federal question.

New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916; Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

Mr. Chief Justice White delivered the opinion of the court:

Solomon, the defendant in error, sued to recover for personal injuries suffered by him while he was working as a brakeman on a switch engine in the yard of the defendant company at Youngstown, Ohio. The negligence charged was that the tender of the engine had a defective coupler in that the knuckle and pin on the same could not be worked without going between the cars, and that the drawbar had so much side play that it would not meet the couplers of other cars and therefore would not [430] automatically couple by impact. The first defect may be put out of view as the jury found it did not exist. As to the second, the respective contentions at the trial were, on the part of the plaintiff, that the play of the drawbar was so great as to cause the coupler to be defective, and on the part of the defendant, that while the drawbar may have had some side play, it only existed to the degree which was essential in such an appliance, and therefore there was no defect. The trial court submitted the case to the jury on the theory that the coupler was defective if it had an unusual side play, and conversely that it was not if it did not have such a degree of side play. From the pleadings and the course of the

trial there is no room for dispute that the case was tried upon the theory that the right to recover was based on the safety appliance law of Ohio, substantially identical in its terms with the safety appliance law of the United States. The judgment on the verdict of the jury in favor of the plaintiff was affirmed without opinion by the circuit court and again affirmed without opinion by the supreme court of Ohio, to which judgment the writ of error now before us was prosecuted.

Confining the case to the statement just made, it is beyond dispute that there is no jurisdiction to review, but it is insisted that the case is not so confined because, after affirmance, the court below entered an order which it directed should be made part of the record, certifying that, in deciding the case, it became necessary for it to consider whether the United States safety appliance law was applicable, and whether, as construed by the trial court, the state law, if applicable, was not repugnant to the due process clause of the 14th Amendment. But assuming that the recited Federal questions are in the record and require consideration, they are so without merit and frivolous as not to give basis for jurisdiction: First, because such plainly is the result of the contention that error to [431] the prejudice of the defendant company concerning the United States safety appliance law, if that law applied, was committed by instructing that it exacted a usual, that is, ordinary, degree of care in the appliances to which that act related. And second, because a like view inevitably is necessary concerning the contention that the state safety appliance law, if it applied, would be repugnant to the 14th Amendment if it exacted a usual and ordinary degree of care. But this is not adequate to dispose of the case, since the argument is that error as to the recited Federal question directly arose from the refusal of the court to instruct a verdict for the railroad company on the ground that there was no proof tending to show an unusual or any defect in the coupler, thereby permitting the jury to find a liability under the law of the United States where none existed, and under the theory of the application of the state law, causing such law to impose a liability for an appliance which was not defective, and hence to take property without due process of law. But while the proposition changes the form of the contention, it does not change the substance of things, since we are of the opinion, after an examination of the record, that the contention that the case should have been taken from the jury on the ground stated is so wholly devoid of merit and wanting in substance as to afford no basis for jurisdiction. As a proposition which is unsubstantial and frivolous cannot be made substantial by asserting another proposition of the same character, it results that there is no ground for the exercise of jurisdiction, and the writ of error is therefore dismissed for want of jurisdiction.

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[432] PENNSYLVANIA RAILROAD COMPANY, Plff. in Err.,

v.

KEYSTONE ELEVATOR & WAREHOUSE COMPANY.

(See S. C. Reporter's ed. 432, 433.)

Error to state court — Federal question — how raised.

No question which will sustain the appellate jurisdiction of the Federal Supreme Court over a state court is involved in rulings in a suit by an elevator company to recover reasonable compensation from a railway carrier for services rendered in handling grain, excluding evidence offered by the carrier to prove that a specified person owned nearly all of the elevator company's stock and was also a member of a partnership for which 90 per cent of the elevator company's business was done, that the grain handled came from other states over the carrier's lines, that competitors of such partnership received grain from the same point at the same rate, but did not have any elevator, perform any elevator service, or receive compensation for such service, that the elevator company's books showed that payments already made by the carrier and consignees covered the actual cost of the services rendered with a reasonable profit, so that further payment would be contrary to the interstate commerce act, or in a ruling rejecting an offer of an opinion and order of the Interstate Commerce Commission of later date than the

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

service rendered and the bringing of the suit.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

[No. 683.]

Submitted April 26, 1915. Decided May 10, 1915.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Philadelphia County, in that state, in favor of plaintiff in a suit by an elevator company to recover from a carrier reasonable compensation for services rendered in handling grain. Dismissed for want of jurisdiction.

See same case below, 246 Pa. 336, 92 Atl. 340.

The facts are stated in the opinion.

Mr. John Hampton Barnes submitted the cause for plaintiff in error.

Mr. M. Hampton Todd submitted the cause for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by the defendant in error to recover reasonable compensation for services rendered in handling grain through its elevators. The plaintiff proved to the satisfaction [433] of the referee to whom the parties agreed to submit the case that 35 cents a ton, the rate demanded, was a reasonable rate. To meet this the defendant offered to prove that Harvey C. Miller owned 93.6 per cent of the plaintiff's stock; that he also was a member of the firm of L. F. Miller & Sons, for which 90 per cent of the plaintiff's business now in question was done; that the grain handled came from other states over the defendant's lines; that competitors of L. F. Miller & Sons received grain from the same point at the same rate, but did not have any elevator, perform any elevator service, or receive compensation for such service; that the plaintiff's books showed that the plaintiff and Harvey C. Miller had received from the payments already made by the defendant and consignees the actual cost of the services rendered, with a reasonable profit, the defendant contending that further payment would be contrary to the act to regulate commerce; and finally an opinion and order of the Interstate Commerce Commission of later date than the service rendered and the bringing of this suit. This evidence was rejected and the supreme court of Pennsylvania sustained the referee, rightly observing that the one question before him was what the plaintiff's services were reasonably worth. 246 Pa. 336, 92 Atl. 340.

There was no complaint that the rate was unreasonable, but only a wrong conception of the grounds upon which an advantage might be pronounced undue. There was no offer to prove that L. F. Miller & Company were using the plaintiff as a tool for the purpose of obtaining a rebate. The offer did not go far enough to bring in the act of Congress, and was not made in an effort to prove that an unreasonable rate was charged.

Writ of error dismissed.

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[434] FREDERICK W. ELLIS, Appt.,
v.
INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 434-447.)

Appeal — finality of decree below.

1. An order of a Federal district court, made upon a petition of the Interstate Commerce Commission filed under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, §§ 8563, 8576), § 12, which directs an officer of a corporation to answer certain questions propounded, and to produce certain documents called for by the Commission, possesses the finality requisite to sustain an appeal to the Federal Supreme Court.

[For other cases, see Appeal and Error, I. d, 21, in Digest Sup. Ct. 1908.]

Carriers — who are — private car owners.

2. A corporation which owns and maintains refrigerator, tank, and box cars, and leases these cars to railway companies or shippers, and which also owns and operates icing stations on various lines of railway, and also furnishes and ices cars for the shipment of perishable fruits, the railway companies paying for the service and charging the shipper according to tariffs on file with the Interstate Commerce Commission, cannot be regarded as a common carrier subject to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), although the definition of "transportation" in § 1 of that act includes such instrumentalities as the corporation leases to the railway companies, since such definition is a preliminary to a requirement that the carriers shall furnish such instrumentalities upon reasonable request, not that the owners and builders shall be regarded as carriers.

[For other cases, see Carriers, I., in Digest Sup. Ct. 1908.]

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302, and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

As to jurisdiction and power of Interstate Commerce Commission—see note to United States v. Tozer, 2 L.R.A. 446.

Interstate Commerce Commission — power to compel testimony — fishing expedition.

3. The Interstate Commerce Commission cannot conduct a fishing expedition into the affairs of a stranger to an investigation proceeding for the chance that something discreditable may be disclosed.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — power to compel testimony — stranger to inquiry.

4. The Interstate Commerce Commission cannot enlarge its powers to compel testimony from a corporation which, not being subject to regulation by the Commission, is simply in the position of a witness interested in, but a stranger to, the inquiry, by making such corporation a party to the proceeding and serving it with notice.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — power to compel testimony — private car owners and builders.

5. The corporate builder and owner of such instrumentalities of commerce as refrigerator, tank, and box cars, which it leases to railway companies and shippers, has the general immunities of an ordinary witness, unless and until it is shown to be merely the tool of the users of the cars, against an inquiry into its private business affairs in an investigation ordered by the Interstate Commerce Commission for the purpose of determining whether the allowances, practices, or minimum carload weights obtaining where private cars are used violate the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, §§ 8563–8565, 8583), §§ 1–3, 15, as being unjust, unreasonable, or unduly discriminatory.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

[No. 712.]

Argued April 12 and 13, 1915. Decided May 10, 1915.

APPEAL from the District Court of the United States for the Northern District of Illinois to review an order directing a corporate officer to answer certain questions propounded by, and to produce certain documents called for by, the Interstate Commerce Commission. Reversed without prejudice.

The facts are stated in the opinion.

Mr. Frank B. Kellogg argued the cause, and, with Messrs. Cordenio A. Severance, Robert E. Olds, Alfred R. Urion, and Charles J. Faulkner, Jr., filed a brief for appellant:

Armour car lines is not a "common carrier," nor is it engaged in "transportation," within the meaning of the act to regulate commerce.

Consolidated Forwarding Co. v. Southern P. Co. 9 Inters. Com. Rep. 182; Commission Reports to Congress, Dec. 24, 1903; Gracie v. Palmer, 8 Wheat. 605, 5 L. ed. 696; Ex parte Koehler, 1 Inters. Com. Rep. 28, 30 Fed. 867; Re Exchange of Free Transportation, 12 Inters. Com. Rep. 40; Enterprise Transp. Co. v. Pennsylvania R. Co. 12 Inters. Com. Rep. 326; Hirsch v. New England Nav. Co. 129 App. Div. 178, 113 N. Y. Supp. 395; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890; Union Stockyards Co. v. United States, 94 C. C. A. 626, 169 Fed. 404; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 573; Pullman Co. v. Linke, 203 Fed. 1017; Lemon v. Pullman Palace Car Co. 52 Fed. 262; United States v. Union Stockyard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Interstate Commerce Commission v. Reichmann, 145 Fed. 235; United States v. Milwaukee Refrigerator Transit Co. 145 Fed. 1007.

The demands of the Commission involve an unwarranted extension of its inquisitorial powers and constitute an unlawful invasion of the private rights and affairs of the respondent and of the company he represents.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Re Pacific R. Commission, 32 Fed. 241; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 38 L. ed. 1047, 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115.

A common carrier subject to the act may make contracts for services and facilities connected with the commerce which it carries on, and such contracts are to be construed and enforced in the same manner and in accordance with the same principles as in the case of ordinary contracts between private parties.

Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Long v. Lehigh Valley R. Co. 65 C. C. A. 354, 130 Fed. 870; Santa Fe, P. & P. R.

Co. v. Grant Bros. Constr. Co. 228 U. S. 177, 57 L. ed. 787, 33 Sup. Ct. Rep. 474.

The decree is a final one from which an appeal lies direct to the Supreme Court of the United States.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Interst. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115.

Mr. Edward W. Hines argued the cause, and, with Mr. Joseph W. Folk, filed a brief for appellee, the Interstate Commerce Commission:

Final decrees only are appealable. An order requiring the production of testimony is not a final decree.

Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356; Webster Coal & Coke Co. v. Cassatt, 207 U. S. 181, 52 L. ed. 160, 28 Sup. Ct. Rep. 108; Wise v. Mills, 220 U. S. 549, 55 L. ed. 579, 31 Sup. Ct. Rep. 597; Haight & F. Co. v. Robinson, 203 U. S. 581, 51 L. ed. 327, 27 Sup. Ct. Rep. 780; Hultberg v. Anderson, 131 C. C. A. 125, 214 Fed. 349; Logan v. Pennsylvania R. Co. 132 Pa. 403, 19 Atl. 137.

Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court?

Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356.

Investigations on the part of the Commission should not be hampered by the technical rules of the common law.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 44, 48 L. ed. 860, 869, 24 Sup. Ct. Rep. 563.

The information which the witness was asked to give was relevant to the inquiry which the Commission was making.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 47, 48 L. ed. 860, 870, 24 Sup. Ct. Rep. 563; Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358; Tap Line Cases (United States v. Louisiana & P. R. Co.) 234 U. S. 1, 58 L. ed. 1185, 34 Sup. Ct. Rep. 741.

The Elkins act was designed to place all shippers upon equal terms.

United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; Interstate Commerce Commission v. Reichmann, 145 Fed. 235.

A witness, not a party to the proceeding, may not question on behalf of the corporation, a party thereto, the materiality of evidence.

Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358.

The Commission may require any person to testify before it if the testimony required relates to a matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused on some personal ground from compliance with the Commission's order to testify.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Interst. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Congress has the same authority to require Armour Car Lines to furnish to the Commission any information which may be necessary to enable it to determine whether or not the act is being violated as it would have if that corporation had been created by an act of Congress.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; United States v. Louisville & N. R. Co. 236 U. S. 318, ante, 250, 35 Sup. Ct. Rep. 363.

Assistant Attorney General Underwood argued the cause and filed a brief for the United States:

The Armour Car Lines is a common carrier within the meaning of the act to regulate commerce.

The Niagara v. Cordes, 21 How. 7, 22, 16 L. ed. 41, 46; Bouvier's Law Dict. "Common Carriers"; Pennsylvania Co. v. United States, 236 U. S. 351, 362, 363, ante, 616, 623, 624, 35 Sup. Ct. Rep. 370; Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. Rep. 291; Union Stockyards Co. v. United States, 94 C. C. A. 626, 169 Fed. 406.

It is proper to examine the legislative history of the act for the purpose of ascertaining the situation which prompted this legislation and the evils sought to be remedied.

Tap Line Cases (United States v. Louisiana & P. R. Co.) 234 U. S. 1, 27, 58 L. ed. 1185, 1195, 34 Sup. Ct. Rep. 741.

The construction placed upon this act by the various members of Congress is in entire harmony with the construction placed upon it by this and other courts.

United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; United States v. Milwaukee Refrigerator Transit Co. 145 Fed. 1007; Interstate Commerce Commission v. Reichmann, 145 Fed. 235; Atchison, T. & S. F. R. Co. v.

United States, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. Rep. 291; Pennsylvania Co. v. United States, 236 U. S. 351, ante, 616, 35 Sup. Ct. Rep. 370.

The act to regulate commerce was intended to afford an effective means of redressing the wrongs resulting from unjust discrimination and undue preference.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

This court has not given the statute a technical construction, but has time and again brushed aside devices invented to subvert its purposes, and consistently enforced the spirit of the law.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 213, 56 L. ed. 729, 737, 32 Sup. Ct. Rep. 436; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; United States v. Baltimore & O. R. Co. 225 U. S. 306, 324, 56 L. ed. 1100, 1106, 32 Sup. Ct. Rep. 817.

The application of the principle of public policy which the statute embodies is to be determined by the substance of things, and not by names, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such purposes.

United States v. Louisville & N. R. Co. 235 U. S. 314, 326, ante, 245, 253, 35 Sup. Ct. Rep. 113.

Answers to questions were compellable even though the Armour Car Lines be not a common carrier subject to the provisions of the act.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 476, 38 L. ed. 1047, 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The power of Congress over interstate commerce is absolute, and its control may be exercised through the Interstate Commerce Commission.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 473, 474, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 214, 56 L. ed. 729, 737, 32 Sup. Ct. Rep. 436.

Every matter which the Commission undertook to investigate in this proceeding was one which it was legally entitled to investigate.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 211, 56 L. ed. 729, 736, 32 Sup. Ct. Rep. 436.

The Commission is not bound in its investigations by the technical rules of pleadings and evidence.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 44, 48 L. ed. 860, 869, 24 Sup. Ct. Rep. 563.

Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact.

Ibid.

Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of the shippers and carriers.

Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 217, 58 L. ed. 568, 575, 34 Sup. Ct. Rep. 291.

Practices governing the handling and icing of cars would be unjust and unreasonable if they resulted in the shipper paying too much for the services rendered; they would be discriminatory if they resulted in giving to certain shippers lower rates or better service and equipment than to other shippers. This principle has been announced by this court in cases involving the distribution of coal cars.

Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

Armour Car Lines had icing plants in various parts of the country. Local conditions determine the cost of refrigeration and icing of cars. It was, therefore, proper and necessary, in order to determine whether the allowances paid the Armour Car Lines were just and reasonable, for the Commission to make detailed investigation concerning local conditions and cost of service and materials at the various points.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 434, 57 L. ed. 1511, 1555, 33 Sup. Ct. Rep. 729; Smyth v. Ames, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418.

If the Commission is precluded from investigating the character of the relations and contracts between a shipper and a subsidiary company organized for the very purpose of securing discriminatory service and rates, there is no reason why, by this simple device, discriminatory service and rates may not be granted to such favored shipper as freely as they were before the passage of the act forbidding same. This court has held that this may not be done by a subsidiary company organized by the railroad. The same principle would forbid such evasion by the shipper.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup.

Ct. Rep. 563; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 309, 57 L. ed. 226, 235, 33 Sup. Ct. Rep. 83; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279.

No corporation, whether public service or private, has any privilege of privacy which would justify a refusal to answer the questions and produce the documents demanded in this proceeding.

Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 215, 56 L. ed. 729, 737, 32 Sup. Ct. Rep. 436.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from an order of the district court, made upon a petition of the appellee, the Interstate Commerce Commission, filed under the act to regulate commerce, § 12. The order directs the appellant to answer certain questions propounded and to produce certain documents called for by the appellee. There is no doubt that this appeal lies. The order is not like one made to a witness before an examiner or on the stand in the course of a proceeding *inter alios* in court. Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356. It is the end of a proceeding begun against the witness. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. Therefore we pass at once to the statement of the case.

The Interstate Commerce Commission, reciting that it appeared from complaint on file that the allowances paid for the use of private cars, the practices governing the handling and icing of such cars, and the minimum carload weights applicable to the commodities shipped [443] therein, on the part of carriers subject to the act to regulate commerce, violated that act in various ways, ordered that a proceeding of investigation be instituted by the Commission of its own motion to determine whether such allowances, practices, or minimum carload weights were in violation of the act as alleged, with a view to issuing such orders as might be necessary to correct discriminations and make applicable reasonable weights. It ordered that carriers by railroad subject to the act be made parties respondent, and, later, that all persons and corporations owning or operating cars and other vehicles and instrumentalities and facilities of shipment or carriage of property in interstate commerce be made parties also. In the proceedings thus ordered the questions propounded were put to the appellant, the vice president and general manager of the Armour Car Lines.

The Armour Car Lines is a New Jersey corporation that owns, manufactures, and maintains refrigerator, tank, and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines of railway, and from these ices and re-ices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, [444] not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself. The petition of the Interstate Commerce Commission to compel an answer to its questions hardly goes on any such ground.

The ground of the petition is that it became the duty of the Commission to ascertain whether Armour & Company, an Illinois corporation shipping packing-house products in commerce among the states, was controlling Armour Car Lines and using it as a device to obtain concessions from the published rates of transportation, and whether Armour Car Lines was receiving for its refrigerating services unreasonable compensation that inured to the benefit of Armour & Company, all in violation of §§ 1, 2, 3, and 15 of the act.

If the price paid to the Armour Car Lines was made the cover for a rebate to Armour & Company or if better cars were given to Armour & Company than to others, or if, in short, the act was violated, the railroads are responsible on proof of the

fact. But the only relation that is subject to the Commission is that between the railroads and the shippers. It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor. It was argued that the Commission might look into the profits and losses of the Armour Car Lines (one of the matters inquired about) in order to avoid fixing allowances to it at a confiscatory rate. But the Commission fixes nothing as to the Armour Car Lines except under § 15 in the event of which we shall speak.

The appellant's refusal to answer the series of questions [445] put was not based upon any objection to giving much of the information sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the Armour Car Lines,—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up. This was beyond the powers of the Commission. Re Pacific R. Commission, 32 Fed. 241; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 479, 38 L. ed. 1047, 1057, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115. The Armour Car Lines not being subject to regulation by the Commission, its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the company a party to the proceedings and serving it with notice. Therefore the matter to be considered here, subject to the qualification that we are about to state, is how far an ordinary witness could be required to answer the questions that are before the court.

We have stated the nature and object of the investigation, and it is to be observed that not every advantage that may inure to a shipper as the result of the position of his plant, his ownership, or his wealth, is a preference. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. ed. 83, 87, 32 Sup. Ct. Rep. 22. But the intervening corporation may be a means by which an owner of property transported indirectly renders the services in question, and in that event its charges are subject to the Commission by § 15. The supposed unreasonable charge may be used as a device to attain the forbidden end, and therefore reasonable latitude should be allowed to see if any such device is used. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 464, 38 L. ed. 1047, 1052, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125. But still, until the Armour Car Lines is shown to be merely the tool of Armour & Company, it has the general immunities that we have stated. With the [446] foregoing general principles in view we proceed to dispose of the questions asked.

It is not necessary to repeat the many pages of questions at length. They are grouped by the government into classes and numbered so that the result may be stated in comparatively few words. The first group concerning interlocking officers and relations between Armour Car Lines, Armour & Company, and Fowler Packing Company, questions 1, 2, 3, and 7, should be answered. The only objection was on account of the general intent avowed as we have stated. So, also, questions 4, 5, 6, concerning the acquirement of cars previously owned by Armour & Company and Armour Packing Company making the second group. Also questions 8, 9, 12, and 13, as to contracts of Armour Car Lines with Armour & Company and Colorado Packing Company for furnishing cars and icing service. The next group, so far as the questions concern the ownership, manufacture, and repair of cars, Nos. 10, 11, 14, 16, 17, and 19, need not be answered, except 11, "where are the cars of Armour Car Lines repaired when not repaired in shops of railroads?" The last two groups concern matters into which the Commission was not authorized to inquire. The fifth, questions 15, 20, 21, 25, 26, 27, and 28, called for statements showing profit and loss, credits and debits to income etc., so far as the same related to transportation as defined in the act; and the sixth, Nos. 22, 23, and 24, for statements showing the amount invested in each icing plant and the detailed results of the operation of each, amount invested in each, cost per ton of ice at the source of supply, etc., etc., all matters belonging to the private business of the Armour Car Lines, and not open if our interpretation of the law is correct. Our decision, however, must be without prejudice to the possibility that the case may be brought within § 15 by evidence to the effect stated above.

Decree reversed without prejudice.

[447] Mr. Justice Day, while not differing from the general views taken by the court, is of opinion that the nature of the inquiry under § 15 made it proper that all the questions should be answered.

Mr. Justice McReynolds took no part in the consideration and decision of this cause.

CUMBERLAND GLASS MANUFACTURING COMPANY, Plff. in Err.,
v.
CHARLES DE WITT, Trading as Charles De Witt & Company.

(See S. C. Reporter's ed. 447–468.)

Error to state court — Federal question — res judicata.

1. A plea of *res judicata*, based upon a judgment of a Federal court adjudicating a right of Federal origin, asserts a right which, if denied by a state court, makes the case reviewable in the Federal Supreme Court under the provisions of the Judicial Code, § 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214), governing writs of error to state courts.

[For other cases, see Appeal and Error, 1983–1992, in Digest Sup. Ct. 1908.]

Bankruptcy — effect of composition.

2. The effect of the composition proceeding authorized by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), § 12, as amended by the act of June 25, 1910 (36 Stat. at L. 838, chap. 412, Comp. Stat. 1913, §§ 9586, 9596), is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the bankruptcy proceeding, and to reinvest the bankrupt with all his property, free from the claims of his creditors.

[For other cases, see Bankruptcy, XII., in Digest Sup. Ct. 1908.]

Bankruptcy — set-off.

3. The object of the provision of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, §§ 9585, 9652), § 68a, that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid," was to give the bankruptcy court the right to apply the established principles of set-off to mutual credits when its action was invoked for that purpose.

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

Judgment — res judicata — bankruptcy — composition — set-off.

4. No adjudication setting off, under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, §§ 9586, 9652), § 68a, against the proved claim of a creditor, a claim against it which was listed among the bankrupt's unliquidated assets, was involved in bankruptcy proceedings terminating in a decree in composition, where such creditor, though objecting to the composition, made no attempt to have the set-off adjudicated in the bankruptcy court, made no opposition to the confirmation of the composition, and took and holds its composition dividend on the full amount of its claim in the same manner as other creditors.

[For other cases, see Judgment, III. j; Bankruptcy, IV., in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On set-off in bankruptcy cases—see note to Morgan v. Wordell, 55 L.R.A. 33.

On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

[No. 191.]

Argued March 10, 1915. Decided May 10, 1915.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment which affirmed a judgment of the Superior Court of Baltimore City, in that state, in favor of plaintiff in an action in which defendant interposed a plea of *res judicata*, based upon certain proceedings in a court of bankruptcy. Affirmed.

See same case below, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702.

The facts are stated in the opinion.

Messrs. **Henry H. Dinneen** and **Arthur L. Jackson** argued the cause and filed a brief for plaintiff in error:

It is clearly the intention of the bankrupt act that, when there are claims and counterclaims between the bankrupt and one of the creditors, these should be adjudicated in the bankruptcy proceedings and the net balance paid or collected by the trustee in bankruptcy.

Re Philip Semmer Glass Co. 67 C. C. A. 551, 135 Fed. 77.

Certainly that which is liquidated in fact should be liquidated in law.

Re Filer, 5 Am. Bankr. Rep. 582.

DeWitt's contention was that the Glass Company's action "robbed" him of a profit of $800. The word "robbed" here was evidently used by DeWitt in a metaphorical sense, but even when used literally, it is the settled law that the right to recover it back is quasi contractual, and especially is that true if the property was taken from the plaintiff by fraud.

Downs v. Baltimore, 111 Md. 692, 41 L.R.A.(N.S.) 255, 76 Atl. 861, 19 Ann. Cas. 644; Re Filer, 5 Am. Bankr. Rep. 582; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 60, 35 L. ed. 68, 11 Sup. Ct. Rep. 478; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 317, 30 L. ed. 94, 6 Sup. Ct. Rep. 1094.

This claim, therefore, being liquidated in fact, and being a quasi contractual claim, is provable in bankruptcy.

Collier, Bankr. 10th ed. 975; Re Hirshman, 104 Fed. 69; Re Filer, 5 Am. Bankr. Rep. 582.

The action of the Glass Company in proving its claim against DeWitt was not a waiver of their right to recover for the same debt on the ground that it was not dischargeable in bankruptcy.

Standard Sewing Mach. Co. v. Kattell, 22 Am. Bankr. Rep. 376; Frey v. Torrey, 8 Am. Bankr. Rep. 196.

Messrs. **Thomas G. Hayes** and **Lewis W. Lake** argued the cause and filed a brief for defendant in error:

What right has the superior court of Baltimore city, or the court of appeals of Maryland, to review the proceedings of the district court of the United States for Maryland, and say that the claims should have been set off, or that the dividend operates as a release to Cumberland, or to decide what claims are to be considered as finally adjudicated?

Raborg v. Hammond, 2 Harr. & G. 49; Cook v. Carroll, 6 Md. 112; Taylor v. State, 73 Md. 220, 11 L.R.A. 852, 20 Atl. 914; Huttig Mfg. Co. v. Edwards, 87 C. C. A. 521, 160 Fed. 619; Re Isaacson, 98 C. C. A. 614, 174 Fed. 406; Ross v. Stroh, 91 C. C. A. 616, 165 Fed. 628; Re Hecox, 90 C. C. A. 627, 164 Fed. 823; Gilbertson v. United States, 94 C. C. A. 158, 168 Fed. 672; Re Lennon, 166 U. S. 552, 41 L. ed. 1112, 17 Sup. Ct. Rep. 658.

There can be no question, in view of the language adopted by this court with reference to § 68a, that it provides a remedy of which the parties may avail themselves, but which by no means operates as a compulsion, or automatically by law, but only upon petition by the parties.

New York County Nat. Bank v. Massey, [illegible] S. 146, 48 L. ed. 383, 24 Sup. Ct. Rep. 199; Scammon v. Kimball, 92 U. S. 371, 23 L. ed. 486; Traders' Nat. Bank v. Campbell, 14 Wall. 97, 20 L. ed. 834.

Composition restores estate to bankrupt free from debts of creditors.

2 Remington, Bankr. § 2346, p. 1425; Re Rider, 96 Fed. 808; Re Becher Bros. 15 Am. Bankr. Rep. 231.

Mr. Justice **Day** delivered the opinion of the court:

Defendant in error, Charles De Witt, trading as Charles De Witt & Company, plaintiff in the court below, and, hereinafter spoken of as the plaintiff, brought his action in the superior court of Baltimore city, Maryland, to recover of the Cumberland Glass Manufacturing Company, hereinafter called the Glass Company, upon the ground that DeWitt, having entered into a written contract with the Mallard Distilling Company of New [449] York to supply them with certain lettered flasks, the Glass Company, with knowledge of that contract, by and through the medium of their agents, did visit the Mallard Distilling Company, and maliciously and without just cause, with the intent to injure the plaintiff and to derive a benefit for itself, did cause, induce, and procure the said Mallard Distilling Company to rescind, break, and violate its contract with the plaintiff. Pleas were interposed, and a trial was had in the superior court, resulting in a verdict and judgment in favor of the plaintiff, which judgment was affirmed in the court of appeals of the state of Maryland (120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702), and the case was brought here.

Summing up the defenses made in the state court, the Maryland court of appeals said (120 Md. 386): "The defendant interposed three pleas—first, that it did not commit the wrong alleged; secondly, limitations; thirdly *res judicata*, based upon certain proceedings had in the United States district court for Maryland, and particularly set out in the pleas."

The Federal question, which is the basis of jurisdiction here, arises upon the plea of *res judicata* to which a demurrer was sustained in the Maryland court of original jurisdiction, which judgment was affirmed by the court of appeals. This presents a Federal question because the plea of former judgment in a Federal court adjudicating a right of Federal origin asserts a right which, if denied, made the case reviewable here under § 709, Revised Statutes, § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214]. Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

From this plea, it appears that the plain-

tiff, trading as Charles De Witt & Company, was adjudicated a bankrupt in the United States district court of Maryland, on the 8th day of February, 1910; that in the list of creditors, plaintiff listed the Glass Company as a creditor in the sum of $790.03. (which claim was upon a [450] promissory note); that proof was duly made of this claim against the plaintiff, in the bankruptcy proceedings; and that among the unliquidated assets reported to the bankruptcy court by the plaintiff was a chose in action against the Glass Company, listed as a claim of De Witt's against the defendant, of unliquidated damages for commissions and breach of contract, in the sum of $940. (The testimony showed that this was the same claim sued upon in the Maryland state court so far as the demand for $800 damages is concerned.) The plea shows that afterwards, on the 26th day of March, 1910, the plaintiff filed a petition in the United States district court, setting out that he had submitted a composition to his creditors whereby they were to accept 20 cents on each dollar of their respective claims in full settlement of their demands against him and his bankrupt estate; further, that a majority in amount of said creditors had agreed to accept the terms of the composition agreement, wherefore he prayed that the same be ratified by the court; that the Glass Company did not agree in writing, pursuant to the provisions of the bankruptcy act, or otherwise, to accept said settlement, but as a majority in amount of said creditors did accept the same, it was ratified by the Federal court, and there was allowed to the defendant the sum of $158.01, as a dividend on its claim of $790.03; that no debit was made against the Glass Company by reason of the alleged claim of De Witt against it for the sum of $940.

Further, "that under and by virtue of the provisions of § 68a of said Federal bankruptcy act it was and became the duty of the referee in bankruptcy and the trustee in bankruptcy representing the bankrupt estate of said De Witt to investigate and determine the existence and validity of any claim asserted by said bankrupt against any creditor filing his claim against said estate; and thereupon to set off the claim of such bankrupt [451] against his said creditor against the claim of said creditor against the said bankrupt, and pay, or demand the payment to the bankrupt estate of, the difference between the accounts thus stated; that as the said referee, trustee, and bankrupt De Witt, the latter the plaintiff herein, did not assert or claim, in said composition account, that any portion of the aforesaid sum of $940 was justly due and owing by this defendant to the then bankrupt estate of the said plaintiff, as claimed by said De Witt in his schedule of assets; that this defendant, being led to believe by the action of the said referee, trustee, and bankrupt in remaining silent and ignoring said bankrupt's alleged claim against this defendant when it was their duty to have spoken and set out the same, if it was found by them or any of them to be due, against said defendant in said composition agreement, did not exercise its right to except to the ratification of said composition account, but suffered said composition account to be finally ratified and confirmed, and unwillingly accepted the settlement of 20 cents on the dollar made according to the tenor of said composition agreement; that this defendant received and accepted its dividend of 20 per cent therefrom in satisfaction of all its claims against said DeWitt, and in exoneration by said De Witt from any and all claims which said De Witt at that time had or claimed to have, and this defendant says that the payment to it by said bankrupt of said dividend, and its acceptance by this defendant, operated as a final settlement and adjustment, in a court of competent jurisdiction, of any and all claims which the parties to this suit then had, or claimed to have, against each other. Wherefore, this defendant says that the alleged cause of action set out in the plaintiff's amended narr. is *res judicata*."

As it was the effect of the judgment of the state court to deny this plea of *res judicata*, it will be necessary to consider somewhat the nature of the proceeding.

[452] Compositions in bankruptcy are provided for by the bankruptcy act of 1898 [30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585]. By § 12 of the act, the bankrupt is permitted to offer a composition after he has been examined in open court or at a meeting of his creditors, and after he has filed in court a schedule of his property and a list of his creditors. Since the amendment of 1910 [36 Stat. at L. 838, chap. 412, Comp. Stat. 1913, § 9586] the offer may be made either before or after adjudication. In order that the composition be effectual, it must be accepted in writing by a majority in number of all the creditors, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay debts having priority, and the cost of proceeding, must be deposited in a place to be designated by, or subject to the order of, the judge. The judge shall confirm the composition if satisfied that it is for the best interests of the creditors, that the bankrupt has not been guilty of any of the acts nor failed to perform any of the duties which would be a bar to his discharge, and that the offer and acceptance are in good faith

and have not been made or procured by the means prohibited in the act. Upon confirmation of the composition, the consideration is distributed as the judge shall direct, and the case dismissed. Whenever the composition is not confirmed, the estate shall be administered as otherwise provided in the bankruptcy act.

Under § 70f of the act, it is provided that, upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him. By § 21g of the act it is also provided that a certified copy of the order of confirmation shall constitute evidence of the revesting of the title, and when recorded, shall impart the same notice that a deed from the trustee to the bankrupt, if recorded, would impart. The order of confirmation becomes in effect a discharge, and is pleaded in bar with like effect. It operates to discharge the bankrupt from all debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. [453] It is thus apparent that, although the composition is provided for by the bankruptcy act, it is in some respects outside of the act, for it is provided that, if the composition is not confirmed, the estate shall be administered in bankruptcy, as in the act provided.

The nature of composition proceedings is nowhere better stated than by Judge Lowell in Re Lane, 125 Fed. 772, 773, in which it is said:

"The case of composition is in some respects exceptional. It is a proceeding voluntary on both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee. The creditors may accept this offer or they may refuse it. For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary. Section 12e (30 Stat. at L. 550, chap. 541, Comp. Stat. 1913, § 9596) provides: 'Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.' Composition is thus treated, even in the act, as in some respects outside of bankruptcy. In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts, and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no bargained release by the creditor. The creditor takes all his debtor's property, whether the debtor likes it or [454] not. The bankrupt's rights of property arise only in the event of a payment of his creditors in full. If a creditor will not prove his claim, the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. Section 66 of the act (30 Stat. at L. 564, chap. 541, Comp. Stat. 1913, § 9650) has the same purpose, and does not apply to composition. But if the composition is paid, the creditors have no further claim upon the debtor or his property. In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more."

The effect of the composition proceeding is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the latter proceeding, and to reinvest the bankrupt with all his property free from the claims of his creditors. True, the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire act. Wilmot v. Mudge, 103 U. S. 217, 26 L. ed. 536. That the restoration of the estate to the bankrupt restores to him his right of action upon choses in action there is no question. Stone v. Jenkins, 176 Mass. 544, 79 Am. St. Rep. 343, 57 N. E. 1002.

With this general view of the nature and effect of composition proceedings, we come to a consideration of § 68a of the bankruptcy act, under which it is claimed the set-off was adjudicated in the bankruptcy court by reason of the proceedings we have already set forth. Section 68a of the bankruptcy act of 1898 provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The object of this provision is to permit, as its terms declare, the statement of the account between the bankrupt and the creditor, with a view to the application of the [455] doctrine of set-off between mutual debts and credits. The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. Black, Bankr. 544; Re Kyte, 182 Fed. 166. The

matter is placed within the control of the bankruptcy court, which exercises its discretion in these cases upon the general principles of equity. Hitchcock v. Rollo, 3 Biss. 276, Fed. Cas. No. 6,535. The section was taken almost literally from § 20 of the act of 1867 [14 Stat. at L. 526, chap. 176]. In Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731, in considering that section of the act of 1867, this court said: "This section was not intended to enlarge the doctrine of set-off or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it." While the operation of this privilege of set-off has the effect to pay one creditor more than another, it is a provision based upon the generally recognized right of mutual debtors, which has been enacted as part of the bankruptcy act, and when relied upon should be enforced by the court. New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

It hence appears that the object of this section was to give the district court the right to apply the established principles of set-off to mutual credits, when its action was invoked for that purpose.

The language of the act indicates the necessity of action by the court, for the statute provides that "the account shall be stated" and the one debt set off against the other, and the balance only allowed to be paid. This statute recognizes the nature of set-off, as established in common law and equitable procedure.

"By the civil law, where there are cross claims between a plaintiff and defendant which are so connected with each other that the establishment of one can legitimately defeat, reduce, or modify the other, the defendant is always entitled to insist that his own claim shall be litigated [456] with that of the plaintiff; that both shall be disposed of by one sentence; and that the plaintiff's recovery shall be limited to what he shall be entitled to, if anything, as the result of adjusting both claims and striking a balance, if necessary, between them; and he does this by bringing a cross action (*reconventio*). Mutual debts do not, indeed, properly constitute cross claims by the civil law, for they extinguish each other *ipso jure*, and the party alone in whose favor the balance is has a claim which can be enforced by action, and his claim is only to the extent of such balance. Therefore a defendant who, at common law, would have recourse to a statutory set-off, would not, by the civil law, bring a cross action, but he would plead payment (*compensatio*). Nor is a defendant who has a genuine cross claim *bound to* assert it by a cross action; he may assert it by a wholly separate and independent action. How, then, does a cross action differ from one which is not a cross action, and which nevertheless is brought by a defendant against a plaintiff? It is conceived that the essential difference is in the judgment. If a defendant wishes to have his own claim and the plaintiff's disposed of by one sentence, in the manner before stated, he brings a cross action. If he wishes to have his own claim disposed of by a separate sentence, and without any reference to the plaintiff's claim, he brings a separate action. In the latter case he may, of course, choose his own time for suing, and his own court, and may prosecute his action slowly or speedily, as he sees fit, and without any reference to the plaintiff's action; but in the former case, as he wishes to have his action and the plaintiff's disposed of together, he must comply with the conditions necessary for that purpose." Langdell, Eq. Pl. § 118.

In the present case, the Glass Company made no attempt to invoke the action of the district court in the bankruptcy proceedings. If it had the right to do so, [457] it did not seek the action of the bankruptcy court to state the account or make the settlement, and we have been unable to find any case, and none is called to our attention, in which it is held that simply because of the bankruptcy proceedings and the filing of the schedule and proofs of debt the set-off is automatically made between parties holding mutual credits. On the other hand, as the section indicates, and so far as we know, all the authorities hold, this section is not self-executing, but its benefit is to be had upon the action of the district court only when it is properly invoked, and that court has the primary duty of determining for itself whether there are "mutual debts or credits" that should be set off one against the other according to the true intent and meaning of the bankruptcy act.

We have no means of knowing what the court would have held had it been asked to order a set-off of the bankrupt's claim for damages against the creditor's claim upon a promissory note. (See Libby v. Hopkins, 104 U. S. 303, 26 L. ed. 769; Re Becker Bros. 139 Fed. 366; Palmer v. Day [1895] 2 Q. B. 618, 64 L. J. Q. B. N. S. 807, 15 Reports, 523, 44 Week. Rep. 14, 2 Manson, 386; and the discussion of the subject in Morgan v. Wordell, 178 Mass. 350, 55 L.R.A. 33, 59 N. E. 1037.) We need not, therefore, inquire what that court would have done had its action been properly invoked, nor whether the Glass Company could have refused the amount of the composition and applied to the district court for an order of set-off, nor what would be the right of

the Glass Company had it refused to take the composition and undertaken to set off its debt when sued in this case. Indeed, the Glass Company in this suit denied and contested the validity of the plaintiff's claim. Nor need we discuss the right of the Glass Company to set off this claim had it tried to do so in the state court.

The question arose in that way in Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572, in which a suit was brought by the trustee in bankruptcy to recover upon a claim in the [458] state court. This was also the situation in Wagner v. Burnham, 224 Pa. 586, 73 Atl. 990. In the English case of West v. Baker, L. R. 1 Exch. Div. 44, 45 L. J. Exch. N. S. 113, 34 L. T. N. S. 102, 24 Week. Rep. 277, the action was brought by one in whom, under a composition proceeding the court had by order vested the estate, such person having furnished the consideration to carry out the composition,—a proceeding authorized by § 81 of the English bankruptcy act of 1869. It was held that in such action the effect of the order was to vest the property of the bankrupt in the plaintiff, subject to the right of set-off as to debts which would have been provable in bankruptcy. No such question arises here, as the plea in this case set up former adjudication in the Federal court, and no attempt was made to plead the right of set-off independently of such plea.

There is lacking in this case the first and most essential element of *res judicata;* namely, former judgment of a competent court, adjudicating the matter in controversy between the parties, yet *res judicata* in the bankruptcy court by the former proceedings was the sole contention of Federal right here put in issue.

As already said, it appears in this plea, that the Glass Company took the amount of the composition, 20 per cent of its full debt, after the composition had been carried by the majority of the creditors, and approved by the court. If, as is now contended, set-off had been automatically worked between these opposing claims, one would substantially have satisfied the other, and the Glass Company would be in no position to claim or receive the dividend that it did receive in the composition. It certainly cannot maintain these inconsistent positions. This point was adjudicated under the former bankruptcy act, which for this purpose is substantially the same as the present one, in the case of Hunt v. Holmes, decided in the district court of Massachusetts (16 Nat. Bankr. Rep. 101, Fed. Cas. No. 6,890), in which the opinion was by Judge [459] Lowell, then district judge. The learned judge ruled that a creditor who took his composition dividend after the composition was finally passed over his objections, making no attempt to have mutual claims adjusted and set off, thereby waived his claim of set-off; there being no evidence that he received the amount under protest or by mistake, or under any other circumstance which would entitle him to a rehearing or readjustment. In Re Ballance, 219 Fed. 537, where a creditor filed a petition to vacate a composition upon the ground of fraud, it was held that the petitioner, after a demurrer to his petition had been overruled, could not take the amount of the composition and also take the chance of proving the allegations of his petition to set aside the composition for fraud, but that he must make election as to which form of relief he would accept, and that he could not take his share of the composition as a partial payment, and proceed to recover upon the unpaid balance of his claim.

So, in this case, although the composition was carried, as the plea avers, against the objection of the Glass Company, it made no attempt to have the set-off adjudicated in the bankruptcy court, made no opposition to the confirmation of the composition, as was its right if it saw fit so to do, and took and holds its proportion of the composition offered, in the same manner as other creditors.

As the only Federal question is presented because of the alleged *res judicata* in the district court, and for the reasons stated that plea was not good, it follows that there is no error of a Federal nature in the judgment of the court of Maryland, and the same is affirmed.

Mr. Chief Justice **White**, with whom concurred Mr. Justice **Hughes**, Mr. Justice **Lamar**, and Mr. Justice **McReynolds**, dissenting:

I am unable to conclude that the plaintiff in error, the [460] Glass Company, was not secured the right by the bankrupt law of the United States to set off a claim held by it against the claim which was sued on by De Witt, the defendant in error, who was plaintiff below. These are the undisputed facts: De Witt, a jobber in glass, thinking that the Glass Company, for the purpose of making the profit itself, had wrongfully induced a person with whom he had a contract for the sale of a lot of glass bottles not to comply with the sale, thereby causing him a loss of a profit of $800, determined not to pay the Glass Company for merchandise which he had bought from it, or to buy from it merchandise and not pay for it, in order thus to be in a position to set off his claim in damages against the purchase price, and thereby make him-

self whole. De Witt was declared an involuntary bankrupt. The Glass Company was stated in the schedules as a creditor on a note for $790.03 which, it is established, was the purchase price of merchandise bought from the company. There was scheduled as an asset of the bankrupt estate an unliquidated claim against the Glass Company for damages, commissions, and breach of contract stated as amounting to $940. De Witt proposed a composition of 20 cents on the dollar which was sanctioned by the requisite vote of creditors, the Glass Company voting in the negative, and the composition, after being approved by the court, was carried out. In doing so De Witt, without liquidating the surrendered claim against the Glass Company for damages, or attempting to have it set off against the claim of that company, paid the 20 per cent upon the face value of the claim. Thereupon, deeming that by the composition he had been reinvested with full ownership of the claim for damages, De Witt brought this suit against the Glass Company to liquidate and enforce the same. The suit originally included an alleged sum for commissions, etc., but the demand was reduced before judgment to the asserted right to liquidate and recover the damages [461] alleged to have been occasioned by the cause previously stated. And it is to the judgment of the court below, allowing the amount of damages claimed against the company without any deduction whatever for the contract price of the goods admitted to be due in the bankruptcy proceedings, that this writ of error is prosecuted.

I am admonished that it may be that my view is obscured by what seems to me the wrongful result which the judgment below accomplishes; that is, allowing De Witt, as a result of the bankruptcy, to hold on to and enforce as against the Glass Company his surrendered claim for damages while at the same time treating the bankruptcy as having relieved him of the duty of paying for the goods bought; that is to say, not confining him to doing that which he contemplated when he refused to pay for the goods, to set off his alleged claim for damages against the price, but permitting him to obtain the goods of the company practically without paying for them, and at the same time to recover the full amount of his damage claim.

The views which control my judgment in the case are covered by two general propositions which I state separately.

(a) *Did the bankrupt law confer upon the Glass Company the right to have the scheduled claim against it for damages when liquidated set off against the debt which it proved for the price of the goods by it sold?* That the comprehensive provisions of §§ 68a and b of the bankrupt law relating to set-offs and counterclaims are coincident with the scope of the act, and therefore give the power to the bankruptcy court to determine whether or not the right of set-off exists as between all and any claims required to be surrendered as assets of the estate, on the one hand, and all debts proved against the estate, on the other, is, I submit, self-evident; for to hold to the contrary would deprive the bankruptcy court of authority to exert its powers over matters to which its jurisdiction in the nature of things [462] must extend. It is equally indisputable, as long since settled by this court, that in exerting its powers when occasion requires it as between all or any of the items of the active or passive side of the bankrupt estate, it is the duty of the court of bankruptcy not merely to determine the right of set-off by strict common-law principles, but to govern the subject by the broad doctrines of set-off as administered by courts of equity. Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731. It is also clear that in order to additionally accomplish the public purposes just stated, the bankrupt act in some respects narrows the operation of set-off, since it prevents it from automatically operating by subjecting it in every case to judicial control. Under these principles there is no reason for doubting that the proved claim of the Glass Company against the bankrupt estate was subject under the law to be set off against the scheduled claim held by the estate against the Glass Company whether the latter claim was so liquidated as to enable the set-off to be made, and that the duty of accomplishing this essential result by the terms of the statute primarily rested upon the bankruptcy court. I say the terms of the statute, since it in express words commands that the set-off for which it provides shall be accomplished, to the end that a distribution shall be made not upon the original claims, but upon the balances resulting from carrying out the commands of the statute as to set-off. This being true, the question at once arises:

(b) *Was the effect of the composition to prevent the set-off, or to relieve of the duty concerning it expressly commanded by the statute?*

The only theory upon which this question can be answered in the affirmative must be the conception that a composition completely terminates bankruptcy, and that therefore whatever rights or duties arose from the bankrupt law which were not fully executed when the composition took place passed out of existence, and therefore the [463] rights granted by the composition

have no ancestral relation to the prior bankruptcy proceedings. But to say this is to misconceive the nature of composition proceedings, which, as this court has long since pointed out, are but a part of bankruptcy, and a means not for destroying the express command of the bankrupt law, but for giving effect to its provisions and rendering them more efficacious for accomplishing the just ends which they have in view. Wilmot v. Mudge, 103 U. S. 217, 26 L. ed. 536. This being true, what is the situation? The bankrupt estate had a scheduled claim against the Glass Company which was unliquidated, and the Glass Company had a proved claim against the estate which was liquidated. The bankrupt proposed by composition to have the assets turned over to him on paying a percentage on the claims due by the estate. By the very terms of the bankrupt act the duty was to set off the one against the other so that only the balance between them would be due on the one side or the other. But, as the claim held by the estate was unliquidated, and this could not be done without liquidation, it follows either that the acceptance of the composition and turning over the estate without liquidation was an abandonment of the unliquidated claim, or that it was transferred to the bankrupt subject to the duty to set off whenever, as a result of a liquidation following the composition, the condition arose which made it possible to obey the express command of the statute. One or the other of these conclusions, I submit, is absolutely required by the plain terms of the statute unless it is to be recognized that the bankrupt law provides that a bankrupt may discharge himself by bankruptcy from all that he owes one of his creditors, and yet, by operation of that statute, retain and after the bankruptcy enforce in his own right all the claims he had against such creditor. But the subject does not depend for its solution upon original reasoning, since it is well demonstrated by authority.

[464] Certain is it that the provisions as to composition which were first enacted by Congress in 1874 (§ 17, chap. 390, 18 Stat. at L. 182) as an amendment to the existing bankruptcy act were in substance taken from the English bankrupt act of 1869. Re Scott, 15 Nat. Bankr. Reg. 73, Fed. Cas. No. 12,519.

In West v. Baker, L. R. 1 Exch. Div. 44, the facts were these: West was adjudicated a bankrupt and a composition was accepted by his creditors and the bankruptcy was annulled. Under a provision of the bankrupt act on the approval of the composition the property was turned over to a trustee, presumably for his security, as he had advanced the sum necessary to enable the bankrupt to pay to his creditors the amount offered in composition. This trustee, then, in the name of the bankrupt, sued one Baker to recover an amount claimed to be due from Baker for work and labor done for him by West before the bankruptcy. By way of defense it was pleaded that before the adjudication in bankruptcy West was indebted to Baker for debts and damages which were provable in bankruptcy against the bankrupt estate, and which could have been set off in bankruptcy against the claim of West, and therefore the defendant, Baker, was entitled as a defense to the suit to set off his claim against the one which the trustee, in the name of West, sought in the suit to enforce. A demurrer to the plea was overruled, the views of the court being stated as follows:

"Kelly, C. B. . . . The whole estate of the bankrupt was undisposed of; and the court has power, under the 81st section, in the case of an adjudication being annulled, to order that the property of the debtor shall vest in such person as the court may appoint, or, in default of such appointment, revert to the bankrupt. This latter has not been done; but the court has transferred the whole estate of the bankrupt to the plaintiff, no doubt, in consideration of the plaintiff having guaranteed a dividend of 7s. 6d. in the pound. Does this transfer [465] entitle the plaintiff to recover debts freed from the right of the debtor to set off such claims as the present? I think not; because in bankruptcy the debtor could have set off this very claim; and if the court has transferred to the plaintiff all the authority itself had, that was to sue the defendant subject to the right to set off not only any specific sum, but any claim to unliquidated damages provable under bankruptcy. If this were otherwise, much injustice would be done. I apprehend the substance of the clauses of the act is, that what passed to the plaintiff was a right to receive debts, but subject to the right to set off counterclaims whether of specific sums or of unliquidated damages provable in bankruptcy.

"Cleasby, B. . . . The question is whether the effect of the 28th section was to alter the status of the defendant because of the substitution of a scheme of settlement for the bankruptcy. On looking at the section the effect appears to be that, instead of the trustee dealing with the estate, the creditors shall be at liberty to accept a composition. This, though accompanied by the annulling of the bankruptcy, does not take the matter out of the bankruptcy court, so as to prevent the general rules of bankruptcy applying, or alter the

position of the parties except so far as it may be altered by the agreement they have come to to take the composition instead of the estate. By § 28 the provisions of a composition or general scheme made in pursuance of the act may be enforced by the court in a summary manner, and are to be binding on all the creditors so far as relates to any debts due to them and provable under the bankruptcy act. That clearly shows that the bankruptcy court still retains the scheme under its control, and therefore it is subject to the ordinary rules of that court as to set-off."

In Ex parte Howard Nat. Bank, 2 Low. Dec. 487, Fed. Cas. No. 6,764, without going into detail, the case was this: There was a bankruptcy and a composition. [466] After the composition the bankrupt sought to enforce a claim which had passed to him in virtue of the composition, and was confronted with an alleged right to set-off as against such claim on his part, a claim against him which had been in the bankruptcy a claim against the estate. The court under these conditions, in upholding the right to set-off, directed attention to the provisions of the bankrupt law on the subject, and to its command that only the balance should be paid, and the inherent relation which that requirement of the act created between the claims scheduled in the bankruptcy, on the the one hand, and proved, on the other, and the character which was affixed to them for the purpose of set-off even after a composition had been ordered. The court said:

"I have treated this as a case between an assignee and a creditor, because the bankrupt in a composition case stands, as to set-off, in the position of an assignee, if none has been appointed."

In other words, treating the allowance of the composition as having, so to speak, irrevocably stereotyped the rights of the parties in conformity with the bankrupt law, and to the end that its purposes might be carried out, the bankrupt holding under the composition was treated for such purposes as but an assignee in bankruptcy, and therefore, so far as set-off was concerned, as having no greater right under the composition than existed in the bankruptcy in favor of the estate at the time the composition was made.

These cases, as well as the principles upon which they rest, clearly make manifest the fact that it was not only within the power, but it was the duty, of the court below, as an inevitable result of the liquidation of the claim against the Glass Company which it made, to treat the set-off as accomplished, since that result was necessary to give vitality to the order of composition and to secure the right of set-off which inhered in the nature of the title given by the bankruptcy court to the bankrupt as the [467] result of the composition. From this conclusion it necessarily follows that the duty to enforce the set-off integrally inhered in the order and judgment which sanctioned the composition, since otherwise the order would have embodied within itself a refusal to obey and give effect to the express command of the bankrupt law as to the nature and character of what could be transferred under the composition. And this consequence is obvious when it is borne in mind that the result of the composition was to recognize and fix the right of set-off although not denying the power to liquidate as a means of carrying out the established right of set-off. This being true, it is also true that the moment the court below liquidated the claim, in and by virtue of the order of composition the duty arose to give effect to the right of set-off established by the order of composition in conformity with the express command of the bankrupt law. And this fully answers the suggestion that as the right to the set-off was not asserted *eo nomine*, but the decree in composition was pleaded as *res judicata*, therefore there was no denial of the right of set-off even if secured as the result of the composition. Certainly it must be that the plea of the decree in composition as *res judicata* was a plea advancing the right which that decree necessarily secured.

This, in my judgment, leaves it necessary only to consider the assertion that even although the right was secured by the bankrupt law, and even although that right was preserved by the composition, and inhered in the very nature of the title which the composition passed, it nevertheless does not here exist because of what was done at the time the composition was adopted. This rests upon the theory that as the Glass Company took the dividend upon its claim, and did not insist upon a liquidation of the claim in damages held by the bankrupt estate, it therefore waived any right to future set-off concerning said claim. I must confess I find difficulty [468] in precisely grasping the proposition. The Glass Company disputed the claim in damages, and the duty of liquidation was on the bankrupt or the bankrupt estate, but not on the Glass Company, and if waiver or estoppel was the result of what was done, the waiver was not as to the right of the Glass Company, but as to the claim for damages, and against the estate which held it. Indeed, the tender to the Glass Company of the full percentage due on its claim without liquidating the claim for damages against it so as to accomplish a set-off, if waiver is to control, was a waiver by the bankrupt of a right

to liquidate and assert his claim in the future. The proposition otherwise stated is this: If the composition is to be considered as having irrevocably excluded the right to set-off, then, of course, the consequences of the failure to ask for it must fall upon the one holding the unliquidated claim, and not be cast upon the one who had no duty or concern with that subject until the liquidation was accomplished; especially in view of the payment made of the percentage upon the amount proved,—a payment which was only consistent with the theory that the unliquidated claim was abandoned. If, on the other hand, it be considered in consonance with the principles and authorities to which I have referred that the composition did not terminate the bankruptcy, but that a liquidation for the purpose of set-off could thereafter be accomplished, then it clearly follows that the effect of the bankruptcy and of the judgment of composition was to fix and secure that right, and it cannot be held, consistently with the statute, that the composition proceedings taken conformably with the statute were a waiver of the right which those proceedings inevitably secured and made effective.

For these reasons I dissent, and am authorized to say that Mr. Justice **Hughes**, Mr. Justice **Lamar**, and Mr. Justice **McReynolds** concur in this dissent.

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[469] M. V. B. PARKER, Plff. in Err.,

v.

JULIA A. McLAIN, Executrix of the Estate of Carey McLain, Deceased.

(See S. C. Reporter's ed. 469–474.)

Error to state court — Federal question — local law or practice.

1. Whether, by consenting to the revivor of an action in the name of plaintiff's executrix, and thus recognizing the latter as the real party in interest, the defendant was estopped from subsequently challenging her capacity to maintain the action, was purely a question of local law or practice, the decision of which by a state court may not be reviewed by the Federal Supreme Court.

[For other cases, see Appeal and Error, 1529–1644, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

2. The objection that a decree of a court of another state was not proved, conformably to U. S. Rev. Stat. § 905, Comp. Stat. 1913, § 1519, because the authenticated record produced in evidence did not contain all the pleadings and proceedings in the suit, but only the decree, with its recitals and findings, is so clearly lacking in merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a state court,—especially where the recitals and findings were so full and explicit and the terms of the decree so direct that nothing more was required to disclose its full purpose, or what was determined by it.

[For other cases, see Appeal and Error, 1110–1137; Evidence, IV. k, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

3. A Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a state court.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

[No. 220.]

Submitted April 14, 1915. Decided May 10, 1915.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which reversed, with a direction to enter judgment for the plaintiff, a judgment of the District Court of Johnson County, in that state, in favor of defendant in an action upon a foreign judgment. Dismissed for want of jurisdiction.

See same case below, 88 Kan. 717, 129 Pac. 1140; on rehearing, 88 Kan. 873, 131 Pac. 153.

The facts are stated in the opinion.

Messrs. **Edward P. Garnett** and **Isaac B. Pickering** submitted the cause for plaintiff in error:

A decree may be something more than a judgment for a sum certain. The very essence of equity is that it may, while requiring the one party to pay money, require, as a condition, that the other party do certain things.

Bispham, Eq. p. 9; Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to questions of local practice and procedure on writ of error from the Federal Supreme Court—see note to Texas & N. O. R. Co. v. Miller, 55 L. ed. U. S. 790.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

The decree of the Missouri court was upon condition to be performed by the plaintiff.

McLain v. Parker, 88 Kan. 720, 129 Pac. 1140.

Only such faith and credit is due to the judicial proceedings of another state in the courts of Kansas as they would receive in the courts of the state where rendered.

L'Engle v. Gates, 74 Fed. 513; Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; First Nat. Bank v. Cunningham, 48 Fed. 510; Warrington v. Ball, 33 C. C. A. 609, 62 U. S. App. 413, 90 Fed. 464; Chicago, R. I. & P. R. Co. v. Campbell, 5 Kan. App. 423, 49 Pac. 321.

A suit at law in one state may be maintained upon a decree in equity of another state, provided the decree in the latter state directs the payment of a fixed and certain sum of money, absolutely and beyond peradventure.

Pennington v. Gibson, 16 How. 65, 14 L. ed. 847.

But an action at law in one state, predicated upon a decree in equity in another state, cannot be sustained on a decree for the performance of acts other than the payment of money.

Warren v. McCarthy, 25 Ill. 95.

In order to sustain an action of debt upon a judgment of a sister state, the obligation must result from the record itself and must be shown by the record, without requiring any averments of additional matter.

Dimick v. Brooks, 21 Vt. 569.

All of the equities remained to be adjusted in the Missouri court where the decree was rendered. That court alone could control the *rem*. It alone could deliver the deeds, and until the exchange of the deeds for the money is completed, the case is still pending in that court. The Kansas court acquired, and could acquire, no jurisdiction in the matter.

Hall v. Ames, 111 C. C. A. 178, 190 Fed. 143; Mount City Co. v. Castleman, 110 C. C. A. 55, 187 Fed. 924.

The question of jurisdiction can be raised at any time; and if shown that the court assuming to act was without jurisdiction, either of the person or of the subject-matter, such acts are a nullity.

23 Cyc. 1563.

The error of which we complain in this court is that the supreme court of Kansas held that the mere fact that it was decided in the highest court of Missouri that it had jurisdiction of the subject-matter was, in itself, conclusive and binding on the courts of Kansas.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897.

The Kansas executrix had no legal capacity to maintain the action.

Reynolds v. Quaely, 18 Kan. 361.

The payment of the judgment sued on to the Kansas executrix would be no defense to an action on the same judgment by one whose title to the judgment was exclusive and adverse to the domiciliary administrator.

1 Woerner, Am. Law of Administration, § 158; 2 Black, Judgm. 563; McLean v. Meek, 18 How. 16, 15 L. ed. 277; Low v. Burrows, 12 Cal. 188; Brown v. Fletcher, 146 Mich. 401, 15 L.R.A.(N.S.) 632, 123 Am. St. Rep. 233, 109 N. W. 686; Braithwaite v. Harvey, 14 Mont. 208, 27 L.R.A. 101, 43 Am. St. Rep. 625, 36 Pac. 38; Ela v. Edwards, 13 Allen, 48, 90 Am. Dec. 174; Low v. Bartlett, 8 Allen, 259; 18 Cyc. 1228, 1229.

Mr. W. R. Thurmond submitted the cause for defendant in error:

There is no Federal question involved in this appeal.

Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555.

The supreme court of Kansas having decided in favor of the full faith and credit claimed for the Missouri judgment under the Constitution and laws of the United States, its judgment cannot be reviewed by this court on writ of error.

Ibid.

The Federal question attempted to be raised comes too late, being presented for the first time on motion for rehearing in the state supreme court.

Capitol Nat. Bank v. First Nat. Bank, 172 U. S. 426, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Kansas City Star Co. v. Julian, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406.

In every instance in which an action of debt can be maintained upon a judgment at law for the sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more.

Pennington v. Gibson, 16 How. 65, 14 L. ed. 847.

All other points made by the plaintiff in error relate to questions arising under the laws of the states of Missouri and Kansas, and are decided (and manifestly correctly decided) by the highest courts of those states (McLain v. Parker, 229 Mo. 68, 129 S. W. 500, 88 Kan. 717, 873, 129 Pac. 940, 131 Pac. 153), whose decisions on such

points are not subject to review by this court.

Missouri ex rel. Hill v. Dockery, 63 L.R.A. 572 note.

[470] Mr. Justice Van Devanter delivered the opinion of the court:

In a suit in the circuit court of Jackson county, Missouri, wherein the court had jurisdiction of the parties and the subject-matter, Carey McLain secured a decree against M. V. B. Parker for a considerable sum of money. The suit was brought and the decree rendered upon the theory that Parker had fraudulently induced McLain to join him in the purchase of certain property; that by falsely overstating the value of the property, the price at which it was being purchased, and the amount he was contributing to the price, Parker had secured from McLain several sums as the latter's share of the purchase money when in truth these sums greatly exceeded his share, and that in consequence McLain was entitled to surrender his interest in the property to Parker, and call upon him to refund what was paid to him. Before beginning the suit McLain executed and tendered to Parker appropriate deeds for the property, and when the suit was begun the deeds were brought into court and lodged with the clerk, to be disposed of by the decree when rendered. Following a recital of these matters and a finding that McLain had been damaged to the extent of his payments to Parker, the decree ordered that the former have and recover from the latter the amounts paid,—each being definitely stated,—with interest at 6 per cent per annum from the date of the decree, and directed that upon the satisfaction of the decree the deeds lodged with the clerk be delivered by him to Parker. The latter carried the case to the supreme court of Missouri, which affirmed the decree, and in doing so pointed out the nature of the suit in these words (229 Mo. 58, 87, 93, 129 S. W. 500): "Plaintiff, whilst charging fraud and deceit in the petition, and having the right to sue for damages without rescinding the contract, has taken the precaution in this, as in other counts, to [471] make a tender of such instruments as would place the defendant *in statu quo*. . . . The gist of these several counts is fraud and deceit, and money paid out to defendant in consequence thereof, and the prayer of the petition is to recover the money so obtained, with interest thereon. The judgment responds to the petition, its prayer, and the proof."

After securing that decree, McLain brought an action thereon in the district court of Johnson county, Kansas, and during the pendency of the action died, leaving a will. The will was duly probated in Kansas, the state of his residence, and letters testamentary were issued in that state whereby his widow became his executrix. An ancillary administrator was also appointed by the probate court of Jackson county, Missouri. Thereafter the action in Kansas was revived in the name of the executrix, with the defendant's express consent, and in regular course a trial was had at which all questions of fact and law were resolved in the plaintiff's favor, save that it was held that the real party in interest was not the executrix, but the Missouri administrator, and that the action ought not to have been revived in the name of the executrix. Judgment was rendered for the defendant, and upon appeal to the supreme court of Kansas was reversed, with a direction to enter judgment for the plaintiff. 88 Kan. 717, 129 Pac. 1140, 88 Kan. 873, 131 Pac. 153. The present writ of error was then sued out by the defendant.

Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision. Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214]. And to be effective for this purpose, the assertion of a Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of this court invoked merely [472] for purposes of delay. Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 871, 18 Sup. Ct. Rep. 435; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691; Sawyer v. Piper, 189 U. S. 154, 156, 47 L. ed. 757, 758, 23 Sup. Ct. Rep. 633.

The contentions advanced by the defendant in the supreme court of Kansas upon which the jurisdiction of this court is sought to be rested are (a) that under the law of Missouri, where the decree sued on was rendered, the administrator appointed in that state was the real party in interest, and therefore the executrix was without legal capacity to maintain the action; (b) that the decree was not proved conformably to the law of Congress (Rev. Stat. § 905, Comp. Stat. 1913, § 1519), because, as was objected when the proof was offered, the authenticated record produced in evidence did not contain all the pleadings and proceedings in the suit, but only the decree, with its recitals and findings; and (c) that

by the terms of the decree the payment of the money by the defendant, and the execution and delivery of the deeds by McLain, were intended to be reciprocal, interdependent, and concurrent acts, and that to make the decree the basis of a judgment in Kansas against the defendant for the payment of the money without requiring performance of the reciprocal obligation imposed upon McLain would contravene the full faith and credit clause of the Federal Constitution (art. 4, § 1) and the law enacted thereunder by Congress (Rev. Stat. § 905), and would deprive the defendant of the due process of law and the equal protection of the laws secured by the 14th Amendment.

The first contention was overruled because, as was said in the opinion, "the defendant explicitly consented to the revivor in the name of the executrix, and in view of that fact cannot be heard to question her capacity to maintain the action." Whether by consenting to the revivor, and thus recognizing the executrix as the real party in interest (see Gen. Stat. [Kan.] § 6023), the defendant [473] was estopped from subsequently challenging her capacity to maintain the action, was purely a question of local law or practice, and its decision by the supreme court of the state is controlling.

The next contention was wholly without any support, and was so held by the supreme court of the state. There is nothing in the full faith and credit clause of the Constitution or in the statute enacted thereunder which requires that the authenticated proof of a decree shall include all the pleadings and proceedings in the suit, or which attempts to specify what parts of the proceedings in a state court shall be included in making up the record in an adjudicated cause. While there may be instances in which a decree or judgment could not well be understood, or would not clearly show what was determined, unless read in connection with the pleadings or other proceedings, this was not such an instance. The recitals and findings were so full and explicit, and the terms of the decree so direct, that nothing more was required to disclose its full purpose or what was determined by it.

The remaining contention was equally without color, because it rested upon an obviously false assumption. The decree did not purport to lay any reciprocal duty or obligation upon McLain, but, on the contrary, proceeded upon the theory that he had done all that could be required of him. This was recognized by the supreme court of Kansas, which said in its opinion (pp. 720, 721): "He was given an absolute and unconditional judgment for the recovery of a specific sum of money. . . . Its enforcement was not made to depend upon any act to be subsequently performed. When it was paid or satisfied the defendant was entitled to receive the deeds from the clerk." And again, p. 874. "If collection is made here it must be presumed that the defendant, upon showing that fact to the Missouri court, can obtain his deeds, just as he might do if the judgment had been satisfied in any [474] other manner, and just as he might procure a discharge of any judgment against him, the amount of which had been collected by suit thereon in another state."

What has been said sufficiently discloses that the Federal questions raised in the case were so plainly devoid of merit as to afford no basis for a review in this court.

Writ of error dismissed.

STATE OF GEORGIA, Complainant,
v.
TENNESSEE COPPER COMPANY and the Ducktown Sulphur, Copper, & Iron Company, Limited.

(See S. C. Reporter's ed. 474-478.)

Injunction — against pollution of air — suit by state — form of decree.

Form of decree outlined which the court thinks will afford adequate relief to the state of Georgia against the discharge of sulphurous fumes from copper smelters in Tennessee in such quantities as are destructive to vegetation in Georgia.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 1, Original.]

Argued April 6 and 7, 1915. Decided May 10, 1915.

ON MOTION to enter a final decree in an original suit in equity by the state of Georgia to enjoin the discharge of noxious gases from copper smelters in Tennessee so as to injure vegetation in Georgia. Form of decree outlined.

The facts are stated in the opinion.

Messrs. **Warren Grice** and **J. A. Drake** argued the cause, and, with Mr. Lamar Hill, filed a brief for complainant.

Mr. Thomas S. Felder, Attorney General of Georgia, also filed a brief for complainant.

Messrs. **W. B. Miller** and **J. A. Fowler** argued the cause and filed a brief for the Ducktown Sulphur, Copper, & Iron Company:

The evidence falls far short of making out a case for an injunctive decree under

the rule laid down on the first hearing and under the general rules of law relating to the abatement of public nuisances.

Missouri v. Illinois, 200 U. S. 521, 50 L. ed. 579, 26 Sup. Ct. Rep. 268; High, Inj. § 760; Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 1; Mississippi & M. R. Co. v. Ward, 2 Black, 485-495, 17 L. ed. 311-315.

Having entered into a stipulation with the Tennessee Copper Company whereby it is permitted to float smoke over its domain, and having made a similar offer to this defendant, plaintiff is not now entitled to any injunctive decree against this defendant.

29 Cyc. 1252; Ballentine v. Webb, 84 Mich. 46, 13 L.R.A. 321, 47 N. W. 485.

In actions brought to enjoin the maintenance of a nuisance, if defendant ceases to maintain the nuisance at any time while the case is within the jurisdiction of the court, and it is apparent that its resumption is not intended by the defendant, a decree of injunction will be denied.

1 High, Inj. 4th ed. § 572; Trulock v. Merte, 72 Iowa, 513, 34 N. W. 307; Perry v. Howe Co-op. Creamery Co. 125 Iowa, 417, 101 N. W. 150; McCarthy v. Gaston Ridge Mill & Min. Co. 144 Cal. 546, 78 Pac. 7; King v. Morris & E. R. Co. 18 N. J. Eq. 399; Arizona Copper Co. v. Gillespie, 230 U. S. 46, 55, 57, 57 L. ed. 1384, 1388, 1389, 33 Sup. Ct. Rep. 1004.

Mr. Justice McReynolds delivered the opinion of the court:

Both defendants are smelting copper ores in Polk county, East Tennessee, near the Georgia line. The works of the Tennessee Company, much the larger of the two, are situated within half a mile of the line; those of the Ducktown Company are some 2½ miles away. The ores contain a very large amount of sulphur,—around 20 per cent,—and in the process of smelting great quantities of sulphur dioxid are formed; if allowed to escape into the air this becomes sulphurous acid, a poisonous gas destructive of plant life.

In October, 1905, the state of Georgia began this original proceeding, alleging that defendants permitted discharge from their works of noxious gases which, being carried by air currents, ultimately settled upon its territory and destroyed the vegetation, and asking for appropriate relief. The case was heard on the merits and the issues determined in complainant's favor, May, 1907. We then said: "If the state of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making, to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next." 206 U. S. 230, 239, 51 L. ed. 1038, 1045, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488.

Hope was entertained that some practical method of subduing the noxious fumes could be devised, and by consent the time for entering a final decree was enlarged. Both companies installed purifying devices. The Tennessee Company and the state finally entered into a stipulation [476] whereby the former undertook annually to supply a fund to compensate those injured by fumes from its works, to conduct its plant subject to inspection in specified ways, and between April 10th and October 1st not to "operate more green ore furnaces than it finds necessary to permit of operating its sulphuric acid plant at its normal full capacity." The state agreed to refrain from asking an injunction prior to October, 1916, if the stipulation was fully observed. The Ducktown Company and the state were unable to agree, and in February, 1914, the latter moved for a decree according a perpetual injunction. Consideration of the matter was postponed upon representation that conditions had materially changed since 1907, and leave was granted to present additional testimony "to relate solely to the changed conditions, if any, which may have arisen since the case was here decided." A mass of conflicting evidence has been submitted for our consideration.

The Ducktown Company has spent large sums—$600,000 and more—since the former opinion in constructing purifying works (acid plant); and a much smaller proportion of the sulphur contained in the ores now escapes into the air as sulphur dioxid,—possibly only 41½ per cent as against 85½ per cent under former conditions. Similar improvements have been installed by the Tennessee Company at great expense, but we are without adequate information concerning the effect produced by them. As it asked and was granted opportunity to show material changes the burden is upon the Ducktown Company. A full and complete disclosure of the improvements installed by it and the results continuously obtained has not been presented.

Counsel maintain that escaping sulphur fumes now produce no substantial damage in Georgia, and further, that if any such damage is being done, the Tennessee Company alone is responsible therefor. We think the [477] proof fails to support either branch of the defense, and the state should have a decree adequate to diminish materially the present probability of damage to its citizens.

The evidence does not disclose with accuracy the volume or true character of the fumes which are being given off daily from the works of either company. Averages may not be relied on with confidence, since improper operation for a single week or day might destroy vegetation over a large area, while the emission of great quantities of fumes during a short period would affect but slightly the average for a month or year.

It appears that in 1913 the total ores smelted by the Ducktown Company amounted to 152,249 tons, or 304,498,000 pounds,—20 per cent sulphur; total matte shipped was 12,537,000 pounds,—about 4 per cent of the ore; the total sulphur in the smelted ores not accounted for, and which escaped into the air in the form of sulphur dioxid, was 13,102 tons, or 26,204,000 pounds,—over 2 pounds of sulphur for each pound of matte, and an average of more than 35 tons per day.

During July, 1913, the total matte shipped (approximately the production) was 846,000 pounds—more was shipped in June and less in August. The July production was thus approximately 7 per cent of the year's total. The sulphur in the fumes generated in connection with the production for this month, not redeemed by the acid plant and emitted into the air, may be fairly estimated as not less than 7 per cent of 13,102, or 917 tons,—substantially 30 tons per day. This amount produced harmful results and must be diminished.

It is impossible from the record to ascertain with certainty the reduction in the sulphur content of emitted gases necessary to render the territory of Georgia immune from injury therefrom; but adequate relief, we are disposed to think, will follow a decree restraining the Ducktown [478] Company from continuing to operate its plant otherwise than upon the terms and conditions following: (1) It shall keep daily records showing fully and in detail the course and result of the operations. (2) A competent inspector, to be appointed by this court, shall have access to all the books and records of the company, shall make frequent careful observations of the conditions—at least once each fortnight—during the next six months, and at the end of that time shall make full report with appropriate recommendations. An adequate sum to cover the necessary cost and expenses must be deposited with the clerk by the company. (3) It shall not permit the escape into the air of fumes carrying more than 45 per cent of the sulphur contained in the green ore subjected to smelting. (4) It shall not permit escape into the air of gases the total sulphur content of which shall exceed 20 tons during one day from April 10th to October 1st of each year, or exceed 40 tons in one day during any other season.

The cause will be retained for further action and either party may apply hereafter for appropriate relief.

Within ten days either side may present a decree in conformity herewith, together with such suggestions as seem desirable.

Mr. Justice Hughes, dissenting:

I do not think that the evidence justifies the decree limiting production as stated.

The Chief Justice and Mr. Justice Holmes join in this dissent.

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[479] WILLIAM P. HEALY and the Healy Box Corporation,[1] Appts.,
v.
SEA GULL SPECIALTY COMPANY.

(See S. C. Reporter's ed. 479–481.)

Federal courts — jurisdiction — patent suit.

A suit in which the bill alleges the infringement of letters patent, and prays for an injunction and for an account of profits, and for triple damages, is none the less one arising under the patent laws, of which the Federal courts have original jurisdiction without regard to the citizenship of the parties, because complainant, anticipating a defense, sets out a license contract as fixing the mode of estimating the damages, and asks for a return of the patented machines leased to the defendant while the license was in force.

[For other cases, see Courts, 553–569, in Digest Sup. Ct. 1908.]

[No. 253.]

Argued and submitted May 3, 1915. Decided May 17, 1915.

APPEAL from the District Court of the United States for the Eastern District of Louisiana to review a decree dismissing the bill in a patent suit. Reversed.

The facts are stated in the opinion.

Messrs. Charles Rosen and Henry B. Gayley submitted the cause for appellants:

The suit is a case arising under the patent laws, and the United States district court had exclusive jurisdiction.

1 Foster, Fed. Pr. 4th ed. § 17e, p. 140; The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 Sup. Ct. Rep. 410; Victor Talking Mach. Co. v. The

[1] Bankruptcy of Healy Box Corporation suggested, and Theodore Friend Humphrey, trustee, substituted May 3, 1915, as party appellant herein.

Fair, 61 C. C. A. 58, 123 Fed. 425; Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364; Wooster v. Crane, 77 C. C. A. 211, 147 Fed. 516; Littlefield v. Perry, 21 Wall. 205, 222, 22 L. ed. 577, 579.

The United States district court had jurisdiction notwithstanding the averments in the bill of complaint or answer as to the former agreement of license.

White v. Rankin, 144 U. S. 628, 636, 36 L. ed. 569, 572, 12 Sup. Ct. Rep. 768; Elgin Wind Power & Pump Co. v. Nichols, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 217; Atherton Mach. Co. v. Atwood-Morrison Co. 43 C. C. A. 72, 102 Fed. 949; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 294, 46 L. ed. 910, 916, 22 Sup. Ct. Rep. 681; Hammacher v. Wilson, 26 Fed. 239; Platt v. Fire-Extinguisher Mfg. Co. 8 C. C. A. 357, 17 U. S. App. 452, 59 Fed. 897; Foster Hose Supporter Co. v. Taylor, 106 C. C. A. 467, 184 Fed. 71; Everett v. Haulenbeek, 68 Fed. 911; Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co. 61 Fed. 256; Pacific Contracting Co. v. Union Paving & Contracting Co. 80 Fed. 737; 1 Hopkins, Patents, 1911 ed. § 515, pp. 760–765; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; Seibert Cylinder Oil-Cup Co. v. Manning, 32 Fed. 625.

Before the court could dismiss the bill for lack of jurisdiction it should have found that there was a subsisting valid license between the parties; and until the court so found, the doctrine of Hartell v. Tilghman could not apply.

Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; White v. Rankin, 144 U. S. 628, 636, 36 L. ed. 569, 572, 12 Sup. Ct. Rep. 768; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Atherton Mach. Co. v. Atwood-Morrison Co. 43 C. C. A. 72, 102 Fed. 949; Everett v. Haulenbeek, 68 Fed. 911; Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co. 61 Fed. 256; Pacific Contracting Co. v. Union Paving & Contracting Co. 80 Fed. 737.

Mr. Randolph Barton, Jr., argued the cause, and, with Mr. James E. Zunts, filed a brief for appellee:

The suit is not a case arising under the patent laws, and therefore the United States district court had no jurisdiction.

11 Cyc. 845, 855; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 47, 31 L. ed. 684, 8 Sup. Ct. Rep. 756; Elgin Wind Power & Pump Co. v. Nichols, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 215; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; 1 Foster, Fed. Pr. 4th ed. p. 140; Foster Hose Supporter Co. v. Taylor, 106 C. C. A. 467, 184 Fed. 71; Hammacher v. Wilson, 26 Fed. 239; Hartell v. Tilghman, 99 U. S. 553, 25 L. ed. 359; Henry v. A. B. Dick Co. 224 U. S. 15, 56 L. ed. 651, 32 Sup. Ct. Rep. 364; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Kempe v. Kennedy, 5 Cranch, 173, 3 L. ed. 70; Marsh v. Nichols, S. & Co. 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798; Philp v. Nock, 17 Wall. 460, 21 L. ed. 679; Platt v. Fire-Extinguisher Mfg. Co. 8 C. C. A. 357, 17 U. S. App. 452, 59 Fed. 897; Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; The Fair v. Kohler Die & Specialty Co. 228 U. S. 25, 57 L. ed. 717, 33 Sup. Ct. Rep. 410; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; Walker, Patents, 4th ed. p. 328; White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768; Wilson v. Sandford, 10 How. 99, 13 L. ed. 344; Wooster v. Crane, 77 C. C. A. 211, 147 Fed. 515.

The defendant having admittedly held a license, it could not be treated as an infringer until the license was revoked by court decree; and a suit for revocation involves no question of patent law.

American Graphophone Co. v. Victor Talking Mach. Co. 188 Fed. 431; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 290, 46 L. ed. 915, 22 Sup. Ct. Rep. 681; Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; Hanifen v. Lupton, 95 Fed. 465; Henry v. A. B. Dick Co. 224 U. S. 15, 56 L. ed. 651, 32 Sup. Ct. Rep. 364; Standard Dental Mfg. Co. v. National Tooth Co. 95 Fed. 291.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the appellants, alleging that Healy is the owner of patents for improvements in boxes and machines for making boxes, and that the Healy Box Corporation is the grantee of the exclusive right to make and use the machines, and to make, use, and sell the boxes containing the patented improvements. The bill next alleges that the defendant is infringing the patents, and will continue to do so unless restrained. Then, anticipating a defense, it sets forth a license to the defendant, a breach of its conditions, and a termination of [480] the same. It adds that the license contained a stipulation that in case of any suit for infringement the measure of recovery should be the same as the royalty agreed upon for the use of the inventions,

and another for the return of the machines let to the defendant while the license was in force. The bill prays for an injunction against making, using, or selling the boxes or machines, for an account of profits received by reason of the infringement, for triple the damages measured as above stated, and for the surrender of the machines. The jurisdiction depended upon this being a case arising under the patent laws, and the district court, thinking that it was merely a matter of contract, dismissed the bill. In our opinion its decision was wrong.

It may be that the reasoning of The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 57 L. ed. 716, 33 Sup. Ct. Rep. 410, is more consistent with that of Mr. Justice Bradley's dissent in Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357 (a decision since explained and limited, White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768), than with that of the majority, but it is the deliberate judgment of the court and governs this case. As stated there, the plaintiff is absolute master of what jurisdiction he will appeal to; and if he goes to the district court for infringement of a patent, unless the claim is frivolous or a pretense, the district court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious disputes. Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681. Jurisdiction generally depends upon the case made and relief demanded by the plaintiff; and as it cannot be helped, so it cannot be defeated by the replication to an actual or anticipated defense contained in what used to be the charging part of the bill. For the same reason it does not matter whether the validity of the patent is admitted or denied.

As appears from the statement of it, the plaintiff's case arose under the patent law. It was not affected by [481] the fact that the plaintiffs relied upon a contract as fixing the mode of estimating damages, or that they sought a return of patented machines to which, if there was no license, they were entitled. These were incidents. The essential features were the allegation of an infringement and prayers for an injunction, an account of profits, and triple damages,—the characteristic forms of relief granted by the patent law. The damages were grounded on the infringement, and the contract was relied upon only as furnishing the mode in which they should be ascertained.

Decree reversed.

BOOTH-KELLY LUMBER COMPANY, Stephen A. La Raut, Alice La Raut, Ethel N. La Raut, and Lucy La Raut, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 481–486.)

Appeal — review of facts — sufficiency of evidence — fraudulent timber land entries.

A decree canceling patents for timber lands on the ground that the entries were fraudulently made for another's benefit will not be disturbed on appeal where the evidence offered in behalf of the defendants is outweighed by the inferences to be drawn from their conduct.

[For other cases, see Appeal and Error, VIII. l, in Digest Sup. Ct. 1908.]

[No. 258.]

Argued May 4 and 5, 1915. Decided May 17, 1915.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which, reversing in part a decree of the District Court for the District of Oregon, ordered the cancelation of certain patents for timber lands. Affirmed.

See same case below, 121 C. C. A. 533, 203 Fed. 423.

The facts are stated in the opinion.

Mr. Albert H. Tanner argued the cause, and, with Messrs. A. C. Woodcock and John Van Zante, filed a brief for appellants:

There is nothing in the timber and stone act to prevent the entrymen from borrowing the money to pay the expenses of making the entries and to pay the government price for the land.

United States v. Detroit Timber & Lumber Co. 124 Fed. 393; Lewis v. Shaw, 70 Fed. 294; Hoover v. Salling, 49 C. C. A. 26, 110 Fed. 47; United States v. Richards, 149 Fed. 443; United States v. Barber Lumber Co. 172 Fed. 960; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; Re Donahue, 32 Land Dec. 349; Re McAtee, 34 Land Dec. 129; Larson v. Weisbecker, 1 Land Dec. 409; Re Ray, 6 Land Dec. 340; Haling v. Eddy, 9 Land Dec. 337; Church v. Adams, 37 Or. 355, 61 Pac. 639; Wilcox v. John, 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. 880; Norris v. Heald, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121; Jones v. Tainter, 15 Minn. 512, Gil. 423; Gross v. Hafemann, 91 Minn. 4, 103 Am. St. Rep. 471, 97 N. W. 430; Fuller v. Hunt, 48 Iowa, 163.

Upon making his initial filing on a tim-

ber claim, the entryman may sell or agree to sell the claim, or borrow money on it, or do as he pleases with it without violating any of the provisions of the timber and stone act.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; United States v. Barber Lumber Co. 172 Fed. 960; United States v. Kettenbach, 175 Fed. 466.

A deed, though absolute in form, if intended as security, is a mortgage, and it may be shown to be such by parol evidence.

Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775; Brick v. Brick, 98 U. S. 514, 25 L. ed. 256; Cabrera v. American Colonial Bank, 214 U. S. 224–230, 53 L. ed. 974–977, 29 Sup. Ct. Rep. 623; Russell v. Southard, 12 How. 139, 13 L. ed. 927; Hall v. O'Connell, 52 Or. 164, 95 Pac. 717, 96 Pac. 1070; Kramer v. Wilson, 49 Or. 333, 90 Pac. 183.

When the government calls the entryman as a witness on its behalf, it is bound by his testimony unless overcome by countervailing evidence.

United States v. Barber Lumber Co. 172 Fed. 960; Choctaw & M. R. Co. v. Newton, 71 C. C. A. 655, 140 Fed. 250; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575.

As to the character of evidence required by a court of equity to set aside a patent, we call attention to the following decisions:

United States v. Budd, 144 U. S. 154–162, 36 L. ed. 384–386, 12 Sup. Ct. Rep. 575; Maxwell Land-Grant Case, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 317, 31 L. ed. 182, 186, 8 Sup. Ct. Rep. 131; United States v. Marshall Silver Min. Co. 129 U. S. 579, 589, 32 L. ed. 734, 738, 9 Sup. Ct. Rep. 343, 16 Mor. Min. Rep. 205; United States v. Stinson, 197 U. S. 200–204, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426; United States v. Clark, 200 U. S. 601–608, 50 L. ed. 613–616, 26 Sup. Ct. Rep. 340.

The declarations of a person after he has parted with the title to real estate are not admissible against his grantee to defeat or destroy the title.

Dodge v. Freedman's Sav. & T. Co. 93 U. S. 379–383, 23 L. ed. 920–922; Phillips v. Laughlin, 99 Me. 26, 105 Am. St. Rep. 253, 58 Atl. 64, 2 Ann. Cas. 1; Vrooman v. King, 36 N. Y. 477.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity brought by the United States for the cancelation of five patents for timber lands issued to the four individual appellants and one Jordan, all of whom subsequently conveyed the lands to the Booth-Kelly Lumber Company. The ground of the bill is that the entries were made pursuant to an understanding with the company, for the purpose of conveying the title to it, in fraud of the law. The defendants, except Jordan, answered jointly, denying the fraud, and the company set up that it was a purchaser for value, without notice. The answer was sworn to by the manager of the company. Afterwards it was amended by agreement so as to allege that the defendants Ethel and Lucy La Raut were still the equitable owners of the land patented to them, and that their warranty deeds to the company were in fact mortgages to secure repayment of advances made to them. The bill was taken for confessed against Jordan, and both courts found for the government as to the land conveyed by him. The circuit court of appeals, reversing the decree of the district court, found for the government as to [484] the other lands also, and ordered a decree for the United States. 121 C. C. A. 533, 203 Fed. 423.

The issue is purely one of fact upon matters with regard to which the circuit court seems to have been prevented from coming to the same conclusion as the circuit court of appeals rather by the presumption in favor of the patents than by its belief in the testimony for the defense. As both courts agreed about Jordan in accordance with his own statement on the stand, we shall re-examine only the cases of the La Rauts.

The La Rauts were poor, two of them being in the employment of the company, and they were connected by marriage with the manager of the company, Booth. As the result of an arrangement with Booth, the nature of which is the point in controversy, by Booth's direction the man who was looking out for the company's timber purchases reported claims for the La Rauts in the neighborhood of the company's extensive tracts. Booth directed Dunbar, the bookkeeper of the company, to see to the furnishing of the money. The La Rauts were taken to inspect the land, so that they might make the necessary affidavits, but beyond that appear to have known nothing and to have made no inquiries at any time. The company paid their expenses, and, through their hands, the land office fees, the cost of publication, and the purchase price,—all the bills, in short. On May 7 and 8, 1902, they received their certificates of title, and in July executed deeds, Booth testifies, to him; certainly either to him or to the company. At or about the same time each received $100,

just as Jordan did, whose claim was one of the same group and filed at about the same time. These deeds were not recorded, and were destroyed; there is some indication in the evidence that the destruction was at the time of a government investigation into land frauds; but the proof is not clear. In 1904 the patents were issued and were delivered to one Alley by the Land Office. Alley secured [485] them at the request of John F. Kelly, vice president of the company. The company ever since has paid the taxes and exercised dominion over the land. In 1907 new warranty deeds were executed to the company by the La Rauts, Ethel and Lucy receiving $25, seemingly in connection with their conveyances, and later Stephen and his wife $50, each.

Booth and Ethel La Raut, now Mrs. Lewis, meet the inference naturally to be drawn from the facts thus far stated, by testifying that it was agreed between them that Booth would get timber claims for her and the other three, carry them, and advance the money necessary until they were able to dispose of the property,—which would seem to imply that they bought the land for speculation, contrary to their affidavits, but of course denies that they bought for the company. Both Ethel and Lucy La Raut were called by the government and both asserted that they bought for themselves, that they still owned the land, and that their deeds were executed only as security for the advances that the company had made, and there is some corroboration of Booth as to details, but the evidence for the defendants is overborne by the whole course of what was done. A part of it is discredited by the established falsity of similar testimony in the matter of Jordan. The claims of Stephen A. La Raut and Alice La Raut, his wife, are disposed of by Mrs. Applestone, daughter of Alice by a former husband, if she is believed. She says that in 1902 her mother told her that she had taken up a claim for Mr. Booth and was to get $100, and that her stepfather took up his claim for the same reason, and that he said that he had received $100 also. The story is confirmed by the behavior of the parties concerned. For after Stephen La Raut and his wife had made their last deeds to the company, when, according to Booth, Stephen wanted to go to Canada and to dispose of his land, and applied to Booth, Booth turned him over to Kelly, gave him no information as to the value of the [486] claims, and let him sell them for $50 in addition to the hundred dollars that each had received in 1902, although they clearly were worth a great deal more. Booth's actual conduct is inconsistent with his having entertained a benevolent scheme, and the sum paid is hardly reconcilable with Stephen and his wife being owners of the land.

If the defendants' case fails as to these two claims it hardly can succeed as to the others, for according to them all were taken under a single arrangement for all. And there is further evidence that Booth's account cannot be accepted. We will not encumber the reports with lengthy statement of details, but, apart from evidence of other fraudulent claims in the same group with these, the books of the company, which were under Booth's eye, tell a different story from his. The ledger showed no names, but the journal account under each name charges them with $400, the price of the land, and $100 which each received (with a small additional item for Stephen), and then on July 31, 1902, charges the whole $500 to stumpage, the general account of the company for the purchase of land. There the accounts end, and thereafter the lands were carried on the company's land account. The actual expenses other than the foregoing never were charged to them at all, but all, including the later payments of $25 and $50, went without specification into the stumpage account. There are attempts to explain all this by alleged oral statements that Booth held himself responsible, as there is a lame effort also to get rid of the original sworn answer, the inconsistencies of which, with the subsequent testimony, we have not stated at length. We think it enough to say that the explanations fail to escape the effect of the incontrovertible facts.

Decree affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[487] SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plff. in Err.,
v.
MARY ELIZABETH WHITLEY.

(See S. C. Reporter's ed. 487–499.)

Judgment — of sister state — full faith and credit.

The mother's right to sue in Idaho

NOTE.—Generally, as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Mills v. Duryee, 3 L. ed. U. S. 411; Darby v. Mayer, 6 L. ed. U. S. 367; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

as an heir under Id. Rev. Codes, § 4100, upon a claim for damages for the negligent killing of her son, which was created for the benefit of his heirs by that statute, is not barred by a judgment of a Washington court in an action upon such statutory liability, brought by the administratrix appointed under the laws of Tennessee, to which action the mother was not a party, and in which, because brought without her sanction, she could not, under the Idaho statute, have been represented by the administratrix; nor is any different conclusion demanded because of a subsequent unsuccessful attempt by the mother in the Tennessee courts to obtain a share in the proceeds of the recovery in the Washington suit.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

[No. 206.]

Argued March 18, 1915. Decided May 17, 1915.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment which affirmed a judgment of the District Court for the County of Kootenai in favor of plaintiff in an action for death. Affirmed.

See same case below, 23 Idaho, 642, 132 Pac. 121.

The facts are stated in the opinion.

Mr. W. G. Graves argued the cause, and, with Messrs. B. H. Kizer, F. H. Graves, and B. B. Adams, filed a brief for plaintiff in error:

Under a statute like that of Idaho, where the right to recover damages for death by wrongful act is given to the "heirs or personal representatives" of the decedent, there is but one right of action and there can be but one recovery. Either of the designated classes may sue in the first instance, there being no prior right of suit in either, and a recovery by one is a bar to a second suit by the other.

Hartigan v. Southern P. Co. 86 Cal. 142, 24 Pac. 851; Daubert v. Western Meat Co. 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 397, 73 Pac. 244; Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733; Alder Co. v. Fleming, 36 C. C. A. 419, 159 Fed. 593; McBride v. Berman, 79 Ark. 62, 94 S. W. 913; St. Louis, I. M. & S. R. Co. v. Needham, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371; Whelan v. Rio Grande Western R. Co. 111 Fed. 326; Hawkins v. Barber Asphalt Paving Co. 202 Fed. 340; Beard v. Skeldon, 113 Ill. 584; Louisville & N. R. Co. v. Sanders, 36 Ky. 259, 5 S. W. 563; Willis Coal & Min. Co. v. Grizzell, 100 Ill. App. 480; Peers v. Nevada Power, Light & Water Co. 119 Fed. 400; Consolidated Coal Co. v. Domsroski, 106 Ill. App. 641; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236; Di Paolo v. Laquin Lumber Co. 178 Fed. 877; Roberts v. Central of Georgia R. Co. 124 Fed. 471; Keele v. Atchison, T. & S. F. R. Co. 151 Mo. App. 364, 131 S. W. 730; Foster v. Hicks, 93 Miss. 219, 46 So. 533; Tennessee C. R. Co. v. Brown, 125 Tenn. 351, 143 S. W. 1129; Re Taylor, 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913D, 276; Kling v. Torello, 87 Conn. 301, 46 L.R.A. (N.S.) 930, 87 Atl. 987; Marques v. Koch, 176 Mo. App. 143, 161 S. W. 648; Shawnee Gas & Electric Co. v. Motesenbocker, 41 Okla. 454, 138 Pac. 790; Riggs v. Northern P. R. Co. 60 Wash. 292, 111 Pac. 162; Benson v. English Lumber Co. 71 Wash. 616, 129 Pac. 403.

A right of action conferred by a state statute to recover damages for death by wrongful act is transitory, and may be maintained in another state whose laws give a similar remedy under a similar state of facts.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

The right of action is enforced in another state upon the theory that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of tort that accompanies the person of the defendant elsewhere (Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1004); and therefore the right to recover and its incidents are governed by the *lex loci*, and not by the *lex fori* (Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. ed. 274, 38 L.R.A. (N.S.) 40, 32 Sup. Ct. Rep. 132; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Reynolds v. Day, 79 Wash. 499, L.R.A.—, —, 140 Pac. 681, 5 N. C. C. A. 814).

The rule extends to all substantial incidents of the action, so that distribution of the amount recovered should be made in accordance with the laws of the state where the cause of action arose.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Leman v. Baltimore & O. R. Co. 128 Fed. 191; Denver & R. G. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305; Hartley v. Hartley, 71 Kan. 691, 114 Am. St. Rep. 519, 81 Pac. 505; McDonald v. McDonald, 96 Ky. 209, 49 Am. St. Rep. 289, 28 S. W. 482; Texas & N. O. R. Co. v. Miller, — Tex. Civ. App. —, 128 S. W.

1165; Bolinger v. Beacham, 81 Kan. 746, 106 Pac. 1094; Cowen v. Ray, 47 C. C. A. 352, 108 Fed. 320; Florida C. & P. R. Co. v. Sullivan, 61 L.R.A. 410, 57 C. C. A. 167, 120 Fed. 799.

The capacity in which a personal representative sues in the courts of Washington to recover damages under the Idaho statute for a death occurring in Idaho is determined by the Idaho statute, from which, solely, he derives the right to sue at all; but it may be remarked that the rule in Washington is the same as in Idaho, as, indeed, it is everywhere under like statutes; *viz.*, that the recovery is not for the benefit of the estate, but for the sole benefit of the heirs, and when a personal representative sues, he does so as trustee for the heirs.

Copeland v. Seattle, 33 Wash. 415, 65 L.R.A. 333, 74 Pac. 582; Archibald v. Lincoln County, 50 Wash. 55, 96 Pac. 831.

The administratrix, though appointed under the laws of Tennessee, was authorized to recover from defendant in Washington upon the right of action given by the statute of Idaho:

(a) Because the statute conferring it does not require that it be enforced in the Idaho courts, or by a personal representative appointed by the Idaho courts. It may therefore be enforced in the courts of another state, and by a representative appointed by the courts of another state.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Hodges v. Kimball, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 845; Missouri P. R. Co. v. Lewis, 24 Neb. 848, 2 L.R.A. 67, 40 N. W. 401; Higgins v. Central New England & W. R. Co. 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; Chandler v. New York, N. H. & H. R. Co. 159 Mass. 589, 35 N. E. 89; Illinois C. R. Co. v. Crudup, 63 Miss. 291; Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48, 38 Am. Rep. 491.

(b) Because a personal representative who sues upon a right of action given by the Idaho statute is, at least, a quasi trustee for the heirs, and the rule that a receiver or an administrator appointed by the courts of one state will not be permitted to sue in the courts of another state does not apply to a quasi assignee or quasi trustee.

Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415; Kansas P. R. Co. v. Cutter, 16 Kan. 568; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48, 3 Am. Neg. Cas. 106; Memphis & C. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E 527; Wabash, St. L. & P. R. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Boulden v. Pennsylvania R. Co. 205 Pa. 264, 54 Atl. 906; Robertson v. Chicago, St. P. M. & O. R. Co. 122 Wis. 66, 66 L.R.A. 919, 106 Am. St. Rep. 925, 99 N. W. 433; St. Louis Southwestern R. Co. v. Graham, 83 Ark. 61, 119 Am. St. Rep. 112, 102 S. W. 700; Kelly v. Union P. R. Co. 141 Mo. App. 490, 125 S. W. 818; Voris v. Chicago, M. & St. P. R. Co. 172 Mo. App. 125, 157 S. W. 835; Knight v. Moline, East Moline & W. R. Co. 160 Iowa, 160, 140 N. W. 839.

(c) Because the superior court of the state of Washington for Spokane county held that the Tennessee administratrix might sue and recover in the courts of Washington upon the right of action given by the statutes of Idaho. While that court is not the highest court of the state, nevertheless its decision as to what is the law of the state must be accepted by this court as conclusive in the absence of a controlling statute or decision of a higher court.

Laing v. Rigney, 160 U. S. 531, 542, 40 L. ed. 525, 528, 16 Sup. Ct. Rep. 366; Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Though the perosnal representative sues for the benefit of, and as trustee for, the heirs of the decedent, they are not entitled to be made parties to the action, or in any way to control it. He is their representative for all the purposes of the action.

Yelton v. Evansville & I. R. Co. 134 Ind. 414, 21 L.R.A. 158, 33 N. E. 629; Pittsburgh, C. C. & St. L. R. Co. v. Moore, 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290; Cleveland, C. C. & St. L. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285; Major v. Burlington, C. R. & N. R. Co. 115 Iowa, 309, 88 N. W. 815; Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; Louisville v. Hart, 143 Ky. 171, 35 L.R.A.(N.S.) 207, 136 S. W. 212; Slusher v. Weller, 151 Ky. 203, 151 S. W. 684; Harbison-Walker Refractories Co. v. McFarland, 156 Ky. 44, 160 S. W. 798.

It follows that he may in good faith compromise the claim without the consent of the beneficiaries.

Foot v. Great Northern R. Co. 81 Minn. 493, 52 L.R.A. 354, 83 Am. St. Rep. 395, 84 N. W. 342; Washington v. Louisville & N. R. Co. 136 Ill. 49, 26 N. E. 653.

The widow possesses the same right where she is authorized to sue in behalf of herself and children.

Shambach v. Middlecreek Electric Co. 232 Pa. 641, 81 Atl. 802; Hamilton v. Missouri P. R. Co. 248 Mo. 78, 154 S. W. 86.

Where several judgments founded upon the same cause of action are recovered against the same defendant in several different states, a payment of one of them is a satisfaction of all.

2 Black, Judgm. 2d ed. § 1013; 23 Cyc. 1493; 17 Am. & Eng. Enc. Law 2d ed. 863.

For a statement of the rule in actions to recover damages for death by wrongful act, see Nelson v. Chesapeake & O. R. Co. 88 Va. 971, 15 L.R.A. 583, 14 S. E. 838; and see Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084.

Judicial proceedings in the courts of each state shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; Hampton v. M'Connel, 3 Wheat. 234, 4 L. ed. 378; Christmas v. Russell, 5 Wall. 302, 18 L. ed. 478; Tilt v. Kelsey, 207 U. S. 43, 57, 52 L. ed. 95, 101, 28 Sup. Ct. Rep. 1.

The Washington court intended, of course, to give effect to the Idaho statute in every incident of the recovery, for the supreme court of that state has held that a transitory action, to recover for a tort committed in another state, is to be maintained under, and in its every incident governed by, the *lex loci*, and not the *lex fori*.

Reynolds v. Day, 79 Wash. 499, L.R.A.—, —, 140 Pac. 681, 5 N. C. C. A. 814.

Though a state statute which authorizes a recovery for death by wrongful act requires that the action shall be brought in the name of the state, and that the distribution of the award must be made by the jury, an action under it may be maintained by a personal representative in another jurisdiction, where distribution of the award must be made in accordance with the statutes of descent. The substantial thing is the award of damages for the benefit of the heirs of the deceased, and it is wholly immaterial how that result is accomplished.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

Even had the Washington court misconceived the law of Idaho, and rendered judgment in accordance with its mistaken view in a case where the Idaho courts would not have given relief, the effect must have been given it in Idaho which it had in Washington.

Fauntleroy v. Lum, 210 U. S. 230, 237, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641.

That a judgment of the courts of another state is founded upon a demand which is illegal in the state where it is sought to be enforced, or that recognition of it is expressly prohibited by statute, as a rule of public policy, in such state, will not justify a refusal to give effect to it. Nothing can be considered but its effect in the courts of the state where it was rendered, and that same effect must be given it in the courts of every other state.

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Fauntleroy v. Lum, supra.

It is commonly accepted law that a judgment to which a trustee is a party binds his *cestuis que trust* (Beals v. Illinois, M. & T. R. Co. 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314; Kent v. Lake Superior Ship Canal R. & Iron Co. 144 U. S. 75, 36 L. ed. 352, 12 Sup. Ct. Rep. 650); that in all honest dealings *cestuis que trust* are bound by the acts of their trustee (Shaw v. Little Rock & Ft. S. R. Co. 100 U. S. 605, 25 L. ed. 757); and that a purchaser from a trustee is not bound to see to the disposition of the payment he makes to the trustee (Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; Potter v. Gardner, 12 Wheat. 498, 6 L. ed. 706). By parity of reason, the heirs are bound by the suit and the compromises of the personal representative whom the statute authorizes to recover damages for death by wrongful act, and the defendant in such an action has nothing to do with the distribution of the sum recovered from him as damages, but discharges his full obligation when he pays the judgment rendered against him (13 Cyc. 380–382; 8 Am. & Eng. Enc. Law, 2d ed. 955).

Judgments by default or confession are as conclusive as any other.

2 Black, Judgm. 2d ed. §§ 697, 698; Seattle Nat. Bank v. School Dist. 20 Wash. 368, 55 Pac. 317; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; State ex rel. Schmidt v. Superior Ct. 62 Wash. 556, 114 Pac. 427.

The findings of fact, upon which the judgment rests, recite that they were made after a trial duly had, and are based upon evidence adduced by the respective parties. If the fact that the judgment was rendered by consent affected its validity, the fact could not have been shown collaterally to impeach the judgment in Washington.

Rogers v. Miller, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525; Christofferson v. Pfennig, 16 Wash. 491, 48 Pac. 264; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Ballard v. Way, 34 Wash. 116, 101 Am. St. Rep. 993, 74 Pac. 1067; Munch v. McLaren, 9 Wash. 676, 38 Pac. 205; Belles v. Miller, 10 Wash. 259, 38 Pac. 1050.

Submission to a judgment against which one has no defense is not consent to the judgment, nor payment of it voluntary payment.

Harris v. Balk, 198 U. S. 215, 227, 49 L. ed. 1023, 1028, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084.

In order to determine whether full faith and credit have been denied the Washington judgment, the court will examine the pro-

ceedings in the Washington court in the light of the statutes of that state and the decisions of its courts, and determine therefrom the nature of the liability enforced, who were represented in the action, the credit the judgment was entitled to in the courts of Washington,—every question, indeed, which affects the claim of the judgment to recognition in the courts of another state. The decision of the Idaho courts upon any of such matters neither concludes nor affects this court.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415.

As the recovery was based upon the Idaho statute, its every incident was governed by that statute, notwithstanding it was secured in the courts of Washington.

Slater v. Mexican Nat. R. Co. 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. ed. 274, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132; Tennessee Coal, I. & R. Co. v. George, 233 U. S. 354, 58 L. ed. 997, L.R.A.—, —, 34 Sup. Ct. Rep. 587; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1004; Reynolds v. Day, 79 Wash. 499, L.R.A.—, —, 140 Pac. 681, 5 N. C. C. A. 814.

The cause of action sued upon in Washington was no part of the estate of A. P. Whitley; it was never subject to the jurisdiction of the courts of Tennessee; and the laws of that state had nothing to do with its administration.

Boulden v. Pennsylvania R. Co. 205 Pa. 264, 54 Atl. 906.

The Idaho statute had no extraterritorial effect, of course, but, as the defendant committed a wrong in Idaho which was actionable there, the statute gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found (Slater v. Mexican Nat. R. Co. 194 U. S. 126, 48 L. ed. 902, 24 Sup. Ct. Rep. 581). There is an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and is not only the ground, but the measure, of the maximum recovery (Western U. Teleg. Co. v. Brown, 234 U. S. 547, 58 L. ed. 1459, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1004).

The court will not interpolate into the statute what is not there, by holding that the personal representative must be one residing in the state or appointed by its authority.

Dennick v. Central R. Co. 103 U. S. 11, 19, 26 L. ed. 439, 442.

The Idaho statute was the sole authority for the plaintiff in the Washington action to maintain it. She owed to the Tennessee appointment nothing—so far as that action was concerned—but the naked official designation "personal representative" which brought her within the Idaho statute, and thus authorized her to sue. She sued not by the authority which the probate court gave when it granted her the power to administer the estate of the deceased, but solely by virtue of the authority vested in her by the statute.

Boulden v. Pennsylvania R. Co. 205 Pa. 264, 54 Atl. 906.

It will not be assumed that the courts of one state will be more discerning or more zealous in the protection of legal rights than the courts of another.

Robertson v. Chicago, St. P. M. & O. R. Co. 122 Wis. 66, 106 Am. St. Rep. 925, 99 N. W. 433; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 74, 3 Am. Neg. Cas. 106.

The rule of Copeland v. Seattle, 33 Wash. 415, 65 L.R.A. 333, 74 Pac. 582, and Koloff v. Chicago, M. & P. S. R. Co. 71 Wash. 543, 129 Pac. 398, would not be applicable in an action brought under the Idaho statute.

Reynolds v. Day, 79 Wash. 499, L.R.A.—, —, 140 Pac. 681, 5 N. C. C. A. 814.

The plaintiff in the case at bar ratified the suit of the administratrix in the Washington courts, and the ratification was equivalent to a precedent authorization.

Cook v. Tullis, 18 Wall. 332, 338, 21 Pac. 933, 936; West v. Chehalis, 12 Wash. 372, 50 Am. St. Rep. 896, 41 Pac. 171; Gaffney v. Megrath, 23 Wash. 493, 63 Pac. 520; Smith v. Morse, 9 Wall. 76, 19 L. ed. 597; Dresser v. Wood, 15 Kan. 344; Hughes County v. Ward, 81 Fed. 314; Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; Erwin v. Blake, 8 Pet. 18, 8 L. ed. 852; Denney v. Parker, 10 Wash. 218, 38 Pac. 1018; Lambert v. Gillette, 24 Wash. 726, 64 Pac. 784; State ex rel. Lippincott v. Spokane, 44 Wash. 688, 87 Pac. 944; Morgan v. Fidelity & Deposit Co. (Morgan v. Williams) 66 Wash. 649, 38 L.R.A.(N.S.) 292, 120 Pac. 106; Gaines v. Miller, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426; Rader v. Maddox (Teague v. Maddox) 150 U. S. 128, 37 L. ed. 1025, 14 Sup. Ct. Rep. 46; Mechem, Agency, §§ 151, 169.

This court is not concerned with the effect which the supreme court of Idaho might give to one of its own judgments. The question it is concerned with is the effect

which the Washington courts would give to the Washington judgment. That ascertained, the courts of Idaho must give it the same effect, however much it may be opposed to their views of policy or law. Though an Idaho statute positively forbade, yet they would be obliged to give the Washington effect to the Washington judgment.

Christmas v. Russell, 5 Wall. 302, 18 L. ed. 478.

Though the Washington court erred in rendering the judgment; placed, mayhap, an erroneous construction upon the Idaho statute, and in consequence rendered an unwarranted judgment,—still the courts of Idaho might not deny its effect, for a judgment is conclusive as to all the *media concludendi* and cannot be impeached within or without the state because of mistake of law.

Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

The Idaho court's opinion as to the construction of the laws of Tennessee, and as to the effect of such laws in controlling actions in Washington, does not conclude this court. Those matters will be determined in the exercise of its independent judgment.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415.

The mother's rights would have been recognized in the recovery had her name not been mentioned in the case.

Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48, 3 Am. Neg. Cas. 106; Duzan v. Myers, 30 Ind. App. 227, 96 Am. St. Rep. 341, 65 N. E. 1046; Oyster v. Burlington Relief Dept. 65 Neb. 789, 59 L.R.A. 291, 91 N. W. 699; Missouri P. R. Co. v. Barber, 44 Kan. 612, 24 Pac. 969; McGlone v. New Jersey R. & Transp. Co. 37 N. J. L. 304; Hamilton v. Bordentown Electric Light & Motor Co. 68 N. J. L. 85, 52 Atl. 290, 12 Am. Neg. Rep. 321; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75, 40 Fed. 195; Harper v. Norfolk & W. R. Co. 36 Fed. 102; Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Keller v. New York C. R. Co. 24 How. Pr. 172.

Whatever concluded the trustee concluded equally the *cestui que trust*.

Shaw v. Little Rock & Ft. S. R. Co. 100 U. S. 605, 25 L. ed. 757; Thompson v. Price, 37 Wash. 394, 79 Pac. 951; Carr v. Cohn, 44 Wash. 586, 87 Pac. 926; Lowe v. Lowe, 53 Wash. 50, 101 Pac. 704; Merz v. Mehner, 57 Wash. 324, 106 Pac. 1118; Cleveland, C. C. & St. L. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285; Louisville v. Hart, 143 Ky. 171, 35 L.R.A.(N.S.) 207, 136 S. W. 212; Cincinnati, H. & D. R. Co. v. Thiebaud, 52 C. C. A. 538, 114 Fed. 918.

Mr. John P. Gray argued the cause, and, with Mr. Robert H. Elder, filed a brief for defendant in error:

Under the law as settled by this court, inquiry can be made to determine:

First, whether or not the Washington court had jurisdiction of the defendant in error in the cause, the judgment in which is pleaded as a bar to the rights of the defendant in error;

Second, to determine whether the judgment pleaded was rendered under such circumstances that it is apparent that Mary Elizabeth Whitley was in fact heard on the matter determined;

Third, whether the judgment entered in the Washington case was responsive to the issue duly tendered.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Simmons v. Saul, 138 U. S. 439–448, 34 L. ed. 1054–1059, 11 Sup. Ct. Rep. 369; Reynolds v. Stockton, 140 U. S. 254, 255, 35 L. ed. 464, 465, 11 Sup. Ct. Rep. 773; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

The defendant in error was not a party to, nor bound by, the Washington judgment.

Copeland v. Seattle, 33 Wash. 415, 65 L.R.A. 333, 74 Pac. 582; Koloff v. Chicago, M. & P. S. R. Co. 71 Wash. 543, 129 Pac. 398; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.

The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants.

Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 333–341, 16 L. ed. 650–653; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

It is a settled doctrine, Chief Justice Marshall said, in Rose v. Himely, 4 Cranch, 269, 2 L. ed. 617, that the effect of every judgment must depend upon the power of the court to render that judgment.

A personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law.

National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70.

The plaintiff in error should not be permitted to plead the Washington judgment in bar, because of its own conduct.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084.

The railroad company had entered into the original contract with Josephine Whitley in Washington, making no provision for protecting itself against any other heir.

It consented to the entry of the judgment in the state of Washington and did not contest that case.

It did not require Josephine Whitley to become an administratrix under the laws of the state of Washington, although, under the laws of that state, a foreign administratrix, as such, cannot sue or defend in the courts of that state.

Barlow v. Coggan, 1 Wash. Terr. 257; Re Goss, 73 Wash. 330, 132 Pac. 409.

By asserting that the foreign administratrix had no right to sue, the plaintiff in error could have successfully defended the action against her in that capacity.

The railroad company, the plaintiff in error, did not require this foreign administratrix, with whom it was agreeing to a judgment, to set forth for what heirs the action was maintained or for whose benefit it was being prosecuted, nor to set forth that it was being maintained with the sanction and by the authority of the mother, who the railroad company knew at the time was an heir.

Koloff v. Chicago, M. & P. S. R. Co. 71 Wash. 543, 129 Pac. 398; Serensen v. Northern P. R. Co. 45 Fed. 407; Jones v. Leonardt, 10 Cal. App. 284, 101 Pac. 811.

The railroad company did not give any notice whatever to Mary Elizabeth Whitley, nor make any effort to have her brought into the case in Washington, or protected by the judgment entered there.

The nature of the cause of action was not changed by recovering judgment upon it.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

An administrator derives his title and powers solely from the laws of the place of his appointment, and it is entirely to that authority from which his rights are derived that he is in any manner accountable. The interest of an administrator is only that which the law of his appointment enjoins.

Hill v. Tucker, 13 How. 458, 14 L. ed. 223; Limekiller v. Hannibal & St. J. R. Co. 33 Kan. 83, 52 Am. Rep. 523, 5 Pac. 401.

A death statute cannot be construed to authorize a foreign administrator to sue on the theory that he sues not as an administrator, but as the trustee of an express trust in the amount recovered.

Hall v. Southern R. Co. 146 N. C. 345, 59 S. E. 879.

Under the laws of the state of Washington, the foreign administratrix could not sue in her representative capacity.

Re Goss, 73 Wash. 330, 132 Pac. 409.

A foreign judgment will not be enforced when overriding home policy.

Whart. Confl. L. § 656.

The burden rests upon the plaintiff in error to establish that the judgment in the state of Washington was not given the due effect to which it was entitled.

Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 L. ed. 598, 23 Sup. Ct. Rep. 382.

[492] Mr. Justice Hughes delivered the opinion of the court:

Mary Elizabeth Whitley, the defendant in error, recovered judgment in the district court for the county of Kootenai, Idaho, for the sum of $5,500 as damages for the death of her son, A. P. Whitley, alleged to have been caused by the negligence of the railroad company. the plaintiff in error. The supreme court of the state affirmed the judgment (23 Idaho, 642, 132 Pac. 121), and this writ of error is prosecuted. It is assigned as error that the court failed to give due faith and credit, as required by the Federal Constitution, to a judgment recovered in the state of Washington by Josephine Whitley, as administratrix of the estate of the deceased A. P. Whitley, for the same cause of action.

The facts upon which the question arises are these: The railroad company operates an electric railway between the city of Spokane, in the state of Washington, and Cœur d'Alene, in the state of Idaho. On July 31, 1909, A. P. Whitley, a passenger, was killed in a collision at or near La Cross or Gibbs Station, Idaho, and the court found that his death was caused by the defendant's negligence. The law of the state of Idaho provided: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." (Rev. Codes, § 4100.) The deceased, at the time of his death, was a resident of Shelby county, Tennessee. He was survived by his wife, Josephine Whitley, and his mother, Mary Elizabeth Whitley, the defendant in error. Under the Idaho law, they were his sole heirs. In September, 1909, the railroad company entered into an agreement with Josephine Whitley, promising to pay to her the sum of $11,000 on account of the death of her husband, of which $1,500 was paid at once and the remainder was to be paid [493] upon her appointment as administratrix in Tennessee. Thereupon, in October, 1909, Josephine Whitley obtained from the

probate court of Shelby county, Tennessee, letters of administration upon her husband's estate, and by that court was authorized to settle with the railroad company for the sum above stated. Shortly after,—on October 25, 1909,—the mother of the deceased brought the present action against the railroad company in the state of Idaho. Josephine Whitney, having refused to join as a party plaintiff, was made a defendant. She was not within the jurisdiction of the Idaho court and did not appear; under order of that court, a copy of the summons and complaint was served upon her without the state.

In view of the commencement of this suit, the railroad company refused to carry out the agreement with Josephine Whitley, and she, as administratrix (in November, 1909), brought an action against the company in the superior court of the state of Washington to recover the sum of $9,500 alleged still to be due. In her complaint she set forth her appointment as adminstratrix, the negligence of the defendant causing the death of the intestate, the statute of Idaho, the settlement for $11,000 authorized by the probate court of Tennessee, and the partial payment. It was not alleged that the mother, Mary Elizabeth Whitley, was an heir under the laws of Idaho, where the cause of action arose, or that any recovery was sought on her behalf. The railroad company in its answer denied the wrongful act, and set forth as an affirmative defense that the mother had sued in Idaho, was one of the heirs, and was entitled to maintain her action; and that, if the plaintiff succeeded, the defendant would be exposed to a double recovery. The administratrix replied, alleging that she had full authority under the laws of Idaho to agree to a settlement of the claim, and that the settlement would be a bar to a recovery in the Idaho action. Mary Elizabeth Whitley [494] was not a party to the Washington suit, and no attempt was made to bring her in. It was swiftly determined, without contest. Service of the answer was acknowledged on November 16, 1909, and the reply was served on November 17, 1909. The cause was brought to trial on November 18, 1909; the pleadings were filed shortly after 9 o'clock on the morning of that day; at 9:45 o'clock findings were filed (with a conclusion of law overruling the defense of the railroad company), and at 10 o'clock on the same morning judgment was entered in favor of the plaintiff for the sum of $9,500.

The railroad company at once paid to Josephine Whitley the amount of the judgment and she removed this amount to the state of Tennessee. In the early part of the year 1910, the mother presented her petition to the probate court of Shelby county, Tennessee, alleging that the administratrix had recovered by compromise the sum of $11,000, and that the petitioner, as an heir under the Idaho law, was entitled to one half. The demand was contested and the petition was dismissed. On appeal to the supreme court of Tennessee, the judgment was affirmed; it was held that the fund recovered by the administratrix was "to be distributed in accordance with the laws of the state of Tennessee, and not the laws of the state of Idaho," and that the mother had no interest in the proceeds of the recovery.

After these proceedings, the railroad company amended its answer in the present suit in Idaho, and pleaded in bar the Washington and Tennessee judgments. These defenses the Idaho court overruled, and, as we have said, the mother recovered judgment for $5,500.

In determining the question now presented, it is apparent that the fundamental consideration is that the right to recover damages for the killing of the decedent was created by the Idaho statute. That right could be enforced in another state, if the enforcement was not [495] opposed to its policy (Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905), but, wherever enforced, the liability sprang from the Idaho law and was governed by it. Where suit is brought in another jurisdiction, it has been held that such provisions of the law of the place of the wrongful act as can be deemed to be merely procedural may be treated as nonessential (Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; Tennessee Coal, I. & R. Co. v. George, 233 U. S. 354, 58 L. ed. 997, L.R.A.—, —, 34 Sup. Ct. Rep. 587), but it is clear that the obligation itself has its source in that law. We must look to the Idaho statute to determine what the obligation is, to whom it runs, and the persons by whom or for whose benefit recovery may be had. Slater v. Mexican Nat. R. Co. 194 U. S. 120, 126, 127, 48 L. ed. 900, 902, 903, 24 Sup. Ct. Rep. 581; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 547, 58 L. ed. 1457, 1459, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024.

The construction of that statute by the supreme court of Idaho, with respect to the nature of the right of action created, is in accord with the accepted view of statutes similar to Lord Campbell's act. The recovery authorized is not for the benefit of the "estate" of the decedent; the proceeds of the

recovery are not assets of the estate. Where the personal representative is entitled to sue, it is only as trustee for described persons,—the "heirs" of the decedent. The action, says the supreme court of Idaho, is allowed upon the theory that the wrongful killing of the ancestor "works a personal injury to his heirs." They are the sole beneficiaries. The "heirs" are those who, under the laws of Idaho, take in cases of intestacy; here, it is conceded that these heirs were the widow and mother of the deceased, taking equally. 23 Idaho, pp. 659, 662. It may also be premised that when suit is duly brought by the trustee under such a statutory trust, it is a necessary and conclusive presumption that the trust will be executed and that the rights of the beneficiaries [496] as fixed by the statute which created the obligation will be recognized by all courts before whom the question of distribution may come. Dennick v. Central R. Co. 103 U. S. 11, 20, 26 L. ed. 439, 442. It follows necessarily that if Josephine Whitley, as administratrix, was authorized to sue on behalf of the mother, and she recovered as trustee by virtue of that authority, the Washington judgment constituted an adjudication of the mother's right, and as such would be entitled to full faith and credit in other states, including Idaho; in that case, the fact that the Tennessee court subsequently denied the right of the mother to her share as one of the beneficiaries would present simply the case of an erroneous determination which could not operate to destroy the estoppel of the judgment. Judicial error on a trustee's accounting does not disturb the rights which have become fixed in suits prosecuted by the trustee against third persons.

The question, then, is one of jurisdiction; that is, whether the mother—Mary Elizabeth Whitley—was represented by the administratrix in the Washington suit. The mother was not a party to that suit, and if she was not represented by the administratrix, the Washington court was without jurisdiction as to her, and the Idaho court was not bound to treat the judgment as a bar to her recovery in the present suit. Thompson v. Whitman, 18 Wall. 457, 463, 469, 21 L. ed. 897, 899, 901; National Exch. Bank v. Wiley, 195 U. S. 257, 270, 49 L. ed. 184, 190, 25 Sup. Ct. Rep. 70; Haddock v. Haddock, 201 U. S. 562, 573, 50 L. ed. 867, 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; Fauntleroy v. Lum, 210 U. S. 230, 237, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641. The matter is not one of mere form or procedure, and it is manifest that the authority of the administratrix to represent the mother *without* her consent, if that authority existed, could be derived only from the Idaho statute. Not only did the Tennessee court deny that the Tennessee law conferred the right to represent the mother, but the state of Tennessee was powerless to confer it contrary to the statute which gave the cause of [497] action. The same is true with respect to the state of Washington, where the suit was brought; and there, it may be observed, it has been held under the local statute giving (as does that of Idaho) the right of action for the wrongful killing of the decedent to "heirs or personal representatives" that the personal representative is not entitled to recover unless it be shown that the designated beneficiaries have sanctioned the bringing of the action. Copeland v. Seattle, 33 Wash. 415, 421, 65 L.R.A. 333, 74 Pac. 582; Koloff v. Chicago, M. & P. S. R. Co. 71 Wash. 543, 550, 551, 129 Pac. 398.

The supreme court of Idaho, having authority to construe the Idaho statute, has held that the administratrix did not represent the mother, and, consequently that the mother's right was not barred. The court thus expressed its conclusion:

"It clearly appears then, first, that the respondent in this case, Mary Elizabeth Whitley, had no right of action and no claim whatever under the laws of the state of Tennessee; second, that she was never made a party to the action prosecuted in the state of Washington, and that the action there prosecuted was not prosecuted for her or in her interest or on her behalf, and that she was neither accorded representation there in person nor by trustee, administrator, or other representative. She has, therefore, clearly never been a party to the Washington judgment, and is not bound by that judgment. (Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.)" 23 Idaho, p. 658.

It is left to the plaintiff in error to contend, in substance, that the Idaho court sustained the right of a personal representative, that is, of a duly appointed administrator, to sue under the Idaho statute for the benefit of the "heirs," but denied credit to the judgment in question, recovered in virtue of that right, simply because of the subsequent decision of the Tennessee court in refusing to permit the [498] mother to participate in the proceeds of the recovery; and extracts from the opinion of the Idaho court are quoted in support of the argument. It seems to us that this is too narrow a view of the decision of the state court. We think that the decision, taken in its full scope and with its necessary implications, involves the construction of the statute to the effect that the "heirs" are entitled to sue on their own behalf, and that the statute does not give to an administrator or

personal representative an independent right of action, or authority to bind the heirs without their sanction, but an administrator is authorized by the statute to sue only on their behalf and with their consent. As has been said, similar words in the statute of the state of Washington have been similarly construed. See Copeland v. Seattle, supra (cited in the opinion of the Idaho court); Koloff v. Chicago, M. & P. S. R. Co. supra. And under that construction there is no basis for the conclusion in the present case that the mother was represented in the Washington suit, and that she was bound by the judgment there recovered. It is insisted that the mother ratified by endeavoring to obtain in Tennessee a share of the recovery. But this was a wholly barren proceeding. The administratrix resisted the petition, denying in effect that she had represented the mother in the Washington suit, and asserting that the mother had no interest whatever in that action or the proceeds. The court upheld this contention of the administratrix, and the mother took nothing. Neither the position of the widow nor that of the railroad company was changed in any respect, and it cannot be said that this unsuccessful attempt altered the mother's rights.

It is apparent that the railroad company co-operated with the administratrix in securing the judgment in her favor, without bringing the mother in as a party, and without demanding that proof of authorization of the suit by [499] the mother should be furnished. Had the railroad company made such a demand, there is no reason to believe that it would not have been sustained. Relying upon what appears to be an erroneous construction of the Idaho statute, it preferred to facilitate the administratrix in obtaining the recovery in the absence of the mother, and without its being shown that the suit was brought in her interest and with her authority, and the predicament in which it now finds itself is due solely to its own conduct.

Judgment affirmed.

SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.
W. B. TILGHMAN.

(See S. C. Reporter's ed. 499-502.)

Damages — diminution — comparative negligence.

1. The direction in the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, §§ 8657, 8659), § 3, that the diminution of damages in case of plaintiff's contributory negligence shall be in proportion to the amount of negligence attributable to the injured employee, can only mean that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.

Trial — instructions — damages — comparative negligence.

2. Proper effect is not given to the provisions of the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, §§ 8657, 8659), § 3, that contributory negligence of the employee shall not bar a recovery, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, by an instruction leaving to the jury the matter of diminishing the damages in such case, without naming any standard to which their action shall conform other than their own conception of what is reasonable.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

[No. 713.]

Argued April 22 and 23, 1915. Decided May 17, 1915.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Wake County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Reversed.

See same case below, 167 N. C. 163, 83 S. E. 315, 1090.

The facts are stated in the opinion.

Mr. **Murray Allen** argued the cause and filed a brief for plaintiff in error:

This court has jurisdiction.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 292, 52 L. ed. 1061, 1066, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 483, 56 L. ed. 1174, 32 Sup. Ct. Rep. 790; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Rep. 703; North Carolina R. Co. v. Zachary, 233 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; McGovern v. Philadelphia & R. R. Co. 235 U. S. 389, ante, 283, 35 Sup. Ct. Rep. 127; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

Plaintiff in error is entitled to a reversal of the judgment for error in instructions on the relation of contributory negligence to the measure of damages.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Thornton, Employers' Liability Act, 2d ed. p. 40; Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803; Neil v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 331; Gray v. Southern R. Co. 167 N. C. 433, 83 S. E. 849; Irvin v. Southern R. Co. 164 N. C. 11, 80 S. E. 78; Ridge v. Norfolk Southern R. Co. 167 N. C. 510, L.R.A.—, —, 83 S. E. 762; Pfeiffer v. Oregon-Washington R. & Nav. Co. — Or. —, 144 Pac. 763; Pankey v. Atchison, T. & S. F. R. Co. 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74; New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952; Pittsburg, C. & St. L. R. Co. v. Shannon, 11 Ill. App. 222; Chicago & E. I. R. Co. v. O'Connor, 13 Ill. App. 62; Moody v. Peterson, 11 Ill. App. 180; Grank Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, ante, 392, 35 Sup. Ct. Rep. 143.

Mr. William C. Douglass argued the cause, and, with Messrs. Clyde A. Douglass and Robert N. Simms, filed a brief for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action in the superior court of Wake county, North Carolina, under the employers' liability act of Congress (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), to recover for personal injuries sustained by the plaintiff in a head-on collision of two passenger trains, of one of which he was the conductor in charge. A trial of the issues resulted in a verdict finding that the plaintiff's injuries were caused by the concurring negligence of the railway company and himself, and assessing the damages recoverable by him at $7,000. A judgment in his favor was rendered on the verdict, and the company appealed to the supreme court of the state, where the judgment was affirmed, two judges dissenting. 167 N. C. 163, 83 S. E. 315, 1090.

The Federal question which brings the case here is whether proper effect was given to that part of the statute which deals with the measure of recovery where the employee contributes to his injuries by his own negligence.

At common law there could be no recovery in such a case, the contributory negligence being a complete bar or defense. But this statute rejects the common-law rule and adopts another, deemed more reasonable, by declaring (§ 3), "the fact that the employee may have been guilty [501] of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." This is followed by a proviso to the effect that contributory negligence on the part of the employee shall not be considered for any purpose where the carrier's fault consisted in the violation of a statute—a Federal statute—enacted for the safety of employees (see Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 503, 58 L. ed. 1062, 1069, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635); but this is not such a case, and so the principal provision is the one to be applied. It means, and can only mean, as this court has held, that, where the causal negligence is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employee's contribution to the total negligence. Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. ed. 1096, 1101, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 49, 58 L. ed. 838, 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

At the trial the court instructed the jury that, if they found the plaintiff was injured through the concurring negligence of the railway company and himself, they

should determine the full amount of damages sustained by him, "and then deduct from that whatever amount you think would be proper for his contributory negligence." This was reiterated in different ways and somewhat elaborated, but the fair meaning of all that was said was that a reasonable allowance or deduction should be made for the plaintiff's negligence, and that it rested with the jury to determine what was reasonable. No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employee with the total causal negligence as a means of [502] ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made, and the jury should have been advised of that rule and its controlling force.

It results that the objection to the instructions upon this subject was well taken and should have been sustained.

Judgment reversed.

GEORGE D. COLLINS, Appt.,
v.
JAMES A. JOHNSTON, Warden of the State Prison of the State of California, at San Quentin, etc.

(See S. C. Reporter's ed. 502-512.)

Habeas corpus — in Federal courts — scope of review.

1. Federal courts, on an application for habeas corpus in behalf of a person held in custody under the final judgment of a state court of criminal jurisdiction, are confined to the examination of fundamental and jurisdictional questions. The writ cannot be employed as a substitute for a writ of error.

[For other cases, see Habeas Corpus, I. b, 2; IV., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — criminal prosecutions.

2. A person indicted for perjury for falsely testifying in a suit by his alleged wife for maintenance, support, and alimony that he and she did not intermarry on a specified date, or at any other time, cannot successfully urge that his conviction, under a new indictment charging him with perjury committed on the trial of the first indictment in falsely swearing that on the above date a marriage ceremony was performed between him and another woman, was lacking in due process of law, because the trial court refused to consider his alleged defense that testimony relating to the question of fact whether a ceremonial marriage took place on that date between him and the plaintiff in the maintenance suit could not be material to the issue upon the first indictment, nor furnish any foundation for a charge of perjury, as the marriage, if performed, was a nullity, because at a previous time he and the other woman had intermarried, since the principal questions at issue upon the trial of the first indictment being whether on the day named he entered into a ceremonial marriage with the plaintiff in the maintenance suit, or whether he was at that time already married to the other woman, then still living, the alleged false testimony tended to prove the negative of the first question.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Habeas corpus — Federal courts — scope of review.

3. The refusal by a state court of criminal jurisdiction to consider, on a trial for perjury, the proffered defense of the immateriality of the alleged false testimony, even if erroneous, could not affect the jurisdiction of the court, or amount to more than an error committed in the exercise of juris-

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NOTE.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 491; Re Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 380.

As to denial of due process of law in habeas corpus cases—see note to Hovey v. Elliott, 39 L.R.A. 450.

On habeas corpus to review excessive sentence—see note to Re Taylor, 45 L.R.A. 139.

Generally, as to cruel and unusual punishments—see notes to Franklin v. Brown, L.R.A.1915C, 558; State ex rel. Garvey v. Whitaker, 35 L.R.A. 561.

On prosecution of extradited person for other crime than that for which he was surrendered—see notes to Ex parte McKnight, 14 L.R.A. 128; Com. v. Wright, 19 L.R.A. 206; Cook v. Hart, 36 L. ed. U. S. 934; and Whitten v. Tomlinson, 40 L. ed. U. S. 406.

diction, which cannot be revised by the Federal courts on habeas corpus.

[For other cases, see Habeas Corpus, IV., in Digest Sup. Ct. 1908.]

Federal courts — following state decisions — constitutional construction.

4. The settled construction by the state courts of the provisions of Cal. Const. art. 6, §§ 6, 8, relating to the superior courts, that "there may be as many sessions of said court at the same time as there are judges thereof," "the judgments, orders, and proceedings of any session of the superior court held by any one or more of the judges of said courts, respectively, shall be equally effectual as if all the judges of said respective courts presided at such session," and "a judge of any superior court may hold a superior court in any county at the request of a judge of the superior court thereof, and upon the request of the governor it shall be his duty so to do," as making the court held by a judge of a superior court of one county in another county, upon the request of the governor, a session of the superior court, with the same jurisdiction as if one of the elected judges were sitting, will be accepted by the Federal courts as correct, notwithstanding the subsequent amendment of November 8, 1910, expressly providing for such sessions, since this amendment must be regarded as having been adopted from abundant caution to remove all question of doubt, rather than as recognizing and supplying a *casus omissus*.

[For other cases, see Courts, VII. c, 3, in Digest Sup. Ct. 1908.]

Constitutional law —due process of law — criminal prosecutions — sentence.

5. A sentence of fourteen years' imprisonment for the crime of perjury, imposed under the authority of Cal. Pen. Code, § 126, which makes perjury punishable by imprisonment in the state prison for not less than one nor more than fourteen years, does not deprive the convict of his liberty without due process of law.

[For other cases, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — criminal prosecutions — sentence.

6. The equal protection of the laws is not denied to a person sentenced to fourteen years' imprisonment for the crime of perjury, under the authority of Cal. Pen. Code, § 126, which makes perjury punishable by imprisonment in the state prison for not less than one nor more than fourteen years, although five years' imprisonment may be the average maximum penalty for other felonies denounced by the California laws, some of which may be of greater gravity and of more injurious consequences than perjury.

[For other cases, see Constitutional Law, IV. a, 8, in Digest Sup. Ct. 1908.]

Constitutional law — application of Federal Constitution to state — cruel and unusual punishments.

7. The prohibition of U. S. Const., 8th *Amend.*, against cruel and unusual punishments, is a limitation upon the Federal government, not upon the states.

[For other cases, see Constitutional Law, II. b. in Digest Sup. Ct. 1908.]

Extradition — prosecution for subsequent crime — opportunity to return.

8. Immunity from trial for an offense committed by a person after his extradition until he has been afforded an opportunity to return to the country whence he was extradited was not given by the provisions of the treaties with Great Britain of August 9, 1842 (8 Stat. at L. 576), and July 12, 1889 (26 Stat. at L. 1508), or of U. S. Rev. Stat. § 5275, Comp. Stat. 1913, § 10,121, under which such immunity as to prior offenses only is secured.

[For other cases, see Extradition, 65–67, in Digest Sup. Ct. 1908.]

Extradition — prosecution for subsequent offense.

9. An extradited person is given no right to have the trial of the offense for which he was extradited brought to a conclusion before he can be tried for an offense subsequently committed, by the provisions of the treaties with Great Britain of August 9, 1842 (8 Stat. at L. 576), and July 12, 1889 (26 Stat. at L. 1508), or of U. S. Rev. Stat. § 5275, Comp. Stat. 1913, § 10,121, under which he is entitled to a reasonable time to return to the country whence he was extradited before he can be tried for another offense committed prior to his extradition.

[For other cases, see Extradition, V., in Digest Sup. Ct. 1908.]

[No. 594.]

Argued and submitted February 25, 1915.
Decided May 17, 1915.

APPEAL from the District Court of the United States for the Northern District of California to review an order denying a petition for a writ of habeas corpus in behalf of a person in custody under sentence of a state court of criminal jurisdiction. Affirmed.

The facts are stated in the opinion.

Mr. George D. Collins, *in propria persona*, submitted the cause for appellant:

The duty devolves on the United States district court to issue the writ in the first instance, where the imprisonment is in violation of treaty right.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Cohn v. Jones, 100 Fed. 639; Wildenhus' Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383; Spear, Extradition, 233, 234.

And where the state remedies have been fully exhausted there is a legal right to habeas corpus from the United States dis-

trict court on all questions of constitutional law.

Minnesota v. Brundage, 180 U. S. 499, 505, 45 L. ed. 639, 642, 21 Sup. Ct. Rep. 455; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384.

A petition for habeas corpus is an independent civil suit, to establish the civil right of liberty (Ex parte Tom Tong, 108 U. S. 559, 27 L. ed. 827, 2 Sup. Ct. Rep. 871) against a specific illegal imprisonment; it is therefore of no importance whether the questions raised were or were not presented on a preceding appeal in the criminal case wherein the judgment was rendered. The specific remedy for illegal imprisonment is the writ of habeas corpus, and not appeal. Refusal of relief on application for the writ is held not to be *res judicata* (Church, Habeas Corpus, § 386). Nor will a decision on the validity of an imprisonment, or on questions presented, preclude the issuance of the writ where a different imprisonment is involved.

Cooley, Const. Lim. 7th ed. 82.

Nor can the doctrine of *stare decisis* prevent a re-examination of questions erroneously decided in a case of personal liberty.

2 Sutherland, Stat. Constr. p. 903; 1 Willoughby, Const. Law, p. 52; Hart v. Burnett, 15 Cal. 530.

Nor will a prisoner be precluded from presenting, on petition for habeas corpus, questions of jurisdiction that might have been, but were not, raised or decided upon a preceding appeal or on a prior application for habeas corpus.

Re Central Irrig. Dist. Bonds, 117 Cal. 388, 49 Pac. 354; Balch v. Haas, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974; Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; Union School Twp. v. First Nat. Bank. 102 Ind. 464, 2 N. E. 194; Haynes v. Trenton, 123 Mo. 326, 27 S. W. 622; Boyd v. Alabama, 94 U. S. 645, 648, 24 L. ed. 302, 303.

Habeas corpus is the proper remedy where the imprisonment is in violation of a constitutional right or a treaty right, or where the judgment under which the imprisonment is maintained is the result of a denial of constitutional or treaty right, or the culmination of proceedings where such a right was set up and erroneously rejected.

Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Re Nielsen, 131 U. S. 176, 182, 184, 33 L. ed. 118, 120, 121, 9 Sup. Ct. Rep. 672; Cohn v. Jones, 100 Fed. 639; Wildenhus' Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 385; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384.

The arbitrary denial or rejection by the state courts of a perfectly valid and legally sufficient defense to a criminal accusation—a defense going to the merits, and in law conclusively establishing that the accused is legally innocent of the crime charged, therefore necessitating his acquittal—is a deprivation of the due process of law guaranteed him by the 14th Amendment of the Constitution of the United States.

People ex rel. Witherbee v. Essex County, 70 N. Y. 234; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Hovey v. Elliott, 167 U. S. 409, 446, 42 L. ed. 215, 231, 17 Sup. Ct. Rep. 841; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Wright v. Cradlebaugh, 3 Nev. 349; McClatchy v. Superior Ct. 119 Cal. 416, 39 L.R.A. 691, 51 Pac. 696; Younger v. Superior Ct. 136 Cal. 687, 69 Pac. 485; McGehee, Due Process of Law, 1, 85; Brannon, 14th Amendment, 251.

In accusations of perjury it is a well-established principle of the common law that false testimony relating only to what is declared void by statute, in any event, cannot be made the legal or competent basis of a charge of perjury; that false testimony or truthful testimony, thus relating to a nullity, or a thing nonexistent in contemplation of law,—a mere legal nonentity,—is itself a nullity. False testimony to a manifest nullity is no perjury. It is considered in law an extrajudicial oath. It can prejudice no one, and that is the test.

2 Whart. Crim. Law, 10th ed. § 1282; 11th ed. §§ 1520, 1541, 1546; Crump v. Com. 75 Va. 923; People v. McDermott, 8 Cal. 290; People v. Jones, 123 Cal. 299, 55 Pac. 992; People v. Collier, 1 Mich. 137, 48 Am. Dec. 699; 3 Co. Inst. 164, 167; People v. Tomlinson, 35 Cal. 503; People v. Cole, 130 Cal. 15, 62 Pac. 274; 1 Hawk. P. C. 429; 4 Bl. Com. 137; 2 Bishop, New Crim. Law, § 1014.

The act of the state courts in rejecting the interposed defense is the act of the state.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Scott v. McNeal, 154 U. S. 34, 35, 38 L. ed. 896, 897, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The state courts have no power or jurisdiction to arbitrarily reject a fundamental right.

Yick Wo v. Hopkins, 118 U. S. 369, 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

That they proceeded in the usual course of judicial action will make no difference. That is ordinarily done in every judicial denial of constitutional right; but does not sanctify or render invulnerable the wrong done.

A denial of a constitutional right is an excess of jurisdiction; the resulting judgment is a nullity.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Re Nielsen, 131 U. S. 176, 182, 184, 33 L. ed. 118, 120, 121, 9 Sup. Ct. Rep. 672.

Trial and condemnation in a "court" having no competent jurisdiction over either the person or subject-matter, and no power or authority as a regularly constituted and pre-established judicial tribunal of the state, is *per se* a deprivation of due process of law, contrary to the 14th Amendment.

2 Willoughby, Const. p. 858; McGehee, Due Process of Law, pp. 58, 85; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Scott v. McNeal, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108.

A *casus omissus* in a Constitution cannot be supplied by judicial interpolation.

Jones v. Smart, 1 T. R. 44; McKuskie v. Hendrickson, 128 N. Y. 555, 28 N. E. 650; United States v. Goldenberg, 168 U. S. 95, 103, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; Swift v. Luce, 27 Me. 285; Crawford v. Spooner, 6 Moore, P. C. C. 9; Holmberg v. Jones, 7 Idaho, 752, 65 Pac. 563; 2 Sutherland, Stat. Constr. §§ 366, 498, 605.

Nor can a *casus omissus* be supplied by general usage or common consent. A constitution cannot be amended in that way; not even to avert mischievous or disastrous results or consequences.

2 Sutherland, Stat. Constr. §§ 366, 498, pp. 891, 915.

A so-called practical construction cannot supply a *casus omissus*, nor can time make legal a clear usurpation of power, no matter how long persisted in, by common consent or acquiescence.

Cooley, Const. Lim. 105, 106; Kucker v. Sunlight Oil & Gasoline Co. 230 Pa. 528, 79 Atl. 747, Ann. Cas. 1912A, 503.

This constitutional Amendment of November 8, 1910, must be given legal effect, and that can only be done by holding that there was no provision in the state Constitution for the jurisdiction of a court held in San Francisco by a judge from another county, until the Amendment introduced it. To hold otherwise is to nullify the Amendment by making the state Constitution mean the same thing without the Amendment as it does with it. This the law will not permit. Therefore, it must be held that prior to the Amendment there was no provision for the jurisdiction of the special court held by a judge from another county.

1 Sutherland Stat. Constr. § 237.

Taking § 8 of art. 6 of the state Constitution as it stood prior to the amendment of November 8, 1910, it simply conferred on the judge from another county the power to hold court; but it is one thing to confer the power to hold court and quite another and essentially different thing to confer jurisdiction on the special court so held. The difference is the fundamental one between the power of the judge to hold court and the jurisdiction of the court so held. The judge is not the court.

State ex rel. De Buys v. Civil Dist. Judges, 32 La. Ann. 1261; Ex parte Gardner, 22 Nev. 280, 39 Pac. 570; State ex rel. Ballew v. Woodson, 161 Mo. 453, 61 S. W. 252; State, Lewis, Prosecutor, v. Hoboken, 42 N. J. L. 379; 2 Sutherland, Stat. Constr. § 399.

A jurisdiction vested in a court of twelve judges cannot be exercised or administered by a court of one judge unless special and express provision is made for the purpose.

2 Sutherland Stat. Constr. p. 1046.

If the amendment of November 8, 1910, to § 8 of art. 6 of the state Constitution, is to be applied to the trial, conviction, and sentence of the appellant, then clearly it is an *ex post facto* law, prohibited by § 10 of art. 1 of the Constitution of the United States.

1 Sutherland, Stat. Constr. 237.

To decide that the "court" held by Judge Burnett, in the trial, conviction, and sentence of appellant, had jurisdiction over the person and subject-matter, is necessarily to give the constitutional amendment of November 8, 1910, a retroactive operation, and thereby make it an *ex post facto* law, in violation of § 10 of art. 1 of the Federal Constitution. This conclusion is inevitable. It would also deprive the appellant of his liberty without due process of law and deny him the equal protection of the law, in violation of the 14th Amendment.

State v. Doherty, 60 Me. 504; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656.

The power and authority of the United States over the entire subject of international extradition pursuant to treaty appertain to the sovereignty of the nation, and vest in the Federal government a jurisdiction *sui generis* over the person of the accused, absolutely exclusive of the several states.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Holmes v. Jennison, 14 Pet. 543, 10 L. ed. 581; People ex rel. Barlow v. Curtis, 50 N. Y. 324, 10 Am. Rep. 483; 1 Bishop, New Crim. Proc. § 224.

In this connection, jurisdiction of the "case," *i. e.*, the crime, is undistinguishable from jurisdiction of the person who is charged with the crime.

Re Johnson, 167 U. S. 125, 42 L. ed. 104, 17 Sup. Ct. Rep. 735.

Jurisdiction in the prosecuting state is acquired not by the commission of the crime, but by service of process upon the person of the accused. The proceeding is entirely *in personam*, and not *in rem*.

Herndon v. Ridgeway, 17 How. 424, 15 L. ed. 100; Chaffee v. Hayward, 20 How. 208, 215, 15 L. ed. 804, 852; Re Johnson, 167 U. S. 124, 42 L. ed. 104, 17 Sup. Ct. Rep. 735; United States v. Lee, 84 Fed. 631; Re James, 18 Fed. 853.

It is a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect, until it has wrought its function.

Taylor v. Taintor, 16 Wall. 370, 21 L. ed. 290.

It results that the Federal extradition jurisdiction, exclusive because the Constitution has made it such, and exclusive because it is the jurisdiction first vesting over the person of the accused (*qui est tempore potior est jure*), continues in the United States until it has "wrought its function" in the final termination of the case.

Spear, Extradition, 126, 232, 233.

The party accused can be tried and punished only for the crime or crimes named in the demand and delivery, and when this end has been gained, he should, unless he elects to remain, or commits some other crime after his extradition, be permitted to return to the jurisdiction from which he was removed.

Spear, Extradition, 71, 107, 569.

The first perjury indictment was based on an averment of marriage; this was the extradition case. The second perjury indictment was based on a charge as to the identity of the parties to the same marriage ceremony relied upon by the prosecution to sustain the charge in the extradition case, though it was not alleged in the second perjury indictment that the ceremony constituted a legal or valid or any marriage with the prosecutrix or anyone else; nor that the parties to the cermony thereby intermarried and became husband and wife. It is too plain for argument that an acquittal in the extradition case would be *res judicata*, and a bar to the second perjury indictment derived from and dependent upon the extradition charge.

United States v. Butler, 38 Fed. 499; Coffey v. United States, 116 U. S. 436, 445, 29 L. ed. 684, 688, 6 Sup. Ct. Rep. 437; Cooper v. Com. 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, 11 Am. Crim. Rep. 625.

Where the subsequent charge of subsequent offense is so inseparably related to and connected with the extradition charge as to be altogether derivative from and dependent upon it, to such an extent that it must necessarily fall within the first charge in the event of acquittal, it is not a separate prosecution on a separate offense within the doctrine of Collins v. O'Neil, 214 U. S. 113, 53 L. ed. 933, 29 Sup. Ct. Rep. 573, but merely a fraudulent evasion of the extradition and its legal consequences. It is not so much the commission of a new crime as a repetition of the old one, if any crime at all, —a sort of continuing offense within the general principle declared in Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556, for which there could be but one penalty. Otherwise, if the accused in the same litigation repeated the same alleged perjury in his testimony ten different times, he could, if prosecuted therefor, be punished to the extent of an aggregate prison term of one hundred and forty years, which is sheer nonsense. It results that the trial, conviction, sentence, and imprisonment are flagrantly in violation of the legal rights granted the appellant by the paramount law of the extradition.

Foreign Rel. U. S. 1876, p. 279.

An extradition prohibited by the treaty, as being in fraud of its provisions, cannot be made the legal or competent basis of acquiring the necessary jurisdiction over a subsequent and derivative charge of perjury, dependent entirely on the absolute validity of the extradition.

Reg. v. Ewingtons, 2 Moody, C. C. 223, Car. & M. 319; 2 Whart. Crim. Law, 11th ed. §§ 1521, 1536.

If, as set forth in the record on this appeal, the appellant was extradited at the instance of the state of California, for the purpose of answering civil liabilities, and without any intention to prosecute the extradition charge to a final conclusion, then plainly this was a fraud upon the treaty.

Pooley v. Whetham, L. R. 15 Ch. Div. 435, 50 L. J. Ch. N. S. 236, 43 L. T. N. S. 267, 29 Week. Rep. 296; 1 Bigelow, Fr. p. 484; Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993.

On the facts alleged in the complaint, the state of California became a trespasser *ab initio*, and the subsequent prosecution is as much a fraud on the treaty as was the original extradition itself. Now, in perjury cases, to sustain the accusation, there must be a valid and lawful jurisdiction in the court where the assailed testimony was given.

2 Whart. Crim. Law, 11th ed. §§ 1521, 1536.

Fraud vitiates all jurisdiction thereby obtained in perversion of legal authority.

Reg. v. Serva, 1 Den. C. C. 104, 2 Car. &

K. 53; Wells v. Gurney, 8 Barn. & C. 769; Dunlap v. Cody, 31 Iowa, 260, 7 Am. Rep. 129; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Ilsley v. Nichols, 12 Pick. 275, 22 Am. Dec. 425.

If a man is wrongfully brought into a jurisdiction and there lawfully arrested, he ought to be discharged, for no lawful thing, founded upon a wrongful act, can be supported.

Re Allen, 13 Blatchf. 271, Fed. Cas. No. 208; Hooper v. Lane, 6 H. L. Cas. 443.

Section 126 of the Penal Code of California, so far as it exceeds the penalty of five years' imprisonment in the state prison, is a denial to appellant of the equal protection of the laws of the state of California in arbitrarily discriminating against him in the matter of penalty for giving false evidence in the trial of a case.

Yick Wo v. Hopkins, 118 U. S. 356, 367, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 165, 41 L. ed. 671, 17 Sup. Ct. Rep. 255; Southern R. Co. v. Greene, 216 U. S. 400, 412, 54 L. ed. 536, 539, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Any judicial act in excess of the court's jurisdiction, resulting in deprivation of liberty, is a violation of the requirement in the 14th Amendment that there must be due process of law as an essential prerequisite to lawful imprisonment.

2 Willoughby, Const. p. 858; McGehee, Due Process of Law, 1, 58; Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Re Graham, 138 U. S. 461, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363; Re Bonner, 151 U. S. 256, 38 L. ed. 151, 14 Sup. Ct. Rep. 323.

An excessive sentence is void because—

It is against Magna Charta, the common right of the subject, and the law of the land.

Devonshire's Case, 11 How. St. Tr. 1354.

The phrase "due process of law," as used in the 14th Amendment, means the same thing as "the law of the land."

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 276, 15 L. ed. 374; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

A grossly excessive sentence is a denial of the equal protection of the laws of California, because in similar circumstances the state courts do not impose a sentence of more than one year's imprisonment.

Yick Wo v. Hopkins, 118 U. S. 367, 30 L. ed. 225, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Testimony concerning the one point as to the identity of the parties participant in a marriage ceremony expressly declared void *ab initio* by statute cannot, if false, be made the valid or competent basis of a charge of perjury, especially when given in a case where only a legal marriage would sustain the cause of action there presented.

2 Whart. Crim. Law, 10th ed. § 1282, 11th ed. §§ 1520, 1541, 1546; Rex v. Dunston, Ryan & M. 109; Rex v. Benesech, Peake, N. P. Add. Cas. 93; Crump v. Com. 75 Va. 923.

The common-law marriage with Agnes Newman was perfectly valid.

Sharon v. Sharon, 75 Cal. 9, 16 Pac. 345; Kilburn v. Kilburn, 89 Cal. 50, 23 Am. St. Rep. 447, 26 Pac. 636; Sharon v. Sharon, 79 Cal. 670, 22 Pac. 26, 131; People v. Beevers, 99 Cal. 286, 33 Pac. 844, 9 Am. Crim. Rep. 139.

The notion that the moment the accused is brought by the United States into the territory of the prosecuting state the laws of the latter supersede the high process of the extradition, and that this process, derived from the treaty for the very purpose of carrying into effect the requirements of the treaty, becomes thereupon *functus officio*, is not only clearly untenable, as demonstrated by the reasoning of the court in the Rauscher Case, but is manifestly absurd.

Spear, Extradition, pp. 205, 232, 233.

For all purposes of prosecution other than upon the specific charge on which the extradition was avowedly obtained the accused is deemed constructively present in the country granting the extradition, thus necessitating a new extradition or an extension of the prior extradition, on a subsequent charge of subsequent offense, and therein the production of prima facie evidence of criminality sufficient to establish probable cause as required by the treaty in the first instance, in order to justify the further abridgement of the asylum conferred on and reserved to the accused by the foreign state, as an inseparable condition of the prior extradition.

Heffter, Droit International, par Geffeken, p. 145; 16 Alb. L. J. p. 363; 4 Lawrence, Com. sur. Wheaton, p. 507; Vazelhas, Études d'Extradition, p. 155; 2 Moore, Extradition, pp. 642, 1042; Re Cannon, 47 Mich. 481, 11 N. W. 280; Foreign Rel. U. S. 1876, p. 287; Billot, Traité de l'Extradition, pp. 308, 313; 2 Bernard, Traité de l'Extradition, pp. 483, 493, 510, 516, 570; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222.

Mr. Raymond Benjamin argued the cause, and, with Mr. U. S. Webb, Attorney General of California, and Mr. Robert W. Harrison, filed a brief for appellee.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal, taken under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215], to review a final order of the district court of the United [504] States for the northern district of California, denying appellant's petition for a writ of habeas corpus to be addressed to appellee, as warden of the state prison of the state of California, in whose custody appellant alleges he is held in violation of the Constitution, laws, and treaties of the United States. The petition was based upon § 753, Rev. Stat. (Comp. Stat. 1913, § 1281), and was denied under § 755 upon the ground that, on the face of it, the petitioner was not entitled to the writ.

Appellant is held under the authority of a judgment of the superior court in and for the city and county of San Francisco, in the state of California, imposing a sentence of imprisonment for the term of fourteen years, upon his conviction for perjury upon an indictment presented December 29, 1905. The allegations of fact upon which the Federal questions are raised are somewhat involved, and not easily understood without reference to previous proceedings set forth in Collins v. O'Neil, 214 U. S. 113, 53 L. ed. 933, 29 Sup. Ct. Rep. 573, of which appellant asks us to take judicial notice. Reading the averments of the petition with this aid, the following facts appear: On July 13, 1905, appellant was indicted by the grand jury of the city and county of San Francisco for the crime of perjury, committed in the giving of testimony in an action pending in a court of that county wherein one Charlotta Collins was plaintiff and appellant was defendant, in which she sought to obtain maintenance, support, and alimony for herself and her child; the alleged false testimony being that the said Charlotta and appellant did not intermarry on May 15, 1889, or at any other time, and were never husband and wife. To answer this indictment appellant was extradited from Canada, and he was put upon trial in the month of December before the superior court of the city and county of San Francisco. The jury disagreed, and while appellant was in custody awaiting a further trial he was, on December 29, 1905, again indicted for perjury, the offense being alleged to [505] have been committed in the giving of evidence upon the trial of the first indictment, in that he falsely testified that on May 15, 1889, at a specified place in the city of San Francisco, a marriage ceremony was performed between him and one Agnes Newman, whereas in truth, at the time and place specified, a marriage ceremony was performed between him and one Charlotta Newman. Before being placed on trial upon the second indictment, appellant applied to the United States circuit court for the northern district of California for a writ of habeas corpus, which was denied. 149 Fed. 573. He was then tried, found guilty, and sentenced; the judgment was affirmed by the district court of appeal, and a petition to have the cause heard in the supreme court was denied. 6 Cal. App. 492, 92 Pac. 513. Meanwhile, successive applications for habeas corpus were made to the United States district and circuit courts for the northern district of California and denied. 151 Fed. 358, 154 Fed. 980. And the supreme court of California, having entertained such an application, overruled his contentions and remanded him to the custody of the sheriff. 151 Cal. 340, 351, 129 Am. St. Rep. 122, 90 Pac. 827, 91 Pac. 397. This court reviewed the decision of the state supreme court, and the decision of the United States circuit court, reported in 154 Fed. 980, with the result that both were affirmed. 214 U. S. 113.

It is unnecessary to enlarge upon the doctrine, thoroughly established and recently re-stated, that in habeas corpus proceedings we are confined to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error. Frank v. Mangum, decided April 19, 1915, 237 U. S. 309, ante, 969, 35 Sup. Ct. Rep. 582.

In his petition and in voluminous briefs appellant raises numerous questions, of which it is sufficient to mention the following:

[506] (1) He contends that he was deprived of due process of law, in violation of the 14th Amendment, in that the trial court arbitrarily denied and refused to consider a valid and legally conclusive defense offered by him upon the trial of the second indictment, which resulted in the conviction upon which he is now held in custody. The alleged defense was: that testimony relating to the question of fact whether a ceremonial marriage took place on May 15, 1889, between him and Charlotta Newman could not be material to the issue upon the first indictment, nor furnish valid or competent foundation for a charge of perjury, because the marriage, if performed, was a nullity; and this because at a previous time appellant and Agnes Newman intermarried by written and mutual contract of marriage *per verba de præsenti*, followed by consummation and a public and mutual assumption of marital rights, duties, and obligations, which marriage continued to exist until dissolved by the death of Agnes in the month of May, 1901, and because of this previous marriage any marriage ceremony between

appellant and Charlotta on May 15, A. D. 1889, was void by § 61 of the Civil Code of California. But, plainly, the question whether testimony respecting the alleged ceremony was material upon the trial of the first indictment was to be determined by considering the nature of the issue that was then being tried, and the state of the other evidence that had been introduced at the time the alleged false testimony was given; not by re-examining the merits of that issue or the truth of the other evidence. The principal questions at issue upon the former trial, so far as appears, were: (a) Did appellant enter into a ceremonial marriage with Charlotta on the date named? (b) Was he, at that time, already married to Agnes, then still living? These were questions of fact; if both were answered in the affirmative, the marriage with Charlotta, although made in fact, was void in law. In order for the prosecution to succeed, the [507] first must be answered in the affirmative, the second in the negative; hence, testimony bearing upon either was material. The alleged false testimony of appellant tended to prove the negative of the first question. Manifestly, when he was afterwards tried upon an indictment for perjury based upon that testimony, no legitimate light could be thrown upon the question of its materiality or of its falsity by re-trying the second question of fact or the legal conclusions resulting therefrom. This matter was sufficiently disposed of by the state court of appeal in 6 Cal. App. 492, 498, 500, 505.

Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was "arbitrarily refused" merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged.

(2) A second contention is that the judgment under which appellant is held in custody is not the judgment of the superior court in and for the city and county of San Francisco, or of any legally constituted court of judicature, because Judge Burnett, who presided at the trial and rendered the judgment, was not a judge *de facto* or *de jure* of that court, but was a judge of the superior court for another county in said state, and presided at appellant's trial at the request of the governor, and without the consent or stipulation of appellant, or any request of the judges of the San Francisco superior court. This contention is to to be tested by the state Constitution, of which the pertinent provisions, as they stood at the time of appellant's conviction, are as follows:

"Art. 6, Sec. 6. There shall be in each of the organized [508] counties, or cities and counties of the state, a superior court, for each of which at least one judge shall be elected by the qualified electors of the county, or city and county, at the general state election; provided . . . that in the city and county of San Francisco there shall be elected twelve judges of the superior court, any one or more of whom may hold court. There may be as many sessions of said court, at the same time, as there are judges thereof. . . . The judgments, orders, and proceedings of any session of the superior court, held by any one or more of the judges of said courts, respectively, shall be equally effectual as if all the judges of said respective courts presided at such session. . . .

"Sec. 8. A judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof, and upon the request of the governor it shall be his duty so to do. . . ."

Of course, these sections are to be read together, and their natural meaning is that where a judge of a superior court of one county holds a superior court in another county upon the request of the governor, the court so held by him constitutes a session of the superior court, with the same jurisdiction as if one of the elected judges were sitting. Gardner v. Jones, 126 Cal. 614, 620, 59 Pac. 126, is to this effect. And when we add that Judge Burnett presided at appellant's trial upon the request of the governor, that the district court of appeal affirmed the judgment, and the supreme court refused to review its decision (6 Cal. App. 492, 507), and that the latter court, in the habeas corpus proceeding, upheld the jurisdiction of the trial court (151 Cal. 340), no reasonable doubt remains that the state courts advisedly adopted such a construction of § 8 as to sustain Judge Burnett's authority, even though appellant's present contention was not raised, and therefore not distinctly passed upon. Assuming the question to be open here, we see no reason [509] to disagree with the meaning thus attributed to the Constitution by the courts of the state.

According to appellant's construction of § 8, supra, a superior court judge elected in one county, when holding a superior court in another county upon the request of the governor, would be without jurisdiction, and incapable even of holding a "session" of the court, because of the absence of express provision in the Constitution to that effect. This is so plainly unreasonable that it might be dismissed as absurd, except for the insistence that by a constitutional amendment

adopted November 8, 1910 (several years after appellant's conviction), the people themselves recognized a *casus omissus* in § 8 of article 6, and supplied it by adding these clauses: "There may be as many sessions of a superior court at the same time as there are judges thereof, including any judge or judges acting upon request, or any judge or judges *pro tempore*. The judgments, orders, acts, and proceedings of any session of any superior court held by one or more judges acting upon request, or judge or judges *pro tempore*, shall be equally effective as if the judge or all of the judges of such court presided at such session." But, in view of the settled construction of the section as it previously stood, we must regard the amendment as having been adopted from abundant caution, to remove all question of doubt, rather than as recognizing and supplying a *casus omissus*.

(3) It is contended that a sentence of fourteen years' imprisonment for the crime of perjury is grossly excessive, and therefore illegal, and prohibited by the 14th Amendment of the Constitution of the United States. The sentence was based upon § 126 of the California Penal Code, which reads: "Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years." This is not a case, therefore, of a sentence exceeding the limit authorized by law. Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672.

[510] To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the lawmaking power, are functions peculiarly belonging to the several states; and there is nothing to support the contention that the sentence imposed in this case violates the provisions of the 14th Amendment either in depriving appellant of his liberty without due process of law, or in denying to him the equal protection of the laws. Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Coffey v. Harlan County, 204 U. S. 659, 662, 51 L. ed. 666, 668, 27 Sup. Ct. Rep. 305.

The argument under the equal protection clause is based principally upon the averment that the false testimony to the effect that a ceremonial marriage between appellant and Charlotta Newman did not take place on May 15, 1889, "could not by any possibility induce or influence any order, judgment, or decree of any court or judge, nor any verdict or judicial proceedings, and did not and could not by any possibility injure or tend to injure anyone in his or her rights or status in law." Since the petition shows that the natural tendency, and, presumably, the intended result, of the perjury, was to improperly procure appellant's acquittal upon the first indictment, the present contention is so manifestly frivolous as not to require further discussion. It is argued, also, that in the case of other felonies denounced by the laws of California, "many of them offenses of greater gravity and of more injurious consequences than perjury, the average maximum penalty is five years' imprisonment in the penitentiary, and no more." But it is hardly necessary to say that the comparative gravity of criminal offenses, and whether their consequences are more or less injurious, are matters for the state itself to determine.

The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal [511] government, not upon the states. Barron v. Baltimore, 7 Pet. 243, 247, 8 L. ed. 672, 674; Pervear v. Massachusetts, 5 Wall. 475, 480, 18 L. ed. 608, 609; McElvaine v. Brush, 142 U. S. 155, 158, 35 L. ed. 971, 973, 12 Sup. Ct. Rep. 156; O'Neil v. Vermont, 144 U. S. 323, 332, 36 L. ed. 450, 456, 12 Sup. Ct. Rep. 693; Ensign v. Pennsylvania, 227 U. S. 592, 597, 57 L. ed. 658, 661, 33 Sup. Ct. Rep. 321.

(4) It is contended, upon the authority of United States v. Rauscher, 119 U. S. 407, 430, 30 L. ed. 425, 432, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Cosgrove v. Winney, 174 U. S. 64, 43 L. ed. 897, 19 Sup. Ct. Rep. 598, 11 Am. Crim. Rep. 403, and other cases, that the conviction and imprisonment of appellant under the second indictment are in contravention of the treaty of extradition between the United States and Great Britain, in that he was extradited for the sole purpose of being brought to trial upon the first indictment, and that while that charge was awaiting trial and final disposition, he could not, without violence to the treaty and § 5275 of the Revised Statutes (Comp. Stat. 1913, § 10,121) be tried, convicted, sentenced, and imprisoned upon another charge. It is alleged that the first indictment was dismissed upon motion of the prosecution on July 12, 1909; and that under the treaty and law he was entitled to a reasonable time thereafter in which to return to the country from which he was extradited. In this form, and in others too numerous for mention, appellant reiterates the points that were decided against him by the supreme court of California (151 Cal. 340), whose judgment was affirmed by this court in 214 U. S. 113, where the court said (p. 122): "The contention of the plaintiff in error that the duty to afford opportunity to re-

turn after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed is not even plausible;" and further (p. 123): "The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the state whose laws he has violated [512] since his extradition, and we cannot see that it is a matter of any interest to the surrendering government. There is nothing in § 5275, Rev. Stat., supra, which gives the least countenance to the claims of the plaintiff in error."

Appellant's other points and arguments are but variations of those that have been mentioned.

The final order of the District Court refusing the application for a writ of habeas corpus is affirmed.

NANCY NERON LONGPRE, Gustavo Mourraille, et al., Plffs. in Err.,

v.

CLEMENTE DIAZ Y QUINONES.

(See S. C. Reporter's ed. 512–531.)

Infants — illegal sale of real estate — effect — judicial sanction.

1. No rights whatever conflicting with the title vested in an infant as the sole heir to his father's real property could be created in Porto Rico by a private sale by the widow and guardian *ad litem* in extrajudicial partition proceedings to pay an alleged debt of the estate, contrary to the requirements of the law concerning the administration and sale of the minor's property; nor could any such rights arise out of the judicial sanction of the partition proceedings.

[For other cases, see Infants, II. in Digest Sup. Ct. 1908.]

Ejectment — when maintainable — condition precedent.

2. Ejectment may be brought by the sole heir to recover possession of his deceased father's real property, which had been privately sold contrary to law during his minority by the widow and guardian *ad litem* in extrajudicial partition proceedings, without first seeking a rescission of the unlawful proceedings, or obtaining an annulment of the unauthorized judicial approval of such proceedings.

[For other cases, see Ejectment, I. in Digest Sup. Ct. 1908.]

Parties — who may maintain ejectment.

3. The sole heir, who, as such, was entitled to his father's estate subject to the widow's usufruct, may bring ejectment to recover possession of his father's real property, which had been privately sold contrary to law during his minority by the widow and guardian *ad litem*, under extrajudicial partition proceedings, sanctioned by judicial approval.

[For other cases, see Parties, I. a, in Digest Sup. Ct. 1908.]

Ejectment — rents and profits — good faith of purchaser.

4. The purchaser of an infant's inherited real property, which was privately sold by the widow and guardian *ad litem* in extrajudicial partition proceedings to pay a debt of the estate, contrary to the requirements of law concerning the administration and sale of a minor's property, lacks that good faith which is essential under Porto Rico Civ. Code, §§ 436, 437, 453, in order to enable one in possession of land to retain, on eviction, the fruits and revenues for the period of his possession.

[For other cases, see Ejectment, VI. in Digest Sup. Ct. 1908.]

Ejectment — rents and profits — good faith of heirs.

5. The good faith which, under Porto Rico Civ. Code, § 453, entitles the possessor of real property to retain, upon eviction, the fruits and revenues for the period of his possession, must be deemed to be personal, so as to relieve the heirs and successors, themselves possessing in good faith, from liability, on eviction, for the fruits and revenues during the period of their possession, despite the bad faith of their author or ancestor, the resultant of the void nature of the immediate title under which he held the property, in view of the provisions of § 444 that "any person who succeeds by hereditary title shall not suffer the consequences of a faulty possession of the testator, unless it be shown that he was aware of the defects affecting such possession; but the effects of possession in good faith shall benefit him only from the date of the decease of the testator."

[For other cases, see Ejectment, VI. in Digest Sup. Ct. 1908.]

Infants — property rights — ejectment — rents and profits.

6. The right of an emancipated minor to recover the rents and revenues during the period of his minority from real property which he inherited from his father, but which had been privately sold contrary to law during his minority by the widow and guardian *ad litem*, is not defeated because of the administrative authority vested by law in his mother.

[For other cases, see Infants, II. in Digest Sup. Ct. 1908.]

[No. 51.]

Submitted March 15, 1915. Decided June 1, 1915.

NOTE.—As to who is the real party in interest within the meaning of statutes defining the parties by whom an action must be brought—see note to Stewart v. Price, 64 L.R.A. 581.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment for plaintiff in an action of ejectment. Reversed and remanded for further proceedings.

See same case below, 6 Porto Rico Fed. Rep. 66.

The facts are stated in the opinion.

Messrs. Hector H. Scoville and José R. F. Savage submitted the cause for plaintiffs in error:

The action brought by the defendant in error is a collateral attack on the adjudication of a court of competent jurisdiction, and cannot therefore be maintained.

Thaw v. Ritchie (Thaw v. Falls) 136 U. S. 519, 34 L. ed. 531, 10 Sup. Ct. Rep. 1037; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

The remedy of the defendant in error was by a suit in equity to annul the record title of the plaintiffs in error, and not by an action at law in the nature of ejectment. It was therefore a good defense to this action that the recorded title had not been annulled, and the demurrer to this defense should not have been sustained.

Criado v. Battistini, 3 P. R. R. 365; Blondet v. Fantauzzi Hermanos, 14 P. R. R. 302.

If in the local courts of Porto Rico the defendant in error could not maintain his "acción reivindicatoria" without either first establishing the invalidity of the recorded title of these plaintiffs in error, or joining the two actions in one, he cannot, simply by virtue of changing the forum, obtain the relief which the local courts would not grant him.

Ex parte McNiel, 13 Wall. 236, 243, 20 L. ed. 624, 626.

And it cannot be said that such actions could not be joined on the equity side of the district court of the United States for Porto Rico.

Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 Sup. Ct. Rep. 1033.

The plaintiff in an action of ejectment must show a right to the possession of the property at the time of bringing his action.

Smith v. McCann, 24 How. 398, 16 L. ed. 714.

Until a partition and adjudication of the estate of a decedent has been made, the individual heirs cannot maintain an "acción reivindicatoria" for their individual interests.

Trinidad v. Trinidad, 19 P. R. R. 616.

The success of an action in ejectment (acción reivindicatoria) under the laws of Porto Rico does not necessarily imply in every case payment for the products thereof and an indemnization of the damages caused thereby, but such obligation on the part of the possessor who has been defeated in the action depends upon the circumstances attending the possession.

Criado v. Battistini, 3 P. R. R. 365; Teillard v. Teillard, 18 P. R. R. 546. See also Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547.

Evidence of a speculative character as to the possible production of the land in controversy should not have been admitted, and the jury should have been instructed to disregard it.

15 Cyc. 205; New Orleans v. Gaines, 15 Wall. 624, 21 L. ed. 215; New Orleans v. Gaines (New Orleans v. Christmas) 131 U. S. 191, 33 L. ed. 99, 9 Sup. Ct. Rep. 745; Credle v. Ayers, 126 N. C. 11, 48 L.R.A. 752, 35 S. E. 128.

Mr. Francis H. Dexter submitted the cause for defendant in error. Messrs. Joseph Anderson, Jr., and Damian Monserrat, Jr., were on the brief:

When the judgment is void for lack of authority in the judge, it may be collaterally attacked.

Rich v. Mentz, 134 U. S. 642, 33 L. ed. 1079, 10 Sup. Ct. Rep. 610; 23 Cyc. 1075, note 5; Hatch v. Ferguson, 33 L.R.A. 759, and note, 15 C. C. A. 201, 29 U. S. App. 651, 68 Fed. 43; United States use of Wilson, v. Walker, 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

Plaintiff (defendant in error) claims that he has the legal title; he is out of possession; before he can bring an action to quiet title, he must bring an action at law to recover the possession.

Lacassagne v. Chapuis, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Whitehead v. Shattuck, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; 2 Pom. Eq. Jur. § 724; 73 Cent. L. J. 204.

The title of inheritance is sufficient for a reinvindicatory action when all of the heirs act together for the entire estate, or when there is only one and he acts for himself, as in this case.

Blondet v. Fantauzzi Hermanos, 14 P. R. R. 302; Amy v. Amy, 15 P. R. R. 387; Velilla v. Piza, 17 P. R. R. 1069; Cruz v. Ortiz, 17 P. R. R. 1134; Davila v. Davila, 18 P. R. R. 112; Trinidad v. Trinidad, 19 P. R. R. 616; Decisions of Supreme Court of Spain, Nov. 19, 1904; Jan. 12, 1905; July 4, 1891; Feb. 28, 1893; May 20, 1899; Jan. 21, 1903; May 30, 1899; 5 Manresa, Commentaries on the Civil Code, p. 338; Velilla v. Pizá; People v. Dimas, 18 P. R. R. 1041; Collado

v. Perez, 19 P. R. R. 881; Morales v. Landrau, 15 P. R. R. 761.

The defendants (plaintiffs in error) secured what title they have (and it is denied that they secured any legal title) from the plaintiff (defendant in error), and therefore they would be estopped from setting up that the plaintiff has not sufficient title to maintain this action.

Gaines v. New Orleans, 6 Wall. 642, 18 L. ed. 950; Nieves v. Sanchez, 17 P. R. R. 844.

The act of adjudicating property of an intestate to third persons, strangers to the inheritance, is an absolute act of alienation, and when there are minors or incapacitated persons with interest in the inheritance, all of the legal requisites established for the sale of property of minors or incapacitated persons shall be fulfilled.

2 Manresa, 46, 1907 ed.; Decisions of Supreme Court of Spain, April 1, 1899; June 24, 1902; Sept. 10, 1905; Sept. 30, 1905; April 3, 1899; Nov. 24, 1898; Dec. 26, 1893; Feb. 9, 1887, "Dirección General;" Sept. 10, 1891; Nov. 14, 1881; May 23, 1899. La Dirección General de los Registros, March 14, 1884.

A court by its approval cannot make lawful an unlawful act.

Odriozolo, p. 50, 3d appendix; Gaines v. New Orleans, 6 Wall. 642, 18 L. ed. 950; Monge v. Zechini, 17 P. R. R. 729.

Ignorance of the laws cannot serve as a basis for good faith.

4 Manresa, 1907 ed. p. 102; New Orleans v. Gaines, 15 Wall. 624, 21 L. ed. 215; Monge v. Zechini, 17 P. R. R. 730.

Mr. Chief Justice White delivered the opinion of the court:

Clemente Diaz y Gonzalez, residing in Viequez, Porto Rico, there died in April, 1890, leaving a widow and an infant son, the issue of their marriage. The deceased was the recorded owner of a piece of farming property known as Destino, as well as of other pieces of property of small area and value, all of which were his separate estate, having been acquired before marriage. By the provisions of the Code it is conceded that the minor was the sole legal heir of his father, taking all his property, subject, however, to a usufruct of one third in favor of his mother, the widow. In April, 1892, in conciliatory proceedings before a municipal magistrate preparatory to a suit to be brought by Ramon Aboy Benitez to enforce a debt which he asserted against the estate, the widow admitted that Aboy was a creditor of the estate for a little over 3,000 pesos, evidenced as to a considerable part by the notes of the deceased, and the *remainder* embracing doctors' bills, taxes, and money advanced for the support of the widow and infant child. The creditor, [514] presumably in consequence of this acknowledgment, agreed to await payment until March, 1893, when a lease would expire which existed on the property known as Destino in favor of an agricultural partnership styled Mourraille & Martineau. In the following August, 1892, on the petition of the widow, the court of first instance of Humacao, within whose territorial jurisdiction Viequez was situated, recognized the minor as the sole heir of the father, and as such entitled to his estate subject to the usufruct in favor of the widow, as above stated. The court subsequently, on the petition of the mother, appointed a paternal uncle of the minor, Santos Diaz y Gonzalez, his guardian *ad litem* to act for and represent the infant in matters where, from conflict of interest or otherwise, his mother would be incapacitated from so doing. Thereafter Aboy by a notarial act transferred to the firm of Mourraille & Martineau the greater part of his acknowledged debt, the widow intervening in the act for the purpose of taking cognizance of the transfer, and, in addition, to recognize certain small debts held by the firm against the estate.

Contemplating an extrajudicial partition, the widow and the guardian *ad litem* then united in the appointment of an accountant to accomplish that purpose, who drew an agreement of so-called partition which was executed by the parties on the 27th of December, 1893. In the agreement the liabilities of the estate were enumerated and its assets were stated and valued, and the property of the entire estate was conveyed. For the purposes of this case it suffices to say that as the debt due to the firm of Mourraille & Martineau was, as stated, precisely equal to the value affixed to the farm Destino, that property was transferred and delivered to the firm in extinguishment of its debts, and a like course by transferring other property was pursued as to the comparatively small debt of Aboy. The small remainder of the estate was declared to be subject to the ownership of the minor and the one-third usufruct [515] of his mother. To make this private agreement for voluntary and extrajudicial partition authentic in form by placing it of record, the widow, on February 1st, 1894, appeared before a notary, and, exhibiting the agreement, deposited it among the archives of his office after making the necessary declarations to accomplish that purpose. This being done, a copy of the agreement as authenticated and deposited was presented to the judge of the court of first instance of Humacao for his approval, which was by him given, with a direction to the officer of registra-

tion to place the agreement as authenticated upon the public records. In April, 1894, this was done, thus transferring on the public record the title of the farm Destino from the name of Diaz, the deceased, to the name of the firm of Mourraille & Martineau. It is conceded, however, that in the meanwhile, in February, 1894, as a result of the transfer made under the so-called partition agreement, delivery of the possession of the farm Destino was made to the firm, and they held the same, asserting ownership thereof.

By the provisions of a notarial act executed in May, 1894, which was inscribed upon the public registry, for the purpose of dividing the assets of the firm of Mourraille & Martineau among the partners, the title to the farm Destino passed from the firm to the individual name of Victor Mourraille. By his death, which, although the date is somewhat obscure in the record, occurred probably in January, 1895, the property passed to the plaintiffs in error, his widow and heirs. Whether they took as the result of intestacy or by will is not disclosed and is immaterial to consider, since it is conceded that the rights enjoyed by them were but a continuation of those possessed by Mourraille himself in virtue of the proceedings conveying the property Destino to the firm, and of the attribution of the property to Mourraille in the division of the firm assets.

[516] More than twenty years after the death of his father, the minor, Clemente Diaz, having been duly emancipated, commenced in a local court in Porto Rico this suit against the present plaintiffs in error, the widow and heirs of Mourraille, in revendication of the property called Destino, previously transferred to them under the circumstances above stated. They removed the case to the court below and successfully resisted a motion to remand. Thereupon the petition was amended. As amended in substance it asserted that the plaintiff was the duly registered owner of the property, and that his possession had been wrongfully disturbed in 1894 by the action of the defendants or their author in taking possession of the same. A brief outline of the facts which we have previously stated was made, and the prayer was for a recovery of the farm called Destino, and for a decree for fruits and revenues from the time of taking possession in 1894. An answer was filed which was demurred to for insufficiency. It would seem that before the demurrer was passed upon an amended and fuller answer was filed. By this answer the facts which we have previously stated were in substance admitted. The capacity of the plaintiff to sue was challenged, first, because, as an heir of his father, he had no right to do so, and second, because he was without authority to recover the property without previously suing to rescind the partition proceedings and the recorded title resulting therefrom, and thus collaterally assail those proceedings. The want of right to recover as a question of merits was denied, first, because of a term of prescription which was pleaded; second, because of the validity of the partition proceedings and the conclusive effect of the judgment of approval given to them by the proper court; third, because a suit to rescind such proceedings was barred by a prescription which was also pleaded; fourth, because in any event the plaintiff was without authority to sue to recover the fruits and revenues of the property because, [517] during his minority, they were collectible, if due, by his mother as administrator of his estate, and because even in case there was a right to evict, the fruits and revenues could not be recovered from Mourraille because of his good faith, nor from the defendants holding under him because of their good faith. This answer was again demurred to as stating no defense. The court sustained the demurrer in so far as it questioned the sufficiency of the technical defenses advanced by the answer on the ground that the proceedings of so-called partition were absolutely void and the approval affixed by the judge of the court of first instance of Humacao was equally null because of an absolute want of jurisdiction on his part to take the action in the premises which he had taken. The answer was again amended. The defenses to the merits concerning the want of right to recover the property or its fruits and revenues as well as prescription were all in the fullest way reasserted, and in addition a counterclaim was presented asserting that the defendants, in the event of eviction, were entitled to recover the amount of the debt owned by Mourraille & Martineau which had been used in the so-called partition proceedings to pay for the Destino property, with interest thereon at 6 per cent.

Upon the issues which were made by this answer and counterclaim the case came finally to trial before a jury. On the opening, the plaintiff, to make out his title after establishing his heirship, offered the documents establishing the facts concerning the partition which we have stated, and the defendants expressing their purpose to offer no further evidence on those subjects, the court, applying the conclusion which it had reached on the demurrer as to the absolute nullity of the partition sale, instructed the jury that on the question of

title there must be a verdict for the plaintiff. Thereupon the trial proceeded solely as to the right to recover fruits and revenues, and no evidence on any other subject was offered. It was [518] agreed between the parties that there should be deducted from any sum of fruits and revenues found to be due one third thereof upon the theory that they belonged to the widow of Diaz, the mother of the plaintiff, in virtue of her usufruct, and were not involved in the suit. And it was further admitted that the claim asserted in the counterclaim was valid, and there should be a verdict for the recovery of the sum claimed, with interest. Considerable evidence as to fruits and revenues was offered and some exceptions were taken by the defendants to rulings of the court admitting evidence concerning the subject on the ground that, by its admission, too great leeway was afforded for speculative damages. The defendants specifically requested that the jury be instructed that if they were in good faith they were not liable for fruits and revenues, which was refused and an exception taken. And an exception was also reserved concerning the right to award fruits and revenues to the plaintiff for the period covered by his minority because of the right of his mother to administer his property during such time. There was a verdict and judgment for the property and for the rents and revenues during the entire term of adverse possession, whether held by Mourraille & Martineau, by Mourraille himself, or by the defendants holding under him.

There are twenty-seven assignments of error, but we shall confine our attention to the questions pressed in argument. The validity and effect of the so-called partition proceedings on the title of the property sued for underlies every consideration urged, and we therefore, as did the court below, first consider that subject. While it is obvious that the property left by the deceased, and which passed to his heir, the minor, was bound for the debts of the deceased, and subject to be disposed of under lawful proceedings to pay the same, we think it is indisputably apparent that there was an absolute want of authority on the part of the widow and guardian *ad litem* to give the property of the [519] minor in payment of an alleged debt of the estate of the father. We say this because the so-called partition and the sale of the property by a mere private agreement were directly in the teeth of the requirements of the law concerning the administration and sale of a minor's property, and therefore such mere private sale created no rights whatever conflicting with the title vested in the minor *in virtue of* his heirship. And we are of opinion, moreover, that by the same token it conclusively results that the judge of the court of first instance of Humacao was absolutely without jurisdiction to approve the so-called voluntary partition proceedings, and therefore that no rights whatever arose from such sanction. We do not stop to refer to the requirements of the local law which were absolutely disregarded in the private sale relied upon, since in substance it is not disputed that if the proceedings by which the property was sold had the character which we affix to them, they were wholly unauthorized by the local law, and indeed were prohibited by its express or implied provisions. In the light of this conclusion we are of opinion that the lower court committed no error in overruling the challenge made by the answer to the capacity of the plaintiff to sue in revendication (ejectment) upon the assumption that he was bound first to seek the rescission of the partition proceedings and to obtain an annulment of the order of the judge approving the same, since it is impossible to conceive that the preliminary duty existed to obtain the annulment of that which was already null, or to seek to rescind that which never, in contemplation of law, had any existence whatever. In passing, we observe that the contention that the plaintiff, as the sole heir of his father's estate, and, as such, the owner of the entire property sued for, was without capacity to sue, is, we think, refuted by its mere statement.

Aside from the objections to which we have referred concerning the admissibility of evidence as to the quantum [520] of fruits and revenues, which we shall hereafter notice, this reduces the case to a consideration of the right to recover fruits and revenues. The question arises in a twofold aspect: First, as to the liability for fruits and revenues of Victor Mourraille, the author in title of the defendants, and second, of the defendants themselves. In both, questions of fact and law require to be considered, the first involving the existence of good faith, and the second, the legal responsibility for fruits and revenues resulting from the ultimate conclusion as to the existence of good faith drawn from the proof on the subject.

The provisions of the present Porto Rican Civil Code controlling the subject, which are in substance the same as those of the Spanish Civil Code previously governing in Porto Rico, are as follows, the numbers of the articles of the former Spanish Code being printed in brackets:

"Sec. 453. [451] A possessor in good faith becomes the owner of the fruits col-

lected, so long as the possession is not legally interrupted.

"Natural and cultivated fruits are considered as collected from the time they are gathered or separated.

"Civil fruits are considered as daily proceeds, and belong, in that proportion, to the possessor in good faith.

"Sec. 436. [433] A bona fide possessor is deemed to be the person who is not aware that there exists in his title or in the manner of acquiring it, any flaw invalidating the same.

"A possessor in bad faith is deemed to be any person possessing in any case contrary to the above.

"Sec. 437. [434] Good faith is always presumed, and any person averring bad faith on the part of a possessor is bound to prove the same.

"Sec. 444. [442] Any person who succeeds by hereditary title shall not suffer the consequences of a faulty possession of the testator, unless it be shown that he was aware of the defects affecting such possession; but the [521] effects of possession in good faith shall benefit him only from the date of the decease of the testator."

First. As to the good faith of Mourraille.

As there was no evidence from which the want of good faith of the firm of Mourraille & Martineau or of Mourraille himself was deducible except the proof concerning the giving in payment of the minor's property as the result of the voluntary partition, it follows that unless such evidence established the want of good faith there was error under the very terms of the Code in allowing the recovery of fruits and revenues against Mourraille for the period of his possession, as distinguished from the possession of the defendants holding under him. As we have already, however, pointed out that the partition proceedings were absolutely void because in violation of the requirements of law concerning the sale of the minor's property, it follows that the absence of good faith clearly resulted from taking possession of the property and attempting to hold it under a confessedly nonexistent and void instrument. The conclusion so irresistibly arises from the premise upon which it is based that reference to authority on the subject might well be dispensed with. Authority, however, is not wanting, since in countries where the civil law prevails and the right to retain fruits and revenues in the event of eviction in case of good faith is recognized, with substantial unanimity, it has always been considered that the existence of good faith was excluded and the conclusion of legal bad faith necessarily arose against one who was a party to an attempt to acquire property by a deed, conveyance, or proceeding which was absolutely void because in violation of prohibitory laws. Such was the rule in France prior to the Code Napoleon. So, also, under that Code the doctrine has been expressly announced and applied by the court of cassation. See Hérit. Daudé C. Etienne, Cass. 19 Dec. 1864, Journal Du Palais for 1865, p. 27, and note 3, where a reference is made to other adjudged [522] cases on the subject and to doctrinal writers sustaining the principle. So in Louisiana many years ago it was recognized that "the purchaser of minors' property by private agreement is a possessor in bad faith." Fletcher v. Cavalier, 4 La. 277; Morand v. New Orleans, 5 La. 242. And the same principle was applied to "one possessing by a judgment of a court without jurisdiction." Lowry v. Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556. And that such was the law in Spain both before and after the Civil Code would seem to be undoubted, since Scaevola so treats it. Thus, that author, in his Commentaries on the Spanish Civil Code, volume 8, pages 308 et seq., in commenting on article 442 (identical with § 444 of the Porto Rican Civil Code), says:

"This rule, which is but an expression of the principle that 'the burden of proof is upon the one who makes the charge,' . . . in our opinion had no application in the event the possession takes its origin in a faulty manner of acquiring, either by being contrary to provisions of law, or through lack of compliance with certain requisites. In this case, we said, that proof was not necessary, in as much as bad faith was shown *ipso facto* by the single circumstance of the acquisition being contrary to law. 'Thus,' we said, 'he who acquires a thing belonging to a minor, without authorization from the family council, he who purchases it, regardless of the prohibitions of article 1459, cannot be considered a possessor in good faith, because he knew beforehand that he could not acquire it, that the acquisition was faulty, being contrary to law, and because no one is permitted to plead ignorance of the law.'"

And this brings us to consider under a second heading whether the burden of proof was sustained and the want of good faith of the plaintiffs in error, the heirs of Mourraille holding under him, was established as the result of the proof of Mourraille's own bad faith.

[523] *Second. As to the good faith of the heirs of Mourraille.*

The contention of the plaintiffs in error pressed below and here urged is that, even conceding the absence of good faith of

Mourraille and their liability as his successors or heirs as the result of the eviction, to refund fruits and revenues during his term of possession, the liability of the defendants beyond this to pay rents and revenues did not arise because the proof of the want of good faith in Mourraille did not establish the want of good faith of his heirs holding under him. And because of this proposition it is insisted the court below erred in refusing to charge that, in the absence of proof of bad faith on their part, they were not liable on eviction for fruits and revenues during their possession, as distinguished from that of Mourraille. The contention is rested upon the provisions of § 444 of the Porto Rican Code. (article 442 of the Spanish Code), saying:

"Any person who succeeds by hereditary title shall not suffer the consequences of a faulty possession of the testator, unless it be shown that he was aware of the defects affecting such possession; but the effects of possession in good faith shall benefit him only from the date of the decease of the testator."

This provision, it is insisted, causes the liability of the heirs to pay fruits and revenues upon their eviction to depend upon their personal good faith, disconnected from and uninfluenced by the bad faith found to exist in Mourraille, their author, under whom they held. On the other hand, this is met by the contention that by the very nature of the possession of the heirs under and through Mourraille as his legal successors continuing, so to speak, his personality, the bad faith of their author was imputable to them, and their liability as possessors in bad faith to restore fruits and revenues is consequently established. It is conceded by both parties that the text of the section relied upon was introduced into the Spanish Code as the [524] result of an original conception, since it was not found in the Code Napoleon, and not expressed in the Codes which have followed that Code, as, for instance, the Code of Louisiana. It is also to be conceded that as the text in the Spanish Code had received no authoritative interpretation when it was adopted in so many words into the Porto Rican Code, therefore the adoption carried with it no previous authoritative interpretation. The respective contentions turn upon a discussion of the text relied upon, and the support which each side assumes is afforded their view of the subject, derived from Spanish doctrinal writers on the Code. Thus, in favor of the doctrine that the heirship to the property carries with it as an inseparable incident the heirship to the bad faith of the author or ancestor, especially where such bad faith of the author is the resultant of the void nature of the immediate title under which he held the property, great reliance is placed upon a passage in the work of Scaevola, the eminent legal writer already referred to. The passage in question is found in the comment of the author upon article 442 of the Code immediately following the passage which we have already quoted concerning the proof of bad faith established as against one who has acquired through an absolutely void deed or proceeding, and is as follows:

"Now, then: will the explanation be applicable to the successor? Our opinion inclines to the affirmative. The case presented by us deals with an error of law, and this no one should be ignorant of. The successor cannot maintain that he is ignorant of it: first, because it is not possible to claim ignorance of the law; second, because, on accepting the inheritance, from the moment a person is converted into a successor, there is no other presumption but that he has examined the titles of possession of his author and predecessor. Acceptance of the inheritance implies previous examination of everything concerning it. How can it be lawful for a successor to allege that he believed, for [525] example, that an estate possessed by his predecessor was held in good faith if he had acquired it in a faulty manner, contrary to law? Such allegation would be inadmissible, because the successor, by the mere fact of being such successor, is presumed to know the titles of possession of the predecessor, and therefore the faults attached thereto. On the supposition of which we are speaking, we repeat, bad faith is inherent to transmittal to the successor, inasmuch as the successor continues the personality of the predecessor."

On the other hand, reliance to the contrary is placed upon opinions expressed by other Spanish doctrinal writers on the Code or books dealing with that subject as follows: Manresa, Commentaries on the Spanish Civil Code, vol. 4, pp. 165 et seq.; Spanish Judicial Encyclopedia, Francisco Seix, editor, vol. 4, pp. 665 et seq.; Diaz Guijarro y Martinez Ruiz on the Civil Code, vol. 3, p. 311. Without admitting that the authorities thus relied upon are entirely reconcilable one with the other, or afford what is deemed any safe rule for elucidating the significance of the section of the Code in question, we are of opinion that it must be conceded that these authorities do not coincide with the significance attributed to the article of the Code under consideration stated by Scaevola in the passage just quoted. Because of this situation we do not particularly refer to the authorities last relied upon, since at best we can find

nothing in them to relieve us of the duty of interpreting the section in question, or which renders the performance of the duty of interpretation less difficult. In view of this situation we come to consider the subject with which the article deals primarily from the point of view of historical evolution in order, if possible, to throw light on the doctrinal conditions which led to the incorporation of the article into the Spanish Code, and thus ascertain the intent and purpose which controlled its enactment, [526] and then to interpret the provision from that vantage point.

Speaking in a general sense, before the Code Napoleon, certainly in the provinces more largely influenced by the Roman law, the doctrine of the right of a possessor in good faith to retain the fruits and revenues in case of eviction was firmly established. It was also equally clearly recognized that the bad faith of the author was attributable to one holding under him as an heir or universal successor. If complexities obtained in the application of the doctrine, they in a large measure resulted from questions concerning the burden of proof as to good or bad faith. Pothier, De la Propriété, n. 332 et 336; Domat, Lois Civ., 1re part., liv. 3, title 5, n. 14. And see also a statement of Laurent on the subject, t. 6, n. 221. The general doctrine as to nonliability for fruits and revenues on eviction in case of good faith was embodied in the Code Napoleon in articles 549 and 550. Two things came at an early day to be recognized under that Code: First, that it had come to pass that so far as the restitution of fruits and revenues was concerned, the burden of proof to establish the absence of good faith on the part of a possessor whose eviction was sought was upon the one seeking the eviction. The doctrine as it came to be crystallized is thus stated by Laurent, t. 6, n. 225, p. 298: "According to the principles generally prevailing the burden of proof would rest upon the possessor of property to prove his good faith. In effect, under general principles the owner seeking to recover property would only be obliged to prove his right of property, and when that right was established, by that fact alone the fruits of the property would belong to him as the result of the general rule established by article 547. The possessor who claimed the fruits would then become an actor on his own account, and if the correct principles were rigorously applied, he would be obliged to prove [527] the foundation of his demand; that is to say, his good faith. However, it is established that the possessor under these circumstances is not obliged to prove his good faith because, by the text of article 2268, good faith is always presumed, and the burden is cast upon him who alleges bad faith to prove it."

Second. So, also, in some measure, it may be, because of this view concerning the burden of proof and from many other considerations, the preponderant opinion sustained by judicial decisions and supported by doctrinal authority came to be that, under the Code, the question of good faith was a personal one, depending so much upon considerations of that character that the good faith of the possession of the author was one thing, and the good faith of those holding under him, whether heir or other successor, was another. From this it came to be acknowledged that the right to retain fruits and revenues in case of eviction might exist in favor of an heir who was in good faith from the time of his possession, although it was conclusively established that the author or ancestor was in bad faith, and the duty on the heir would exist to return so much of the fruits and revenues as accrued during the possession of the author. The principle was upheld by the court of cassation in Parent de Chassey C. La Commune de Monceauxle-Comte, May, 1848, Journal Du Palais for 1849, vol. I., p. 12. The doctrine was thus succinctly stated in one of the syllabi: "The heir of a possessor in bad faith may successfully avoid the restitution of the fruits in favor of the true proprietor by setting up his own personal good faith." See also a note to the case in which many authorities supporting the doctrine are collected. Demolombe (vol. IX., n. 613, p. 558) thus states the strongly dominant opinion on the subject: "We ask simply if the fruits which the heir himself may have collected during his possession belong to him in virtue of his personal good faith. The affirmative [528] seems to-day to have triumphed both in jurisprudence and in doctrine where it counts among its supporters many authorities of the most imposing character." Among those cited are Marcadé, t. II., art. 550, n. 2; Toulier, t. II., p. 263; Demante, t. II., n. 385 *bis*, VIII.; and also a list of cases adjudged in numerous intermediary courts and courts of original jurisdiction.

The doctrinal writers, in pointing out the personal character of the question of food faith for the purpose of ascertaining the duty to return fruits and revenues, frequently directed attention to the fact that it was easy to conceive of a case where there might be bad faith on the part of one possessing in virtue of his heirship and good faith on the part of the author, and *vice versa*. The argument that to distinguish because of personal good faith between an heir and his author who

had been in bad faith would be purely academic, since the heir, in virtue of his liability as heir for the obligation of his ancestor, would be obliged to respond for all the fruits and revenues as heir if not as possessor, was met by pointing out that the effect of considering the question as one of personal liability, while it did not break the continuity of heirship, was to sever the continuity of possession and responsibility therefor, and consequently to cause it to result that while the heir as heir would be responsible for the bad faith of the ancestor during his, the ancestor's, term of possession, he would not be responsible as heir for the term in which he, the heir, had possessed the property in good faith.

It is true, as pointed out by Demolombe, following the passage previously quoted, that the doctrine of the personal character of the good or bad faith, so far as the obligation to restore fruits and revenues in case of eviction was concerned, was not universally accepted. It is true also that such doctrine has not been applied under all the codes which literally followed the Code Napoleon. Thus, in [529] Louisiana, where, in substance, the provisions of the Code Napoleon were incorporated in the Civil Code in articles, 3450, 3451, 3452, and 3453, the rule recognized in the law of France before the Code Napoleon has been applied in many decisions. But this subject need not be entered into, since our purpose is not to discuss the relative merits of the doctrine prevailing in France under the Code Napoleon as compared with the contrary view, but only to make clear the fact of the prevalence of the doctrine in France under the Code as a means of elucidating the interpretation of the provisions of the Spanish Code not only so far as they adopt the Code Napoleon, but as they added new provisions on the subject in question.

Coming to so do, and looking in a general way at the text of article 442 and of the cognate articles immediately associated with it in the Spanish Code, we are of the opinion that article 442 and those dealing with the same subject were adopted for the express purpose of causing the law under that Code to conform to the principle of the personal character of the question of good faith so far as the return of fruits and revenues was concerned in case of eviction, and thus enable an heir who possessed in personal good faith to relieve himself from liability despite the personal bad faith of his ancestor or author. In other words, we think that the new provisions were inserted in order to adopt in the Spanish Code the dominant interpretation prevailing in France under the Code Napoleon, and to exclude the possibility of taking a contrary view. The conviction in this regard which results from the general considerations of the text of the articles in the light of the statements made becomes irresistibly certain if the articles and their relation to each other are closely examined. Thus it is to be observed that while in France the duty to show the absence of good faith, which was one of the generating causes from which the doctrine of the personal character of the responsibility was deduced, was [530] expressed in a general provision of the Code Napoleon not associated with the question of responsibility to return fruits and revenues, in this instance that provision was grouped in direct and immediate association with the article under consideration as if to remove all possible question of its application to the subject. Moreover, the careful manner in which the article expresses the distinction between the liability of the heir as heir to return fruits and revenues during the possession by the ancestor in bad faith and the want of liability to return such revenues during the period of possession by the heir in good faith serves palpably to emphasize the dissociation between the continuity of heirship and the break in the continuity of possession for the purpose of the return of fruits and revenues lying at the basis of the doctrine of the personal character of the question of good faith which came to be established under the Code Napoleon.

And this view of the meaning of the text and of its purpose and intent makes clear that it would be impossible to adopt the interpretation stated in the Commentaries of Scaevola to which we have previously referred. We say this because that interpretation rests upon the existence of an assumed presumption of an examination by an heir of the title deeds of his ancestor or author which cannot be indulged in without disregarding the rule as to burden of proof which article 434 (§ 437 of the Porto Rican Code) directly ordains. Besides, when it is considered that the interpretation referred to makes the heir in good faith liable to return fruits and revenues because of the bad faith of the ancestor only in cases where an assumed presumption of an examination of the title papers of an ancestor by an heir would apply, it would follow not only that the burden of proof fixed by the statute would be disregarded, but that the interpretation relied upon would be inapplicable where the bad faith of the ancestor arose from conditions *dehors* his title papers, and which [531] were not susceptible of being disclosed by an examination.

As under the provisions of § 444 of the

Porto Rican Code when rightly interpreted, in the absence of proof of the bad faith of the defendants they were not liable for the return of the fruits and revenues during the period of their possession, even although the bad faith of Mourraille, their author, had been established during the period of his possession, it follows that there was error in the refusal of the court below to so instruct the jury, and hence a reversal must result and a new trial follow. Before, however, so directing, we observe that we are of opinion that the contention concerning the want of right of the plaintiff to recover rents and revenues of the property sued for for the period of his minority because of the administrative authority vested by law in his mother, under the circumstances here disclosed was without merit, and that such also is the case concerning the objection made to the admissibility of testimony concerning the quantum of fruits and revenues because of its speculative character. The judgment, therefore, will be reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

SUPREME COUNCIL OF THE ROYAL ARCANUM and Val M. Schmitz, Regent of De Witt Clinton Council, No. 419, of the Royal Arcanum, Plffs. in Err.,

v.

SAMUEL GREEN.

(See S. C. Reporter's ed. 531–547.)

Error to state court — Federal question — full faith and credit — how raised.

1. A question under the full faith and credit clause of the Federal Constitution as to the effect to be given to the law of another state was sufficiently raised to support a writ of error from the Federal Supreme Court to review a judgment of a New York court holding that the law of New York governs the respective rights of a Massachusetts mutual benefit society and the members of a New York subordinate council, although there was no specific reference to the full faith and credit clause in the repeated assertions in the pleadings that the society was incorporated in Massachusetts, and that the laws of that state controlled the operation and effect of its charter, where a Massachusetts judgment construing such charter was expressly pleaded, accompanied with an explicit averment that not to give it due effect would be a violation of the full faith and credit clause, and the due effect to be given such judgment depends upon whether or not the Massachusetts law controlled the parties.

[For other cases, see Appeal and Error, 1168–1248, in Digest Sup. Ct. 1908.]

Statutes — full faith and credit — powers of mutual benefit society — increasing rates.

2. A violation of the full faith and credit clause of U. S. Const. art. 4, § 1, results from the refusal of the New York courts to hold that the power of a Massachusetts mutual benefit society under its charter and by-laws so to amend such by-laws as to increase its assessment rates, and the rights and duties of the members of a New York subordinate council with respect to such increase, are to be determined by the Massachusetts law, under which, as construed by a judgment of the highest court of that state, such amendment is valid and violates no contract rights of the certificate holder.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1909 Supp.]

Judgment — of sister state — full faith and credit.

3. The full faith and credit due from the New York courts under U. S. Const. art. 4, § 1, to a Massachusetts judgment, which holds that a mutual benefit society incorporated in that state has the power under its charter and by-laws to increase its assessment rates, requires that the courts of the former state, when called upon to consider the validity of such increase as to members of a New York subordinate coun-

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

Generally as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Mills v. Duryee, 3 L. ed. U. S. 411; Darby v. Mayer, 6 L. ed. U. S. 367; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

On reasonableness of new by-law as implied condition to consent to change of by-laws—see note to Olson v. Court of Honor, 8 L.R.A. (N.S.) 521.

On the right of mutual benefit society to increase rates—see notes to Reynolds v.

cil, recognize the controlling effect of the Massachusetts law as established by that judgment.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

Appeal — briefs of counsel — striking from files — improper language.

4. Counsel's brief will be stricken from the files where it is full of vituperative, unwarranted, and impertinent expressions as to opposing counsel.

[For other cases, see Appeal and Error, V. u, in Digest Sup. Ct. 1908.]

[No. 106.]

Argued December 8 and 9, 1914. Decided June 1, 1915.

IN ERROR to the Supreme Court of the State of New York in and for the County of Kings to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which, reversing a judgment of the Appellate Division of the Supreme Court, Second Department, affirmed a judgment of a Special Term of the Supreme Court, holding invalid an increase in the assessment rates of a foreign mutual benefit society. Reversed and remanded for further proceedings.

See same case below, in appellate division, 144 App. Div. 761, 129 N. Y. Supp. 791; in court of appeals, 206 N. Y. 591, 100 N. E. 411.

The facts are stated in the opinion.

Mr. Howard C. Wiggins argued the cause, and, with Messrs. Curtis H. Waterman, John Haskell Butler, W. Holt Apgar, and Joseph A. Langfitt filed a brief for plaintiffs in error:

The right of a corporation to modify the terms of a contract of corporate membership in it depends upon the power of the corporation.

Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549; Durfee v. Old Colony & F. River R. Co. 5 Allen, 230, 242; Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Ellerman v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 217, 23 Atl. 287; Dudley v. Kentucky High School, 9 Bush, 576; 26 Am. & Eng. Enc. Law, 2d ed. p. 959; Korn v. Mutual Assur. Soc. 6 Cranch, 192, 3 L. ed. 195; Mutual Assur. Soc. v. Korn, 7 Cranch, 396, 399, 3 L. ed. 383, 384; Reynolds v. Supreme Council, R. A. 192 Mass. 153, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776; Mock v. Supreme Council, R. A. 121 App. Div. 476, 106 N. Y. Supp. 155; Gaines v. Supreme Council, R. A. 140 Fed. 978.

This question of corporate power depends upon the "public acts" of the state of Massachusetts.

Head v. Providence Ins. Co. 2 Cranch, 127, 167, 2 L. ed. 229, 242; Dartmouth College v. Woodward, 4 Wheat. 636, 4 L. ed. 659; Bank of United States v. Dandridge, 12

Supreme Council, R. A. 7 L.R.A.(N.S.) 1154; and Dowdall v. Supreme Council, C. M. B. A. 31 L.R.A.(N.S.) 417.

Effect of improper language in briefs of counsel.

The remedy most frequently applied when counsel has used improper language in his brief is the striking of the offending brief from the court's files.

Such was the course adopted in ROYAL ARCANUM v. GREEN, following the precedent established in Green v. Elbert, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188, where counsel's brief was stricken from the files because it contained many allegations bearing reproachfully upon the moral character of individuals, which were clearly impertinent and scandalous, and unfit to be submitted to the court.

A brief marked by contemptuous references to the court from which the record comes, of an unwarranted and indefensible character, will be stricken from the files. Smith v. Simpson, 72 C. C. A. 92, 140 Fed. 712.

The use by counsel in their brief of language which reflects upon the trial court requires that such brief be stricken from the files. Nephi Irrig. Co. v. Vickers, 20 Utah, 310, 58 Pac. 836.

Appellant's points and authorities were stricken from the files in Friedlander v. Sumner Gold & S. Min. Co. 61 Cal. 116, because they contained certain objectionable expressions apparently disrespectful to the court below.

The printed argument filed by the attorney for plaintiff in error was stricken from the records and files in Diamond Tunnel Gold & S. Min. Co. v. Faulkner, 17 Colo. 9, 28 Pac. 472, because it referred to the judge below in language which the court said was wholly unnecessary and grossly improper.

In Eureka Steam Heating Co. v. Slotemann, 69 Wis. 398, 34 N. W. 387, the violation of a rule of the Wisconsin supreme court, which, among other things, requires counsel in their briefs and arguments to be respectful to the trial court, was punished by striking the offending brief from the files.

A brief which refers to the trial judge in language which the court says is properly described in the motion to strike as gross, discourteous, unprofessional, scandalous, and impertinent, was stricken from the files in Coats v. Seattle Electric Co. 37 Wash. 8, 79 Pac. 484.

Appellant's brief on an appeal from an order refusing a change of venue based upon the alleged disqualification of the judge because of his interest in the subject-matter was ordered stricken from the files in San Diego Water Co. v. San Diego, 117 Cal. 556, 49 Pac. 582, where such brief insinuated impropriety and indelicacy on the part of the

Wheat. 64, 68, 6 L. ed. 552, 554; Bank of Augusta v. Earle, 13 Pet. 519, 587, 589, 10 L. ed. 274, 307, 308; 7 Am. & Eng. Enc. Law, 2d ed. 695; 1 Cooley, Briefs on Ins. 561.

The power of the corporation, whether at home or abroad, depends upon what power its creator originally gave it.

Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 226, 26 L. ed. 337, 339; Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 189 U. S. 221, 230, 47 L. ed. 782, 23 Sup. Ct. Rep. 517, affirming 48 C. C. A. 15, 108 Fed. 764; Bernheimer v. Converse, 206 U. S. 516, 533, 51 L. ed. 1163, 1175, 27 Sup. Ct. Rep. 755; Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363.

This rule is universally recognized as a well-established principle of jurisprudence, quite apart from constitutional considerations.

Sudlow v. Dutch Rhenish R. Co. 21 Beav. 43; Copin v. Adamson, L. R. 9 Exch. 349, affirmed in L. R. 1 Exch. Div. 17, 45 L. J. Exch. N. S. 15, 33 L. T. N. S. 33, 24 Week. Rep. 85; 1 Lindley, Partn. 4th ed. 1487; Young, Foreign Companies & Other Corporations (in England) 182 (1912); Beale, Foreign Corp. § 304; 2 Morawetz, Corp. §§ 874, 875; 3 Clark & M. Priv. Corp. §§ 562–564; 1 Cook, Corp. 7th ed. § 223; 26 Am. & Eng. Enc. Law, 2d ed. 919, 942; Gibson v. Imperial Council, O. U. F. 168 Mass. 391, 47 N. E. 101; United Order of G. C. v. Merrick, 165 Mass. 421, 43 N. E. 127; Larkin v. Knights of Columbus, 188 Mass. 22, 73 N. E. 850; Millard v. Brayton, 177 Mass. 533, 52 L.R.A. 117, 83 Am. St. Rep. 294, 59 N. E. 436; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; Mutual L. Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106; Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906; Supreme Council, A. L. H. v. Green, 71 Md. 266, 17 Am. St. Rep. 527, 17 Atl. 1048; Supreme Council, R. A. v. Brashears, 89 Md. 631, 73 Am. St. Rep. 244, 43 Atl. 866; Robinson v. Hurst (Mutual Reserve Fund Life Asso. v. Hurst) 78 Md. 68, 20 L.R.A. 761, 44 Am. St. Rep. 266, 26 Atl. 956; Mutual L. Ins. Co. v. Mullan, 107 Md. 463, 69 Atl. 385; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 317, 73 Atl. 791; Supreme Colony, U. O. P. F. v. Towne, 87 Conn. 644, 89 Atl. 264; Supreme Lodge, K. H. v. Nairn, 60 Mich. 44, 26 N. W. 826; Warner v. Delbridge & C. Co. 110 Mich. 590, 34 L.R.A. 701, 64 Am. St. Rep. 367, 68 N. W. 283; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Grimme v. Grimme, 198 Ill. 265, 64 N. E. 1088; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915; Pomeroy v. Manhattan L. Ins. Co. 40 Ill. 398; Tepper v. Supreme Council, R. A. 59 N. J. Eq. 321, 45 Atl. 111, 61 N. J. Eq. 638, 88 Am. St. Rep. 449, 47 Atl. 460; Bock-

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judge in acting upon the view that he was not legally disqualified,—especially where there was nothing in the record to sustain such charge.

A brief on a motion for rehearing was stricken from the files and the clerk directed to return it to counsel, in Anderson v. Cook, 25 Mont. 340, 64 Pac. 873, 65 Pac. 113, 66 Pac. 504, because in language and tone it was disrespectful to the court. Afterwards, upon counsel's disclaimer of any intention to be disrespectful to the court, leave was granted to file a proper brief within seven days.

The misconduct of counsel in including in his brief on appeal wholly unfounded aspersions on the conduct and motive of the trial justice requires that all copies of such brief be returned to him. Rudiger v. Coleman, 112 App. Div. 279, 98 N. Y. Supp. 461.

Counsel's brief was stricken from the files in Ganzer v. Schiffbauer, 40 Neb. 633, 59 N. W. 98, because it contained the statement that the judgment below "was a 'snap judgment' to which the judge hearing the demurrer seems from the record to have been a party," and added, "This ruling was made either by an ignoramus, or with the ulterior purpose of wronging the plaintiff in error."

A brief characterizing the judge below as "the arrogant trial justice," there being nothing in the record to excuse or palliate such expression, was held to be scandalous, in Schleissner v. Schleissner, 72 App. Div. 492, 76 N. Y. Supp. 577, and the clerk of the appellate court was ordered to return all copies furnished him to the counsel who prepared it. The latter was allowed, however, leave to file another brief, omitting the objectionable matter, upon serving the prescribed number of copies on his adversary.

The brief of the district attorney on an appeal from a conviction was stricken from the files, and the clerk directed to return all copies thereof, in People v. Willett, 164 App. Div. 1, 149 N. Y. Supp. 348, affirmed in 213 N. Y. 368, 107 N. E. 707, because, in referring to the justice who granted defendant a certificate of reasonable doubt, it used such expressions as "intellectual inertia," "unmitigated unthinking," and "plain blundering," as well as others, which can have no interpretation other than that of a charge of judicial insincerity and duplicity.

Appellant's brief was stricken from the files in Sawdey v. Spokane Falls & N. R. Co. 27 Wash. 536, 67 Pac. 1094, because it criticized the action of the trial judge in discharging the jury and entering judgment for defendant as "an uncommon example of judicial ignorance and extrajudicial assumption of power and usurpation of the functions of the jury." The court, in answer to counsel's argument that by such language it was merely intended to charge gross, palpable, and manifest error, said that "if counsel in this instance intended, as they seem to claim, simply to allege in a proper

over v. Life Asso. of America, 77 Va. 85; Taylor v. Life Asso. of America, 13 Fed. 497; Manhattan L. Ins. Co. v. Warwick, 20 Gratt. 628, 3 Am. Rep. 218; Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155; Gaines v. Supreme Council, R. A. 140 Fed. 978.

There is no doubt about the law of Massachusetts in this case.

Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776; Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155.

The duty to give full force and effect to the public act of a sister state is as obligatory as the similar duty in respect to the judicial proceedings of that state.

Smithsonian Inst. v. St. John, 214 U. S. 19, 28, 53 L. ed. 892, 897, 29 Sup. Ct. Rep. 601; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 642, 44 L. ed. 619, 620, 20 Sup. Ct. Rep. 506; Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

The effect of the law, as well as its existence, was clearly proved in this case.

Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398.

This is not a case of misinterpreting a statute without denying its validity.

Smithsonian Inst. v. St. John, 214 U. S. 19, 29, 53 L. ed. 892, 897, 29 Sup. Ct. Rep. 601; Glenn v. Garth, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311.

This is not a case where the statute of the domiciliary state is rendered nugatory by contrary legislation in New York, which the corporation might be deemed to have accepted by coming into the state.

Thomas v. Matthiessen, 232 U. S. 221, 58 L. ed. 577, 34 Sup. Ct. Rep. 312; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; Pinney v. Nelson, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The constitutional requirements as to full faith and credit are first and foremost a most solemn rule of evidence.

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and unobjectionable manner that the trial court committed error in its ruling, it would seem that they were extremely unfortunate in the 'selection of words' to express such intention. The meaning of the language objected to is so plain and obvious that it cannot be changed by any amount of subtle reasoning or plausible argument."

The submission of the cause was set aside in Sears v. Starbird, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531, the brief of counsel for appellant stricken from the files, and the appeal ordered dismissed unless a proper brief should be filed within thirty days because appellant's brief unwarrantably contained this language: "The court, out of the fullness of his love for a cause, the parties to it, or their counsel, or from an overzealous desire to adjudicate 'all matters, points, arguments, and things,' could not, with any degree of propriety under the law, patch and doctor up the case of the plaintiffs, which perhaps the carelessness of their counsel had left in such a condition as to entitle them to no relief whatever."

A brief which sharply reflects upon the rectitude of purpose of trial and appellate courts and of opposing counsel will be stricken from the files. Pittsburgh, C. C. & St. L. R. Co. v. Muncie & P. Traction Co. 166 Ind. 466, 77 N. E. 941, 9 Ann. Cas. 165.

Counsel's brief was stricken from the files in State ex rel. Smyth v. Kennedy, 60 Neb. 300, 83 N. W. 87, because it conveyed quite plainly counsel's apprehension that political considerations might be a factor in the decision of the case.

A brief on a petition for rehearing was stricken from the files in Fred Krug Brewing Co. v. Healey, 71 Neb. 667, 99 N. W. 489, 101 N. W. 329, because it contained unjust, querulous, and unfounded personal and offensive criticisms of the commissioner who wrote the opinion.

For discourteous and unprofessional language used by appellant's counsel in his brief on a petition for rehearing such brief was stricken from the files in Shirk v. Hupp, 167 Ind. 515, 78 N. E. 242, 79 N. E. 490, and the petition for rehearing was overruled.

Because of abusive language used by counsel for plaintiffs in error, their brief was stricken from the files in Scott v. Brown, 10 Kan. App. 581, 63 Pac. 451.

A brief which contained ten pages devoted exclusively to a tirade against a number of attorneys who testified in favor of the appellant, which has no connection with the case, was stricken from the files in Stern v. Daniel, 45 Wash. 611, 88 Pac. 1116, with leave granted to file a proper brief in thirty days.

A brief charging opposing counsel with subornation of perjury was stricken out in Cramer v. Tittle, 3 Cal. Unrep. 80, 21 Pac. 750, with permission to file another brief within ten days, the judgment otherwise to be reversed. The court said that placing

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 296, 32 L. ed. 239, 245, 8 Sup. Ct. Rep. 1370; Story, Confl. L. § 609; Thompson v. Whitman, 18 Wall. 457, 462, 463, 21 L. ed. 897, 899, 900.

The fact that the Reynolds Case was decided upon an agreed statement of facts does not affect the force of the judgment based thereon.

Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679; Yates v. Utica Bank, 206 U. S. 181, 51 L. ed. 1015, 27 Sup. Ct. Rep. 646; Northern P. R. Co. v. Slaght, 205 U. S. 122, 130, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442; Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; Alley v. Nott, 111 U. S. 472, 28 L. ed. 491, 4 Sup. Ct. Rep. 495; Bissell v. Spring Valley Twp. 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495.

The statement that "the plaintiff was not directly or indirectly a party" to the Reynolds Case is merely a conclusion of law.

Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011; Miedreich v. Lauenstein, 232 U. S. 236, 243, 58 L. ed. 584, 589, 34 Sup. Ct. Rep. 309.

A member of a corporation is bound by a decree against a corporation in respect to corporate matters, such as the making of an assessment.

Hawkins v. Glenn, 131 U. S. 319, 329, 332, 33 L. ed. 184, 191, 192, 9 Sup. Ct. Rep. 739; Glenn v. Liggett, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867; Glenn v. Marbury, 145 U. S. 499, 506, 36 L. ed. 790, 793, 12 Sup. Ct. Rep. 914; Lehman v. Glenn, 87 Ala. 625, 6 So. 44; Furnald v. Glenn, 12 C. C. A. 27, 26 U. S. App. 202, 64 Fed. 49; Glenn v. Foote, 36 Fed. 824; Calloway v. Glenn, 105 Ky. 648, 49 S. W. 440; Glenn v. Williams, 60 Md. 93; Castleman v. Templeman, 87 Md. 546, 41 L.R.A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; Priest v. Glenn, 2 C. C. A. 305, 4 U. S. App. 478, 51 Fed. 400; Hamilton v. Glenn, 85 Va. 901, 9 S. E. 129; Howard v. Glenn, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610; McKim v. Glenn, 66 Md. 479, 8 Atl. 130; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 6 So. 46, 9 So. 265; Glenn v. Springs, 26 Fed. 494; Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806; Lewis v. Glenn, 84 Va. 947, 6 S. E. 866; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Converse v. Hamilton, 224 U. S. 243, 252, 253, 56 L. ed. 749, 752, 753, 32 Sup. Ct. Rep. 415, 136 Wis. 589, 118 N. W. 190; Selig v. Hamilton, 234 U. S. 652, 661, 662, 58 L. ed. 1518, 1524, 34 Sup. Ct. Rep. 926, 195 Fed. 153; Converse v. Ayer, 197 Mass. 443, 84 N. E. 98; Spargo v. Converse, 112 C. C. A. 337, 191 Fed. 823; Converse v. Mears, 162 Fed. 767; Hamilton v. Simon, 178 Fed. 130;

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such charges in a brief was a gross breach of professional ethics; that they should be made under oath and in a proper court.

A brief was stricken from the files in Gates v. Parmly, 113 Wis. 147, 87 N. W. 1096, as being in violation of Wisconsin supreme court rule 27, where it charged the opposite party with producing and using false testimony, accused the opposing counsel of "juggling with the abstracts" and keeping them from the attention of the court, and using others which showed defective titles, and stated that one of the attorneys was allowed to "swipe four forties for practically nothing as a consideration," and charged another with "sliding in descriptions or sliding them out" while his associate was arguing the case.

In Scroggin v. Brown, 14 Ill. App. 338, the court struck from the files a brief which insinuated that opposing counsel tried to have a witness swear to an untruth; that court and counsel were "trying to beat somebody regardless of the law, and that one of the instructions below was not intended to state the law correctly." Leave was given to file another brief which should be couched in decorous language and should be respectful in its terms to the judge who tried the cause, the attorney, and all other persons mentioned therein.

Briefs of counsel on both sides were stricken from the files in Stager v. Harrington, 27 Kan. 414; that of defendant in error because he not only criticized unfairly some of the acts of the trial court and of opposing counsel, as shown by the record, but went outside the record in the effort to exhibit adverse counsel in a ridiculous and unenviable attitude, treating both such counsel and the justice before whom the case was tried with injustice and undeserved indignity; that of the plaintiff in error because it also contained some matters which had no proper place in any brief and evidently tended to provoke some of the unfair criticism found in the opposing brief.

In Zinser v. Sanitary Dist. 175 Ill. App. 9, the court refused to strike counsel's brief from the record as being disrespectful to the trial judge because, if his client had been wronged by the demeanor and language of the trial judge, he had a right to have the matter investigated.

The court, in Colorado & S. R. Co. v. Davis, 35 Colo. 148, 83 Pac. 777, thought that a brief, though containing improper remarks with respect to the judge who tried the case, was not so objectionable in that regard as to justify striking it from the files.

In Duncan v. Times-Mirror Co. — Cal. —, 52 Pac. 651, the court refused to strike from the files a brief which was largely an indiscriminate discussion upon law, mythology, Shakespeare, and the Bible, saying that, upon a careful perusal of its pages, the court did not find that ugly intent directed toward the trial judge which the respondent

Hamilton v. Levison, 198 Fed. 444; Converse v. Stewart, 105 App. Div. 478, 94 N. Y. Supp. 310, 117 App. Div. 922, 102 N. Y. Supp. 1133, 192 N. Y. 578, 85 N. E. 1107, 192 Fed. 941; 118 C. C. A. 212, 197 Fed. 152, 218 U. S. 666, 54 L. ed. 1202, 3 Sup. Ct. Rep. 226; Converse v. Ætna Nat. Bank, 79 Conn. 163, 64 Atl. 341, 7 Ann. Cas. 75; Converse v. First Nat. Bank, 79 Conn. 603, 65 Atl. 1064, 1065, 212 U. S. 567, 53 L. ed. 654, 29 Sup. Ct. Rep. 691; Converse v. McCauley, 136 Wis. 594, 118 N. W. 192; Blackburn v. Irvine, 123 C. C. A. 405, 205 Fed. 227, affirming 198 Fed. 360; Irvine v. Elliott, 203 Fed. 105; Irvine v. Putnam, 190 Fed. 321; Irvine v. Bankard, 181 Fed. 206; Irvine v. Putnam, 167 Fed. 182; Goss v. Carter, 84 C. C. A. 402, 156 Fed. 746; Shipman v. Treadwell, 200 N. Y. 472, 93 N. E. 1104, 208 N. Y. 404, 102 N. E. 634.

The binding force of such judgments is recognized everywhere, quite apart from the constitutional aspects of the question.

Bank of Australasia v. Nias, L. R. 16 Q. B. 733, 20 L. J. Q. B. N. S. 284; Bank of Australia v. Harding, 9 C. B. 661, 19 L. J. C. P. N. S. 345, 14 Jur. 1094; Kelsall v. Marshall, 26 L. J. C. P. N. S. 19, 1 C. B. N. S. 241, 2 Jur. N. S. 1142, 5 Week. Rep. 114; Copin v. Adamson, L. R. 1 Exch. Div. 17, 45 L. J. Exch. N. S. 15, 33 L. T. N. S. 33, 24 Week. Rep. 85; 3 Clark & M. Priv. Corp. § 800; 4 Thomp. Corp. 2d ed. §§ 4970 et seq.

A judgment of this kind is equally binding upon stockholders when it is in favor of the corporation.

Story, Eq. Pl. §§ 97, 120; Willoughby v. Chicago Junction R. & Union Stockyards Co. 50 N. J. Eq. 656, 25 Atl. 277; Harmon v. Auditor, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161.

The enforcement of this rule is a matter of strict constitutional right.

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Hunt v. Whewell, 122 Wis. 42, 99 N. W. 599; Converse v. Hamilton, 136 Wis. 591, 118 N. W. 190, 224 U. S. 260, 56 L. ed. 755, 32 Sup. Ct. Rep. 415; Mutual F. Ins. Co. v. Phœnix Furniture Co. 108 Mich. 170, 34 L.R.A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; Parker v. Stoughton Mill Co. 91 Wis. 181, 51 Am. St. Rep. 881, 64 N. W. 751; Rand, McN. & Co. v. Mutual F. Ins. Co. 58 Ill. App. 528; Hammond v. Knox, 125 App. Div. 9, 109 N. Y. Supp. 367; Lycoming F. Ins. Co. v. Langley, 62 Md. 211; Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Swing v. Karges Furniture Co. 123 Mo. App. 367, 100 S. W. 662.

The judgment in Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A. (N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776, is a conclusive bar to the present action in the courts of Massachusetts.

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claimed was there manifested, and that plaintiff being his own attorney and of advanced years, the court would not too closely scrutinize the suggestions apparently intended as pleasantries found in the brief, directed toward opposing counsel.

As noted above, leave is often granted counsel to file another and proper brief in place of the offending brief. This is probably because, as Mr. Justice Jordan, in a specially concurring opinion in Pittsburgh, C. C. & St. L. R. Co. v. Muncie & P. Traction Co. 166 Ind. 466, 77 N. E. 941, 9 Ann. Cas. 165, suggests, striking counsel's brief from the files because of its improper language operates more to punish the client than the attorney.

The court said, in Friedlander v. Sumner Gold & S. Min. Co. 61 Cal. 116, that the client ought not ordinarily to suffer because his counsel had wilfully employed language disrespectful towards the judge below, and that the court would, after striking the objectionable brief from the files, examine the transcript of record to ascertain whether errors had occurred below.

A judgment should not be affirmed because of improper language in appellant's reply brief, nor should appellant's main brief be stricken from the files because of such language in the reply brief. Relief in such case is limited to a rule against the offending brief, either to strike it as a whole or make a cost allowance against it in case the party in whose behalf it was filed is successful on the appeal. Shannon v. Loeb, 65 Wash. 640, 118 Pac. 823.

But, in addition to striking from the files appellant's brief, which was said to be lacking in respect for the trial judge, and scandalous and unprofessional in a high degree, the court in Alton Nat. Bank v. Beggs, 108 Ill. App. 672, affirmed the judgment below under a court rule because of appellant's failure to file a proper brief in the case.

Not only severe rebuke, but exemplary punishment, is called for where counsel for plaintiff in error states in his brief that the judgment below "is everywhere unsupported, is vicious, virulent with venom through and through, infected and infectious, fit for that antidote for that bane spoken of by Justice Swayne in Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807." Such discourteous and unprofessional conduct requires not only that the brief be stricken from the record and removed from the files, but that the case be treated as though no brief had been filed, and that the writ of error consequently be dismissed, as required by the rules of court. Long-Bell Lumber Co. v. Newell, 19 Okla. 590, 91 Pac. 697.

The mere striking of an offensive brief from the files was not regarded as sufficient punishment in Kelley v. Boettcher, 27 C. C. A. 177, 49 U. S. App. 620, 82 Fed. 794, where

Gaskill v. Dudley, 6 Met. 550, 39 Am. Dec. 750; 2 Black, Judgm. § 504; Holyoke Bank v. Goodman Paper Mfg. Co. 9 Cush. 576; Farnum v. Ballard Vale Mach. Shop, 12 Cush. 507; Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125; Mills v. Gore, 20 Pick. 28; Bigelow v. Winsor, 1 Gray, 299; Blackinton v. Blackinton, 113 Mass. 231.

This judgment must have the same effect in the courts of New York as in Massachusetts.

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

The proper recognition of the law of the state of the domicil of the corporation is an administrative necessity, as well as a constitutional requirement in cases like the present.

Graham v. First Nat. Bank, 84 N. Y. 393, 38 Am. Rep. 528; Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; Smith v. Galloway [1898] 1 Q. B. 71, 67 L. J. Q. B. N. S. 15, 77 L. T. N. S. 469, 46 Week. Rep. 204; Bradbury v. Wild [1893] 1 Ch. 377, 62 L. J. Ch. N. S. 503, 3 Reports, 195, 68 L. T. N. S. 50, 41 Week. Rep. 361, 57 J. P. 68; Rosenberg v. Northumberland Bldg. Soc. L. R. 22 Q. B. Div. 373, 60 L. T. N. S. 558, 37 Week. Rep. 368; British Equitable Assur. Co. v. Baily [1906] 1 A. C. 35, 75 L. J. Ch. N. S. 73, 94 L. T. N. S. 1, 22 Times L. R. 152, 13 Mans. 13.

Mr. F. J. Moissen argued the cause and filed a brief for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

Conformably to the authority conferred by the General Laws of Massachusetts to organize fraternal beneficiary [534] corporations, in 1877 there was issued to designated persons a certificate of incorporation under the name of the Supreme Council of the Royal Arcanum. By the constitution and by-laws, referred to in the certificate, the corporation became what is known as a fraternal association under the lodge system. Its principal objects as stated were:

"1st. To unite fraternally all white men of sound bodily health and good moral character, who are socially acceptable and between twenty-one and fifty-five years of age.

"2d. To give all moral and material aid in its power to its members and those dependent upon them.

"3d. To educate its members socially, morally, and intellectually; also to assist the widows and orphans of deceased members.

"4th. To establish a fund for the relief of sick and distressed members.

"5th. To establish a widows' and orphans' benefit fund, from which, on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding

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the brief filed in behalf of appellants, instead of being confined to the questions arising on the record, contains page after page of denunciation and abuse of the judges who decided the cause below, going far beyond criticism or denunciation of the decision, being personal in its attack upon the intelligence, integrity, and character of the judges, and containing allegations of matters of a personal nature in no manner connected with or suggested by anything in the record, and insinuations and charges against those judges in ungentlemanly language. In addition to striking this brief from the files the court struck from the record the name of the offending counsel, and directed that he be no longer heard in the case, granting, however, permission to the client to appear by other counsel and file briefs within a specified time.

The brief of appellant's attorney was stricken from the files in Mann v. Hefter, 128 N. Y. Supp. 663, because it contained personal criticism of the trial justice, and in addition, the court, in the exercise of its discretion over costs, denied the costs of the appeal to appellant, although the order appealed from was reversed.

In Stoll v. Pearl, 122 Wis. 619, 99 N. W. 906, 100 N. W. 1054, a wilful violation of the Wisconsin supreme court rule prohibiting the printing of "any brief disrespectful to this court or any member of it, or to the court below, or to opposing counsel," was punished by striking the brief from the files with $25 costs.

Instead of striking the entire offending brief from the files, the courts are sometimes content with the expunging of the objectionable language.

Certain portions of the brief for counsel for the appellants were stricken out, in Dunbar v. Bell, 90 Ark. 316, 119 S. W. 670, on motion on account of objectionable language.

In Rosenberg v. Stern, 77 Ill. App. 248, affirmed in 177 Ill. 437, 53 N. E. 78, language which the court characterized as indecorous and disrespectful to the trial court was ordered stricken from counsel's brief.

A part of appellee's printed argument which the court said fell very far below the courtesy and dignity which should characterize forensic discussions was stricken out on motion in Cassidy v. Palo Alto County, 58 Iowa, 125, 12 N. W. 231.

Charges in a brief that opposing counsel had tampered with the record will be expunged therefrom. Taggart v. Bundick, — Kan. —, 43 Pac. 243. The court said that, if true, direct charges in a proper court could be made and the proper action taken; but that it was most reprehensible to make such charges in a brief.

Appellant's counsel was required, in Christensen v. Floriston Pulp & Paper Co. 29 Nev. 552, 92 Pac. 210, to expunge from his brief

$3,000 shall be paid to his family, or those dependent on him, as he may direct. . . ."

There was power conferred by the constitution and by-laws to subsequently amend such constitution and by-laws in the manner therein provided. The general governing power of the order was vested in the Supreme Council, and the administration of its affairs under the supervision of such council was intrusted to the officers named in the constitution. Authority was given to the Supreme Council to sanction the organization of local lodges or councils, upon whom were conferred certain powers not in any way conflicting with the constitution and by-laws of the order, and the members of such local lodges or councils were required to be members of the order, and [535] were subject to the duties and responsibilities which resulted from that relation, and enjoyed also the resulting benefits.

Pursuant to the constitution, under due authority, there was organized in the state of New York a local lodge or council known as the De Witt Clinton Council No. 419 of the Royal Arcanum. In May, 1883, Samuel Green, the defendant in error, made application to become, and was admitted as, a member of this council. In his application it was directed that in case of his death, "all benefit to which I may be entitled from the Royal Arcanum, be paid to Louisa Green related to me as my wife, subject to such future disposal of the benefit, among my dependents, as I may hereafter direct, in compliance with the laws of the order. . . . I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules, and usages of the order now in force, or which may hereafter be adopted by the same."

Upon the admission of the applicant a certificate was issued to him as a member of the De Witt Clinton Council No. 419, of the Royal Arcanum, upon the condition, among others, "that the said member complies, in the future, with the laws, rules, and regulations now governing the said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund." The certificate then stated that upon compliance with these conditions, "The Supreme Council of the Royal Arcanum hereby promises and binds itself to pay out of its widows' and orphans' benefit fund, to Louisa Green (wife) a sum not exceeding $3,000, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member. . . ."

At the time this certificate was issued, under the by-laws [536] the amount of the assessment required to be paid to the corporation to enable it to meet claims coming due under the widows' and orphans' benefit fund

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certain references and allusions which reflected unwarrantably upon the trial judge, and was barred from further participation in the case until the objectionable matter should be so expunged.

In Matthews's Appeal, 104 Pa. 444, the court's attention was called to the following language in appellant's paper book, used in reference to the master's report: "Such a course of reasoning is contrary to common sense. Its fallacy is too plain to provoke criticism. It is kin to the utterings of a 'crank.' . . . But the master bridged it over by saying that there was so little of the balance of purchase money left that the game would not be worth the candle. And therefore excused the company from fault. Here, again, we have a ruling which more closely resembles the utterings of a 'crank' than it does the reasoning of a chancellor." The court promptly held such language to be improper,—especially since the master's report had been confirmed by the court below, and the book was therefore ordered to be suppressed. The objectionable language having been expunged, the case was, with the consent of appellee's counsel, heard by the court.

In United States v. Peuschel, 116 Fed. 649, the court struck from the brief of counsel as amounting to a general denunciation of the Land Department the following paragraphs:

"Perhaps the court has gathered from what has been said in our briefs already filed in this case and the case of United States v. Maid (D. C.) 116 Fed. 650, that our regard for the decisions, rules, and regulations of the Land Department is not unbounded.

"And but for the fact that counsel for plaintiff has again thrust these rules and regulations into this case, we would refrain from saying what every lawyer who has practised before the Land Department must know, that as a tribunal expounding the law and as a legislative body the Land Department has been an active, persistent, and lamentable failure."

Courts are more inclined to be lenient with offending counsel where their improper language may have been provoked by expressions in their adversary's brief.

A motion to strike counsel's brief from the files was denied in People ex rel. Lake County v. Parks, 26 Colo. 322, 57 Pac. 692, on the ground that, after a careful examination and consideration of such brief, the court could not say that the rules which prohibit abuse or scandal from appearing in a brief had been transgressed, it being barely possible that some of the language employed in the brief of opposing counsel may have provoked the line of argument of which the latter complains.

Respondent's brief will not be stricken

was graded according to the age of the member, and the contribution required of Green for this purpose was stated in his certificate to be $1.80 per assessment, and he paid up to 1898 at that rate various assessments called for under the rules of the order. In 1898, by a three-fourths vote of the Supreme Council, the system theretofore prevailing, exacting the payment of assessments as called for, was changed and the duty was imposed to make payment monthly of a sum the amount of which, although still dependent upon the age of the member, was higher than had previously prevailed. Under these new rates the sum due from Green was $3.16 per month, and he met regularly the payments thus exacted until the year 1905. In that year by the action of the Supreme Council, taken in virtue of the requisite three-fourths vote, while the standard of age was continued, the sum to be paid was again increased so that the monthly assessment of Green became $6.87, and from October, 1905, when these new rates became effective, down to February, 1910, it is not disputed that Green paid the amount of the increased assessments monthly, although it was found by the trial court that he did so under protest because of a denial on his part of the right of the Supreme Council, even under the sanction of the requisite vote, and in compliance with the forms of the constitution and laws of the order, to increase the rates.

In the meanwhile, shortly after the going into effect of the increased rates, that is, in November, 1905, sixteen members of the order, holders of certificates under the widows' and orphans' benefit fund, filed a bill in the supreme judicial court of Massachusetts against the corporation in their own behalf and in behalf of all other certificate holders to vacate and set aside the by-laws [537] by which the rates had been increased, on the ground that the increase was *ultra vires* of the corporation and violative of contract rights. The case was submitted by agreement of counsel to the whole court upon an agreed statement of facts, and was on May 17th, 1906, decided. The court, after a careful review of the general nature of the corporation, of the character of the fund, of the rights of its members as evidenced by the certificates, of the constitution and by-laws of the corporation, and the laws of the state applicable thereto, decided that the increase complained of was valid, impaired no contract right of the certificate holders, and was entitled to be enforced. Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776.

Four years after this decision Green ceased to make the payments required by the by-laws of the corporation, and in vir-

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from the files because it criticizes the language of appellant's brief as a transgression of the bounds of propriety, and as a "coarse and brutal aspersion upon the trial court," and insinuates that opposing counsel are lost to all sense of propriety, where appellant's counsel invited such denunciation by their disrespectful and discourteous expressions in their own brief with reference to the trial court, since they are not in a position to urge the application of the strict rules of professional ethics in their behalf. Sawdey v. Spokane Falls & N. R. Co. 27 Wash. 536, 67 Pac. 1094.

In some cases the court has contented itself with administering a rebuke or a warning to offending counsel.

The court, in Kneeland v. American Loan & T. Co. 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426, contended itself with noticing that counsel's brief contained aspersions on the conduct of opposing counsel, and with reminding counsel that the language used in briefs, as well as that employed in oral argument, must be respectful.

Counsel was reminded, in Confrey v. Stark, 73 Ill. 187, of the impropriety of using language in his brief which was not decorous to the judge who tried the case.

Counsel was severely rebuked in Hays v. Walker, 90 Ind. 105, for using coarse expressions in his brief, the court saying that "counsel who abuse their adversary instead of arguing their cases do their clients no good and themselves no honor."

The court contented itself, in Paine v. Frost, 67 Iowa, 282, 25 N. W. 243, with censuring counsel for stating in his argument facts outside of the record which he claims impeach the judicial conduct of the judge who tried the case below.

In Brownell v. McCormick, 7 Mont. 12, 14 Pac. 651, the court censured counsel for using language in his brief by which he attempted to cast reproach upon the proceedings of the court below, and sought to make it the object of contemptuous wit and ridicule.

The subjection of the trial judge to false criticism in counsel's brief deserves severe reproof. Isley v. Gilbert, 129 App. Div. 583, 113 N. Y. Supp. 1134.

Attacks in counsel's brief upon the general charge of the court below as meaningless, unintelligent, and evidence of prejudice in the mind of the trial judge, etc., are doubly censurable, said the court in Lau v. W. B. Grimes Dry Goods Co. 38 Neb. 215, 56 N. W. 954, where no exception was taken to the charge, either at the time or in a motion for a new trial.

In Flannagan v. Elton, 34 Neb. 355, 51 N. W. 967, the court, in reproving counsel for inserting in his brief attacks or insinuations against the parties, opposing counsel, and the trial judge, said: "Where the character

tue of his membership and ownership of the certificate issued to him commenced in a state court in New York this suit against the Supreme Council and the regent of De Witt Clinton Council No. 419, assailing the validity of the increase in the rate of assessment made in 1905 on the ground that it was void, as exceeding the powers of the corporation, and because conflicting with his contract rights as a member of the corporation and a certificate holder. The prayer of the bill was not that the corporation be restricted to the method and rate of assessment which prevailed in 1883, when the complainant became a member, but that the corporation be confined to the rate of assessment established by the amendment adopted in 1898, and that the complainant be decreed to have a contract right to pay only that sum monthly in discharge of his duty to pay assessments, and that the corporation and its officers be enjoined during his life from exacting any greater sum, or in any way suspending him for refusing to pay the amount fixed by the amendment of 1905.

[538] The answer in twenty-seven distinct paragraphs asserted the validity of the assessment and the action of the corporation by which it was established. It asserted that the complainant, as a member in a mere beneficiary association, was bound thereby, and that no contract rights of his were affected. In many reiterated forms of statement it was asserted that the corporation was created under the laws of Massachusetts and was subject thereto, and that under those laws, by which the power to make the change was to be determined, the validity of the change was beyond question. It was then alleged that the Reynolds suit in the courts of Massachusetts was brought by certain members and certificate holders against the corporation not only in their own behalf, but as a class suit in favor of all others similarly situated, and that the facts in that case were substantially identical with those presented in this. The judgment of the supreme judicial court of Massachusetts maintaining the by-law, and holding that the assessment was valid and binding, and that no contract rights existing in favor of certificate holders were impaired by the increase of rate, was explicitly referred to, and in addition the 27th paragraph of the answer expressly counted on the judgment as follows:

"That the defendant Supreme Council says that the rights of the plaintiff in respect to his contract with the said defendant and his membership in the defendant order, and the changes adopted by it, were and are concluded and determined by the aforesaid judgment of the supreme judicial court of Massachusetts; that under the Constitution of the United States the same is entitled to full faith and credit in the state of New York, and that the complaint should be dismissed."

On the trial the proceedings and judgment in the Massachusetts court, duly exemplified, as required by the act of Congress, were offered in evidence and excluded [539] and an exception reserved. The court made what in the record are styled findings of fact, but which embrace every question of law which it was conceived the controversy could possibly involve. The court held that

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of the parties or the attorneys is not involved in the case, all references and comments of a personal nature by a party in his briefs are entirely out of place, and are in the nature of an admission that there is not sufficient merit in his side of the controversy to warrant him in relying thereon, and hence that it is necessary to direct attention to the faults or failings of the adverse party or his attorney. It is not complementary to a court to suppose that such statements would divert its attention from the points at issue, or be given the slightest weight; and they should be omitted. Neither will attacks or insinuations against the trial judge be countenanced. The law has provided an adequate remedy for the correction of his rulings, and all presumptions are that he acted honestly and in the utmost good faith."

In Smith v. Bingman, 3 Ill. App. 65, the court contented itself with condemning criticisms in appellant's brief upon the judge who tried the case, and insinuations in such brief against the professional conduct of opposing counsel. "Briefs," said the court, "should be respectful to the court, the parties, and all persons named in them; and this court will, as far as it has power, see that this rule is enforced."

In State ex rel. Burbridge v. Call, 41 Fla. 450, 26 So. 1016, the court reproved counsel for using language in their briefs disrespectful to the adverse party or his counsel, and gave warning that a repetition of such impropriety would be followed by the more drastic remedy of striking the briefs from the files.

"Hereafter," said the court in Chicago & A. R. Co. v. Bragonier, 13 Ill. App. 467, "briefs containing offensive language will be promptly stricken from the files."

The court said in Sax v. Drake, 69 Iowa, 760, 28 N. W. 423, that it would probably be justified in striking from the files the entire argument of counsel for suggesting therein that one of the parties was of a firm of sharp Jewish clothing dealers, but contented itself with merely expressing disapproval of the remark as disrespectful to the court in insinuating that the court might be influenced by race prejudice.

In American Bonding Co. v. Dufur, 49 Wash. 632, 96 Pac. 160, the court said that appellant's brief was so rambling, vituperative, and discourteous to the trial court that

the complainant was not barred by laches in consequence of his having accepted the amendment to the rates made in 1898, and that as he had protested in making the payments during the four years as to the rates fixed under the amendment of 1905, he was not estopped from questioning the validity of that amendment. It was decided that under the law of New York as a certificate holder the complainant had a contract which entitled him to prevent any increase of rate over that established in 1898. So far as the law of Massachusetts was concerned, it was declared that although, if governed by that law, the assessment would be valid, as the complainant was a member of a subordinate council existing in New York and doing business there, the rights of its members were controlled by the New York law, wholly irrespective of the law of Massachusetts. The rights asserted by the complainant were adjudged to exist, and the relief prayed for was granted.

The case then went to the appellate division of the second department. The court, considering the character of the corporation, the provisions of its Constitution and by-laws, and the powers which they conferred on the corporation, as well as the application for membership and the certificate issued pursuant thereto, decided that the amendment as to rates was not *ultra vires* of the corporation, but, on the contrary, was within its powers, and violated no contract rights of the complainant. Without deciding whether the case was controlled by the law of Massachusetts, and without passing upon the action of the trial court in seemingly rejecting the offer of the Massachusetts judgment, the court, treating that judgment as before it, and considering besides the Massachusetts law as open [540] for its consideration, held that the law of that state and the judgment there rendered served additionally to sustain the view taken as to the significance of the constitution and by-laws of the order, and thus served additionally to demonstrate that error had been committed by the trial court in holding that under the law of New York there was a right to relief. 144 App. Div. 761, 129 N. Y. Supp. 791. The case then went to the court of appeals, where the judgment of the appellate division was reversed and that of the trial court affirmed on the ground that the law of New York governed and established under the circumstances disclosed the right of the complainant to the relief which had been awarded him. 206 N. Y. 591, 100 N. E. 411.

It is not disputable that, disregarding details, all the rights asserted under the assignments of error come to one contention, that a violation of the full faith and credit clause of the Constitution of the United States resulted from refusing to hold that the rights of the parties were to be determined by the Massachusetts law and to apply that law, and in further refusing to give due effect to the decree rendered in Massachusetts concerning the subject of the controversy.

By a motion to dismiss it is urged that this question is not open for consideration because it was not raised below. But, as we have seen, the fact that the charter was a Massachusetts charter, and the controlling character of the laws of that state on its

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had there been a motion to strike it, the motion would probably have been sustained, but as no motion had been made to strike the brief and affirm the judgment, the court would undertake to decide the controversy on the merits.

A brief on rehearing, in the course of which it is said that one of the respondent's contentions is disposed of "cavalierly," that a certain legal proposition in the opinion "almost defies comment," that "such a decision violates every instinct of justice, disregards the fundamental maxims of equity, rewards conduct which the law abominates and abhors, and from which all moral sense recoils," and in which the question was asked with regard to one of the conclusions stated in such opinion, "Is it not a mere quibble—a juggling of words?"—is certainly disrespectful and might well be stricken from the files, said the court in Lynch v. Ryan, 132 Wis. 277, 111 N. W. 707, 112 N. W. 427. The court said, however, that it would not proceed to this extreme, feeling that counsel would, on reflection, realize the impropriety of their remarks and refrain from such outbreaks in the future.

"The brief for defendant in this cause," said the court in Tomlinson v. Territory, 7 N. M. 195, 33 Pac. 950, "contains such an unwarranted attack upon the trial judge, his conduct, rulings, and instructions, as to amount to a scandalous and impertinent attack upon the judiciary of the territory and of this court, of which the nisi prius judge is a member, which would warrant us of our own motion in striking the brief and argument from the files, and affirming the decision without further investigation. It is proper for defendant to show errors, and apply law to the same; but to allow an attorney to come into this court and criticize and question, comment upon, and condemn the motives which actuated the judge in his rulings below, would be to place the defendant above the law, and to subject the courts of this territory to wild tirades of abuse from any person of a malignant or depraved mind,—would be lowering the dignity of the bench, and subversive of good government."

No attempt has here been made to include cases which consider the questions whether the use of such improper language amounts to contempt of court, or whether counsel may be disbarred or suspended from practice because of the use of such language.

operation and effect, were asserted by way of defense over and over again in the pleadings. It is, indeed, true that in none of the averments concerning the duty to apply the Massachusetts law and the validity under that law of the provision of the constitutions and by-laws which was assailed was any express reference made to the full faith and credit clause of the Constitution of the United States; but this was not the case as to the Massachusetts judgment which was expressly pleaded, accompanied with an explicit averment that not [541] to give it due effect would be a violation of the full faith and credit clause of the Constitution of the United States. And as what was the due effect to be given to the judgment depended, as we shall hereafter more particularly point out, upon whether the Massachusetts law controlled the parties, since if it did, the judgment would be entitled to one effect, and if it did not, to another effect, it follows that the claim as to constitutional right concerning the judgment also involved deciding whether the Massachusetts law controlled. It follows that in both aspects the claim of full faith and credit under the Constitution of the United States was asserted, and whether the court below erred in holding that that clause was inapplicable because the contract was a New York contract governed by New York law is the question for decision. And the solution of that question involves two considerations: first, was the controversy to be determined with reference to the Massachusetts charter and laws and judgment; and second, if yes, did they sustain the right of the corporation to make the increased assessment complained of?

Before coming to consider the subject in its first aspect as controlled by authority, we briefly contemplate it from the light of principle in order that the appositeness of the authorities which are controlling may be more readily appreciated.

It is not disputable that the corporation was exclusively of a fraternal and beneficiary character, and that all the rights of the complainant concerning the assessment to be paid to provide for the widows' and orphans' benefit fund had their source in the constitution and by-laws, and therefore their validity could be alone ascertained by a consideration of the constitution and by-laws. This being true, it necessarily follows that resort to the constitution and by-laws was essential unless it can be said that the rights in controversy were to be fixed by disregarding the source from which they arose, and by putting out of view [542] the only considerations by which their scope could be ascertained. Moreover, as the charter was a Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that state, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding, on the one hand, that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying, on the other hand, that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all, but by applying many divergent, variable, and conflicting criteria. In fact, their destructive effect has long since been recognized. Gaines v. Supreme Council, R. A. 140 Fed. 978; Supreme Council, R. A. v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866. And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many states in passing on questions involving the general authority of [543] fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the state under which it was granted as the test and measure to be applied. Supreme Lodge, N. E. O. P. v. Hines, 82 Conn. 315, 73 Atl. 791; Supreme Colony, U. O. P. F. v. Towne, 87 Conn. 644, 89 Atl. 264; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Grimme v. Grimme, 198 Ill. 265, 64 N. E. 1088; Supreme Council, A. L. H. v. Green, 71 Md. 263, 17 Am. St. Rep. 527, 17 Atl. 1048; Supreme Council, R. A. v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866; United Order, G. C. v. Merrick, 165 Mass. 421, 43 N. E. 127; Gibson v. Imperial Council, O. U. F. 168 Mass. 391,

47 N. E. 101; Larkin v. Knights of Columbus, 188 Mass. 22, 73 N. E. 850; Supreme Lodge, K. H. v. Nairn, 60 Mich. 44, 26 N. W. 826; Tepper v. Supreme Council, R. A. 59 N. J. Eq. 321, 45 Atl. 111, s. c. 61 N. J. Eq. 638, 88 Am. St. Rep. 449, 47 Atl. 460; Bockover v. Life Asso. of American, 77 Va. 85. In fact, while dealing with various forms of controversy, in substance all these cases come at last to the principle so admirably stated by Chief Justice Marshall more than a hundred years ago (Head v. Providence Ins. Co. 2 Cranch, 127, 167, 2 L. ed. 229, 242) as follows:

"Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers."

In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, that the law of the state by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, that the state law and proceedings are binding as to the ascertaining of [544] the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected; and third, that putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. Selig v. Hamilton, 234 U. S. 652, 58 L. ed. 1518, 34 Sup. Ct. Rep. 926; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739.

That the doctrines thus established if applicable here are conclusive is beyond dispute. That they are applicable clearly results from the fact that although the issues here presented as to things which are accidental are different from those which were presented in the cases referred to, as to every essential consideration involved the cases are the same and the controversy here presented is and has been, therefore, long since foreclosed.

The controlling effect of the law of Massachusetts being thus established and the error committed by the court below in declining to give effect to that law and in thereby disregarding the demands of the full faith and credit clause being determined, we come to consider whether the increase of assessment which was complained of was within [545] the powers granted by the Massachusetts charter, or conflicted with the laws of that state. Before doing so, however, we observe that the settled principles which we have applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that state, and therefore, as we have previously stated, how necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment was the exact equivalent of the assertion of a claim of right under the Constitution of the United States to the application of the laws of the state of Massachusetts. We say this because, if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment.

Additionally, before coming to dispose of

the final question it is necessary to say that, in considering it in view of the fact that the appellate division treated the Massachusetts judgment as in the record and considered it, and that the court below made no reference to its technical inadmissibility, but, on the contrary, treated the question as being one not of admissibility, but of merits, we shall pursue the same course and treat the judgment as in the record upon the hypothesis that the action of the trial [546] court did not amount to its technical exclusion, but only to a ruling that as it deemed the law of Massachusetts inapplicable, it so considered the judgment, and therefore held it merely irrelevant to the merits.

Coming, then, to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the supreme judicial court of Massachusetts in the Reynolds Case. And this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members. (See Hartford L. Ins. Co. v. Ibs, this day decided [237 U. S. 662, post, —, 35 Sup. Ct. Rep. 692].) Into that subject, therefore, we do not enter.

Before making the order of reversal we regret that we must say something more. The printed argument for the defendant in error is so full of vituperative, unwarranted, and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the foregetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once when it came to our attention after the argument of the case had we not feared that by doing so delay in the examination of the case and possible detriment to the parties would result. Following the precedent established in Green v. Elbert, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188, which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files and the decree below in accordance with the [547] views which we have expressed will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A. D. DANIELS, Appt.,
v.
JESSIE E. WAGNER.

(See S. C. Reporter's ed. 547-567.)

Public lands — discretionary power of Land Department — rejection of lawful entry.

1. The Land Department possesses no general discretionary power to reject entries on vacant public land selected, in entire conformity with the provisions of the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, Comp. Stat. 1913, § 5129), and the departmental regulations, in lieu of lands relinquished in a forest reservation, or to award the lands to subsequent and subordinate applicants under the homestead, timber and stone, and other land laws, nor can such discretionary power be said to arise because of the primary mistake made by the local land officers, who, disregarding their plain duty, rejected the lieu entries and allowed the filing of claims which were subsequent in date.

[For other cases, see Public Lands, I. e, 2; I. e, 6, in Digest Sup. Ct. 1908.]

Courts — finality of decisions of Land Department — findings of fact.

2. Courts have no power to review findings of fact by the Land Department which were within its province and duty to make.

[For other cases, see Courts, I. e, 6, in Digest Sup. Ct. 1908.]

Parties — defendants — United States.

3. The United States is not a necessary party to a suit by a prior entryman whose entry has been rejected by the Land Department in favor of a subordinate entryman, to charge the latter with a trust in his favor, because a patent from the United States is involved.

[For other cases, see Parties, II. a, 2, in Digest Sup. Ct. 1908.]

[No. 239.]

Argued April 21 and 22, 1915. Decided June 1, 1915.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the District of Oregon, sustaining a demurrer to the bill in a suit to charge the defendant with a trust in favor of complainant in land claimed under the United States. Reversed and remanded for further proceedings.

See same case below, 125 C. C. A. 93, 205 Fed. 235.

The facts are stated in the opinion.

Mr. **Harrison G. Platt** argued the cause, and, with Messrs. Robert Treat Platt and Hugh Montgomery, filed a brief for appellant:

These appeals involve the construction and application of a statute of the United States.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 528, 47 L. ed. 575, 581, 23 Sup. Ct. Rep. 365.

Where, by mistake in the interpretation of the law, the Secretary of the Interior has caused a patent to issue to a subsequent claimant of public land, the prior claimant, having done all that the law requires him to do, is entitled to maintain a suit in equity to have the patentee declared a trustee for such prior claimant.

Lee v. Johnson, 116 U. S. 48, 49, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424, 428; Silver v. Ladd, 7 Wall. 219, 228, 19 L. ed. 138, 141; Stark v. Starr, 6 Wall. 402, 419, 18 L. ed. 925, 930.

The power of the Land Department to determine the validity of entries or selections is not an arbitrary or unlimited power, and in the exercise of such power the Department is not permitted to dispose of public lands to whomsoever it chooses.

Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 9; Howe v. Parker, 111 C. C. A. 466, 190 Fed. 757.

Filing of the relinquishment operates *eo instanti* to restore the land to the public domain and make it subject to selection.

Moritz v. Hinz, 37 Land Dec. 382; Keane v. Brygger, 160 U. S. 276, 287, 40 L. ed. 426, 430, 16 Sup. Ct. Rep. 278; Brown v. Gurney, 201 U. S. 184, 193, 50 L. ed. 717, 722, 26 Sup. Ct. Rep. 509.

The forest reserve lieu selections operated to segregate the land selected as against subsequent applications made by defendants to enter the same.

United States v. Buchanan, 232 U. S. 72, 76, 58 L. ed. 511, 514, 34 Sup. Ct. Rep. 237; Porter v. Landrum, 31 Land Dec. 352; Re Southern P. R. Co. 32 Land Dec. 51; Re Santa Fe P. R. Co. 33 Land Dec. 161; Eaton v. Northern P. R. Co. 33 Land Dec. 426; Santa Fe P. R. Co. v. Northern P. R. Co. 37 Land Dec. 669.

Every act of Congress under which a claim to public land may be initiated confers a substantial right.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300; Re Santa Fe P. R. Co. 41 Land Dec. 98; Robinson v. Lundrigan, 227 U. S. 173, 57 L. ed. 468, 33 Sup. Ct. Rep. 255; Shepley v. Cowan, 91 U. S. 330, 337, 338, 23 L. ed. 424, 426, 427.

The act of June 4, 1897, is an offer by the government to purchase land privately held within a forest reserve and give in exchange therefor other public land, and the acceptance of the offer of exchange by the selector created a contractual relation.

Roughton v. Knight, 219 U. S. 537, 547, 55 L. ed. 326, 327, 31 Sup. Ct. Rep. 297; Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300; Jones v. Northern P. R. Co. 34 Land Dec. 110; Burke v. Southern P. R. Co. 234 U. S. 669, 679, 680, 58 L. ed. 1527, 1544, 1545, 34 Sup. Ct. Rep. 907; West v. Edward Rutledge Timber Co. 210 Fed. 189; Sawyer v. Gray, 205 Fed. 160; Camp v. Smith, 2 Minn. 155, Gil. 131, 143; United States v. Bostwick, 94 U. S. 53, 66, 24 L. ed. 65, 66; United States v. Devereux, 32 C. C. A. 564, 61 U. S. App. 548, 90 Fed. 182, 186; Davis v. Gray, 16 Wall. 203, 232, 21 L. ed. 447, 457; People v. Stephens, 71 N. Y. 549; Carr v. State, 127 Ind. 206, 11 L.R.A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; Daggett v. Bonewitz, 107 Ind. 279, 7 N. E. 900; Murray v. Charleston, 96 U. S. 432, 445, 24 L. ed. 760, 763; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Houston & T. C. R. Co. v. Texas, 170 U. S. 261, 42 L. ed. 1029, 18 Sup. Ct. Rep. 610; Story, Const. § 1391.

When the forest lieu selections were finally considered by the Secretary of the Interior and the facts found justifying the selections, the rights of the lieu selector related back to the date of the original selection and cut off all intervening claims.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 358, 31 Sup. Ct. Rep. 300; Campbell v. Weyerhaeuser, 219 U. S. 424, 55 L. ed. 279, 31 Sup. Ct. Rep. 321; Northern P. R. Co. v. Wass, 219 U. S. 426, 55 L. ed. 280, 31 Sup. Ct. Rep. 321; Svor v. Morris, 227 U. S. 524, 57 L. ed. 623, 33 Sup. Ct. Rep. 385; Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636.

The principle of "first in time, first in right" has been applied to claims and entries of every kind, and is applicable to these cases. Daniels's selections being first in time, the Secretary was vested with no discretion to award the lands involved herein to the defendants.

Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615; Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83; McHenry v. Nygaard, 72 Minn. 2, 74 N. W. 1106; Jones v. Northern P. R. Co. 34 Land Dec. 110; Willamette Valley & C. M. Wagon Road Co. v. Bruner, 26 Land Dec. 356; Sage v. Swenson, 64 Minn. 517, 67 N. W. 544; Southern P. R. Co. v. Wiggs, 43 Fed. 333; St. Paul & S. City R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334.

Mr. **Alexander Britton** also argued the cause for appellant.

Mr. J. H. Carnahan argued the cause, and, with Mr. F. H. Mills, filed a brief for appellee:

The decisions of the Land Department upon questions of fact, in the absence of a fraud practised by patentee, are binding upon the courts in a proceeding of the character of this suit.

Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Love v. Flahive, 205 U. S. 195, 51 L. ed. 768, 27 Sup. Ct. Rep. 486; Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

The appellant could have no claim of priority by claiming an equity before the Department, since both the legal and equitable title to the land at the time of tendering the forest lieu lands by Edward B. Perrin must be exclusively in the latter.

Re Northern P. R. Co. 33 Land Dec. 75.

The act of June 3d, 1878, requires notice to be given by timber and stone entrymen of final proof, and that proof shall be made not less than sixty days from date of entry and within ninety days therefrom, requiring adverse claimants to appear and protest.

6 Land Dec. 115.

Adverse claimants (appellant) failing to so appear and contest or protest are bound by such notice.

Kerns v. Lee, 142 Fed. 985; Small v. Lutz, 41 Or. 577, 67 Pac. 421, 69 Pac. 825.

In case the forest lieu land tendered is rejected, the base is not lost, but is returned.

United States v. McClure, 174 Fed. 510; Re Lewis, 33 Land Dec. 43; Re Northern P. R. Co. 33 Land Dec. 75; Re Austin, 33 Land Dec. 589; Kern Oil Co. v. Clarke, 30 Land Dec. 550.

The bill of complaint must be predicated upon such a fraud on the part of the patentee as prevented the plaintiff in this case from fully presenting his case before the Land Department.

Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Shepley v. Cowan, 91 U. S. 330–340, 23 L. ed. 424–427; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Potter v. Hall, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545; Greenameyer v. Coate, 212 U. S. 434–436, 53 L. ed. 587, 588, 29 Sup. Ct. Rep. 345.

There is no equity in the bill of complaint unless the United States can be made a party.

United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 135; Maxwell Land-Grant Case, 121 U. S. 325, 379, 30 L. ed. 949, 958, 7 Sup. Ct. Rep. 1015.

The act of June 4, 1897, contemplates an exchange of equal estates requiring the assent of the United States.

Re Lewis, 33 Land Dec. 43; Re Northern P. R. Co. 33 Land Dec. 75; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692.

Mr. Chief Justice White delivered the opinion of the court:

Daniels, the appellant here, was plaintiff in the trial court and appellant in the court below. In stating this case in its opinion the court below mentioned that there were fifteen other cases under submission in which Daniels also was the plaintiff in the trial court and the appellant before it, and that all the cases involved substantially the same legal questions. The court evidently considering that its conclusions in this disposed of the other cases, directed a judgment of affirmance not only in this, but in the other fifteen cases. It would seem, since only fourteen of the cases besides this one are here, that in one of the cases no appeal was taken; but otherwise the situation which existed below obtains here, since this and fourteen other cases are before us for decision. For the appellant this case and the fourteen others were argued in one brief, but for the appellees the cases in the briefs are divided into groups, presumably in consequence of what was assumed to be some material difference of fact between them. In passing upon the cases the court below substantially rested its conclusion upon what it decided was the power of the officers of the Land Department over the land entries which are the subject of the controversy, although in concluding its opinion the court intimated rather than decided that even if its views on the question of power were mistaken, there was a state of fact in this (and presumably in the other cases) which required a decision against Daniels, the appellant. 125 C. C. A. 93, 205 Fed. 235.

In the argument before us for the appellant it is not disputed that if the court below was right in its ruling as to the power of the Land Department, its conclusion in [553] this and all the other fifteen cases was correct and its decrees must be affirmed, since, under the hypothesis stated, there is no contention that there is any fact in this or any of the other cases which would justify a different conclusion. On

the other hand, in the arguments for the appellees, although it is not disputed that if the court below erred in the proposition which it maintained concerning the power of the Land Department, its decrees were wrong, it is nevertheless insisted that putting the proposition of power out of view, in some, if not in all, the cases, particular facts were established which, when properly considered, would require an affirmance of the decrees.

Under these conditions, to avoid repetition in the statement of the other cases, we proceed first in this case to dispose of the proposition as to the power of the officers of the Land Department in order, if it be found that such proposition was well founded, to decide this and all the other cases without going any further. In following this method we shall state the case on broad lines so as to present in bold relief the legal question for decision, paying no heed to facts not in any way involved in that question. If, after doing so, the power upheld by the court below be found not to exist, we shall then examine the facts to determine how far they may control or influence the decision of the case.

In June, 1902, the state of Oregon prepared lists selecting lands in place of certain designated school lands for which it claimed to be entitled to be indemnified, and these lists were filed in the local land office and were transmitted for approval to the Commissioner of the General Land Office. The state, before such approval, sold to Daniels the land covered by the lists, including that with which this controversy is concerned. The Land Department subsequently refused to approve the state lists because of error concerning the school lands for which the right of indemnity was asserted. Daniels, the purchaser from the [554] state, was therefore without right in and to the land. Through the governor of the state an arrangement was made with the Land Department by which the state might point out and substitute other school sections, the right to which had been lost, for those previously stated, and if it could not do so, on notice from the Department that its lists would be canceled the state might relinquish its claim, if any, arising from the filing of the lists, in favor of its vendees, who, on presentation of the relinquishment, might enter the land which they had already bought from the state. The Department directed attention to the fact that in the meanwhile the right of the vendees to make the proposed entry would be indubitably preserved, as the filing of the previous lists by the state had segregated the land, and until the relinquishment was presented that segregation would continue; and further, that if the relinquishment and the application to enter the lands were filed together, no danger of loss of right would exist. Daniels, to avail of this advantage, procured the Aztec Land & Cattle Company and one Perrin, who owned land which had been included in the San Francisco Mountains Forest Reserve, in his interest and for his account to surrender said land to the United States under the provisions of the act of Congress of June 4, 1897 (chap. 2, 30 Stat. at L. 36), and to apply for the benefit of Daniels to enter as lieu land the land which he had bought from the state of Oregon. To accomplish this purpose it was understood that the relinquishments which the state had made of its rights, if any, to such land, resulting from its filed lists, should be delivered to the land office in connection with the application to enter the lieu lands, thus following the method suggested previously by the Land Department. Carrying out this purpose after compliance in every respect with the statute and with the regulations of the Land Department, the application for the lieu lands was filed and the certificate of relinquishment [555] from the state was simultaneously handed to the proper land office.

When the applications were made it is not disputed that it was the duty of the local land officers, on receipt of the application, to file and transmit it to the Commissioner of the General Land Office for his approval; but, for some reason best known to themselves, they rejected the application and allowed subsequent entries in favor of other persons to be made under the homestead, timber and stone and other laws. From this there resulted a controversy which led to repeated directions by the Land Department to the local land office to allow the lieu entry, but which, for one reason or another, were not carried out, until finally in February, 1910, the whole subject came before the Secretary of the Interior on appeal from a ruling of the Commissioner of the General Land Office that the lieu entry was valid, and again directing that it be allowed and consummated. In great detail reviewing the facts concerning the Daniels purchase from the state of Oregon and his obtaining the relinquishment conformably to the instructions of the Department, after holding that his perfect good faith was established, and after finding as a matter of fact that the application for the entry of the lieu lands and the relinquishment from the state had been filed simultaneously in the local land office although the relinquishment had not been marked by the local officers as filed until afterwards, the Secretary came to re-

view the controversy which had followed, and to state his general conclusions as to the entry of the lieu lands as follows:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries [556] for most of these lands. It is thought, however, that in instances where the Land Department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in canceling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition. See Hoyt v. Weyerhaeuser, 88 C. C. A. 404, 161 Fed. 324."

Giving effect to these opinions the Secretary of the Interior decided that the entries subsequent in date to the Daniels or lieu land entries should be maintained except as to certain of said subsequent claims which were held to be subordinate to the Daniels or lieu land claims for reasons which we need not notice. When this action of the Secretary was carried into effect by the Land Department this suit was brought, charging that, by error of law of the Department of the Interior, Daniels had been deprived of his right to enter the land, and seeking to charge the defendants to whom the right to enter the land had been awarded or those holding under them with a trust in favor of Daniels. The averments of the bill were full, and embraced the facts above recited, and the opinion of the Secretary, rendered in 1910, was made a part of the bill. The bill was demurred to as stating no case for relief. It was amended and again demurred to for the same reason. The trial court sustained the demurrer, and in substance held that the Land Department had the discretionary power to award the lands, without reference to the priority of the applications, to the persons selected as a result of taking into account the general equitable considerations stated in the opinion of the Secretary of the Interior which [557] we have already quoted. On appeal the decree of the trial court was affirmed. It was held that the Land Department, as to the character of the entries in question, possessed the discretionary power which was relied upon by the Secretary of the Interior as the basis for his action, although it was held or intimated in considering a decision of this court that the discretionary power asserted could not be applied to indemnity selections made by a railroad company under a railroad grant. In concluding the court said:

"But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local land office as selected by the state of Oregon by certain school indemnity lists, and that those lists were not relinquished by the state until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. Greenameyer v. Coate, 212 U. S. 434, 443, 53 L. ed. 587, 590, 29 Sup. Ct. Rep. 345."

This brings us to determine whether the Land Department had a right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so,—an authority the possession of which was sustained by both the courts below.

In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded (a) that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the land office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation, and upon the doing and offering to do everything required [558] by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; (b) that in the particular case the application to enter the lieu land came within the grant of the statute, and all that was required by law or lawful regulation was done by the applicant in order to obtain entry; and (c) that it was the plain duty of the proper authorities of the Department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where, under an act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discre-

tion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation. And the inherent vice which thus clearly appears from the mere statement of the proposition when reduced to the ultimate conceptions which it involves is not relieved by the suggestion that the action taken in this case by the Department rested not upon the assumption that there was a general discretion, but upon the assumption that such discretion arose because of the primary [559] mistake made by the local land officers concerning the lieu entry and the allowance of the filing of claims which were subsequent in date. We say this because thus seemingly to limit the discretionary power exerted would, in our opinion, aggravate its manifest unsoundness, for the power as thus qualified would come to this: That the commission of a wrong by the officers of the Department in disobeying the act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of law lawful and the taking away of the right of an individual legal. But this, in another form of statement, brings the proposition back to its real and essential basis.

Let us consider the subject from the point of view of the authorities relied on as sustaining the possession of the discretionary power by the Land Department, first, from the point of view of the opinion expressed by the Secretary of the Interior, and second, from that of the court below in affirming the action of that officer. As to the first, it is to be observed that the only authority referred to was the case of Hoyt v. Weyerhaeuser, decided April 17, 1908, in the circuit court of appeals for the eighth circuit (88 C. C. A. 404, 161 Fed. 324), and that therefore the ruling was not the result of any prior administrative rule or practice of the Department asserting the existence of the administrative authority which the proposition involves. We do not stop to point out that in our opinion the ruling in Hoyt v. Weyerhaeuser did not sustain the right to exert the discretionary authority which it exercised, since that case, after the action of the Land Department, was reviewed in this court and reversed upon reasoning which negatives the assumption that the Department possessed the discretionary authority which it assumed it had. Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300.

As to the second, while the court below likewise referred [560] to no practice or ruling of the Land Department asserting the possession by the Department of the latitude of discretion which it exercised, that power was sustained and the lawfulness of its exertion in the present case established by the ruling in Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692. While thus understanding the Cosmos Case, the court recognized that the decision in Weyerhaeuser v. Hoyt was in conflict with such view if that decision was applicable to the case before it, which the court concluded was not the case because it must be restricted to applications for indemnity selections made by a railroad company under a railroad grant, and therefore did not relate to lieu land selections applied for under the act of 1897. But we are of opinion that this interpretation of the Cosmos Case cannot be justified. In the first place we can discover no reason for holding that the Cosmos Case either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case of lieu land entries or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the Cosmos Case it was decided that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a prerequisite to allowing a lieu entry under the act of 1897, but that ruling has no relation to the question of the right of the Department, after it had passed on the prerequisites required for the entry under the act of 1897, and after it had decided that they had all been complied with, to deny the right of the applicant to enter, and under the theory of a discretion possessed to permit a later applicant to take the land, thus depriving the first applicant of the right conferred upon him by the act of Congress. The difference between the two is that which must obtain between the power to decide, on the one hand, whether the prerequisites [561] to an

entry exist, and the right, on the other, of the Land Department, after finding that an applicant has fully complied with the law and is entitled to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done.

It is true again that in the Cosmos Case the court declined to hold that the Department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its final allowance,—a ruling which but in a different form illustrates the broad distinction which we have just pointed out. It is also true that Weyerhaeuser v. Hoyt concerned a question of the selection of indemnity lands by a railroad company under a railroad grant, but the reasoning in that case, we are of opinion, in the very nature of things is repugnant to the possibility of the possession of the discretionary power in the Department here asserted.

There being, then, no basis for the assumption of a discretionary power on the part of the Land Department upon which the lieu land entry or entries were finally rejected and the land awarded to other entrymen who were later in time, the bill stated a cause of action sustaining the relief prayed unless the demurrer was rightly maintained for some other reason. And for the purpose of considering that subject we state under one heading the questions involved in its solution.

From the point of view that it is established that error of law was committed by the Land Department in assuming that it had a discretion to reject the lieu entry, is its action nevertheless sustainable because of the suggestion made by the court below in closing its opinion, or for any other fact or reason pressed in argument?

These considerations are, of course, as the matter went off on a demurrer, to be determined by the bill [562] and the opinion of the Secretary of the Interior of 1910, which was annexed to the bill. Although, in considering and disposing of the question of law, we have given a summary of the proceedings in the Land Department, we refer more fully to the subject. The application to make the lieu entry was presented to the local land office February 8, 1904. After its rejection the applicant for the entry appealed, the date not being given. On this appeal the decision of the local land officers was affirmed by the Commissioner of the General Land Office, the date not being given, and on appeal to the Secretary of the Interior, the local land officers and the Commissioner of the General Land Office were reversed, October 25, 1905, and the local officers were directed to allow the lieu entry. This order was not carried out because the local land officers declined to do so upon the ground that the land covered by the lieu entry was included in a named reservation, and on appeal taken by the lieu entrymen the Commissioner of the General Land Office reversed the action of the local officers, January 23, 1906, and sent the matter back with directions to the local land officers to allow the lieu entry or entries "as of date February 8, 1904, the day on which they were originally presented, if no other objection appeared." What then ensued is thus stated by the Secretary in his opinion:

"Under dates of March 5 and June 11, 1906, the register submitted full reports to your office [General Land Office] upon the said applications, and stated there were objections to the allowance of the same in that there were various homestead and timber and stone applications which had been allowed subsequently to the cancelation of the state's list. The register also referred to the fact that Daniels had caused a contest to be instituted against the state's selection, and questioned his good faith in the matter.

"Separate appeals were taken by the Aztec Land & [563] Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

"Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels was entitled to protection as a bona fide purchaser from the state; that the state's selections were filed January 28, 1902, while the lands were sold on January 21st, preceding, at which time they were public lands of the United States, and no one purchasing them could claim to be a bona fide purchaser from the state; that as late as October 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the state, but was acting adversely to it, and attempting to contest the lists under which he later asked for recognition as a bona fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed; and if he had since acquired assignments of the state's certificates of sale, he had done so with full knowledge of the invalidity of the state's claim; that the facts set forth above were fatal to his contention that he was a bona fide purchaser,

and as such should be permitted to file the state's relinquishment and obtain precedence over others seeking to appropriate the lands under the general land laws; that to concede to him this privilege under letters October 17 and 13, 1903, mentioned above, would, in effect, be to make such persons as from time to time might constitute the State Land Board agents to dispose of the public lands of the United States, within the state, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the state's lists invalid for want of sufficient base, the filing of the state's relinquishment, and the protection of [564] the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

"A motion for review of said decision of June 26th, 1906, having been filed by Daniels, the Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels was not, strictly speaking, a bona fide purchaser from the state, because the certificates of sale issued by the state antedated the filing of the school indemnity selections, and therefore were made at a time when there was no actual claim of the state pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the state, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a bona fide purchase.

"The decision of June 26th, 1906, was therefore recalled, and it was ordered that the lieu selection should be reinstated."

As additionally stated by the Secretary in his opinion, the Commissioner of the General Land Office transmitted the decision just stated to the local land officers along with the lieu entry or entries for allowance, and instructed those officers to notify the parties who had been allowed to make entries subsequent to the filing of the lieu applications to show cause why their entries should not be canceled.

Thereupon, as further stated by the Secretary, "a petition termed a motion for rereview of Departmental Decisions of May 15 and 18, 1907, was filed on behalf of Archie Johnson, who claimed a part of the lands under a sale made thereof under the Public Land Laws. This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the state's selection involved; that the entire [565] proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the Public Land Laws."

And it was the controversy which arose from this petition which took the subject again before the Commissioner of the General Land Office and to the Secretary of the Interior, and which led to the final decision of the Department of 1910, with which we are dealing, maintaining the right of the lieu entrymen, and in which, as we have previously seen in discussing the question of discretion, the Department explicitly and finally found (1) that Daniels as a matter of fact was in good faith in his dealings concerning the purchase of the land from the state of Oregon and the receipt from the state of its relinquishment, and (2) that the application for the lieu entry or entries and the relinquishment by the state were presented to the land office for filing at one and the same time. Because of its conclusive effect upon that aspect of the question we append in the margin the finding made by the Secretary of the Interior on this subject.[1]

[1] "It is true the record shows that the relinquishments were not marked filed in the local office until February 10, 1904, which was two days after the presentation of the scrip applications.

"It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been received on February 8, instead of February 10, the filing would have been noted on the day they were received.

"But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the state's relinquishments were, in fact, filed simultaneously.

"The filing was by mail, and the letter of transmittal was written by Daniels's attorney, the said L. T. Barin.

"The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered scrip applications is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the state had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

[566] Under these conditions it is apparent that the suggestion made in the opinion of the court below was either inadvertent, or, if not, was clearly without foundation,—a result as to which there is no room for controversy in view of the express finding by the Department of the simultaneous presentation of the relinquishment and the application for the lieu entry or entries, since it constitutes a finding of fact by the Department which it was within its province and its duty to make, and which the courts have no power to review. And from this it follows that any attempt to base a right in favor of persons entering subsequently because of the failure of the local land officers to file would reduce the case at once to the contention that one who had done everything essential, exacted either by law or the regulations of the Department, to obtain a right from the land office conferred upon him by Congress, could be deprived of the same either by the exercise of discretion or by a wrong committed by the land officers.

In addition, in the brief for the appellee in this case [567] various mixed contentions of law and fact are stated under six propositions which it is deemed establish that the demurrer was rightly sustained even although the Land Department did not possess the discretion which it assumed it had. Some of them we think too obviously devoid of merit to require anything but statement. For instance, the contention that because a patent of the United States is involved, therefore the United States is a necessary party. As to the others, we think whatever be their merit, as to which we intimate no opinion, they plainly concern themselves with the merits of the case, and have no tendency to establish the proposition that the demurrer was rightly sustained. Thus, so far as the final action of the Secretary was concerned, we think under the averments of the bill and on the face of the Secretary's opinion it is to be assumed that the necessary parties to enable the Secretary to act were before him, and that this carries with it, at least for the purposes of the hearing on the merits, the question whether there was an insufficiency of parties in the previous hearings.

Our conclusion, therefore, is that the judgment sustaining the demurrer was wrong and it must be and is reversed and the case is remanded for further proceedings in accordance with this opinion.

Reversed.

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[568] ALFRED D. DANIELS, Appt.,
v.
FRANK JOHNSTON and D. W. Dineen.[1]
(No. 234.)

ALFRED D. DANIELS, Appt.,
v.
RALPH E. BUTLER and D. W. Dineen.[1]
(No. 235.)

A. D. DANIELS, Appt.,
v.
EDGAR B. CONNOR and D. W. Dineen.[1]
(No. 236.)

A. D. DANIELS, Appt.,
v.
D. W. DINEEN[1] and Joseph W. Satterthwaite. (No. 240.)

(See S. C. Reporter's ed. 568, 569.)

Public lands — reviewing action of Land Department — charging patentee as trustee for equitable owner.

A prior entryman is not precluded by the issuance of a patent from the United States to a subordinate entryman from seeking to impose a trust upon the title which the patent represents.

[For other cases, see Public Lands, 1065-1074, in Digest Sup. Ct. 1908.]

[Nos. 234, 235, 236, and 240.]

Argued April 21 and 22, 1915. Decided June 1, 1915.

FOUR APPEALS from the United States Circuit Court of Appeals for the Ninth Circuit to review decrees which affirmed decrees of the District Court for the Dis-

"It is worthy of [notice] too, that there has not been found any correspondence or record which would indicate that if the said Barin had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

"I conclude, therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be in your office report of September 28th, 1903, above quoted."

[1] Death of D. W. Dineen suggested, and appearance of Elizabeth Dineen, individually and as executrix of the last will and testament of D. W. Dineen, deceased, as a party appellee in these cases, filed and entered April 21, 1915.

trict of Oregon, sustaining demurrers to the bills in suits to charge defendants with a trust in favor of complainant in lands claimed under the United States. Reversed and remanded for further proceedings.

See same case below, 125 C. C. A. 93, 205 Fed. 235.

Mr. Harrison G. Platt argued the cause, and, with Messrs. Robert Treat Platt and Hugh Montgomery, filed a brief for appellant.

For contentions of these counsel, see their brief as reported in Daniels v. Wagner, ante, 1102.

Mr. Alexander Britton also argued the cause for appellant.

Mr. Homer D. Angell argued the cause, and, with Messrs. Forest S. Fisher and William D. Fenton, filed a brief for appellees:

In cases Nos. 234 and 235 patents issued prior to the decision of the Secretary relied on; therefore, the Secretary was without jurisdiction and the decision is of no force.

Moore v. Robbins, 96 U. S. 530, 532, 24 L. ed. 848, 849; Brown v. Hitchcock, 173 U. S. 473, 478, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

The patents issued to appellees Butler and Johnston, in cases Nos. 234 and 235, are final and conclusive, and this court, under the pleadings, has no jurisdiction to inquire into them.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 876, 11 Mor. Min. Rep. 673.

Equity will not charge a patentee as trustee for another unless the other has the better title and has the complete ownership of the land, with the exception of the bare legal title.

Carroll v. Safford, 3 How. 441, 460, 11 L. ed. 671, 680; Stark v. Starr, 6 Wall. 402, 419, 18 L. ed. 925, 930; Garland v. Wynn, 20 How. 6, 15 L. ed. 801; Lindsey v. Hawes, 2 Black, 554, 17 L. ed. 265; Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Johnson v. Towsley, 13 Wall. 72, 81, 20 L. ed. 485, 486; Bohall v. Dilla, 114 U. S. 47, 50, 29 L. ed. 61, 62, 5 Sup. Ct. Rep. 782; Hughes v. United States, 4 Wall. 232, 18 L. ed. 303; Rector v. Gibbon, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. Rep. 605; Widdicombe v. Childers, 124 U. S. 400, 31 L. ed. 427, 8 Sup. Ct. Rep. 517; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; Wilcox v. Jackson, 13 Pet. 498, 514, 515, 10 L. ed. 264, 272, 273.

Lands selected by appellant were at the time thereof, to wit, February 8, 1904, not open to settlement, because they were included within a pending state school indemnity selection, relinquishment to which was not filed until February 10, 1904. Findings of fact in the Land Department are controlling upon the parties only when necessary to the decision.

Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848.

Lands included in a pending void or voidable selection are not subject to entry.

Leaming v. McKenna, 31 Land Dec. 318; Re California & O. Land Co. 33 Land Dec. 595; Re Santa Fe P. R. Co. 34 Land Dec. 121; Sante Fe P. R. Co. v. State, 34 Land Dec. 12; Re Sante Fe P. R. Co. 33 Land Dec. 161; Re Cobb, 31 Land Dec. 221.

On February 8, 1904, the Department required a relinquishment to be accepted by the Commissioner and entry canceled of record before lands covered thereby would be open to entry, which rule governs this case, notwithstanding it was later changed.

Circular of July 14, 1899, 29 Land Dec. 29; California & O. Land Co. 33 Land Dec. 597; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 602.

Appellant's application to exchange lands under the act of June 4, 1897, did not comply with the act and the regulations of the Land Department, in that he did not tender with his application nonmineral and nonoccupancy affidavits.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 304, 309, 47 L. ed. 1064, 1065, 1070, 23 Sup. Ct. Rep. 692, 29 Land Dec. 394; Kern Oil Co. v. Clarke, 30 Land Dec. 551; Gray Eagle Oil Co. v. Clarke, 30 Land Dec. 570; Kern Oil Co. v. Clotfelter, 30 Land Dec. 583; Bakersfield Fuel & Oil Co. v. Saalburg, 31 Land Dec. 312; 28 Land Dec. 524; Kern Oil Co. v. Clarke, 31 Land Dec. 301; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760; Circular of Secretary of Interior, 31 Land Dec. 130.

An offer to exchange lands under the act of June 4, 1897, must be passed upon and accepted by the Commissioner of the General Land Office before it becomes effective, which was not done in Daniels's Case.

24 Land Dec. 592; Roughton v. Knight, 219 U. S. 537, 544, 55 L. ed. 326, 327, 31 Sup. Ct. Rep. 297; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 312, 313, 47 L. ed. 1064, 1072, 23 Sup. Ct. Rep. 692.

The act of June 4, 1897, was for the benefit of owners of isolated tracts in forest reserves.

Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297.

Selections of public lands requiring approval of the Secretary of the Interior do not create a vested or equitable interest in the selector until such approval.

New Orleans P. R. Co. v. Parker, 143 U. S. 57, 36 L. ed. 70, 12 Sup. Ct. Rep. 364; Humbird v. Avery, 195 U. S. 507, 49 L. ed. 298, 25 Sup. Ct. Rep. 123; Wisconsin C. R. Co. v. Price County, 133 U. S. 512, 33 L. ed. 695, 10 Sup. Ct. Rep. 341; Sjoli v. Dreschel, 199 U. S. 565, 50 L. ed. 312, 26 Sup. Ct. Rep. 154; Osborn v. Froyseth, 216 U. S. 578, 54 L. ed. 623, 30 Sup. Ct. Rep. 420; Weyerhaeuser v. Hoyt, 219 U. S. 380, 391, 55 L. ed. 258, 31 Sup. Ct. Rep. 300.

The final conclusion and decision of the Department of the Interior is the authoritative decision of the Department and binding upon the parties, and supersedes other conclusions and decisions reached prior thereto.

United States ex rel. Knight v. Lane, 228 U. S. 6, 57 L. ed. 709, 33 Sup. Ct. Rep. 407; Potter v. Hall, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545; Greenameyer v. Coate, 212 U. S. 434, 442, 53 L. ed. 587, 590, 29 Sup. Ct. Rep. 345.

The doctrine of relation is a fiction of law, and is invoked only in the interest of equity.

Weyerhaeuser v. Hoyt, 219 U. S. 397, 424, 55 L. ed. 266, 279, 31 Sup. Ct. Rep. 300; Gibson v. Chouteau, 13 Wall. 92, 101, 20 L. ed. 534, 537; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 310, 47 L. ed. 1071, 23 Sup. Ct. Rep. 692; Roughton v. Knight, 219 U. S. 544, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; Campbell v. Weyerhaeuser, 88 C. C. A. 412, 161 Fed. 332; Shepley v. Cowan, 91 U. S. 337, 23 L. ed. 426; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612.

Equity will not disturb a patent unless error of law complained of is clear and the facts on which it is based have been determined beyond controversy.

Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Durango Land & Coal Co. v. Evans, 25 C. C. A. 523, 49 U. S. App. 305, 80 Fed. 425; Quinn v. Chapman, 111 U. S. 445, 28 L. ed. 476, 4 Sup. Ct. Rep. 508; Miller v. Kerr, 7 Wheat. 1, 5 L. ed. 381.

The approval required to be made by the Commissioner of the General Land Office of an application to exchange lands under the act of June 4, 1897, is not merely ministerial, but judicial, and gives power to decide between contending equities.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692; Williams v. United States, 138 U. S. 514, 524, 34 L. ed. 1026, 1031, 11 Sup. Ct. Rep. 457; Re California & O. Land Co. 33 Land Dec. 600; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420; United States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356; Wilcox v. Jackson, 13 Pet. 498, 514, 515, 10 L. ed. 264, 272, 273; Decatur v. Paulding, 14 Pet. 497, 515, 10 L. ed. 559, 568; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; Re Clarke, 32 Land Dec. 233; Miller v. Thompson, 36 Land Dec. 492; Kern Oil Co. v. Clarke, 30 Land Dec. 550; Sherar v. Veazie, 40 Land Dec. 549.

The Department of the Interior has been designated to administer the Land Department, and its conclusions will not be set aside except for the most urgent reasons.

Williams v. United States, 138 U. S. 514, 524, 34 L. ed. 1026, 1031, 11 Sup. Ct. Rep. 457; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Orchard v. Alexander, 157 U. S. 373, 381, 39 L. ed. 738, 740, 15 Sup. Ct. Rep. 635.

The application of the appellant to select the lands in question, being rejected by the local officers of the Land Department, did not segregate the land attempted to be selected from the public domain.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 392, 55 L. ed. 258, 263, 31 Sup. Ct. Rep. 300; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297.

The mere offer to select land under the act of June 4, 1897, not accepted or passed upon by the officials of the Land Department, confers no right upon the appellant.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 312, 47 L. ed. 1072, 23 Sup. Ct. Rep. 692; Roughton v. Knight, 219 U. S. 544, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; Campbell v. Weyerhaeuser, 88 C. C. A. 412, 161 Fed. 332.

The act of June 4, 1897, merely signifies the willingness of the government to exchange certain lands for an equal area of lands within the limits of a forest reserve, and no rights are acquired by the selector until his application for the exchange is approved.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692; Gauthier v. Morrison, 232 U. S. 452, 58 L. ed. 680, 34 Sup. Ct. Rep. 384; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300; Campbell v. Weyerhaeuser, 88 C. C. A. 412, 161 Fed. 333, 219 U. S. 425, 55 L. ed. 280, 31 Sup. Ct. Rep. 321.

Mr. Chief Justice White delivered the opinion of the court:

These four cases were embraced among the fifteen which were argued by the appellant in one brief. For the appellees, however, they were argued in an elaborate brief which presses upon our attention fifteen different propositions. Without going into detail, however, after giving them all careful examination we think none of them affords [569] ground for sustaining the action of the court below in maintaining the demurrers, first, because many of them rest upon contentions concerning the good faith of Daniels in purchasing from the state of Oregon the right to lands under the school indemnity lists which, even if that subject were relevant to the issues here arising, are without merit, since they but contradict and conflict with the finding by the Secretary of the Interior as to good faith, which finding we have pointed out in No. 239 [237 U. S. 547, ante, 1102, 35 Sup. Ct. Rep. 740]. Second, because other of the propositions dispute in various forms of statement the finding of the Secretary that the applicant or applicants for the lieu entry or entries had complied with every requirement of the statute and regulations which were prerequisite to the allowance of the right which they claimed. And finally, because the remainder perhaps not directly, but certainly by indirection, seek to establish as a matter of construction under the act of 1897 [30 Stat. at L. 11, chap. 2] that the Department possessed the discretionary power which it asserted.

We have not included in this classification of the propositions the first three, which advance the theory that because patents had been issued to the subordinate entrymen in Nos. 234 and 235, therefore there was no right on the part of the lieu entrymen to assail the patent by indirection by seeking to impose a trust upon the title which the patents represent. But this view is so directly in conflict with the well-settled principle on that subject that we deem it unnecessary to say more. Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Duluth & I. R. R. Co. v. Roy, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549; Burke v. Southern P. R. Co. 234 U. S. 669, 692, 58 L. ed. 1527, 1549, 34 Sup. Ct. Rep. 907.

For these reasons and those stated in No. 239, the decrees sustaining the demurrers in these cases must be reversed, and the cases remanded for further proceedings in accordance with the opinion in this and in No. 239.

Reversed.

[570] A. D. DANIELS, Appt.,
v.
ALVINA S. MERRITHEW. (No. 237.)

A. D. DANIELS, Appt.,
v.
BERNICE SACKVILLE. (No. 238.)

A. D. DANIELS, Appt.,
v.
MASON C. MESERVEY. (No. 245.)

A. D. DANIELS, Appt.,
v.
JOHN Y. JOHNSON. (No. 246.)

A. D. DANIELS, Appt.,
v.
ANDREW J. MANNING. (No. 247.)

(See S. C. Reporter's ed. 570-572.)

These cases are governed by the decision in Daniels v. Wagner, ante, 1102.

[Nos. 237, 238, 245, 246, and 247.]

Argued April 21 and 22, 1915. Decided June 1, 1915.

FIVE APPEALS from the United States Circuit Court of Appeals for the Ninth Circuit to review decrees which affirmed decrees of the District Court for the District of Oregon, sustaining demurrers to the bills in suits to charge defendants with a trust in favor of complainant in lands claimed under the United States. Reversed and remanded for further proceedings.

See same case below, 125 C. C. A. 93, 205 Fed. 235.

Mr. Harrison G. Platt argued the cause, and, with Messrs. Robert Treat Platt and Hugh Montgomery, filed a brief for appellant.

For contentions of these counsel, see their brief as reported in Daniels v. Wagner, ante, 1102.

Mr. Alexander Britton also argued the cause for appellant.

Mr. A. W. Lafferty argued the cause, and, with Messrs. P. A. Lafferty, H. M. Manning, and Arthur I. Moulton, filed a brief for appellees:

A certificate of sale, issued by the state, upon a forged application to purchase, to a fictitious person, conveys neither legal nor equitable title. No person can become an innocent purchaser of such a certificate, or, indeed, a purchaser of it at all, for the fictitious person could not execute any as-

signment or deed transferring either the certificate of sale or the title acquired under it. Even the most casual investigation would have shown Daniels that his immediate grantors were not persons in being, which fact must have put him upon inquiry to determine the bona fides of the title he was acquiring. If he made any inquiry at all he must have discovered that the whole transaction was not only fraudulent, but criminal.

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

In the usual course of the practice in the Land Department an entryman cannot secure a right of entry by presenting a relinquishment of a state selection list simultaneously with a new application for the same land. The only way Daniels could have secured such an entry was by availing himself of the special suggestion of the Secretary of the Interior, upon the theory that he had a vested interest in the land in controversy, arising out of his purchase from the state. This special procedure having been created by the Secretary, and not being founded on any statute, it was within the competency of the Secretary to exercise a broad discretion in following it. In fact, serious question may be made whether the Secretary had authority to prescribe such a mode of procedure at all.

Re California & O. Land Co. 33 Land Dec. 595.

Even if the relinquishments had been presented at the land office on the 8th day of February, 1904, instead of on the 10th day of February, 1904, as the record shows, Daniels had no such interest in the relinquishments as would authorize him to insist upon their acceptance and filing, nor was any officer of the Land Department under any obligation to accept or file the relinquishment.

Re California & O. Land Co. 33 Land Dec. 595.

A public record cannot be impeached by extrinsic evidence. The records of the United States land office at Lakeview, Oregon, show that the relinquishments of the state lieu selections were not filed in that office until February 10, 1904. There was no evidence in any wise competent to show that they were filed at any earlier date, and the suggestion in the decision of the Secretary of the Interior that they may have been filed on February 8, 1904, simultaneously with Daniel's lieu selections, will be disregarded, as it appears clearly from the decision that it was not based on any competent evidence, and the Secretary committed a clear error of law in arriving at the belief expressed in his opinion.

Musser v. Hyde, 2 Watts & S. 314; Hatch v. Haskins, 17 Me. 391.

A decision of an officer that is afterwards, within the time when the matter in question is still within the jurisdiction of such officer, revoked and set aside, or which is reserved upon appeal, is not effective for any purpose. Accordingly, it cannot be claimed by Daniels that because different officers of the Land Department expressed the idea that he had equitable rights based upon his purchase from the state that ought to be protected, such action constituted an approval and acceptance of his selection lists.

Brandt v. Brandt, 40 Or. 477, 67 Pac. 508.

The mere tendering of a list of lieu selections, under the act of Congress of June 4, 1897, does not create any vested interest in the lands selected until such selection is approved by the Secretary of the Interior.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 303; Sjoli v. Dreschel, 199 U. S. 564, 567, 50 L. ed. 311, 313, 26 Sup. Ct. Rep. 155; Humbird v. Avery, 195 U. S. 480, 507, 49 L. ed. 286, 298, 25 Sup. Ct. Rep. 123; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 512, 33 L. ed. 687, 695, 10 Sup. Ct. Rep. 341; New Orleans P. R. Co. v. Parker, 143 U. S. 42, 57, 36 L. ed. 66, 70, 12 Sup. Ct. Rep. 369; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 310, 47 L. ed. 1064, 1071, 23 Sup. Ct. Rep. 697; Roughton v. Knight, 219 U. S. 537, 547, 55 L. ed. 326, 327, 31 Sup. Ct. Rep. 297; Musser v. McRae, 38 Minn. 411, 38 N. W. 103.

There can be no relation back to the date of the filing of a selection when the Secretary of the Interior has never approved the selection. The doctrine of relation depends on an approval. When there is an approval, such an approval relates back to the date of the application in certain cases, but there can be no relation without approval.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 303; Roughton v. Knight, 219 U. S. 537, 547, 55 L. ed. 326, 327, 31 Sup. Ct. Rep. 297.

The act of June 4, 1897, is not a grant in *præsenti*. No title is vested in any person by reason of the act itself, nor by reason of the mere presentation at the local land office of an application to claim the benefit of it. It merely gives authority to those who come within its terms to seek a trade of lands with the United States, and the transaction in question is never perfected until the offer to relinquish and select lieu lands is approved by the Secretary of the Interior.

Roughton v. Knight, 219 U. S. 537, 547, 55 L. ed. 326, 327, 31 Sup. Ct. Rep. 297;

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 310, 47 L. ed. 1064, 1071, 23 Sup. Ct. Rep. 697.

Mr. Chief Justice White delivered the opinion of the court:

These five cases were among the fourteen referred to in the opinion in No. 239, just decided [237 U. S. 547, ante, 1102, 32 Sup Ct. Rep. 740]. [571] For the appellant they were argued in the brief which was filed in No. 239, and which was stated to be applicable to the other fourteen cases. But for the appellees a brief was filed applicable to these five cases. In this brief nothing is said to maintain the existence of the discretionary power under which the Land Department acted, and which we have decided in No. 239 was not possessed, the brief stating that the subject is irrelevant because the correctness of the action of the Land Department and the court below in sustaining the demurrers is maintainable on other grounds, as follows:

1. Because of the failure of the lieu entrymen to file in time the relinquishment made by the state of Oregon, and the assumed resulting priority of the rights of the other entrymen over those of the lieu entrymen. But this contention is governed by the ruling made in No. 239 on the same subject, since we directed attention to the specific finding of the Secretary of the Interior to the contrary and pointed out its binding force.

2. In addition various propositions are urged concerning the bad faith of Daniels in buying the right to the land from the state, and the assumption, based upon this premise, of his want of right to the relinquishment or to use it in order to clear away the supposed impediment on the land record to the allowance of the lieu entries. But, even assuming, for the sake of argument, that the premise of fact upon which this contention proceeded had any real relevancy to the right of the lieu entrymen to acquire the land and to use the relinquishment to enable them to do so, such premise is devoid of merit because of the express finding of the Secretary of the Interior which we have stated in the opinion in No. 239 that Daniels's good faith in the Oregon transaction was established. It is true that the argument in these cases in an indirect way seemingly assails the correctness [572] of this finding, but as it is conclusive here, nothing more need be said on that subject.

It results that these cases, both as to law and the facts, are disposed of by the opinion expressed in No. 239. The decrees sustaining the demurrers in these cases are therefore reversed, and they are remanded for further proceedings in accordance with the opinion in this and in No. 239.

Reversed.

A. D. DANIELS, Appt.,
v.
VALENTINE BERNHARD. (No. 241.)

A. D. DANIELS, Appt.,
v.
MARK T. HOWARD. (No. 242.)

A. D. DANIELS, Appt.,
v.
JOHN C. LEONARD. (No. 243.)

A. D. DANIELS, Appt.,
v.
VESTAL W. WAKEFIELD. (No. 244.)

(See S. C. Reporter's ed. 572-574.)

Public lands — review of action of Land Department — relief in equity — mandamus.

Mandamus is not the sole remedy available to a prior entryman whose entry has been unlawfully rejected by the final decision of the Secretary of the Interior in favor of a subordinate entryman. He may sue in equity to charge the latter with a trust in his favor.

[For other cases, see Public Lands, 1041-1050; Mandamus, II. d, 4, in Digest Sup. Ct. 1908.]

[Nos. 241, 242, 243, and 244.]

Argued April 21 and 22, 1915. Decided June 1, 1915.

FOUR APPEALS from the United States Circuit Court of Appeals for the Ninth Circuit to review decrees which affirmed decrees of the District Court for the District of Oregon, sustaining demurrers to the bills in suits to charge defendants with a trust in favor of complainant in lands claimed under the United States. Reversed and remanded for further proceedings.

See same case below, 125 C. C. A. 93, 205 Fed. 235.

Mr. Harrison G. Platt argued the cause, and, with Messrs. Robert Treat Platt and Hugh Montgomery, filed a brief for appellant.

NOTE.—As to when mandamus is the proper remedy, generally—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

For contentions of these counsel, see their brief as reported in Daniels v. Wagner, ante, 1102.

Mr. Alexander Britton also argued the cause for appellant.

Mr. J. H. Carnahan argued the cause and field a brief for appellees:

No vested right is acquired by the mere offer to file a forest lieu selection which is rejected.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 308, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692; Pacific Land & Improv. Co. v. Elwood Oil Co. 190 U. S. 316, 47 L. ed. 1073, 23 Sup. Ct. Rep. 698; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; United States v. McClure, 174 Fed. 510; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612; Osborn v. Froyseth, 216 U. S. 570, 54 L. ed. 619, 30 Sup. Ct. Rep. 420; Pacific Live Stock Co. v. Isaacs, 52 Or. 54, 96 Pac. 464; Robinson v. Lundrigan, 101 C. C. A. 590, 178 Fed. 230, 227 U. S. 173, 57 L. ed. 468, 33 Sup. Ct. Rep. 255; Miller v. Thompson, 36 Land Dec. 492; Ehalainen v. Santa Fe P. R. Co. 42 Land Dec. 578; Re Walker, 36 Land Dec. 495; Sherar v. Veazie, 40 Land Dec. 549; Re Lewis, 33 Land Dec. 43; Re Moses, 33 Land Dec. 333; Smith v. State, 40 Land Dec. 554; Instructions, 24 Land Dec. 589, 592; Instructions, 30 Land Dec. 28; Kern Oil Co. v. Clarke, 30 Land Dec. 550, 569, 31 Land Dec. 288; Gray Eagle Oil Co. v. Clarke, 30 Land Dec. 570; Re Cobb, 31 Land Dec. 220; Sante Fe P. R. Co. v. State, 34 Land Dec. 12.

The administration of the forest reserve lieu land act of June 4, 1897, as amended by subsequent acts of Congress, is vested in the Land Department of the United States.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 4, 21 Mor. Min. Rep. 633, 190 U. S. 301, 308, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297, 156 Cal. 123, 103 Pac. 844; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Regulations of Interior Dept. 24 Land Dec. 592; Pacific Live Stock Co. v. Isaacs, 52 Or. 54, 96 Pac. 464; Catholic Bishop v. Gibbon, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779; Knight v. United Land Asso. 142 U. S. 161, 177, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612; Kern Oil Co. v. Clarke, 30 Land Dec. 550; Re Clarke, 32 Land Dec. 235; Miller v. Thompson, 36 Land Dec. 492.

The decisions of the Land Department upon questions of fact are conclusive.

De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; Gertgens v. O'Connor, 191 U. S. 237, 48 L. ed. 163, 24 Sup. Ct. Rep. 94; Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800; Love v. Flahive, 205 U. S. 105, 51 L. ed. 768, 27 Sup. Ct. Rep. 486; Johnson v. Townsley, 13 Wall. 72, 20 L. ed. 485; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; Whitcomb v. White, 214 U. S. 16, 53 L. ed. 891, 29 Sup. Ct. Rep. 599.

Likewise its decisions upon mixed questions of law and fact.

Quinby v. Conlan, 104 U. S. 420, 426, 26 L. ed. 800, 802; Whitcomb v. White, 214 U. S. 15, 16, 53 L. ed. 889, 890, 29 Sup. Ct. Rep. 599; Ross v. Day, 232 U. S. 114, 58 L. ed. 528, 34 Sup. Ct. Rep. 233; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; Gonzales v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102.

The acts of the executive departments of the government, when acquiesced in, and especially their interpretation of statutes which they are called upon almost daily to construe, if acquiesced in for a long time, are almost conclusive upon the courts.

Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420; Orchard v. Alexander, 157 U. S. 373, 39 L. ed. 738, 15 Sup. Ct. Rep. 635; Knight v. United Land Asso. 142 U. S. 161, 177, 35 L. ed. 974, 979, 11 Sup. Ct. Rep. 258; Parsons v. Venzke, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; Williams v. United States, 138 U. S. 514, 524, 34 L. ed. 1026, 1031, 11 Sup. Ct. Rep. 457; Kern Oil Co. v. Clarke, 31 Land Dec. 288, 300; Pacific Live Stock Co. v. Isaacs, 52 Or. 54, 96 Pac. 464.

The Secretary of the Interior is vested with large discretionary powers in the administration of our public land system.

Williams v. United States, 138 U. S. 514, 524, 34 L. ed. 1026, 1031, 11 Sup. Ct. Rep. 457; Knight v. United Land Asso. 142 U. S. 161, 177, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258; Fowler v. Dennis, 41 Land Dec. 173.

The act of June 4, 1897, contemplates a common-law exchange of equal estates, which requires the assent of both parties thereto before the exchange is consummated.

Co. Litt, 50a, 50b, 51a, 51b; Butler & Hargrave's Notes; Shep. Touch. 294; 3 Words & Phrases, p. 2547; United States v. McClure, 174 Fed. 510; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612; Lessieur v. Price, 12 How. 59, 74, 13 L. ed. 893, 899; Roughton v. Knight, 156 Cal. 123, 103 Pac. 844, 219 U. S. 537, 55 L. ed. 326,

31 Sup. Ct. Rep. 297; Re Lewis, 33 Land Dec. 43; Re Moses, 33 Land. Dec. 333; Re Hyde, 28 Land Dec. 290; Ops. Assistant Atty. Gen. 28 Land Dec. 312; Ops. Assistant Atty. Gen. 28 Land Dec. 472; Ops. Atty. Gen. 30 Land Dec. 105; Kern Oil Co. v. Clarke, 30 Land Dec. 550; 31 Land Dec. 294; Gray Eagle Oil Co. v. Clarke, 30 Land Dec. 570; Instructions, 31 Land Dec. 225; Re Clarke, 32 Land Dec. 233, 235; Miller v. Thompson, 36 Land Dec. 492; Smith v. Idaho, 40 Land Dec. 554.

In case of rejection of lieu land applications the base lands are not lost.

United States v. McClure, 174 Fed. 510; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612; Re Lewis, 33 Land Dec. 43; Gesner v. Hammond, 33 Land Dec. 66; Kern Oil Co. v. Clarke, 30 Land Dec. 561; Re Moses, 33 Land Dec. 334; Re Austin, 33 Land Dec. 589; Re Kribs, 37 Land Dec. 143; Smith v. Idaho, 40 Land Dec. 554.

The selector of land under the exchange provisions of the act of June 4, 1897, is the owner of the base land and must pay taxes thereon until the selection is approved by the Commissioner of the General Land Office and the exchange consummated. In cases similar to Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 303, cited by appellant, if the grant made by Congress is not satisfied out of the indemnity limits the lands are lost to the railroad company, and the grant fails. Whereas, under the act of Congress of June 4, 1897, if the selection fails, the selector still retains the land he attempted to relinquish to the United States, and loses nothing.

Re Lewis, 33 Land Dec. 43; Re Moses, 33 Land Dec. 333; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 308, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692; Clearwater Timber Co. v. Shoshone County, 155 Fed. 628; Pacific Land & Improv. Co. v. Elwood Oil Co. 190 U. S. 316, 47 L. ed. 1073, 23 Sup. Ct. Rep. 698; Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154; Grant v. Iowa R. Land Co. 54 Iowa, 673, 7 N. W. 113; Musser v. McRae, 38 Minn. 409, 38 N. W. 103; Page v. Price County, 25 Wash. 6, 64 Pac. 801.

If dissatisfied, plaintiff should have brought mandamus against the Secretary of the Interior when the selections were finally rejected.

Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420.

The decisions of the Interior Department construing the laws specially intrusted to it for execution, and the rules and regulations promulgated by it in the discharge of its duties, should not be disturbed or reversed except for the most cogent reasons.

Knight v. United Land Asso. 142 U. S. 161, 167, 35 L. ed. 974, 977, 12 Sup. Ct. Rep. 258; Orchard v. Alexander, 157 U. S. 372, 375, 39 L. ed. 737, 738, 15 Sup. Ct. Rep. 635; Catholic Bishop v. Gibbon, 158 U. S. 155, 166, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779; Parsons v. Venzke, 164 U. S. 89, 91, 41 L. ed. 360, 362, 17 Sup. Ct. Rep. 27; Gray Eagle Oil Co. v. Clarke, 31 Land Dec. 306; McMichael v. Murphy, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 460; Williamson v. United States, 207 U. S. 425, 462, 52 L. ed. 278, 297, 28 Sup. Ct. Rep. 163; Logan v. Davis, 233 U. S. 613, 58 L. ed. 1121, 34 Sup. Ct. Rep. 685; Small v. Rakestraw, 196 U. S. 403, 49 L. ed. 527, 25 Sup. Ct. Rep. 285.

Lands suspended from entry, or reserved by competent authority, and lands occupied or covered by an entry, selection, or filing, and mineral lands, are not subject to selection under the exchange provisions of the act of June 4, 1897.

Leaming v. McKenna, 31 Land Dec. 318; Kern Oil Co. v. Clarke, 31 Land Dec. 288; Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. ed. 264, 271; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 688, 18 L. ed. 689, 691; Grisar v. McDowell, 6 Wall. 363, 381, 18 L. ed. 863, 868; California & O. Land Co. 33 Land Dec. 595; Santa Fe P. R. Co. v. California, 34 Land Dec. 12; Re Santa Fe P. R. Co. 34 Land Dec. 119.

The decision of the Secretary of the Interior in the cases at bar followed a long line of decisions rendered by his predecessors.

Kern Oil Co. v. Clarke, 30 Land Dec. 550; Instructions, 24 Land Dec. 589, 592; Gray Eagle Oil Co. v. Clarke, 30 Land Dec. 570; Re Peavey, 31 Land Dec. 186; Re Cobb, 31 Land Dec. 220; Porter v. Landrum, 31 Land Dec. 353.

The regulations promulgated by the Secretary of the Interior in pursuance of statute have all the force and effect of law.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692; Knight v. United Land Asso. 142 U. S. 161, 177, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258; Minor v. Mariott, 2 Land Dec. 709; Re Berger, 5 Land Dec. 169; Rogers v. Lukens, 6 Land Dec. 111; Instructions, 9 Land Dec. 86; Re Leonard, 9 Land Dec. 189; Re Lindback, 9 Land Dec. 284; Hessong v. Burgan, 9 Land Dec. 353.

The law deals tenderly with the settler upon public lands.

Ard v. Brandon, 156 U. S. 537, 543, 39 L. ed. 524, 526, 15 Sup. Ct. Rep. 406; Shepley v. Cowan, 91 U. S. 330, 338, 23 L. ed. 424, 427.

The courts of the United States take ju-

dicial notice of the regulations of the Land Department.

Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 764; Jones v. United States, 137 U. S. 202, 216, 34 L. ed. 691, 697, 11 Sup. Ct. Rep. 80; Jenkins v. Collard, 145 U. S. 546, 560, 36 L. ed. 812, 817, 12 Sup. Ct. Rep. 868.

The fact that plaintiff was awarded a decision by the Interior Department prior to the final decision of February 17, 1910, in favor of defendants, gives him no standing, since the final decision alone determines the rights of the parties.

Potter v. Hall, 189 U. S. 292, 295, 47 L. ed. 817, 819, 23 Sup. Ct. Rep. 545; Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345.

Mr. Chief Justice White delivered the opinion of the court:

The printed argument for the appellant in these four cases was presented in the one brief embracing No. 239 [237 U. S. 547, ante, 1102, 35 Sup. Ct. Rep. 740], and the other fourteen cases referred to in that case, but they were separately briefed for the appellees. The separate brief covers fifteen propositions of law, or it may be, in some aspects, of intermingled law and fact, each supported by a copious citation of authority. All but one or two of the propositions are directly or indirectly urged as a means of support for the possession by the Land Department of the discretionary power which the Department assumed it possessed, and the possession of which was sustained by the court below. As in No. 239 we have held that proposition to be without merit, it follows that there is no necessity for reviewing the propositions relied upon, as they present the subject in no new aspect. We say, however, without stopping to state and review them, that many of the propositions but enunciate elementary rules of construction about which there could be no dispute, but which are inapplicable to the question here arising for decision.

Moreover, in concluding, we observe that the proposition that Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420, established the doctrine that the sole remedy of the complainant under the circumstances here disclosed was to have proceeded by mandamus against the Secretary of the Interior when his final decision was rendered finds no support on the face of the case relied upon, and is absolutely in conflict with the elementary and settled doctrine to the contrary.

[574] As these reasons, as well as those stated in No. 239, are conclusive that the demurrers in these cases should not have been sustained, it follows that the decrees sustaining the demurrers in these cases must be and they are reversed and remanded for further proceedings in accordance with this and the opinion in No. 239.

Reversed.

A. D. DANIELS, Appt.,

v.

MARTHA M. CRADDOCK, Ruby I. Auten, and J. B. Auten, her Husband, and William Shirk.

(See S. C. Reporter's ed. 574, 575.)

This case is governed by the decision in Daniels v. Wagner, ante, 1102.

[No. 248.]

Argued April 21 and 22, 1915. Decided June 1, 1915.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the District of Oregon, sustaining a demurrer to the bill in a suit to charge the defendants with a trust in favor of complainant in land claimed under the United States. Reversed and remanded for further proceedings.

See same case below, 125 C. C. A. 93, 205 Fed. 235.

Mr. Harrison G. Platt argued the cause, and, with Messrs. Robert Treat Platt and Hugh Montgomery, filed a brief for appellant.

For contentions of these counsel, see their brief as reported in Daniels v. Wagner, ante, 1102.

Mr. Alexander Britton also argued the cause for appellant.

Mr. Will R. King submitted the cause for appellees. Messrs. L. F. Conn and F M. Saxton were on the brief:

The Land Department has power and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation, and the selection of other lands in lieu thereof, of which the courts will take judicial notice.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692.

An executive withdrawal of lands from entry or selection is valid, and an entry or selection thereof during the period covered by the withdrawal is insufficient to give the entryman or selector any vested rights therein.

United States v. Midwest Oil Co. 236 U. S. 459, ante, 673, 35 Sup. Ct. Rep. 309.

A proposal to exchange land within a forest reservation for lands outside may be withdrawn before acceptance.

Roughton v. Knight, 219 U. S. 544, 55 L. ed. 326, 31 Sup. Ct. Rep. 297.

To take advantage of the proposal contained in this act, the applicant must select the land he wishes to receive in lieu, and file a sufficient relinquishment of land within a forest reserve. Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu.

Ibid.

Before one can acquire an equitable title to lands selected by him in lieu of lands relinquished in a forest reservation under the act of June 4, 1897, his relinquishment and lieu selection must be approved by some officer authorized to make such approval.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692.

Mr. Chief Justice White delivered the opinion of the court:

Included among the fifteen cases which were argued by the appellant in a single brief, this case was separately argued by the appellees. The brief pressed upon our attention seven propositions, all of which we are of opinion [575] are disposed of by the views announced in No. 239 [237 U. S. 547, ante, 1102, 35 Sup. Ct. Rep. 740], since the propositions all in substance either conflict with the finding of the Secretary of the Interior as to the performance by the lieu applicants of every essential requirement to entitle them to make the entry, or directly or indirectly assert the possession by the Land Department, at least as to the lieu entries, of the discretionary power which was asserted and recognized by the court below. It follows, therefore, that for the reasons here stated and those expressed in No. 239 the judgment must be and it is reversed, and the case is remanded for further proceedings in accordance with this and the opinion in No. 239.

Reversed.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, Jersey City, Appt.,

v.

PENNSYLVANIA RAILROAD COMPANY.

(See S. C. Reporter's ed. 575–580.)

Appeal — from circuit court of appeals — jurisdiction below.

Vague references to the Federal Constitution in a bill which seeks redress for injury to persons and property from a nuisance produced by the operation of a railway alleged to be in a highway are not sufficient to show that the jurisdiction of

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NOTE.—Appellate jurisdiction of Federal Supreme Court over circuit courts of appeals.

This note is supplementary to a note on the same subject appended to the case of Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Final or interlocutory decree below.

A judgment of a Federal circuit court of appeals which reverses the judgment of a district court in condemnation proceedings, vacates the commissioners' award to the owners of the property taken, and requires that compensation be ascertained anew through a trial by jury, is essentially interlocutory, and cannot be the subject of a writ of error from the Federal Supreme Court. United States v. Beatty, 232 U. S. 463, 58 L. ed. 686, 34 Sup. Ct. Rep. 392.

A decree of a Federal circuit court of appeals, which affirmed an order of a court of bankruptcy, granting a temporary injunction against the prosecution in a state court of a suit affecting the bankrupt estate, is interlocutory, and is therefore not reviewable under the bankrupt act of July 1, 1898, § 24a, providing for appeals in controversies arising in bankruptcy proceedings as in other cases, although the case is not one of the class which the act of March 3, 1891, § 6, makes final in the circuit courts of appeals. Mitchell Store Bldg. Co. v. Carroll, 232 U. S. 379, 58 L. ed. 650, 34 Sup. Ct. Rep. 410.

A decree of a Federal circuit court of appeals which, on the appeal authorized by the act of March 3, 1891, § 7, as amended by the act of April 14, 1906, to review interlocutory decrees of a circuit court granting an injunction, reversed such a decree and directed both that the injunction be dissolved and the bill dismissed, is a final decree, and appealable to the Federal Supreme Court under § 6 of the former act, where the jurisdiction of the circuit court was invoked not solely upon the ground of diverse citizenship, but also upon the ground that the suit was one arising under an act of Congress, and the requisite jurisdictional amount was involved. United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055, 32 Sup. Ct. Rep. 620.

Jurisdiction below depending upon diverse citizenship.

A decree of a circuit court of appeals affirming a decree of dismissal rendered by a Federal circuit court is not reviewable in the Federal Supreme Court where, if the allegations which set up diversity of citizenship were stricken from the bill, the circuit court would have had no jurisdiction of the suit. Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418.

A decree of a circuit court of appeals is

the Federal circuit court over the cause was invoked on grounds other than diversity of citizenship, so as to permit an appeal to the Federal Supreme Court from a decree of the circuit court of appeals, nor are the nature and character of the acts complained of sufficient to justify the implication that the Federal Constitution was relied upon as the basis of jurisdiction, where the possibility of affixing to such acts the character of state action is excluded because the allegations of the bill unmistakably charge that such acts were the result of the negligence of the carrier, and because, if the pleadings be disregarded and the jurisdiction be tested by the statements in the opinion of the court below, it appears that the railway tracks were not in the highway, as alleged in the bill, but were on a right of way not part of a street.

[For other cases, see Appeal and Error, 768–784, in Digest Sup. Ct. 1908.]

[No. 269.]

Argued May 7, 1915. Decided June 1, 1915.

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed a decree of the Circuit Court for the District of New Jersey, dismissing the bill in a suit for injunctive relief and an award of damages against a railway company for an al-

none the less final under the act of March 3, 1891, § 6, upon the theory that the jurisdiction of the circuit court depended upon diverse citizenship alone, because other grounds of jurisdiction may be inferred argumentatively from the statements in the bill. Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

The jurisdiction of the court of first instance depended entirely upon the diverse citizenship alleged in the bill, so as to preclude any appeal to the Federal Supreme Court from the decree of the circuit court of appeals, although the bill contains a general allegation that the suit arises under the Federal Constitution, and other averments referring to supposed and conjectured violations of the contract and due-process-of-law clauses of that instrument which are either without color of merit or are not a necessary part of the statement of the cause of action, but are in anticipation of defenses which it is thought the defendants may possibly interpose. Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 Sup. Ct. Rep. 657.

The jurisdiction of the Federal circuit court of a suit by an electric light and power company to enjoin the threatened disconnection, pursuant to a resolution of the municipal common council, of the wires used by the company in supplying its patrons with electric current for power and heating purposes, must be deemed to have been invoked solely on the ground of diverse citizenship, so as to make the decision of the circuit court of appeals final, where the bill did not show, either in terms or by necessary intendment, that complainant was asserting a right, privilege, or immunity under the Federal Constitution, or was in anywise invoking its protection, but, for anything that appears, it was planting its right to relief solely upon the doctrine of estoppel. Omaha Electric Light & P. Co. v. Omaha, 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974.

The jurisdiction of a Federal circuit court over a suit by a nonresident to compel a municipality specifically to perform certain paving contracts was none the less dependent upon diverse citizenship, so as to make the decree of the circuit court of appeals final, because the bill also asserted violations of alleged vested rights protected by the Federal Constitution, where the basis of such assertion is that complainant had binding contracts with the municipality which the latter refused to permit him to perform. McCormick v. Oklahoma City, 236 U. S. 657, ante, 771, 35 Sup. Ct. Rep. 455.

Allegations in the complaint in an action by an employee of a railway company to recover damages for the injuries received by him while mining coal in a colliery owned and operated by the railway company, that such coal was intended for use by the railway company in its conduct of interstate commerce, do not bring the case within the Federal employers' liability act of April 22, 1908, and therefore do not deprive the judgment of the Federal circuit court of appeals in such case of the finality which attends the judgments of that court when the jurisdiction below is dependent entirely upon diverse citizenship. Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, post, —, 35 Sup. Ct. Rep. 902.

The jurisdiction of a Federal district court of a suit by a New York telegraph company against a Kentucky railway company to expropriate by judgment under a state statute the right of use for a telegraph line over the right of way, bridges, and property of the railway company, is none the less dependent entirely upon the diverse citizenship of the parties so as to render a judgment of the circuit court of appeals final because of an unexplained averment by the telegraph company that it had accepted the provisions of the act of July 24, 1866, since that act gave the telegraph company no right of eminent domain, and even if such act had to be relied upon to bring the telegraph company within the benefit of the state expropriation statute, the suit would still arise under the state law. Louisville & N. R. Co. v. Western U. Teleg. Co. 237 U. S. 300, ante, 965, 35 Sup. Ct. Rep. 598.

A suit to determine conflicting claims to a tract of land allotted to Creek Indians cannot be said to arise under the Federal statutes governing such allotments, so as to permit an appeal to the Federal Supreme Court under the act of March 3, 1891, § 6,

leged nuisance occasioned by the operation of its trains in a highway. Dismissed for want of jurisdiction.

See same case below, L.R.A.1915E, 623, 125 C. C. A. 629, 207 Fed. 897.

The facts are stated in the opinion.

Mr. **Frank M. Hardenbrook** argued the cause and Mr. Marshall Van Winkle filed a brief for appellant.

Mr. **Albert C. Wall** argued the cause, and, with Mr. James B. Vreedenburgh, filed a brief for appellee.

Mr. Chief Justice **White** delivered the opinion of the court:

Brought in the circuit court of the United States for the district of New Jersey, and there decided, this case was taken by appeal to the circuit court of appeals for the third circuit, where the decree of the circuit court was affirmed. L.R.A.1915E, 623, 125 C. C. A. 629, 207 Fed. 897. It is here on appeal upon the assumption that the decree of affirmance is susceptible of being here reviewed, and at the threshold, because of a motion to dismiss, we come to consider whether the assumption of jurisdiction to review has any foundation.

There is no question concerning the jurisdiction of the circuit court, and of the circuit court of appeals to review the action of that court, since the complaint expressly alleged diversity of citizenship. But as this court has no power under the statute to re-

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from a decree of the circuit court of appeals, where the bill, although containing enough to indicate that those statutes constitute the source of the complainant's title or right, and that the defendants are in some way claiming the land, and particularly the oil and gas therein, adversely to him, makes no mention of those statutes or of any controversy respecting their validity, construction, or effect, and leaves the precise nature of the controversy unstated and uncertain. Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

The jurisdiction of a Federal circuit court over a suit to quiet title was not wholly dependent upon the citizenship or alienage of the parties, so as to make the decree of the circuit court of appeals final, where the bill sought to quiet complainants' title to a tract of land commencing in a grant from Spain, depending for its completeness on a treaty with Spain and certain laws of the United States, and the action under those laws by the officers of the Land Department, and especial reliance was placed upon those laws to defeat defendant's claim of title, and to have it removed as a cloud upon that asserted by complainants. Wilson Cypress Co. v. Del Pozo y Marcos, 236 U. S. 635, ante, 758, 35 Sup. Ct. Rep. 446.

An action to recover damages for personal injuries, based upon the Federal safety appliance act, is one in which the judgment of a circuit court of appeals may be reviewed in the Federal Supreme Court. Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

A writ of error lies from the Federal Supreme Court to review a judgment of a circuit court of appeals which affirmed a judgment of the circuit court, founded upon the employers' liability act of April 22, 1908, where the matter in controversy exceeds $1,000. Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134.

An appeal lies to the appropriate Federal circuit court of appeals from a final decree of a circuit court in a suit in which jurisdiction was invoked both because the case was ancillary to a receivership suit which depended upon diverse citizenship, and upon grounds which involved alleged infractions of the Federal Constitution and rights secured thereby which might have warranted a direct appeal to the Federal Supreme Court. Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

The jurisdiction of a Federal circuit court of a suit brought by the receiver of a railway company appointed in another suit in that court, by which he seeks to enjoin the enforcement of an order of a state railroad commission, regulating freight rates, as interfering with interstate commerce, as depriving the owners of the receivership estate of their property without due process of law and without compensation, and as denying them the equal protection of the laws, was not dependent entirely upon diverse citizenship, within the meaning of the act of March 3, 1891, making the decrees of the circuit courts of appeals final in such cases. Ibid.

The jurisdiction of a Federal circuit court of a suit by an Indiana corporation to enjoin a common carrier incorporated under the laws of Kentucky from refusing to accept interstate shipments of intoxicating liquors consigned to local-option points in Kentucky was not dependent upon diverse citizenship alone, so as to make the judgment of the circuit court of appeals final, where there was involved not only the validity of the Kentucky statute as a regulation of interstate commerce, but the question as to whether the sole remedy was not by an application to the Interstate Commerce Commission. Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

A suit arises under the laws of the United States within the meaning of the Judicial Code, § 24, so as to permit an appeal to the Federal Supreme Court from a decree of a circuit court of appeals in the cause where it is brought in equity by persons not parties to a bankruptcy proceeding, who set up rights in opposition to the adjudication in bankruptcy and the appointment of trus-

view the decision of the circuit court of appeals in a case where the jurisdiction of the circuit court was invoked alone upon diversity [577] of citizenship, it follows that whether we have jurisdiction depends upon whether the jurisdiction of the circuit court was by the pleadings invoked not alone because of diverse citizenship, but also because rights under the Constitution and laws of the United States were expressly asserted in the pleadings as a basis for jurisdiction. In other words, the inquiry is whether, if the averments in the complaint of diversity of citizenship were disregarded, there would yet remain in the complaint such averments as to the existence of rights under the Constitution and laws of the United States as would be adequate to sustain jurisdiction. Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892.

The cause of action relied upon was injury inflicted on the property of the complainant, and wrong suffered by its officers and agents in their persons, occasioned by a nuisance produced by the operation of the trains of the railroad company along its tracks alleged to be situated on Sixth street in Jersey City. The ownership by the complainant of a church, a schoolhouse, and other property in the immediate vicinity of

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tees therein, and seek to have such trustees restrained from prosecuting an equity suit against them in a state court, insisting that the bankruptcy proceedings were void for want of jurisdiction, and that the entire proceedings were a fraud upon the bankruptcy act, and that, even if the proceedings were valid, the appointment of the trustees was void. Hull v. Burr, 234 U. S. 712, 58 L. ed. 1557, 34 Sup. Ct. Rep. 892.

See also, supra, United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055, 32 Sup. Ct. Rep. 620.

Suit against Federal corporation.

The judgment of a Federal circuit court of appeals in an action against a corporation created by an act of Congress may be brought up for review in the Federal Supreme Court by writ of error. Texas & P. R. Co. v. Hill, 237 U. S. 208, ante, 918, 35 Sup. Ct. Rep. 575; Texas & P. R. Co. v. Marcus, 237 U. S. 215, ante, 924, 35 Sup. Ct. Rep. 578.

Intervention.

The finality of a decision of a circuit court of appeals under the act of March 3, 1891, § 6, on the theory that diverse citizenship was the sole ground of the jurisdiction of the circuit court, is not affected by a petition in intervention which was entertained and disposed of in virtue of the jurisdiction already invoked. Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

The decree of a Federal circuit court, entered pursuant to the mandate of a circuit court of appeals, upon a petition to enforce rights granted by a decree in intervention proceedings in a foreclosure suit, is not appealable to the Federal Supreme Court where the jurisdiction of the original foreclosure suit was based solely upon diverse citizenship, although, when the case went back from the circuit court of appeals to the circuit court, the latter court authorized an amendment to the petition, alleging that the decree ordered by the circuit court of appeals failed to give full faith and credit to the original decree in the intervention proceedings. St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510.

Federal questions subsequently arising.

Whether the jurisdiction of the Federal circuit court depended on diverse citizenship alone, within the meaning of the act of March 3, 1891, § 6, making the decrees of the circuit courts of appeals final in such cases, or was rested on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, without regard to any questions that might have been brought into the suit by the answers or in the course of the subsequent proceedings. Shulthis v. McDougal, supra.

The circuit court's jurisdiction is none the less dependent entirely upon diverse citizenship, so as to preclude an appeal to the Federal Supreme Court from the decree of the circuit court of appeals, because the cross bill may be broader than the original bill, and may seek relief on a Federal ground, while the case as made by the original bill disclosed diverse citizenship as the sole ground for jurisdiction. Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 Sup. Ct. Rep. 657.

The jurisdiction of a circuit court of appeals is not final because the jurisdiction of the district court, as originally invoked, depended solely upon diverse citizenship, where, by an amended and supplemental bill, there were added to the ground of original jurisdiction constitutional grounds which existed before the suit was begun, and which might have been averred in the original bill. Vicksburg v. Henson, 231 U. S. 259, 58 L. ed. 209, 34 Sup. Ct. Rep. 95.

A constitutional question first advanced on the trial of a cause cannot serve as the basis for a writ of error from the Federal Supreme Court to a circuit court of appeals. Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

A writ of error will not lie from the Federal Supreme Court to review a judgment of a circuit court of appeals, in a suit in which the jurisdiction of the dis-

Sixth street, the damage by interruption of light and view, and the injury by smoke and dust and cinders, were in the bill fully and graphically described. But the only passage in the bill which in any degree whatever gives basis for the assumption that jurisdiction was invoked because of a reliance on rights claimed under the Constitution and laws of the United States is ¶ XI., which is as follows:

"XI. That the said acts of the defendant have taken from your orator property consisting of the easements of light and air to which your orator is legally entitled, and deprives it of the same without due process of the law, and without just compensation, or any compensation whatever, and that such acts of the defendant in such interference with and appropriation of said property of [578] your orator has been, and now is, a violation of the provisions of the Constitution of the United States."

As from any point of view it is impossible, because of the vagueness of these averments, to escape, to say the least, doubt as to whether the bill asserted rights under the Constitution and laws of the United States which would be adequate to sustain the jurisdiction of the circuit court if the allegations of diversity of citizenship were stricken out, it follows that they are insufficient to sustain the claim of jurisdiction, since the rule is that averments to accomplish that result must be expressly and clearly made. Hull v. Burr, 234 U. S. 720, 58 L. ed. 1561, 34 Sup. Ct. Rep. 892. In-

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trict court was invoked wholly upon the ground of diversity of citizenship, although in the course of the suit there arose a question as to the validity, under the Federal Constitution, of a municipal ordinance which was the foundation of the successful party's right, and the unsuccessful party could therefore have brought the case directly to the Federal Supreme Court from the district court. Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 98, 57 L. ed. 1409, 33 Sup. Ct. Rep. 1003.

See also supra, St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510.

Trademark and copyright cases.

A final decree of a circuit court of appeals in a suit to enjoin the infringement of a trademark registered under the act of February 20, 1905, cannot be reviewed by the Federal Supreme Court by appeal, but only upon certiorari, in view of § 18 of that act, placing suits brought under its provisions within the scope of the act of March 3, 1891, § 6, which makes decisions of the circuit courts of appeals final "in all cases under the patent laws, under the revenue laws, under the criminal laws, and in admiralty cases," with power in the Supreme Court to require any such case to be certified thereto for review and determination, with the same power and authority in the case as if it had been carried up by appeal or writ of error. Hutchinson, P. & Co. v. Loewy, 217 U. S. 457, 54 L. ed. 838, 30 Sup. Ct. Rep. 613.

An appeal to the Federal Supreme Court to review a decision of a circuit court of appeals in a case arising under the trademark act of February 20, 1905, cannot be maintained under the Judicial Code, § 241, as one not made final by that Code, although trademark cases are not included in the enumeration, in § 128 of the Code, of the decisions which shall be final (except as reviewable under §§ 239, 240, on certified questions or by certiorari), since these sections, in view of the provisions of §§ 292, 294, 297 of the Code, bearing upon the extent to which it was intended to affect or repeal prior laws, must be read in connection with § 18 of the trademark act, placing trademark cases upon the same footing, as respects the remedy by certiorari, as cases arising under the patent laws. Street v. Atlas Mfg. Co. 231 U. S. 348, 58 L. ed. 262, 34 Sup. Ct. Rep. 73.

A decree of a Federal circuit court of appeals affirming the dismissal in a district court of a suit to restrain the use of the name "Webster," as applied to the sale of dictionaries of the English language, is not appealable to the Federal Supreme Court on the theory that the jurisdiction below was not solely dependent upon diverse citizenship, where the bill rests upon allegations tending to establish unfair competition in trade, which contained no element of a cause of action arising under the Federal Constitution or laws, and upon trademarks having the word "Webster" as their chief characteristic, registered, under the act of March 3, 1881, long after the expiration of the copyright securing to the publishers the exclusive right to publish the Webster dictionaries, and under the act of February 20, 1905, which contains provisions making the jurisdiction of the circuit courts of appeals final. G. & C. Merriam Co. v. Syndicate Pub. Co. 237 U. S. 618, post, —, 35 Sup. Ct. Rep. 708.

Bankruptcy cases.

On the general subject of the appellate jurisdiction of the Federal Supreme Court in bankruptcy cases—see note to James v. Stone, 57 L. ed. U. S. 573.

The petition in an action by a trustee in bankruptcy upon a bond which was given so that certain property might be removed out of the jurisdiction does not disclose, as a ground of Federal jurisdiction, in addition to that shown by averments of diverse citizenship, that the case arose under the laws of the United States, so as to permit a writ of error from the Federal Supreme Court to review the judgment of the circuit court of appeals, where the trustee does not rely upon any right specially conferred upon him by any Federal statute, but rests his right to recover solely upon the ownership of the

deed, it is apparent on the face of the paragraph of the bill which we have quoted that it entirely fails even vaguely to manifest the purpose to base the jurisdiction of the court upon the fact that constitutional rights were relied upon. So completely is this the case that the argument made by the appellant to sustain jurisdiction frankly admits that the averments of the bill are inadequate for that purpose, but suggests that the nature and character of the acts relied upon are sufficient to justify the implication that the Constitution of the United States was relied upon as a basis for jurisdiction, and thus to cure the insufficiency. Thus in the argument it is said: "While reference to the Constitution in the complaint is not sufficient to invoke jurisdiction, the facts as alleged in the complaint of the acts of nuisance committed by the defendant, the evidence of which is entirely undisputed in the record, show conclusively that the acts of the defendant in permitting black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust, and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives to fall upon or enter into the premises and structures of the complainant in such appreciable quantities as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the [579] same by the complainant and the priests connected therewith, the teachers and children connected with the school, and persons using the said respective

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property by the bankrupts as their own before the bankruptcy proceedings. Lovell v. Newman, 227 U. S. 412, 57 L. ed. 577, 33 Sup. Ct. Rep. 375.

The right to a review in the Federal Supreme Court of a decision of a circuit court of appeals which affirmed the ruling of the bankruptcy court, made in the course of the determination of an issue as to the alleged bankruptcy, upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, must be found in the bankruptcy act, and no such right is given by the provisions of the act of March 3, 1891, § 6, governing the general appellate jurisdiction of the Federal Supreme Court over the circuit courts of appeals. J. W. Calnan Co. v. Doherty, 224 U. S. 145, 56 L. ed. 702, 32 Sup. Ct. Rep. 460.

An appeal will not lie to the Federal Supreme Court from a judgment of a circuit court of appeals, which affirmed a judgment of the bankruptcy court, refusing to grant a discharge in bankruptcy, but the only appeal contemplated by the bankrupt act of July 1, 1898, §§ 24, 25, is from the bankruptcy court to the circuit court of appeals. James v. Stone, 227 U. S. 410, 57 L. ed. 573, 33 Sup. Ct. Rep. 351.

A decree of a circuit court of appeals which affirmed a decree of a district court, dismissing the petition of a trustee in bankruptcy to prevent the enforcement in a state court of a lien for labor and materials, is appealable to the Federal Supreme Court. Hobbs v. Head & D. Co. 231 U. S. 692, 58 L. ed. 440, 34 Sup. Ct. Rep. 253.

A dispute between the assignee of the bankrupt's accounts and the trustee in bankruptcy, over the ownership of the proceeds of the assigned accounts collected by the trustee, which is presented by a petition filed in the bankruptcy proceedings, is a controversy arising in bankruptcy proceedings within the meaning of the bankrupt act of July 1, 1898, § 24, governing the appellate jurisdiction of the circuit court of appeals and the Federal Supreme Court. Greey v. Dockendorff, 231 U. S. 513, 58 L. ed. 339, 34 Sup. Ct. Rep. 166.

A contest in a bankruptcy court over the distribution of a fund in the hands of a trustee in bankruptcy, derived from the sale under an order of a state court of certain property which that court held had been conveyed by the bankrupt in fraud of antecedent creditors, is a controversy arising in bankruptcy proceedings, the decree in which is appealable as in other cases in equity under the act of March 3, 1891, to the circuit court of appeals, and thence to the Supreme Court. Globe Bank & T. Co. v. Martin, 236 U. S. 288, ante, 583, 35 Sup. Ct. Rep. 377.

A controversy in bankruptcy, appealable under the Judicial Code, § 128, to the circuit court of appeals, and thence to the Federal Supreme Court, was not initiated by an attempted intervention in a summary proceeding in a court of ancillary jurisdiction to restore certain property of bankrupts in the custody of those having no right to it to the bankruptcy court of original jurisdiction, where the interveners claim solely under alleged assignments of the property, made after the filing of the petition in the bankruptcy proceedings in the original case. Lazarus v. Prentice, 234 U. S. 263, 58 L. ed. 1305, 34 Sup. Ct. Rep. 851.

A decision of a circuit court of appeals which affirmed a ruling of the bankruptcy court, made in the course of the determination of an issue as to the alleged bankruptcy, upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, is not a final decision allowing or rejecting a claim within the meaning of the provisions of the bankrupt act of July 1, 1898, § 25b, governing appeals to the Federal Supreme Court. J. W. Calnan Co. v. Doherty, 224 U. S. 145, 56 L. ed. 702, 32 Sup. Ct. Rep. 460.

The question whether an order of the bankruptcy court from which no appeal was taken, postponing a part of the claim of an officer of a bankrupt corporation to the claim of an intervener, was correctly interpreted by the referee and court in the distribution directed by a subsequent administrative order, is not one concerning the allowance or rejection of a claim within the meaning of the provisions of the bankrupt

structures of the complainant," amounted to a violation of the Constitution of the United States.

But even if this impossible assumption were yielded to, there would yet be no ground upon which to rest jurisdiction, since the bill contains allegations which would exclude the possibility of implying from the facts alleged that there was an intention to base jurisdiction on rights asserted under the Constitution of the United States. We say this because ¶ XII. of the bill unmistakably charges that the acts complained of were the result of the negligence of the carrier in operating its trains, thus excluding the possibility of affixing to them the character of state action so as to bring them within the 14th Amendment. The paragraph in question is as follows:

"XII. That the aforesaid acts, use, occupation of and appropriation by the defendant as aforesaid constitute and are a nuisance to and one of special injury to your orator, and are unnecessary, avoidable, and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad, and which acts are continuous, and which will cause great and irreparable loss to your orator, and subject your orator to the prosecution of a multiplicity of suits for damages unless the defendant be restrained by injunction from the commission thereof."

It is true that, in the opinion of the court

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act of July 1, 1898, § 25b, governing appeals from the circuit courts of appeals to the Federal Supreme Court, but is a matter arising in the administration of the bankrupt estate, which the Supreme Court is not empowered to review. Wynkoop H. C. Co. v. Gaines, 227 U. S. 4, 57 L. ed. 391, 33 Sup. Ct. Rep. 214.

A decision of a circuit court of appeals that certain creditors from whom a bankrupt obtained goods by fraud were entitled to preferential payment of their claim, presented by an intervening petition after their further prosecution of an action of replevin against a receiver appointed by a state court had been enjoined by the bankruptcy court, is not reviewable in the Federal Supreme Court, as involving a question which would sustain a writ of error to a state court, because the replevin suit in the state court was considered by the circuit court of appeals as showing the purpose of the creditors to rescind the sale of the goods replevied, and as a means of identifying what part of the goods sued for was in the possession of the state court, and, afterwards, what proceeds of sales went into the possession of the bankruptcy court under an order of the state court for the delivery of the property to the receiver in bankruptcy, upon the condition that the latter should assume and pay the liabilities incurred in the state court Blake v. Openhym, 216 U. S. 322, 54 L. ed. 498, 30 Sup. Ct. Rep. 309.

An appeal will not lie to the Federal Supreme Court from a decision of a circuit court of appeals, made in the exercise of its jurisdiction under the bankrupt act of July 1, 1898, § 24b, upon a petition to revise the proceedings of the bankruptcy courts. Mitchell Store Bldg. Co. v. Carroll, 232 U. S. 379, 58 L. ed. 650, 34 Sup. Ct. Rep. 410.

The Federal Supreme Couurt has no jurisdiction of an appeal from a decree of a circuit court of appeals, dismissing, for want of jurisdiction, an appeal from an order of a circuit court, entered upon a revisory petition filed under the bankruptcy act of March 2, 1867. The decree of the circuit court is final. Kyle v. Hammond, 225 U. S. 692, 56 L. ed. 1260, 32 Sup. Ct. Rep. 406.

The revisory order of a Federal circuit court of appeals in the proceedings authorized by the bankrupt act of July 1, 1898, § 24b, which reversed a decree of the bankruptcy court, confirming the order of the referee, refusing to allow a certain claim to be filed for the purpose of voting at the election of the trustee, and directed that court to allow the claim to be proved, is not reviewable in the Federal Supreme Court, even if the circuit court of appeals treated the proceeding as an appeal. Duryea Power Co. v. Sternbergh, 218 U. S. 299, 54 L. ed. 1047, 31 Sup. Ct. Rep. 25.

The special finding of fact requisite under general order in bankruptcy No. 36, on an appeal to the Federal Supreme Court, under the bankruptcy act of July 1, 1898, § 25b, from a final decision of a circuit court of appeals allowing or rejecting a claim under that act, is not required where the decision below is one denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as a first lien on the property of the bankrupt; and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy, since such a contention presents a controversy arising in bankruptcy proceedings over which the circuit courts of appeals, under § 24a of the bankrupt act, exercise appellate jurisdiction as in other cases, and the circuit court of appeals act of March 3, 1891, governs the manner of review in the Supreme Court. Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412.

See also, infra, Thomas v. Sugarman, 218 U. S. 129, 54 L. ed. 967, 29 L.R.A.(N.S.) 250, 30 Sup. Ct. Rep. 650.

Hearing and determination.

The Federal Supreme Court, when reviewing a judgment of a circuit court of appeals in a negligence case which is brought up to the former court solely on the ground that the defendant corporation has a charter from the United States, will go no further than to inquire whether there was plain error. Texas & P. R. Co. v. Rosborough, 235 U. S. 429, ante, 299, 35 Sup. Ct. Rep. 117.

The Federal Supreme Court, when re-

below, it is said that the case of the complainant was pressed upon it in the argument upon two grounds: wrong resulting from acts of mere negligent operation on the part of the railroad, and wrongs necessarily arising from even a careful operation by the railroad of its trains over its tracks situated in the street as alleged in the complaint. But here again, [580] if we disregarded the pleadings and tested the jurisdiction by the statements in the opinion of the court below as to the arguments urged upon it, the situation as to the absence of a Federal question adequate to confer jurisdiction would be manifested. We say this because the opinion also states that it was established by the proof, and not controverted in the argument below, that the tracks of the railroad were not on Sixth street, as alleged in the bill, but were on a right of way not part of a street,—a situation which at once gives rise to the inquiry whether the operation of the road complained of could, under this condition, be treated as state action within the meaning of the 14th Amendment.

Dismissed for want of jurisdiction.

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viewing a judgment of a circuit court of appeals, affirming a judgment of a circuit court in an action to recover damages for personal injuries, discharges its whole duty, with reference to the contention that the plaintiff was so clearly guilty of contributory negligence that it was the duty of the court to direct a verdict for defendant, by giving to the record such examination and consideration as may be necessary in order to determine whether plain error was committed by the court below, and is not called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence to draw inferences therefrom which may possibly conflict with the conclusions below as to the tendencies of the proof. Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

The Federal Supreme Court on a writ of error to a circuit court of appeals which rests on the employers' liability act of April 22, 1908, but involves no contention as to its meaning, need only determine whether plain error was committed in relation to the principles of general law involved. Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, ante, 277, 35 Sup. Ct. Rep. 130.

A judgment of a Federal circuit court of appeals in an action based upon the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, will be affirmed by the Supreme Court where all the questions presented for decision are of general law, not involving the interpretation of a statute, and it does not clearly appear that error was committed in the decision of such questions. Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

A question of interpretation of the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, is not presented for review in the Federal Supreme Court on writ of error to a circuit court of appeals by the refusal of the request of the defendant, in a suit based on that statute, to take the case from the jury by a peremptory instruction, where, in view of the state of the proof, such request was absolutely without merit. Ibid.

The question of the operation of the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, on the doctrine of assumption of risk, cannot be said to arise on a record which shows that the trial court's statement in reply to an exception to the general charge based on the court's silence as to assumption of risk, that he understood the doctrine to have been abolished by that statute, was so qualified as to convey clearly that, as the matters to which the excepted charge related purely concerned the common-law principles of fellow servant and contributory negligence, they were controlled by the provisions of the statute, and there was nothing in the excepted portion of the general charge which in any possible way was relevant to the doctrine of assumption of risk,—especially as this question was not presented by any request to charge, nor raised on the motion for new trial, nor referred to in the assignments of error either in the circuit court of appeals or in the Supreme Court. Ibid.

The issue of unfair competition must be regarded as open for consideration by the Federal Supreme Court, on an appeal from the circuit court of appeals, where there was both diversity of citizenship and the assertion of a valid trademark to give jurisdiction to the circuit court, in view of the statutory provision making the judgments of circuit courts of appeals final only where the jurisdiction below depended entirely upon diversity of citizenship, or where the case arose under the patent, revenue, criminal, or admiralty laws. Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 55 L. ed. 536, 31 Sup. Ct. Rep. 456. See, however, supra, Hutchinson, P. & Co. v. Loewy, 217 U. S. 457, 54 L. ed. 838, 30 Sup. Ct. Rep. 613.

The judgment of the trial court cannot be reversed in the Federal Supreme Court on writ of error to a circuit court of appeals, because the latter court affirmed the judgment without opinion. Texas & P. R. Co. v. Hill, 237 U. S. 208, ante, 918, 35 Sup. Ct. Rep. 575.

A motion to dismiss, for want of jurisdiction, an appeal to the Federal Supreme Court from a circuit court of appeals, is not premature because the record has not been printed, where the Supreme Court is sufficiently advised as to the situation of the case from a printed transcript of the proceedings in the district court to dispose of the motion without doing injustice to the

parties. Lazarus, Michel & Lazarus v. Prentice, 234 U. S. 263, 58 L. ed. 1305, 34 Sup. Ct. Rep. 851.

Five per cent damages for delay will be awarded under United States Supreme Court rule 23 upon the affirmance of a judgment of a circuit court of appeals in a suit based on the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, where the contentions that the interpretation of the statute was involved are wholly lacking in merit, the only questions presented for decision being those of general law, as to which it does not clearly appear that any error was committed. Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

Time limit for suing out writ of error.

The general provisions of U. S. Rev. Stat. § 1007, Comp. Laws 1913, § 1666, limiting the time within which a writ of error must be allowed and lodged in the clerk's office if a supersedeas is desired, would govern writs of error from the Federal Supreme Court to the circuit courts of appeals, even under the mistaken hypothesis that writs of error from the circuit courts of appeals to inferior courts, and appeals from such courts to the circuit courts of appeals, were all that were within the purview of the provision of the act of March 3, 1891, § 11, that "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." Title Guaranty & S. Co. v. United States, 222 U. S. 401, 56 L. ed. 248, 32 Sup. Ct. Rep. 168.

The time fixed by U. S. Rev. Stat. § 1007, Comp. Laws 1913, § 1666, within which a writ of error from the Federal Supreme Court to a circuit court of appeals must be allowed and lodged in the clerk's office if a supersedeas is desired, cannot be extended by a stay granted to afford an opportunity to apply for a writ of certiorari, since there is no power in the Federal Supreme Court to allow a certiorari under the act of March 3, 1891, in a case where there is authority to review the action of the lower court by writ of error or appeal. Title Guaranty & S. Co. v. United States, supra.

An appeal to the Federal Supreme Court from a decree of a circuit court of appeals on a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt in fraud of creditors need not be taken within the thirty days prescribed by general orders in bankruptcy No. 36, for appeals under the bankrupt act, but the appellate jurisdiction being under, or the same as that under, the circuit courts of appeals act of March 3, 1891, § 6, the appeal is in time if taken within a year. Thomas v. Sugarman, 218 U. S. 129, 54 L. ed. 967, 29 L.R.A.(N.S.) 250, 30 Sup. Ct. Rep. 650.

WILLIAM TOOP, Emma Musselwhite, et al., Plffs. in Err.,

v.

ULYSSES LAND COMPANY, the Northwestern Mutual Life Insurance Company, and William Gaskill.

(See S. C. Reporter's ed. 580–583.)

Error to district court — frivolous Federal question.

1. The averment in a suit by nonresident aliens that their right to inherit the real property claimed notwithstanding their alienage was secured by treaty is too frivolous to serve as the basis of a direct writ of error from the Federal Supreme Court to a district court, where the treaty did not go into effect until two years after the death of their intestate, and had no retroactive effect, although the widow, who survived the intestate and died after the treaty was adopted, was entitled to a life use of the property.

[For other cases, see Appeal and Error, 938–989, in Digest Sup. Ct. 1908.]

Error to district court; frivolous Federal question.

2. A contention that a state statute forbidding the ownership of real property by nonresident aliens is repugnant to the 14th Amendment to the Federal Constitution is too frivolous to support the jurisdiction of the Federal Supreme Court of a direct writ of error to a district court.

[For other cases, see Appeal and Error, 938–989, in Digest Sup. Ct. 1908.]

[No. 284.]

Submitted May 13, 1915. Decided June 1, 1915.

IN ERROR to the District Court of the United States for the District of Nebraska to review a judgment in favor of defendants in a suit by nonresident aliens to enforce a right of inheritance to real property of their intestate. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Messrs. **Almon W. Bulkley, Clair E. More,** and **J. J. Boucher** submitted the cause for plaintiffs in error. Mr. Thomas D. Crane was on the brief.

No appearance for defendants in error.

Messrs. **R. C. Roper** and **C. M. Skiles** by special leave filed a brief as *amici curiæ*.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On treaty guaranties to aliens—see note to Gandolfo v. Hartman, 16 L.R.A. 277.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

The plaintiffs in error, who were plaintiffs below, alleging themselves to be residents of England and subjects of the Kingdom of Great Britain and Ireland, in 1912 sued the defendants in error to recover a two-thirds interest in a piece of real estate situated in Nebraska. They alleged that John Toop, a resident of Nebraska, who had owned the real estate in question, died in 1898 intestate and without issue, his widow surviving him, and that as children and grandchildren of a deceased brother and sister of Toop, they, as his heirs, became the owners of the two thirds of the property sued for. It was charged that the right to inherit the property notwithstanding the alleged alienage was secured by a treaty between the United States and Great Britain which took effect in 1900 [31 Stat. at L. 1939]. In their answer the defendants deraigned their title from the children and granchildren of a deceased sister of Toop, who, it was alleged, were American citizens at the time of Toop's death. Without denying the kinship of the plaintiffs to Toop, as they alleged, it was asserted that as aliens they were incapacitated from taking by inheritance or holding real estate in the state of Nebraska, in virtue of a law of [582] that state which was in force at the time of Toop's death. The case was submitted to the court on an agreed statement of facts and was decided against the plaintiffs on the ground that applying the state law prohibiting nonresident aliens "from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise," etc. (act of March 16, 1889, Comp. Stat. 1907, § 4825), the plaintiffs had no interest in the property for which they sued. The court concluded that the treaty referred to in the pleadings was not necessary to be considered, as it only became operative two years after the death of Toop, and had no retroactive effect.

On the face of the pleadings the only ground upon which there is any semblance of jurisdiction to entertain this direct writ of error is the averment of the treaty between the United States and Great Britain. But the absolutely frivolous character of that ground is apparent when it is considered that the treaty only went into effect two years after the death of Toop, and the vesting of the property in those entitled legally to take it. It is true that it is now argued—a contention which seems not to have been pressed below—that the treaty is involved because Toop's widow, who survived him and died in 1907, after the treaty was adopted, had a use of the property during her life, and therefore title to it did not pass to the heirs until her death. This, however, does not add substance to the proposition, but only asserts another unsubstantial contention, for it is apparent that the fee of the property was not in suspension until the death of the wife, but passed to the heirs entitled to take, subject, it is true, to the use of the widow, but nevertheless, so far as the passage of the title was concerned, uncontrolled and uninfluenced by the treaty.

As, except for a contention that the state statute forbidding the ownership of real property by aliens was repugnant to the 14th Amendment, which seems also [583] not to have been raised below, and which we think also is too frivolous to afford a basis for jurisdiction, what we have said disposes of all the considerations relied upon as the basis for the right to prosecute this direct writ of error, it follows that we are without jurisdiction, and the writ is therefore dismissed for want of jurisdiction.

JOHN A. S. BROWN and Frank E. Schermerhorn, Trustees, etc., Petitioners,

v.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, etc.

(See S. C. Reporter's ed. 583-588.)

Courts — Federal jurisdiction — suits by assignees.

1. A suit to enforce the rights in and to the corpus of a trust estate of persons claiming under the assignee of a part of the beneficiary's interest in a testamentary trust by the terms of which the trust estate was to be held by the trustee for the purpose of paying the income to such beneficiary until he reached a certain age, when it was to become his absolutely, is not within the provisions of the Judicial Code, § 24, governing suits to recover upon a chose in action in favor of any assignee or subsequent holder, since such provision does not apply to suits brought by a transferee or assignee for the recovery of an interest in property.

[For other cases, see Courts, 817-830, in Digest Sup. Ct. 1908.]

NOTE.—On suits by assignees in Federal courts—see notes to Goldsmith v. Holmes, 1 L.R.A. 817; Republic Iron Min. Co. v. Jones, 2 L.R.A. 746; and American Freehold Land & Mortg. Co. v. Thomas, 12 L.R.A. 681.

As to certiorari in United States courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

Certiorari — to circuit court of appeals — review of merits — disposition of case.

2. The Federal Supreme Court will not consider and dispose of the merits on a writ of certiorari to a circuit court of appeals upon finding that the latter court erred when it reversed, on the ground of a lack of the requisite diverse citizenship to support the Federal jurisdiction, a decree of a circuit court deciding the cause on the merits, with directions "to dismiss the bill, but not upon the merits," but will remand the case to the circuit court of appeals, so that the latter court may decide the case on the merits.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

[No. 286.]

Argued and submitted May 13 and 14, 1915.
Decided June 1, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed, with directions to dismiss the bill, a decree of the Circuit Court for the Southern District of New York in favor of defendants in a suit to establish a trust. Reversed and remanded for further proceedings.

See same case below, 124 C. C. A. 367, 206 Fed. 461.

Statement by Mr. Chief Justice White:

Conrad Braker, Jr., of New York, who there died July 21st, 1891, by his will created several trusts in favor of his son, Conrad Morris Braker. The beneficiary of these trusts, the son, assigned a portion of his interest in them to one Rabe, and nearly the whole of the remainder to the New York Finance Company. Rabe subsequently assigned to the Finance Company the interest which he had acquired, and the Finance Company, which thus claimed to be the successor or assignee to all, or nearly all, the interest of Braker, the son, under the trusts, assigned certain parts of its interest to one Cunningham and the remainder to one Wood. Cunningham having died, this suit was commenced in 1911 in the circuit court of the United States for the southern district of New York by the trustees under his will to enforce one of the trusts under the assumption that it had matured and was owned by the estate of Cunningham in virtue of the assignment made to him. The jurisdiction of the court was based solely on diversity of citizenship. The bill was demurred to for various causes, one of which challenged the jurisdiction of the court on the ground that, as there was no diversity of citizenship as between the original parties, and hence no jurisdiction, none did or could result under the law from the assignments. The demurrer was overruled and the case on the merits was decided against the complainants, who appealed to the circuit court of appeals for the second circuit.

While the case was there, on February 5th, 1913, the trustees under the will of Cunningham commenced another suit in the district court of the United States for the southern district of New York against the trustee [585] under the will, to enforce another trust which they asserted had matured, and which they claimed to have a right to enforce in consequence of the assignment from the New York Finance Company. In the meanwhile Wood, to whom as we have previously said an assignment had been made, having died, his testamentary executors also on the same day commenced in the district court a suit against the trustee of the will of Braker, to enforce the trust. The jurisdiction in both these cases also depended on diverse citizenship. The cases were put at issue by answer, and while they were on the docket awaiting trial, this case, which was pending in the circuit court of appeals, was by that court decided June 27th, 1913. The court primarily intimated opinions concerning the controlling influence of a prior ruling made in the state surrogates' court, and further intimated views on the merits which came ultimately, however, to be mere *obiter*, since the court placed its final ruling on a question of Federal jurisdiction, and held that, as Braker, the son, was not a party, and as diversity of citizenship did not exist if the prior parties were considered, and as the assignee had no greater right than had his assignor to invoke the Federal jurisdiction, there was no jurisdiction, and the decree below was therefore reversed, with directions "to dismiss the bill, but not upon the merits." (124 C. C. A. 367, 206 Fed. 461.) Before, however, such decree became final, a writ of certiorari was granted, and in consequence of that fact the case is now before us.

After the decision of the circuit court of appeals, and after the granting of the writ of certiorari by this court, demurrers to the jurisdiction were filed in the two cases pending in the district court on the ground covered by the decision of the circuit court of appeals in this case, and the district court, evidently following that decision, changed its previous ruling and dismissed both of the cases for want of jurisdiction. Under the provisions of [586] § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215] direct appeals were then prosecuted in both the

cases from the district court to this court. On these appeals, as the result of the allowance of a motion to advance, the cases were heard in December last, and the judgments below were reversed, it being decided that the assignee under the circumstances was not within the provisions of § 24 of the Judicial Code [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1913, § 991], and therefore the existence of diversity of citizenship between the parties gave authority to hear and decide the cases. Brown v. Fletcher, 235 U. S. 589, ante, 154, 35 Sup. Ct. Rep. 154.

Mr. **Charles H. Burr** argued the cause and filed a brief for petitioners.

Mr. **William P. S. Melvin** submitted the cause for respondent.

Mr. Chief Justice **White**, after making the foregoing statement, delivered the opinion of the court:

It is apparent from the statement which we have made that the ruling as to the question of jurisdiction, made in the two previous cases involving the same subject-matter which is here in controversy, so far as it concerned the jurisdiction of the court as a Federal court, conclusively demonstrates that the court below erred in declining to take cognizance of the cause upon the theory that it was without its jurisdiction as a Federal court to do so. While it is clear, the question of jurisdiction being thus determined, that we have power to consider and dispose of the merits, we think it is equally clear that we ought not to exert the authority (a), because to do so would be out of harmony with the provisions of the Judicial Code, giving a right to direct review on questions of jurisdiction; and (b), because it would be in a broad sense incompatible with the provisions giving finality to the judgments and decrees of the circuit court of appeals in cases, of which this is one, within the final competency of those courts. We say [587] the first, because it is apparent that if we now determine the merits of this case, we shall in a large sense virtually decide the merits of the two other cases concerning in a sense the same subject-matter involved in the cases which came here on direct appeals as to jurisdiction and jurisdiction alone, and which now, the question of jurisdiction alone having been determined, doubtless await the action of the district court and the review of that action by the court below if, after the cases have been decided by the district court, they are carried to the circuit court of appeals for review and final decision. We say the second, because as this case is one over which the action of the court below is made final by the statute, we are of opinion that its refusal to decide the case on the merits because of an erroneous conclusion as to want of power as a Federal court to do so ought not, under the circumstances here disclosed, to be made the basis by which this court would perform a duty which the statute contemplates should be discharged by the court below.

Indeed, the views just stated have been applied by previous rulings. Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 54 L. ed. 757, 30 Sup. Ct. Rep. 505; United States v. Rimer, 220 U. S. 547, 55 L. ed. 578, 31 Sup. Ct. Rep. 596; William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co. 228 U. S. 645, 57 L. ed. 1003, 33 Sup. Ct. Rep. 722. In the Lutcher Case, which was brought here by the allowance of a writ of certiorari, it was found that the court below, the circuit court of appeals of the fifth circuit, had from a mistake of law refused to consider the merits of the case, and although it was recognized that, as the result of the certiorari, the whole case was open to our review, it was yet pointed out that as, by the provisions of the act of 1891 [26 Stat. at L. 826, chap. 517], the cause was one which, apart from certiorari, was within the competency of the circuit court of appeals, and its judgment, when rendered, would be final, the duty of this court was not to determine the case on the merits, but, after correcting the error which had stood in the way of the court below performing its duty, to remand the case [588] to that court so that such duty might be discharged. So in the Rimer Case which was brought here by certiorari,—when it was discovered that the writ had obviously been allowed upon a mistaken conception as to the existence in the case of a far-reaching question of public importance justifying the issue of the writ, it was pointed out that, the mistake becoming apparent, it was our duty not to decide the case, but to remand it to the circuit court of appeals, to which the certiorari had been directed, to enable that court to discharge its duty. And the same principle was involved in the Cramp Case, where, after the case had been brought to this court by certiorari, and it was held that the decision of the court below was void because the court which decided it was not legally organized, while it was recognized that there was power under the certiorari to dispose of the whole case, it was held that the duty arose, in order to give effect to the statute, not to decide but to remand the case so that when the court below was organized conformably to the statute, the

case might be considered and disposed of as the statute contemplated it should be.

While it follows from these considerations that the decree below must be reversed, it also results that it is our duty to remand the case to the court below, that is, the Circuit Court of Appeals, to the end that, all questions concerning its jurisdiction as a Federal court having been determined by the prior decision of this court, it proceed to discharge its duty of hearing and deciding the case conformably to law.

Reversed and remanded for further proceedings consistent with this opinion.

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[589] J. P. WAUGH, Plff. in Err.,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF MISSISSIPPI and A. A. Kincannon, Chancellor.

(See S. C. Reporter's ed. 589-597.)

Constitutional law — equal protection of the laws — excluding Greek letter fraternities from state educational institutions.

1. A state statute prohibiting the existence of Greek letter fraternities and similar societies in the state's educational institutions, and depriving members in them of the right to receive or compete for diplomas, class honors, prizes, or medals, does not deny the equal protection of the laws guaranteed by U. S. Const., 14th Amend., because it is construed by the officials charged with its enforcement not to apply "to students already entered, and who conduct themselves with that decorum always expected of Southern gentlemen."

[For other cases, see Constitutional Law, IV. a, 1, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — privileges and immunities — admission to state educational institutions — renunciation of Greek letter fraternity.

2. The state may require a member of a chapter of a Greek letter fraternity at another college to renounce his allegiance to and affiliation with such fraternity before admitting him as a student to any educational institution supported by the state without denying him due process of law or his privileges and immunities as a citizen of the United States under U. S. Const., 14th Amend., although the fraternity to which he belongs may be a moral and of itself a disciplinary force.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

NOTE.—On the right of a state to forbid affiliation with a secret society by a student in an educational institution supported by the state— see notes to Wayland v. School Directors, 7 L.R.A.(N.S.) 352; and University of Mississippi v. Waugh, L.R.A.1915D, 588.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

[No. 255.]

Argued May 4, 1915. Decided June 1, 1915.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree which, reversing a decree of the Chancery Court of Lafayette County, in that state, sustained a demurrer to and dismissed a bill in a suit to restrain the execution of a statute prohibiting Greek letter fraternities and societies in the state's educational institutions. Affirmed.

See same case below, 105 Miss. 623, L.R.A.1915D, 588, 62 So. 827.

The facts are stated in the opinion.

Mr. A. F. Fox argued the cause, and, with Mr. Hamilton Douglas, filed a brief for plaintiff in error:

The 2d section of the Mississippi anti-fraternity act and the order of the board of trustees is unreasonable and *ultra vires*.

22 Am. & Eng. Enc. Law, 936; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Miller v. Fitchburg, 180 Mass. 32, 61 N. E. 277; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; Re Viemeister, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334; Words & Phrases, pp. 5427, 5431, 5432; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Bissell v. Davison, 65 Conn. 183, 29 L.R.A. 251, 32 Atl. 348; Burdick v. Babcock, 31 Iowa, 562; Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387; Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; Hobbs v. Germany,

94 Miss. 469, 22 L.R.A.(N.S.) 983, 49 So. 515; Kinzer v. Independent School Dist. (Kinzer v. Toms) 129 Iowa, 441, 3 L.R.A. (N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Bradford v. Board of Education, 18 Cal. App. 19, 121 Pac. 929; State ex rel. Stallard v. White, 82 Ind. 278, 42 Am. Rep. 496; Wayland v. Hughes (Wayland v. School Dist.) 43 Wash. 441, 7 L.R.A.(N.S.) 352, 86 Pac. 642; Wilson v. Board of Education, 233 Ill. 464, 15 L.R.A.(N.S.) 1137, 84 N. E. 697, 13 Ann. Cas. 330.

Plaintiff in error is denied the equal protection of the laws.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; McFarland v. Goins, 96 Miss. 67, 50 So. 493; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 200, 6 Sup. Ct. Rep. 1064.

Classification must be reasonable.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247.

Mr. William G. Cavett also filed a brief for plaintiff in error:

Can the legislature declare that being a member of a Greek letter fraternity is *per se* a nuisance, as a matter of law, when as a matter of fact it is for the promotion and enforcement of the best morals, the highest possible attainment and standing in the classes, and good order and discipline in the student bodies?

Calder v. Bull, 3 Dall. 386–388, 1 L. ed. 648, 649.

The right to attend the state public schools is recognized by the Constitution of the state of Mississippi, and is therefore a vested, legal right of which Mr. Waugh could not be deprived merely because he was a member of a fraternity.

State ex rel. Stallard v. White, 82 Ind. 278, 42 Am. Rep. 496; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; McFarland v. Goins, 96 Miss. 67, 50 So. 493; Hobbs v. Germany, 94 Miss. 469, 22 L.R.A.(N.S.) 983, 49 So. 515; State ex rel. Kelleher v. St. Louis Public Schools, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W. 617; Claybrook v. Owensboro, 16 Fed. 301; Wammack v. Holloway, 2 Ala. 33; Memphis v. Woodward, 12 Heisk. 499, 27 Am. Rep. 750; Maloney v. Collier, 112 Tenn. 100, 83 S. W. 672; Nelson v. Sneed, 112 Tenn. 48, 83 S. W. 788; Hoke v. Henderson, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; State Prison v. Day, 124 N. C. 362, 46 L.R.A. 295, 32 S. W. 748; State ex rel. Walser v. Bellamy, 120 N. C. 212, 27 S. E. 113; State ex rel. Clark v. Stanley, 66 N. C. 63, 8 Am. Rep. 488; People ex rel. Murphy v. McAllister, 10 Utah, 357, 37 Pac. 578; Pratt v. Police & Fire Comrs. 15 Utah, 1, 49 Pac. 747; Heath v. Salt Lake City, 16 Utah, 374, 52 Pac. 602; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092; Silvey v. Boyle, 20 Utah, 205, 57 Pac. 880; Cooley, Const. Lim. 6th ed. 482; Black, Constitutional Prohibitions, p. 119, § 99; Adams v. Roberts, 119 Ky. 364, 83 S. W. 1035; Malone v. Williams, 118 Tenn. 390, 121 Am. St. Rep. 1002, 103 S. W. 798; Peck v. Smith, 41 Conn. 442; Rulison v. Post, 79 Ill. 567; McIntyre v. Blanchard School, 11 Ont. Rep. 439; Stuckey v. Churchman, 2 Ill. App. 584; Morrison v. Lawrence, 186 Mass. 456, 72 N. E. 91; Boyd v. Blaisdell, 15 Ind. 73; Donohoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Stephenson v. Hall, 14 Barb. 222; Roe v. Deming, 21 Ohio St. 666.

The required act and pledge prohibit a man from peaceably and lawfully assembling with his fraternity brothers during vacation, and prohibit him from speaking of his fraternity, and therefore suppress freedom of speech.

Gibbons v. Ogden, 9 Wheat. 1, 211. 6 L. ed. 23, 73; Ex parte Foster, 44 Tex. Crim. Rep. 423, 60 L.R.A. 631, 100 Am. St. Rep. 866, 71 S. W. 593; Re Shortridge, 99 Cal. 526, 21 L.R.A. 755, 37 Am. St. Rep. 78, 34 Pac. 227; Dailey v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The act and pledge deprive a citizen and taxpayer of natural, inherent, and inalienable rights without due process of law.

Vanhorne v. Dorrance, 2 Dall. 304, 310, 1 L. ed. 391, 394; Wynehamer v. People, 13 N. Y. 378; People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Re Flukes, 157 Mo. 125, 51 L.R.A. 176, 80 Am. St. Rep. 619, 57 S. W. 545; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Allgeyer v. Louisiana, 165 U. S. 578, 586, 589, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 762, 28 L. ed. 585, 589, 4 Sup. Ct. Rep. 652; Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; New York L. Ins. Co. v.

Head, 234 U. S. 149, 58 L. ed. 1259, 34 Sup. Ct. Rep. 879.

Taxing Waugh's property and depriving him of the benefits of the state institutions simply because he is a member of a fraternity—a harmless organization—is violative of the 14th Amendment and invidiously discriminates against him.

McFarland v. Goins, 96 Miss. 67, 50 So. 493; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 613, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 236, 41 L. ed. 979, 985, 17 Sup. Ct. Rep. 581; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 661, 22 L. ed. 455, 461; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Scott v. Toledo, 1 L.R.A. 688, 36 Fed. 385; Claybrook v. Owensboro, 16 Fed. 301, 23 Fed. 634; Davenport v. Cloverport, 72 Fed. 689; United States v. Buntin, 10 Fed. 730; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Ward v. Flood, 48 Cal. 51, 17 Am. Rep. 405; Virginia v. River, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; Wong Him v. Callahan, 119 Fed. 381; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Louthan v. Com. 79 Va. 196, 52 Am. Rep. 626; 2 Story, Const. Lim. ¶ 1881; McPherson v. Blacker, 146 U. S. 1, 36, 36 L. ed. 869, 878, 13 Sup. Ct. Rep. 3; Plessy v. Ferguson, 163 U. S. 537, 545, 41 L. ed. 256, 259, 16 Sup. Ct. Rep. 1138; Ex parte Heyfron, 7 How. (Miss.) 127; Ex parte Garland, 4 Wall. 333, 377, 18 L. ed. 366, 370; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, L.R.A.—, —, 34 Sup. Ct. Rep. 333; Home Ins. Co. v. Morse, 20 Wall. 445, 451, 22 L. ed. 365, 368; Doyle v. Continental Ins. Co. 94 U. S. 535, 536, 24 L. ed. 148, 150.

Not only does the act of the legislature invidiously discriminate against men who are members of fraternities, but the power is delegated and reposited in the trustees to so discriminate, and said repository of state power did invidiously discriminate against Mr. Waugh, the appellant.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; State v. Newton, 3 Tenn. C. C. A. 93; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Dobbins v. Los Angeles, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; Quintini v. Bay St. Louis, 64 Miss. 490, 60 Am. Rep. 62, 1 So. 625; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; State ex rel. Stallard v. White, 82 Ind. 278, 42 Am. Rep. 496; Fertich v. Michener, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. 605; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547.

The police power of a state confers no license to violate the Constitution nor destroy constitutional rights.

Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 42 Sup. Ct. Rep. 878, 882, 48 Sup. Ct. Rep. 488; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Dobbins v. Los Angeles, 195 U. S. 223, 236, 237, 49 L. ed. 169, 175, 176, 25 Sup. Ct. Rep. 18; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Courts view the constitutionality of a statute from the natural and legal effect of the language employed, and the effect of such statute when put into operation.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Lochner v. New York, 198 U. S. 45, 62, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Ex parte Hodges, 87 Cal. 162, 25 Pac. 577.

Classification by a legislative department must be reasonable, and must not be arbitrary, oppressive, or capricious, and cannot depend upon considerations having no possible connection with the duties of citizens.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43; L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 119, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; State ex rel. Harris v. Herrmann, 75 Mo. 353; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am.

St. Rep. 443, 31 S. W. 781; State ex rel. Stallard v. White, 82 Ind. 278, 42 Am. Rep. 496; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 561, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; McPherson v. Blacker, 146 U. S. 1, 39, 36 L. ed. 869, 878, 13 Sup. Ct. Rep. 3.

Neither the legislature nor the repository of state power can arbitrarily assume the position of *pater familias*, supervisor or king with unlimited power over students, and invade the homes and wrest from parents the parental rights and control, and deprive appellant of his liberty and pursuit of happiness.

Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; Hobbs v. Germany, 94 Miss. 469, 22 L.R.A. (N.S.) 983, 49 So. 515; State ex rel. Bowe v. Board of Education, 63 Wis. 234, 53 Am. Rep. 284, 23 N. W. 102; Lochner v. New York, 198 U. S. 45, 62, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539; Boyd v. United States, 116 U. S. 616, 632, 641, 29 L. ed. 746, 752, 754, 6 Sup. Ct. Rep. 524; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Fletcher v. Peck, 6 Cranch, 137, 3 L. ed. 178; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

Mr. **Jackson H. Ralston** argued the cause, and, with Messrs. William C. McLean and William E. Richardson, filed a brief for defendants in error:

It is the reasonable and proper thing for the legislature or for the board of trustees to prohibit membership on the part of a student in a secret organization among students, whether there be a chapter of such organization in the university itself or somewhere else in the state.

Wilson v. Board of Education, 233 Ill. 464, 15 L.R.A.(N.S.) 1136, 84 N. E. 697, 13 Ann. Cas. 330; Wayland v. Hughes (Wayland v. School Dist.) 43 Wash. 441, 7 L.R.A. (N.S.) 352, 86 Pac. 642; Kinzer v. Independent School Dist. (Kinzer v. Toms) 129 Iowa, 441, 3 L.R.A.(N.S.) 497, 105 N. W. 686, 6 Ann. Cas. 996; State ex rel. Stallard v. White, 82 Ind. 278, 42 Am. Rep. 496; Cumming v. Richmond County Bd. of Edu. 175 U. S. 545, 44 L. ed. 266, 20 Sup. Ct. Rep. 197.

It is to be presumed and conclusively presumed that the legislature of the state and the board of trustees are fully qualified to prescribe rules and regulations of discipline.

Frisbie v. United States, 157 U. S. 166, 39 L. ed. 659, 15 Sup. Ct. Rep. 586.

No discrimination whatever is made by the act of the legislature, or the resolutions passed by the board of trustees in pursuance of the act against the plaintiff in error.

Selover, B. & Co. v. Walsh, 226 U. S. 113, 57 L. ed. 146, 33 Sup. Ct. Rep. 69; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; German Alliance Ins. Co. v. Hale, 219 U. S. 309, 55 L. ed. 229, 31 Sup. Ct. Rep. 246.

There is nothing in the Federal Constitution which this act of the legislature violates, for the additional reason that this act is a police regulation reserved to the state, and the state undoubtedly has the right to govern its own public institutions, and the legislature of a state decides what laws are necessary within the police power, subject only to the condition that such exercise must not be arbitrary, and must have some reasonable relation to a purpose which it was competent for the government to effect.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Mutual Loan Co. v. Martell, 222 U. S. 233, 56 L. ed. 178, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Ah Sin v. Wittman, 198 U. S. 500, 49 L. ed. 1142, 25 Sup. Ct. Rep. 756; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 201, 202, 57 L. ed. 187, 188, 33 Sup. Ct. Rep. 44; People ex rel Pratt v. Wheaton Colloge, 40 Ill. 186; Gott v. Berea College, 156 Ky. 376, 51 L.R.A. (N.S.) 21, 161 S. W. 204.

Mr. Justice **McKenna** delivered the opinion of the court:

Plaintiff in error, herein called complainant, by a bill in the chancery court of Lafayette county, state of Mississippi, attacked the validity and sought to restrain the execution of an act of the state prohibiting Greek letter fraternities and societies in the state's educational institutions.

Sec. 1 of the act designates by name certain societies, and declares that they "and all other secret orders, chapters, fraternities, sororities, societies and organizations of whatever name, or without a name, of similar name and purpose, among students, are hereby abolished and further prohibited to exist in the University of Mississippi and in all other educational institutions sup-

ported, in whole or in part, by the state." [Laws 1912, chap. 177, p. 193.]

By § 2 of the act any student in the University belonging to any of the prohibited societies is not permitted to receive or compete for class honors, diplomas, or distinctions, nor contend for any prize or medal. But it is provided that any student who is a member of any of the prohibited orders or societies may, upon entrance to any of the schools, "file with the chancellor, president or superintendent, as the case may be, an agreement in writing that he will not, during his attendance at said school, affiliate with same, nor attend their meetings, nor in any wise contribute any dues or donations to them, and, thereafter so long as such agreement is complied with in good faith, such student shall not be subjected to the restrictions created by this section."

Subsequent sections provide for the enforcement of the [592] statute by the trustees and faculties of the institutions by rules and punishments, and for the removal of any trustee or member of faculty if he fail or refuse to enforce the act.

Complainant in his bill set out the act and alleged that he was a resident, citizen, and taxpayer in Goodman, Holmes county, in the state of Mississippi. That he was a member, and had been for several years, of what is known as the Kappa Sigma Fraternity, and was affiliated and identified with the chapter of that fraternity at Millsaps College, and that such fraternity is one of those mentioned in the statute.

He also alleged that subsequent to the enactment of the statute the board of trustees of the University adopted an order which recited that the board desired it to be understood that the statute was "not to be construed to apply to students already entered, and who conducted themselves with that decorum always expected of Southern gentlemen."

Subsequently the board ordered that certain pledges should be incorporated in the application of a student for admission into the University. These were: that he was not pledged to become a member of any of the prohibited fraternities, nor a member of any such; and that he would pledge and promise not to join any such while he was a student, or aid, abet, or encourage the organization or perpetuation of any of the orders. And, further, that he would not apply for nor accept any scholarship or medal or in any way be a beneficiary of any students' self-help fund. That it would be his purpose and constant endeavor so to act that no word or deed of his could be even remotely construed as being violative of the letter and spirit of the statute. The obligation was to be binding between the sessions of 1912-13 and 1913-14. The pledges required were embodied in the application of students.

Complainant applied for admission into the law department [593] of the University, but was refused admission because he declined to sign the pledge required, though he alleged that he was otherwise eligible for admission under the laws of the state and of the United States; that he has never been a member of any of the prohibited fraternities organized among the students of the University or located at the University, and, though he is affiliated with and pays dues to the chapter of the Kappa Sigma Fraternity at Millsaps College, if admitted as a student to the University of Mississippi, he has no intention or purpose of encouraging the organization or continuance of any of the prohibited fraternities, or of affiliating with or paying dues to any at the University.

The statute is charged to be in certain particulars in violation of the Constitution of Mississippi. It is also charged to be in violation of the 14th Amendment of the Constitution of the United States because it "without reason deprives the complainant of his property and property right, liberty and his harmless pursuit of happiness, and denies to the complainant the equal protection of the law of the state of Mississippi."

The charge is accentuated by the allegation that the society of which complainant is a member "has for its paramount purpose the promotion and enforcement of good morals, the highest possible attainment and standing in the classes, and good order and discipline in the student bodies of the different colleges with which it is connected."

A demurrer was filed to the bill on grounds which asserted the validity of the statute and the insufficiency of the bill, and subsequently a motion was made to strike out the praise of the purposes of the Kappa Sigma Fraternity. The demurrer was overruled and the motion denied.

Defendants declined to plead further, and it was decreed, with recitation of details, that the statute was in violation of the Constitution of Mississippi, "and in violation of that paragraph of § 1 of article 14 of [594] the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws." The statute was declared to be "unconstitutional, null, and void," and the orders of the trustees of the University "*ultra vires*, unreasonable, and void." It was ordered that the

injunction theretofore granted be made perpetual.

The decree was reversed by the supreme court of the state, the demurrer sustained, and the bill dismissed.

The supreme court specifically rejected the contention that the statute was not in accordance with the Constitution of the state, and as specifically sustained the orders of the trustees as being authorized by the statute.

The rulings cannot be questioned here; indeed, are not questioned, for counsel say that the assignments of error are all based on the contention that the statute is unconstitutional and void for the reason that it violates the 14th Amendment in denying to complainant "the equal protection of law and the harmless pursuit of happiness, and that the various rules and regulations adopted by the board of trustees are *ultra vires* and void, because they are unreasonable, unnecessary, and deny plaintiff in error the equal protection of the law and the harmless pursuit of happiness;" and deprive him of property and property rights without due process of law and of the privileges and immunities of citizens of the United States.

If the statute is valid, the orders of the board of trustees are, and to keep up a distinction between them can only lead to confusion. Counsel, however, seem to urge that the statute may be adjudged valid and the orders of the trustees declared "*ultra vires* and unwarranted even by the said act, and that the action of the board of trustees in enforcing said regulation is arbitrary and unreasonable in depriving complainant of his constitutional rights."

However, we need not dispute about the distinction, but pass to the grounds of attack on the statute and orders [595] and ask, Wherein does either offend against the 14th Amendment? to be specific, Wherein do they deprive plaintiff of the equal protection of the laws or obstruct his pursuit of happiness?

The statute is universal in its prohibitions. None of the named societies or others "of whatever name, or without name," are permitted to exist in the University; and no student who is a member of any of them is permitted to receive or compete for class honors nor contend for prizes or medals. To secure this result one of the orders of the trustees was directed.

But, by another order of the trustees, a distinction is made. By it it is provided that the statute is not to be construed "to apply to students already entered, and who conduct themselves with that decorum always expected of Southern gentlemen." This order is assailed by plaintiff as "a clear discrimination between the 'ins' and 'outs,' between those who were, at the time the statute was enacted, students in the University, and those who were not on that date members of the student body, and who might desire to be admitted as such." The contention is made much of by counsel and the order is denounced as irrational and arbitrary. But counsel overlook that it is an obvious principle of construction, and sometimes of justice, that laws are not to be construed retrospectively. The trustees regarded and followed the principle, and left undisturbed the students already in the University, admonishing them, however, that their honor would be regarded as pledged not to abuse the right or the indulgence. And whether it was a right or an indulgence,—whether required by the statute or accorded by the trustees,—it was based on an obvious and rational distinction, and the supreme court sustained its competence.

The next contention of complainant has various elements. It assails the statute as an obstruction to his pursuit of happiness, a deprivation of his property and [596] property rights, and of the privileges and immunities guaranteed by the Constitution of the United States. Counsel have considered these elements separately and built upon them elaborate and somewhat fervid arguments, but, after all, they depend upon one proposition: whether the right to attend the University of Mississippi is an absolute or conditional right. It may be put more narrowly,—whether, under the Constitution and laws of Mississippi, the public educational institutions of the state are so far under the control of the legislature that it may impose what the supreme court of the state calls "disciplinary regulations."

To this proposition we are confined, and we are not concerned in its consideration with what the laws of other states permit or prohibit. Its solution might be rested upon the decision of the supreme court of the state. That court said: "The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline, and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts." [105 Miss. 635, L.R.A.1915D, 588, 62 So. 827.]

This being the power of the legislature under the Constitution and laws of the state over its institutions maintained by public funds, what is urged against its exercise to which the Constitution of the

United States gives its sanction and supports by its prohibition?

It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the state of Mississippi to determine. It is to be remembered that the University was established by the state, and is under the control of the state, and the enactment of the statute may have been induced by the opinion that membership in the prohibited [597] societies divided the attention of the students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity. Nor can we accommodate the regulations to the assertion of a special purpose by the applying student, varying, perhaps, with each one, and dependent alone upon his promise.

This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the state of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the 14th Amendment.

Judgment affirmed.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plff. in Err.,
v.
VARNVILLE FURNITURE COMPANY.

(See S. C. Reporter's ed. 597–604.)

Commerce — state regulation — carrier's liability — congressional action.

Congress has so far taken over the subject of a carrier's liability for loss or damage to interstate shipments by the act of June 18, 1910 (36 Stat. at L. 539, chap. 309, Comp. Stat. 1913, § 8563), and the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), amending respectively §§ 1 and 20 of the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), as to invalidate the provisions of S. C. Civ. Code 1912, § 2573, in so far as they may subject a terminal carrier to the prescribed penalty of $50 for failure to pay promptly a claim for damages to an interstate shipment, no matter where the loss occurred, unless the carrier proves that the shipment never came into its possession, or succeeds, within the forty days allowed, in shifting the loss by giving notice as to when, where, and by which carrier the property was damaged, or by showing that it used due diligence, but was unable to discover where the damage occurred; nor is the statute saved by calling it an exercise of the police power, nor by the proviso in the act of June 29, 1906, saving the rights of holders of bills of lading under existing law.

[For other cases, see Carriers, III. h, in Digest Sup. Ct. 1908.]

[No. 273.]

Argued May 12, 1915. Decided June 1, 1915.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Circuit Court of Hampton County, in that state, affirming a judgment of the Magistrate's Court for that county in favor of plaintiff in an action against a terminal carrier to recover the damages to an interstate shipment and a penalty for failure to pay the claim promptly. Reversed.

See same case below, 98 S. C. 63, 79 S. E. 700.

The facts are stated in the opinion.

Mr. F. Barron Grier argued the cause and filed a brief for plaintiff in error:

The penalty act of South Carolina, codified as § 2573, Code of 1912, vol. 1, as construed by the supreme court of the state in this and other recent cases, makes the delivering carrier responsible for the delicts of the connecting carrier, resulting in loss or damage to the lawful holder of the bill of lading, in a through shipment, although it may not, as a matter of fact, be the carrier at fault.

Varnville Furniture Co. v. Charleston & W. C. R. Co. 98 S. C. 63, 79 S. E. 700; Willett v. Southern R. Co. 66 S. C. 477, 45 S. E. 93, 14 Am. Neg. Rep. 635; Du Pre v. Columbia, N. & L. R. Co. 98 S. C. 468, 79

NOTE.—On liability of a connecting carrier for loss beyond its own line—see note to Roy v. Chesapeake & O. R. Co. 31 L.R.A. (N.S.) 1.

On the effect of the Carmack amendment upon the liability of a connecting carrier for loss beyond its own line—see note to Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. U. S. 516.

On constitutionality of a statute imposing a penalty or added liability for the failure of a carrier to pay a claim—see note to Mobile & O. R. Co. v. Brandon, 42 L.R.A. (N.S.) 106.

S. E. 310; Eastover Mule & Horse Co. v. Atlantic Coast Line R. Co. 99 S. C. 470, 83 S. E. 599.

The subject of the Carmack amendment is "carrier liability" for loss, damage, or injury to property, caused by it, or by any connecting carrier to whom the property is delivered, or over whose line it may pass. It embraces the entire subject and covers every detail of carrier liability to the lawful holder of the bill of lading which the receiving or initial carrier is required to issue.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

The state of South Carolina has no inherent power to deal with this subject. Its power is permissive only and dependent upon nonaction by Congress, and ceases to exist the moment that Congress asserts its paramount authority over the subject, which is of national scope and importance, admitting of but one uniform system of regulations.

Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, 34 Sup. Ct. Rep. 790; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556.

The South Carolina penalty statute was upheld on the theory that there was no Federal legislation on the subject involved. The decisions held that the penalty imposed was for a delict of duty pertaining to the business of a common carrier, and in so far as it affected interstate commerce was an aid thereto by its tendency to promote safe and prompt delivery of the goods, or its legal equivalent, prompt settlement of proper claim for damages.

Charles v. Atlantic Coast Line R. Co. 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E. 927; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378.

The Hepburn act, amending the commerce act of Congress, has been construed by this court to deny to the state the power of enforcing by statutory penalties the duty of receiving and prompt delivery of property in consummation of interestate transportation.

St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140.

The Interstate Commerce Commission, pursuant to the powers conferred on the Commission by the commerce act of Congress, has assumed the regulation of the payment of claims for loss or damage and for overcharge of freight by carriers. Action by Congress or the Commission supersedes and annuls state regulation. It is not necessary that there be directly inhibitive congressional legislation or conflicting regulation by the Commission, but legislation by Congress, or regulation by the Commission, which occupies the field, excludes action by the state.

Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 444, 56 L. ed. 257, 263, 32 Sup. Ct. Rep. 140; Conference Ruling No. 462, April, 25, 1915; Conference Ruling No. 464, May 28, 1914; Conference Ruling, No. 236.

Congress has legislated specifically with reference to freight overcharge, and the Interstate Commerce Commission under its delegated powers has assumed control of the subject.

Barnes, Interstate Transportation, p. 600, §§ 405-D, 405-J; Laning-Harris Coal & Grain Co. v. St. Louis & S. F. R. Co. 15 Inters. Com. Rep. 37; Leonard v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 538.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for $14.75, damage to furniture in transit from High Point, North Carolina, to Varnville, South Carolina, $4.60 overcharge, and $50 penalty under [601] a South Carolina statute (Civil Code 1912, § 2573), for a failure to pay the claims within forty days. The defendant contended that the law imposing the penalty was invalid under the act to regulate commerce, especially § 20 [24 Stat. at L. 386, chap. 104], as amended by the act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, 593, Comp. Stat. 1913, §§ 8563, 8592, known as the Carmack amendment. The lower courts gave judgment for the plaintiff, and the judgment was affirmed by the supreme court of the state. Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378, was relied upon as still sustaining the law notwithstanding the amend-

ments of the Federal act. 98 S. C. 63, 79 S. E. 700.

The defendant (plaintiff in error) received the goods from the Southern Railway Company and delivered them in damaged condition. Where the damage was done does not appear. But by § 2572, in such cases the initial, intermediate, or terminal carrier who fails within forty days from notice to inform the notifying party when, where, and by which carrier the property was damaged is made liable for the amount of the claim and a penalty of $50, although it may escape by proof that it used due diligence and was unable to trace the property, etc. By § 2573 a similar liability is imposed on carriers for failure to pay claims for freight overcharge or damage to property while in the possession of such carriers, "within forty days in case of shipments from without the state, after the filing of such claim," etc. If the property never came into their possession, they are remitted to § 2572. It seems to follow from the decision in this case, that the terminal carrier is held for a loss anywhere along the line, and for the penalty, unless it proves that the property never came into its possession, etc., or succeeds in shifting the loss within the forty days allowed. Therefore the assumption of this court in Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 129, 54 L. ed. 411, 416, 30 Sup. Ct. Rep. 378, that the statute only concerned property lost or damaged while in the possession of a [602] carrier in South Carolina, no longer is correct; perhaps because of amendments in what now is § 2572.

It is true that in the opinion of the supreme court the judgment is spoken of as being for damage done to a shipment "while in defendant's possession in this state," and it is said that the statute limits the liability to such damage. But in view of the record this can mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible is itself in fault. The defendant happened to be the last carrier of the line, and in many states, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remained so until the latest moment when it could have been harmed. But while this seems to have made its first appearance in the guise of a true presumption of fact, it became, if it was not always, a rule of substantive law, a rule of convenience, calling on the last carrier to explain. Willett v. Southern R. Co. 66 S. C. 477, 479, 45 S. E. 93, 14 Am. Neg. Rep. 635; Moore v. New York, N. H. & H. R. Co. 173 Mass. 335, 337, 73 Am. St. Rep. 298, 53 N. E. 816. The rule is stated as a rule of policy in South Carolina, and the statute makes it still more clearly so, since, with the limits that we have stated, it applies indifferently to any carrier in the line, if within the state, according to the accident of the plaintiff's demand. The case, then, we repeat, is that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the state, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law.

The claims dealt with in Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378, all arose before June 29, 1906, the date of the Carmack amendment. The South Carolina law has been amended and enlarged in scope since that decision, but it is less necessary to scrutinize those changes [603] than to consider the modifications of the United States law. As it now stands that law requires the initial carrier to issue a through bill of lading, and makes it liable for all damage anywhere on the route. § 20. By § 1 as amended by the act of June 18, 1910, chap. 309, § 7, 36 Stat. at L. 539, 546, Comp. Stat. 1913, § 8563, it is made the duty of carriers to secure the safe transportation and delivery of property subject to the act, upon reasonable terms. As was said in Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 420, 58 L. ed. 1377, 1382, 34 Sup. Ct. Rep. 790, the result of many recent cases there cited, beginning with Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and coming down through Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, is that "the special regulations and policies of particular states upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded." It is true that in that case the inclusion of the attorney's fee, not exceeding $20, in the costs upon judgments for certain small claims was upheld, although incidentally including some claims arising out of interstate commerce. But, apart from the effect being only incidental, the ground relied upon was that the statute did not "in any way enlarge the responsibility of the carrier" for loss or "at all affect the ground of recovery, or the measure of recovery" (pp. 420, 422). The South Carolina act, on the other hand, extends the liability to losses on other roads in other jurisdictions, and increases it by a fine difficult to escape.

It overlaps the Federal act in respect of the subjects, the grounds, and the extent of liability for loss. We leave on one side the remote analogies put forward in the decision of the state court, as, in our opinion, the cases and principle to which we have referred are sufficient and direct. We should add that the item for overcharges also falls under the act of Congress, § 2, as it now stands, since that section makes the receiving of greater compensation than is received from others for similar services an unjust and unlawful discrimination. [604] The penalty, the only matter that we are considering, was exacted for a failure to pay both claims, within forty days, irrespective of the question whether adequate investigation had been possible, as required by the Interstate Commerce Commission's rulings, Nos. 462, 236, and 68.

It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. Southern R. Co. v. Reid, 222 U. S. 424, 443, 56 L. ed. 257, 262, 32 Sup. Ct. Rep. 140. But that is immaterial. When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 435, 57 L. ed. 284, 287, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Southern R. Co. v. Railroad Commission, 236 U. S. 439, 446, 447, ante, 661, 665, 35 Sup. Ct. Rep. 304. The legislation is not saved by calling it an exercise of the police power, or by the proviso in the Carmack amendment saving the rights of holders of bills of lading under existing law. Adams Exp. Co. v. Croninger, 226 U. S. 491, 506, 507, 57 L. ed. 314, 320, 321, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

Judgment reversed.

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[605] LUMBER UNDERWRITERS OF NEW YORK et al., Petitioners,

v.

O. C. RIFE[1] et al.

(See S. C. Reporter's ed. 605–610.)

Insurance — waiver of condition — knowledge of company — renewal.

A fire insurance company cannot be deemed to have waived a breach of the warranty in a policy insuring lumber that a continuous space of 100 feet shall be maintained between the lumber and the mill of the assured because, during the life of an earlier policy, of which the one in question is a renewal, the insurance company learned that there were permanent structures between some of the lumber piles and the mill, reducing the clear space in that direction to less than 100 feet, where the policy requires any waivers to be written upon or attached to that instrument.

[For other cases, see Insurance, VII. a, in Digest Sup. Ct. 1908.]

[No. 279.]

Argued May 13, 1915. Decided June 1, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Western District of Tennessee in favor of defendants in a suit upon a policy of fire insurance. Reversed.

See same case below, 122 C. C. A. 346, 204 Fed. 32.

The facts are stated in the opinion.

Mr. R. Lee Bartels argued the cause and filed a brief for petitioners:

The admission of parol evidence to vary the terms of a prior written contract upon the theory of estoppel is an evasion of the true rule.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 27 C. C. A. 42, 5[illegible] U. S. App. 517, 82 Fed. 408; Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Ins. Soc. 77 C. C. A. 121, 146 Fed. 695; Carpenter v. Providence Wash[illegible]

NOTE.—As to whether failure of the insurer to speak or act after notice of a breach of the policy constitutes a waiver thereof—see notes to Phenix Ins. Co. v. Grove, 25 L.R.A.(N.S.) 1, and Schmidt v. Williamsburgh City F. Ins. Co. 51 L.R.A. (N.S.) 261.

On the effect of nonwaiver agreement on conditions existing at the inception of an insurance policy—see note to Gish v. Insurance Co. of N. A. 13 L.R.A.(N.S.) 826.

On the power of agents to bind insurer by oral waiver or estoppel *in pais* as to forfeitures occurring after issuance of policy and before loss, under policies of insurance requiring consent or waiver to be in writing—see note to Industrial Mutual Indemnity Co. v. Thompson, 10 L.R.A.(N.S.) 1064.

On the parol-evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel as applied to policies of insurance—see note to Haapa v. Metropolitan L. Ins. Co. 16 L.R.A. (N.S.) 1165.

[1] Suggestion of death of O. C. Rife, and appearance of Robert Lockwood, Jr., administrator, etc., as a party respondent here filed and entered May 13, 1915.

ington Ins. Co. 16 Pet. 495, 512, 10 L. ed. 1044, 1051; Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312; Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. ed. 246; Connecticut F. Ins. Co. v. Buchanan, 4 L.R.A.(N.S.) 758, 73 C. C. A. 111, 141 Fed. 877.

Relating to conditions that were agreed should be maintained in the future and subsequent to the delivery and issuance of the contract, the warranty is one *in futuro*.

2 Cooley, Briefs on Ins. 1466.

Though the insurer knew that at the time of the issuance of the contract the clear space therein provided for was not being maintained, nevertheless, he had the right to presume that the insured, by accepting the policy containing a requirement for a greater amount of clear space, would comply with the policy provision, and thereafter maintain the amount of clear space contracted for.

Keller v. Liverpool & L. & G. Ins. Co. 27 Tex. Civ. App. 102, 65 S. W. 695; England v. Westchester F. Ins. Co. 81 Wis. 583, 29 Am. St. Rep. 917, 51 N. W. 954; Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union F. Ins. Soc. 77 C. C. A. 121, 146 Fed. 695; Michigan Shingle Co. v. London & L. F. Ins. Co. 91 Mich. 443, 51 N. W. 1111.

Estoppel cannot arise from a promise as to future action, with respect to a right to be acquired, upon an agreement not yet made.

Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674.

The contract of insurance contained the usual provision with respect to waivers, commonly known as the nonwaiver clause. This is a reasonable provision, and one enforceable in the courts. It is a valid contract and has so been held by this court, applicable alike to waivers claimed by the insured to have been made by the principal or company, as well as to waivers claimed to have been made by an agent.

Carpenter v. Providence Washington Ins. Co. 16 Pet. 512, 10 L. ed. 1051; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 317, 54 L. ed. 496, 30 Sup. Ct. Rep. 312; Ætna L. Ins. Co. v. Moore, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. Rep. 186.

If we treat the issuance of the policy in controversy as a mere technical renewal of a previously existing policy, expiring May 22, 1909, nevertheless such renewal is in all respects a new contract, and the rights of the parties are alone dependent upon the provisions of such new contract.

Hartford F. Ins. Co. v. Walsh, 54 Ill. 167; De Jernette v. Fidelity & C. Co. 98 Ky. 561, 33 S. W. 828; Long Bros. Grocery Co. v. United States Fidelity & G. Co. 130 Mo. App. 430, 110 S. W. 29; Proctor Coal Co. v. United States Fidelity & G. Co. 124 Fed. 424; Danvers Sav. Bank v. National Surety Co. 92 C. C. A. 423, 166 Fed. 671.

The contract in controversy is complete in all of its terms, and is a new, separate, and independent contract from any former policy. The minds of the parties have met upon its terms, and their rights must be governed accordingly, unaffected by any knowledge acquired under a previously existing contract.

Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Ins. Soc. 77 C. C. A. 121, 146 Fed. 700; Brady v. Northwestern Ins. Co. 11 Mich. 445; Arlington Co. v. Empire City F. Ins. Co. 116 App. Div. 460, 101 N. Y. Supp. 772; Hartford F. Ins. Co. v. Walsh, 54 Ill. 167.

Mr. Caruthers Ewing argued the cause and filed a brief for respondents:

The policy in force when the fire occurred, being a renewal of a previous policy, is but a continuation of the original contract of insurance.

Mallette v. British American Assur. Co. 91 Md. 471, 46 Atl. 1005; Hay v. Star F. Ins. Co. 77 N. Y. 235, 33 Am. Rep. 607; Martin v. Jersey City Ins. Co. 44 N. J. L. 273; 1 Cooley, Briefs on Ins. pp. 516, 849; Farmers' Loan & T. Co. v. Central Park, N. E. & E. R. Co. 113 C. C. A. 591, 193 Fed. 963; Carter v. Brooklyn L. Ins. Co. 110 N. Y. 15, 17 N. E. 396; Kedey v. Petty, 153 Ind. 179, 54 N. E. 798; Lime Rock Bank v. Mallett, 34 Me. 547, 56 Am. Dec. 673; Central Bank v. Willard, 17 Pick. 153; Tannebaum v. Bloomingdale, 27 Misc. 532, 58 N. Y. Supp. 235; Abel v. Phœnix Ins. Co. 47 App. Div. 81, 62 N. Y. Supp. 218; Holloway v. Schmidt, 33 Misc. 747, 67 N. Y. Supp. 169; Strouse v. American Credit Indemnity Co. 91 Md. 244, 46 Atl. 328, 1063; Insurance & Law Bldg. Co. v. National Bank, 71 Mo. 60; Koehler v. Hussey, 22 Ky. L. Rep. 317, 57 S. W. 241; Pitney v. Glen's Falls Ins. Co. 65 N. Y. 6; 3 Cooley, Briefs on Ins. p. 2648.

No waiver of a condition or provision of the policy could result from any fact known to the insurer's agent issuing the policy at the time the policy was issued, the agent being without express authority from the insurer to make the waiver and the written contract providing in substance against this result.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup.

Ct. Rep. 133; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312; Ætna L. Ins. Co. v. Moore, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. Rep. 186; Gish v. Insurance Co. of N. A. 13 L.R.A.(N.S.) 826, note; Industrial Mut. Indemnity Co. v. Thompson, 10 L.R.A.(N.S.) 1064, note; Sharman v. Continental Ins. Co. 167 Cal. 117, 52 L.R.A.(N.S.) 670, 138 Pac. 708.

The written contract whereby the assured agreed that a continuous clear space of 100 feet shall at all times be maintained between the property insured and any woodworking or manufacturing establishment cannot be varied by parol evidence that the assured was not to maintain such continuous clear space.

Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Kupferschmidt v. Agricultural Ins. Co. 80 N. J. L. 441, 34 L.R.A.(N.S.) 503, 78 Atl. 225; Ellison v. Gray, 55 N. J. Eq. 581, 37 Atl. 1018; Keller v. Liverpool & L. & G. Ins. Co. 27 Tex. Civ. App. 102, 65 S. W. 695; England v. Westchester F. Ins. Co. 81 Wis. 583, 51 N. W. 954; Michigan Shingle Co. v. London & L. F. Ins. Co. 91 Mich. 443, 51 N. W. 1111; Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Ins. Soc. 77 C. C. A. 121, 146 Fed. 695.

The insurer elected not to avoid the policy, but treated it as in full force and received new benefits therefrom, and became, as a matter of law, charged with its burdens.

Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500; Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 232, 20 L. ed. 622; Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; State L. Ins. Co. v. Murray, 86 C. C. A. 344, 159 Fed. 408; Murray v. State L. Ins. Co. 151 Fed. 539; Ætna L. Ins. Co. v. Frierson, 51 C. C. A. 424, 114 Fed. 56; Millville Mut. Marine & F. Ins. Co. v. Mechanics' & W. Bldg. & L. Asso. 43 N. J. L. 652; Martin v. Jersey City Ins. Co. 44 N. J. L. 273; Redstrake v. Cumberland Mut. F. Ins. Co. 44 N. J. L. 294; Agricultural Ins. Co. v. Potts, 55 N. J. L. 158, 39 Am. St. Rep. 637, 26 Atl. 27, 537; Ætna Ins. Co. v. Holcomb, 89 Tex. 404, 34 S. W. 915; Wagner v. Westchester F. Ins. Co. 92 Tex. 549, 50 S. W. 569; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705; Security Mut. L. Ins. Co. v. Calvert, 101 Tex. 128, 105 S. W. 320; Equitable Life Assur. Soc. v. Ellis, 105 Tex. 526, 147 S. W. 1152, 152 S. W. 625; Knoebel v. North American Acci. Ins. Co. 135 Wis. 424, 20 L.R.A.(N.S.) 1037, 115 N. W. 1094; Ramsey v. Travelers' Protective Asso. 147 Wis. 405, 133 N. W. 634; O'Neill v. Northern Assur. Co. 155 Mich. 564, 119 N. W. 911; Laxton v. Patrons' Mut. F. Ins. Co. 168 Mich. 448, 134 N. W. 467; Hause v. Standard Acci. Ins. Co. 172 Mich. 59, 137 N. W. 694; Dahrooge v. Sovereign Fire Assur. Co. 175 Mich. 248, 141 N. W. 572.

The proposition advanced is that parol evidence, while not admissible to vary the terms of a written contract, is permissible, and is usually the only evidence to be adduced to establish facts which show that the contract as originally written was subsequently altered, expressly or by necessary implication. The further proposition being that if a contract be "null and void" as written, because of the failure of one of the parties to conform to a stipulation therein, the same may be made effective by any subsequent course of conduct of the party at whose option the contract was "null and void," which signifies an intention to treat the contract as in force. This result attaches to (1) accepting a benefit under the contract to which the party would not be entitled except on the theory that the contract was not "null and void," (2) acquiescence in the other party's course of dealing with the contract on the theory that it was still effective, (3) lulling the other party into that security which the belief that he had the protection afforded by the contract could alone produce, and (4) failure to signify nonacquiescence in the situation when and while benefits are being derived from the contract, and maintaining silence until the time comes to bear a burden imposed by the contract.

London & L. F. Ins. Co. v. Fischer, 34 C. C. A. 503, 92 Fed. 500; Rochester German Ins. Co. v. Schmidt, 151 Fed. 681; State L. Ins. Co. v. Murray, 86 C. C. A. 344, 159 Fed. 408; Farmers' Feed Co. v. Insurance Co. of N. A. 92 C. C. A. 95, 166 Fed. 111; Metropolitan L. Ins. Co. v. Williamson, 98 C. C. A. 90, 174 Fed. 116; Bennett v. Council Bluffs Ins. Co. 70 Iowa, 600, 31 N. W. 948; Hagan v. Merchants' & B. Ins. Co. 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; Hamilton v. Home Ins. Co. 94 Mo. 353, 7 S. W. 261; Phenix Ins. Co. v. Covey, 41 Neb. 724, 60 N. W. 12; Home F. Ins. Co. v. Hammang Bros. 44 Neb. 566, 62 N. W. 883; Allen v. German American Ins. Co. 123 N. Y. 6, 25 N. E. 309; Morrison v. Insurance Co. of N. A. 69 Tex. 353, 5 Am. St. Rep. 63, 6 S. W. 605; Kahn v. Traders' Ins. Co. 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059; Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co. 123 Ala. 667, 26 So. 655; Phœnix Ins. Co. v. Johnston, 143 Ill. 106, 32 N. E. 429; Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30

L.R.A.(N.S.) 539, 127 N. W. 837; Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 8 L.R.A.(N.S.) 708, 74 N. E. 964, 79 N. E. 905; Gray v. National Ben. Asso. 111 Ind. 531, 11 N. E. 477; Traders' Ins. Co. v. Letcher, 143 Ala. 400, 39 So. 271; Phenix Ins. Co. v. Hart, 149 Ill. 513, 36 N. E. 990; New York L. Ins. Co. v. Evans, 136 Ky. 391, 124 S. W. 376; Glasscock v. Des Moines Ins. Co. 125 Iowa, 170, 100 N. W. 503; Polk v. Western Assur. Co. 114 Mo. App. 514, 90 S. W. 397; Horton v. Home Ins. Co. 122 N. C. 498, 65 Am. St. Rep. 717, 29 S. E. 944; Mutual L. Ins. Co. v. French, 30 Ohio St. 240, 27 Am. Rep. 443; German-American Ins. Co. v. Harper, 75 Ark. 98, 86 S. W. 817; Clay v. Phœnix Ins. Co. 97 Ga. 44, 25 S. E. 417; Union Nat. Bank v. Manhattan L. Ins. Co. 52 La. Ann. 36, 26 So. 800; Schmurr v. State Ins. Co. 30 Or. 29, 46 Pac. 363; Arnold v. American Ins. Co. 148 Cal. 660, 25 L.R.A.(N.S.) 6, 84 Pac. 182; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit upon a policy insuring lumber for one year from May 22, 1909. The policy contained a warranty by the assured that a continuous clear space of 100 feet should be maintained between the lumber and the mill of the assured, and also a provision requiring any waivers to be written upon or attached to the instrument. The lumber was burned during the year, but it appeared by the undisputed evidence that the warranty had been broken, and the judge directed a verdict for the defendants. It appeared, however, that the policy was indorsed, "No. 27,868, renewing # 27,566," and the plaintiffs offered to prove that pending the earlier policy the defendants had the report of an inspection that informed them of the actual conditions, showing permanent structures between where some of the lumber was piled and the mill, that made the clear space in this direction less than 100 feet, and that with that knowledge they issued the present policy and accepted the premium. This evidence was excluded, subject to exception. But it was held by the circuit court of appeals that the jury should have been allowed to find whether the defendants had knowledge of the conditions and reasonable expectation that they would [609] continue, and so had waived the warranty. For this reason the judgment was reversed. 122 C. C. A. 346, 204 Fed. 32.

When a policy of insurance is issued, the import of the transaction, as everyone understands, is that the document embodies the contract. It is the dominant, as it purports to be the only and entire, expression of the parties' intent. In the present case this fact was put in words by the proviso for the indorsement of any change of terms. Therefore when, by its written stipulation, the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received. Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso. 203 U. S. 106, 107, 51 L. ed. 109, 111, 27 Sup. Ct. Rep. 27; Connecticut F. Ins. Co. v. Buchanan, 4 L.R.A.(N.S.) 758, 73 C. C. A. 111, 141 Fed. 877, 883. See Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312; Ætna L. Ins. Co. v. Moore, 231 U. S. 543, 559, 58 L. ed. 356, 366, 34 Sup. Ct. Rep. 186. There is no hardship in this rule. No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. The assured also knows better than the insurers the condition of his premises, even if the insurers have been notified of the facts. If he brings to the making of his contract the modest intelligence of the prudent man, he will perceive the incompatibility between the requirement of 100 feet clear space and the possibilities of his yard, in a case like this, and will make a different contract, either by striking out the clause or shortening the distance or otherwise, as may be agreed. The distance of 100 feet that was written into this policy was not a fixed, conventional formula that there would be trouble in changing, if [610] the insured would pay what more, if anything, it might cost. Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.

The plaintiffs try to meet these recognized rules by the suggestion that after a contract is made, a breach of conditions may be waived, "void" only meaning voidable at the option of the insurers (Grigsby v. Russell, 222 U. S. 149, 155, 56 L. ed. 133, 136, 36 L.R.A.(N.S.) 642, 32 Sup.

Ct. Rep. 58, Ann. Cas. 1913B, 863); that this policy was a renewal of a former one, and that the case stands as if, after the breach of warranty had been brought to the notice of the insurers, a premium had been paid and accepted without a new instrument. But what would be the law in the case supposed we need not consider, as in our opinion it is not the one before us. The policy in suit is a document complete in itself. The indorsement that we have quoted is probably only for history and convenient reference. We see no ground for attributing to it any effect upon the contract made. The fact that the policy has a provision for renewal has no bearing, and we do not perceive how it would matter if the previous one had the same. No use was made of the clause. Therefore, in our opinion, the principles that we have laid down apply to the present case (Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union F. Ins. Soc. 77 C. C. A. 121, 146 Fed. 695, 700), and the action of the District Court was right.

Judgment reversed.

The Chief Justice, Mr. Justice McKenna, and Mr. Justice Day are of opinion that the Circuit Court of Appeals properly disposed of the case, and dissent.

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[611] IDA RICHARDSON HOOD and Odile Mussom Hood Holland, Appts.,
v.
J. B. McGEHEE et al.

(See S. C. Reporter's ed. 611–615.)

Judgment — full faith and credit — adoption.

1. Adoption proceedings in Louisiana are not denied the full faith and credit to which they are entitled under U. S. Const. art. 4, § 1, by the provisions of the Alabama statute of descents, under which, as construed by the Alabama courts, children adopted by proceedings in other states are denied the right to take real property in Alabama by descent from their foster parents.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

Parent and child — adoption — effect.

2. Children adopted in Louisiana were given no contract rights to land subsequently acquired in Alabama by their foster parents by virtue of a clause in the instrument of adoption, which was simply the language of adoption used in the duly authorized notarial act, by which the adopting parents bind and obligate themselves to support, maintain, and educate the adopted children as if their own, and "hereby invest them with all the rights and benefits of legitimate children in their estate."

[No. 281.]

Submitted May 13, 1915. Decided June 1, 1915.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Alabama, dismissing the bill in a suit to quiet title. Affirmed.

See same case below, 117 C. C. A. 664, 199 Fed. 989.

The facts are stated in the opinion.

Mr. E. Howard McCaleb submitted the cause for appellants:

In the absence of any settled decision construing state statutes by the highest state court, Federal courts exercise an independent judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of the parties accrued.

Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140.

Recognition of the status of an adopted child, fixed as such by a state court having jurisdiction, is compelled by the full faith and credit clause of the Constitution, and rights of inheritance must be accorded in another state when the latter state has, by statute, recognized such rights of inheritance in adopted children, and where, before such adoption, the heritable rights of such child having accrued, there was no settled decision of the highest state court construing its adoption statute adversely.

Whart. Confl. L. § 25a; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321.

In order to effectuate the intention of the parties to a contract, the state of things, the relation of the parties, their connection with the subject-matter, and the surrounding circumstances, should govern, and such interpretation accorded strongly against the grantor.

Moran v. Prather, 23 Wall. 501, 23 L. ed. 123; Merriam v. United States, 107 U. S. 441, 27 L. ed. 533, 2 Sup. Ct. Rep. 536; United States v. Peck, 102 U. S. 65, 26 L. ed. 47; Bradley v. Washington, A. & G. Steam Packet Co. 13 Pet. 89, 10 L. ed. 72; United States v. Gibbons, 109 U. S. 200, 27 L. ed. 906, 3 Sup. Ct. Rep. 117; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 609, 36 L. ed. 281, 12 Sup. Ct. Rep. 479;

Note.—On the right of child adopted in other state to take under local statute of descent and distribution—see notes to Irving v. Ford, 65 L.R.A. 186; Brown v. Finley, 21 L.R.A.(N.S.) 679; and Finley v. Brown, 25 L.R.A.(N.S.) 1285.

Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 21 L. ed. 64; Crass v. Scruggs, 115 Ala. 264, 22 So. 81; Saunders v. Clark, 29 Cal. 300; Brown v. Slater, 16 Conn. 192, 41 Am. Dec. 136; Cravens v. Eagle Cotton Mills Co. 120 Ind. 9, 21 N. E. 981; Strong v. Gregory, 19 Ala. 149; Field v. Leiter, 118 Ill. 30, 6 N. E. 877; Noonan v. Bradley, 9 Wall. 407, 19 L. ed. 761; Homer v. Schonfeld, 84 Ala. 315, 4 So. 105; Hunter v. McGraw, 32 Ala. 519; Seay v. McCormick, 68 Ala. 549; Livingston v. Arrington, 28 Ala. 424.

Statutory implications are operative only when the deed or instrument fails to contain statutory covenants.

Douglass v. Lewis, 131 U. S. 75, 33 L. ed. 53, 9 Sup. Ct. Rep. 634.

In deeds, the words are to be construed strongly against the party using them, while in respect to statutes in derogation of the common law, they should be construed strictly.

Ibid.

Ineffective adoption proceedings and contract, accompanied by a promise of the adopting parent to leave his estate to the adopted child, will amount to a contract when fully performed by the child, and will be specifically enforced in equity against the collateral heirs of the adopting parent or his legal representative.

Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007; Chehak v. Battles, 133 Iowa, 107, 8 L.R.A.(N.S.) 1136, 110 N. W. 330, 12 Ann. Cas. 140; Winne v. Winne, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; Godine v. Kidd, 29 Abb. N. C. 36, 19 N. Y. Supp. 335; Healy v. Simpson, 55 App. Div. 315, 66 N. Y. Supp. 927, affirmed in 167 N. Y. 572, 60 N. E. 1112; Wright v. Wright, 99 Mich. 170, 23 L.R.A. 196, 58 N. W. 54; Fuselier v. Masse, 4 La. 424; Gall v. Gall, 29 Abb. N. C. 19, 19 N. Y. Supp. 332; Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Kenyon v. Youlen, 53 Hun, 592, 6 N. Y. Supp. 784; Matthews v. Matthews, 62 Hun, 110, 16 N. Y. Supp. 621; Bush v. Whitaker, 45 Misc. 74, 91 N. Y. Supp. 616; Parsell v. Stryker, 41 N. Y. 480; Brown v. Sutton, 129 U. S. 239, 32 L. ed. 666, 9 Sup. Ct. Rep. 273; 3 Parsons, Contr. §§ 405, 406; Schouler, Wills, §§ 452, 454; Waterman, Spec. Perf. § 41; Jaffee v. Jacobson, 14 L.R.A. 352, 1 C. C. A. 11, 4 U. S. App. 4, 48 Fed. 21; Healey v. Simpson, 113 Mo. 340, 20 S. W. 881; Teats v. Flanders, 118 Mo. 660, 24 S. W. 126; Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; Van Tine v. Van Tine, — N. J. —, 1 L.R.A. 155, 15 Atl. 249; Van Dyne v. Vreeland, 11 N. J. Eq. 370; Brown v. Sutton, 129 U. S. 239, 32 L. ed. 666, 9 Sup. Ct. Rep. 273; Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624.

Practical construction of instruments by the parties to them should, in case of doubt as to the meaning of the words used, control the intention of the parties and the meaning of their language.

Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594.

Mr. John P. Tillman submitted the cause for appellees:

Under the statutes of descent in Alabama, as construed by the supreme court of that state, children adopted under statutes of a foreign state do not inherit from adopting parents.

Brown v. Finley, 157 Ala. 424, 21 L.R.A. (N.S.) 679, 131 Am. St. Rep. 68, 47 So. 577, 16 Ann. Cas. 778; Lingen v. Lingen, 45 Ala. 410.

The law of a state in which land is situated controls and governs its transmission by will and its descent in case of intestacy.

Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; DeVaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; Olmsted v. Olmsted, 216 U. S. 386, 54 L. ed. 530, 25 L.R.A.(N.S.) 1292, 30 Sup. Ct. Rep. 292.

The construction placed upon the statutes of descent by the supreme court of Alabama is binding upon the Federal courts.

Middleton v. McGrew, 23 How. 45, 47, 16 L. ed. 403, 404; Gardner v. Collins, 2 Pet. 58, 7 L. ed. 347; Burgess v. Seligman, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Hanrick v. Patrick, 119 U. S. 156, 169, 30 L. ed. 396, 404, 7 Sup. Ct. Rep. 147; Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 73, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; Louisiana v. Pilsbury, 105 U. S. 278, 294, 26 L. ed. 1090, 1095; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1029, 20 Sup. Ct. Rep. 873; Leffingwell v. Warren, 2 Black, 599, 17 L. ed 261; Thompson v. Sloss-Sheffield Steel & I. Co. 126 C. C. A. 564, 209 Fed. 840.

Permitting real estate in Alabama to descend according to the statutes of that state is no denial of full faith and credit to the proceedings of adoption in Louisiana.

Olmsted v. Olmsted, 216 U. S. 386, 54 L. ed. 530, 25 L.R.A.(N.S.) 1292, 30 Sup. Ct. Rep. 292; Clarke v. Clarke, 178 U. S. 186, 190, 44 L. ed. 1028, 1030, 20 Sup. Ct. Rep. 873; Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853.

The adoption proceedings do not operate as an agreement to convey or devise the lands.

2 Pom. Eq. Jur. § 843; Hunt v. Rhodes, 1 Pet. 1, 7 L. ed. 27; Bowins v. English, 138 Mich. 178, 101 N. W. 204; Boardman v. Reed, 6 Pet. 328, 8 L. ed. 415; Heryford v. Davis, 102 U. S. 243, 26 L. ed. 162; Beardsley v. Beardsley, 138 U. S. 266, 34 L. ed. 929, 11 Sup. Ct. Rep. 318; Bell v. Bruen, 1 How. 169, 11 L. ed. 89; Scott v. United States, 12 Wall. 443, 20 L. ed. 438; Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 36 L. ed. 277, 12 Sup. Ct. Rep. 479; Albring v. Ward, 137 Mich. 352, 100 N. W. 609; Davis v. Jones, 94 Ky. 320, 42 Am. St. Rep. 360, 22 S. W. 331; Davis v. Hendricks, 99 Mo. 478, 12 S. W. 887; Clark v. West, 96 Tex. 437, 73 S. W. 797; Sharkey v. McDermott, 91 Mo. 648, 60 Am. Rep. 270, 4 S. W. 107; Tyler v. Reynolds, 53 Iowa, 146, 4 N. W. 902; Shearer v. Weaver, 56 Iowa, 578, 9 N. W. 907; United States Trust Co. v. Hoyt, 150 App. Div. 621, 135 N. Y. Supp. 849.

[614] Mr. Justice Holmes delivered the opinion of the court:

This is a bill to quiet title to land in Alabama. It was dismissed by the circuit court on demurrer and the decree was affirmed without further discussion by the circuit court of appeals. 189 Fed. 205, 117 C. C. A. 664, 199 Fed. 989. The plaintiffs and appellants are children of the late General Hood and were adopted in Louisiana in 1880 by George T. McGehee, who bought the property in question in 1886. The defendants are McGehee's heirs if the Louisiana adoption does not entitle the plaintiffs to the Alabama land. The bill sets up that the adoption did entitle them to it by virtue of article 4, § 1, of the Constitution of the act of Congress in pursuance of the same, entitling the Louisiana record to full faith and credit. By the instrument of adoption the McGehees "bind and obligate themselves to support, maintain and educate [the plaintiffs] as if they were their own children; and hereby invest them with all the rights and benefits of legitimate children in their estate;" and the bill further sets up that the latter clause constituted a contract with the plaintiffs so to invest them. It alleges services as children to McGehee, and also an advance to him of $8,600, being the plaintiffs' share of the Hood Relief Fund collected in the Southern states. Finally a familiar letter of McGehee to the plaintiffs, which has been probated as a will in Mississippi, where McGehee lived, but is not alleged to have been admitted to probate in Alabama, is set forth, *valeat quantum*. It states that, with immaterial exceptions, "everything else of mine is to be yours equally divided," and that the letter will be valid as a will.

The alleged will is relied upon only as confirming the intent supposed to be expressed by the instrument of adoption, and as showing that, if the bill is dismissed, it should be dismissed without prejudice. As there seems to be no ground for supposing that it could take effect on real estate [615] in Alabama, it may be laid on one side. The other contentions were correctly disposed of by Judge Grubb in an accurately reasoned opinion. The Alabama statute of descents as construed by the supreme court of the state excludes children adopted by proceedings in other states. Brown v. Finley, 157 Ala. 424, 21 L.R.A.(N.S.) 679, 131 Am. St. Rep. 68, 47 So. 577, 16 Ann. Cas. 778; Lingen v. Lingen, 45 Ala. 410. There is no ground upon which we can go behind these decisions, and the law, so construed, is valid. The construction does not deny the effective operation of the Louisiana proceedings, but simply reads the Alabama statute as saying that, whatever may be the status of the plaintiffs, whatever their relation to the deceased by virtue of what has been done, the law does not devolve his estate upon them. There is no failure to give full credit to the adoption of the plaintiffs, in a provision denying them the right to inherit land in another state. Alabama is sole mistress of the devolution of Alabama land by descent. Olmsted v. Olmsted, 216 U. S. 386, 54 L. ed. 530, 25 L.R.A.(N.S.) 1292, 30 Sup. Ct. Rep. 292.

The language relied upon as a contract was simply the language of adoption used in the duly authorized notarial act. It had its full effect by constituting the plaintiffs adopted children under the Louisiana law. It gave them whatever rights the Louisiana law attempted and was competent to give them as such children, and it did not purport to do more. As matter of supererogation we may repeat the remark of Judge Grubb that the proceeding gave the children all that was expected at the time, as it was effective in Louisiana and recognized in Mississippi, and that it cannot acquire a greater scope on the strength of a subsequent purchase in Alabama, or from McGehee's mistaken expectation that the land would descend to them.

Decree affirmed.

[616] M. C. H. PARK, Trustee of the Estate of Slayden-Kirksey Woolen Mill, Bankrupt, Plff. in Err.,

v.

W. W. CAMERON and E. R. Bolton.

(See S. C. Reporter's ed. 616-618.)

Bankruptcy — jurisdiction — suit to avoid transfer.

A suit by a trustee in bankruptcy against directors of the bankrupt corporation cannot be regarded as one to recover property fraudulently transferred by the bankrupt, and hence justiciable in a court of bankruptcy under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), §§ 23b, 70e, where the import of the allegations of the bill is not that the corporation has done anything, but that certain of its officers by false pretenses have withdrawn its funds.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 293.]

Submitted May 14, 1915. Decided June 1, 1915.

IN ERROR to the District Court of the United States for the Western District of Texas to review a judgment dismissing a suit by a trustee in bankruptcy to recover funds formerly belonging to the bankrupt. Affirmed.

The facts are stated in the opinion.

Messrs. John Neethe, James D. Williamson, and Rhodes S. Baker submitted the cause for plaintiff in error.

Mr. Charles A. Boynton submitted the cause for defendants in error. Messrs. W. M. Sleeper and Ben G. Kendall were on the brief.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by a trustee in bankruptcy to recover funds formerly belonging to the bankrupt. The district court dismissed the bill for want of jurisdiction. The defendants in error admit that the court had jurisdiction of a suit by the trustee to recover property fraudulently transferred by the bankrupt (§§ 23b, 70e), but deny that this is such a suit. The plaintiff says that it is—so that our decision must rest upon an analysis of the bill. The trouble with it is that the cause of action is not very steadily conceived; [617] but in view of what seem to us the dominant allegations, we are of opinion that the decree was right.

If we stopped with the opening averment, it is uncompromising: that the bankrupt transferred to the defendants, for the purpose of defrauding its creditors, $8,250 in cash. The declaration goes on to tell that the defendants, being largely interested in the bankrupt corporation, bought 275 shares of one Altgeld to prevent the depreciation of the stock on the market; that they sold them to Harris, but had trouble about collecting the price (two notes for $4,125 each, secured by the stock), Harris discovering that he had been overreached; that thereafter the defendants, being directors, conspired with one Kirksey, the general manager, and induced him to make a pretended purchase of the stock, but really for the corporation, and to use in payment for the same $8,250 of the corporation's funds; that the corporation had no funds with which to purchase its own stock, but was heavily involved, and that the sale was void; that the purchase was a pretense to purchase the stock from the defendants, and that $4,125 of the corporation's funds were received by each of them. Then it is alleged that the defendants knew, or ought to have known, that the corporation was not indebted to Kirksey, that it was insolvent, and "that the stock so pretended to be sold by them, either to the said Kirksey, or to the said corporation, was of no value," and that the money received was the property of the bankrupt. So far it might seem that the declaration sustained the plaintiff's contention. But it continues that the corporation did not authorize the foregoing transactions or ratify them, and that the defendants knew it; and "that to conceal said misapplication of funds" the defendants caused entries to be made on the corporation's books, making the transaction appear to be a purchase of the stock by Kirksey, contrary to the facts, "and the defendants knew said S. F. Kirksey, Jr., was not to repay said funds to said corporation," [618] and the liability was not intended to be a bona fide one, and afterwards, pursuant to the conspiracy, was canceled and retired. The other allegations are not material to the question before us. Those that we have recited seem to us in their conclusion to import not that the corporation has done anything, but that certain of its officers, by false pretenses, have withdrawn its funds. If so, the suit is not to avoid a transfer by the bankrupt of its property, but a suit against wrongdoers, who have appropriated it without the bankrupt's assent, and therefore not within §§ 23b and 70e of the act.

Judgment affirmed.

G. & C. MERRIAM COMPANY, Appt.,
v.
SYNDICATE PUBLISHING COMPANY.

(See S. C. Reporter's ed. 618–624.)

Appeal — from circuit court of appeals — jurisdiction below.

1. A decree of a Federal circuit court of appeals affirming the dismissal in a district court of a suit to restrain the use of the name "Webster," as applied to the sale of dictionaries of the English language, is not appealable to the Federal Supreme Court on the theory that the jurisdiction below was not solely dependent upon diverse citizenship, where the bill rests upon allegations tending to establish unfair competition in trade, which contained no element of a cause of action arising under the Federal Constitution or laws, and upon trademarks having the word "Webster" as their chief characteristic, registered, under the act of March 3, 1881 (21 Stat. at L. 502, chap. 138), long after the expiration of the copyright securing to the publishers the exclusive right to publish the Webster dictionaries, and under the act of February 20, 1905 (33 Stat. at L. 724, chap. 592, Comp. Stat. 1913, § 9485), which contains provisions making the jurisdiction of the circuit courts of appeals final.

[For other cases, see Appeal and Error, 768–784, in Digest Sup. Ct. 1908.]

Trademarks — registration — effect of expiration of copyright.

2. After the expiration of the copyright securing to the publishers the exclusive right to publish the Webster dictionaries, the further use of the word "Webster" to designate dictionaries of the English language could not be acquired by registration as a trademark, as the word had become public property.

[For other cases, see Trademarks, II. in Digest Sup. Ct. 1908.]

[No. 217.]

Argued April 14, 1915. Decided June 1, 1915.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing the bill in a suit to restrain the use of the name "Webster" as applied to dictionaries of the English language. Dismissed for want of jurisdiction.

See same case below, 125 C. C. A. 177, 207 Fed. 515.

The facts are stated in the opinion.

Note.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605, and Roman Catholic Church v. Pennsylvania R. Co. *ante*, 1119.

Mr. William B. Hale argued the cause and filed a brief for appellant:

The bill alleges and claims rights under the act of 1881, under which complainant's basic and broadest trademarks are registered. Accordingly an appeal lies herein as a matter of right.

Street v. Atlas Mfg. Co. 231 U. S. 348, 58 L. ed. 262, 34 Sup. Ct. Rep. 73; Baglin v. Cusenier Co. 221 U. S. 580, 55 L. ed. 863, 31 Sup. Ct. Rep. 669; Jacobs v. Beecham, 221 U. S. 263, 55 L. ed. 729, 31 Sup. Ct. Rep. 555; Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 55 L. ed. 536, 31 Sup. Ct. Rep. 456; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79.

Where there is general Federal jurisdiction of the whole case because of diverse citizenship, and also a Federal question arising under the trademark laws giving a right of appeal to this court, the whole case comes up for review, and this court has, and will exercise, jurisdiction to determine the question of unfair competition. and all other questions arising upon the record, regardless of its determination of the questions of validity and infringement of trademark.

Baglin v. Cusenier Co. 221 U. S. 580, 55 L. ed. 863, 31 Sup. Ct. Rep. 669; Jacobs v. Beecham, 221 U. S. 263, 55 L. ed. 729, 31 Sup. Ct. Rep. 555; Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 55 L. ed. 536, 31 Sup. Ct. Rep. 456; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79.

The principle is the same as in cases of direct appeals where a constitutional question is involved. In such cases this court has jurisdiction to determine every question arising upon the record,—non-Federal as well as Federal questions, and is not limited to a determination of the constitutional question.

Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

The general rule is that, if the cause of action is based upon a Federal statute, an appeal lies to this court from the decree of the circuit court of appeals.

Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

The fact that infringement of registered trademarks was added to the bill by amendment does not make the decision of the circuit court of appeals final.

Vicksburg v. Henson, 231 U. S. 259, 58 L. ed. 209, 34 Sup. Ct. Rep. 95.

Mr. Hugh A. Bayne argued the cause and filed a brief for appellee:

This court has no jurisdiction to entertain this appeal unless the name "Webster's" was entitled to registration as a trademark under the act of March 3, 1881.

Street v. Atlas Mfg. Co. 231 U. S. 348, 58 L. ed. 262, 34 Sup. Ct. Rep. 73; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

On the face of appellant's bill and exhibits, the name "Webster's" was not subject to appropriation as a trademark, nor entitled to protection as such, under the act of 1881.

Merriam v. Holloway Pub. Co. 43 Fed. 450; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 192, 41 L. ed. 127, 16 Sup. Ct. Rep. 1002; Merriam v. Famous Shoe & Clothing Co. 47 Fed. 411; Merriam v. Texas Siftings Pub. Co. 49 Fed. 944; G. & C. Merriam Co. v. Straus, 136 Fed. 477; Ogilvie v. G. & C. Merriam Co. 149 Fed. 858, 16 L.R.A.(N.S.) 549, 88 C. C. A. 596, 159 Fed. 638, 14 Ann. Cas. 796, 95 C. C. A. 423, 170 Fed. 167; G. & C. Merriam v. Saalfield, 111 C. C. A. 517, 190 Fed. 927, 117 C. C. A. 245, 198 Fed. 369.

Messrs. Wade H. Ellis, R. Golden Donaldson, Hugh A. Bayne, and Challen B. Ellis also filed a brief for appellee.

Mr. Justice Day delivered the opinion of the court:

This suit was brought by complainant to enjoin the defendant from the use of the name "Webster" as a trademark and tradename, when applied to the sale of dictionaries of the English language. A decree was entered dismissing the bill in the United States district court (125 C. C. A. 177, 207 Fed. 515). This decree was affirmed upon appeal [620] to the circuit court of appeals for the second circuit (125 C. C. A. 177, 207 Fed. 515), and from the latter decree an appeal was taken to this court.

The original bill set up at great length the origin and history of the Webster dictionary publications, the succession of the complainant to the ownership of the rights of publication, and the various copyrights which had been taken out from time to time to protect the use of the name "Webster," as applied to dictionaries of the English language, and facts were set out in detail concerning the various publications which the complainant and its predecessors had made from time to time. The bill, in its original form, relied upon the secondary meaning which, it was alleged, the history of the publications had established in the name "Webster," as applied to English dictionaries, and it was alleged that the exclusive right to use that name in such connection had become the property of the complainant, and entitled it to protection against those who used the word in such manner as to cause their publications to be purchased as and for the publications of the complainant. It was charged that the respondent belonged to the class of persons wrongfully using the name thus acquired, and facts in detail were set forth to support this contention of unfair competition in trade. After the bill was filed an amendment was added setting up the ownership in complainant of certain trademarks, duly registered in the Patent Office of the United States, in accordance with the statutes in such case made and provided. The amendment alleges the registration of two trademarks under the act of 1881 (21 Stat. at L. 502, chap. 138), and of eight trademarks under the act of 1905 (33 Stat. at L. 724, chap. 592, Comp. Stat. 1913, § 9485), and it was charged that the defendant used and imitated the complainant's trademarks upon Webster's dictionaries, by affixing the word "Webster" to dictionaries in a manner closely imitating complainant's registered trademarks or one of [621] them, the natural tendency of such acts being to deceive the public and to pass off defendant's dictionaries as and for the dictionaries of the complainant. The prayer of the bill was amended so as to ask relief by injunction against the defendant from in any manner copying, imitating, or infringing any of complainant's registered trademarks. The bill as amended therefore rested upon (1) allegations tending to establish unfair competition in trade, (2) trademarks registered under the act of 1881, and (3) trademarks registered under the act of 1905.

A motion to dismiss the appeal was made and passed for consideration to the argument upon the merits, which has now been had.

The circuit court of appeals' decree, affirming the decree of the district court, was final unless, in addition to the allegations of diverse citizenship which were contained in the bill, there was an averment of a cause of action and consequent basis of jurisdiction arising under the Constitution or statutes of the United States. Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704. If the jurisdiction of the district court was invoked on the ground of diversity of citizenship, and the averment as to a right arising under the Federal Constitution or statutes was unsubstantial and without real merit, either because of its frivolous character upon its

face, or from the fact that reliance was based upon a claim of Federal or statutory right denied by former adjudications of this court, then the appeal to this court must be dismissed. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123.

So far as concerns the allegations of unfair competition in trade, upon which the bill mainly rests, such averments contain no element of a cause of action arising under the Federal Constitution or statutory law. The registered trademarks, and essential part of which covers the use of [622] the word "Webster" as applied to dictionaries of the English language, were registered, some under the act of 1881 and some under the act of 1905. In the latter act there is a recognition of the right to obtain a trademark upon a proper name, when the same has been in use for ten years under conditions named in the statute. That act was before this court in Thaddeus Davids Co. v. Davids, 233 U. S. 461, 58 L. ed. 1046, 34 Sup. Ct. Rep. 648, and the distinction between it and former acts was pointed out, particularly in that the act of 1905 gave the right to the use of ordinary surnames as a trademark, which right did not exist under the prior legislation. The act of 1905 contains provisions making the jurisdiction of the circuit court of appeals final. Street v. Atlas Mfg. Co. 231 U. S. 348, 58 L. ed. 262, 34 Sup. Ct. Rep. 73.

The act of 1881 expressly denied the right of an applicant to obtain a trademark upon his own name, and gave no recognition to the right to a trademark in a proper name, nor did it confer authority to register such name and thereby acquire a right not recognized at common law. Brown Chemical Co. v. Meyer, 139 U. S. 540, 542, 35 L. ed. 247, 248, 11 Sup. Ct. Rep. 625; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 134, 135, 49 L. ed. 972, 984, 25 Sup. Ct. Rep. 609.

Moreover, it appears upon the face of the bill that the registration of the trademarks relied upon, having the name "Webster" as applied to dictionaries of the English language as their chief characteristic, was made long after the expiration of the copyright securing to the publishers the exclusive right to publish the Webster dictionaries. After the expiration of a copyright of that character, it is well settled that the further use of the name by which the publication was known and sold under the copyright cannot be acquired by registration as a trademark; for the name has become public property, and is not subject to such appropriation. Such was the decision of Mr. Justice Miller, sitting at circuit, in the first of what may be called the Webster Dictionary Cases,—Merriam v. [623] Holloway Pub. Co. 43 Fed. 450. In that case, the learned justice in vigorous terms denied the right to appropriate as a trademark the designation "Webster's Dictionary" after the expiration of the copyright. To the same effect is Merriam v. Famous Shoe & Clothing Co. 47 Fed. 411. These cases were cited with approval in the opinion in Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002, in which case the subject was fully considered, and the cases, American and foreign, were reviewed; the conclusion being reached that on the expiration of a patent there passed to the public not only the right to make the machine in the form covered by the letters patent, but along with the public ownership of the device described there necessarily passed to the public the generic designation of the thing which had arisen during the life of the monopoly. As the cases cited in the opinion in that case show, this doctrine is no less applicable to the expiration of a copyright, upon the termination of which there passes to the public the right to use the generic name by which the publication has been known during the existence of the exclusive right conferred by the copyright. In the Singer Case, at page 202, the same doctrine was applied to a trademark containing the word "Singer" and attempted to be used as one of the constituent elements of a trademark.

In that case while the right of another, after the expiration of the monopoly, to use the generic designation, was recognized, it was also stated that its use must be such as not to deprive the original proprietor of his rights, or to deceive the public, and that such use of the name must be accompanied with indications sufficient to show that the thing manufactured or sold is the work of the one making it, so that the public may be informed of that fact,—this latter consideration arising from the use of the name as designating the production of the original owner, and in order to prevent confusion and unfair trade, and [624] the wrongful appropriation of another's rights. As we have already said, the feature of the case involving unfair competition in trade came within the jurisdiction of the district court because of diverse citizenship, and the right of appeal was limited to the circuit court of appeals.

From what has been said, it follows that

the name "Webster" was not subject to appropriation or registration as a trademark, under the act of 1881, and the contention to the contrary as a basis for jurisdiction in the district court was devoid of substantial merit and was foreclosed by previous decisions of this court. In reaching this conclusion, we have not overlooked the cases relied upon by the complainant, cited in opposition to the motion to dismiss for want of jurisdiction, in which this court has held that where jurisdiction was invoked upon diverse citizenship and also because of alleged rights arising from the Federal trademark statute of 1881, this court has jurisdiction upon appeal from the circuit court of appeals,—Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 55 L. ed. 536, 31 Sup. Ct. Rep. 456; Baglin v. Cusenier Co. 221 U. S. 580, 55 L. ed. 863, 31 Sup. Ct. Rep. 669; Jacobs v. Beecham, 221 U. S. 263, 55 L. ed. 729, 31 Sup. Ct. Rep. 555. These cases are readily distinguishable from the one at bar, in which there was an attempt to register and obtain a statutory trademark upon a proper name, which registration was also long after the expiration of the copyright embodying the same designation as its distinguishing feature.

It follows that this appeal must be dismissed for want of jurisdiction.

Dismissed.

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[625] GEORGE EBELING, Appt.,

v.

THOMAS W. MORGAN, Warden of the United States Penitentiary at Leavenworth, Kansas.

(See S. C. Reporter's ed. 625–631.)

Criminal law — continuing or separate offenses.

Each successive cutting into the different mail bags with intent to rob or steal the mail therefrom by a person who, in the same transaction, tears or cuts successively a number of such bags with intent to rob or steal any of the mail, is a distinct offense punishable under the Federal Criminal Code, § 189, which provides for the punishment of anyone who "shall tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail . . . with intent to rob or steal any such mail."

[For other cases, see Criminal Law, I. g, in Digest Sup. Ct. 1908.]

[No. 736.]

Argued and submitted April 7, 1915. Decided June 1, 1915.

APPEAL from the District Court of the United States for the District of Kansas to review an order refusing to issue a writ of habeas corpus. Affirmed.

The facts are stated in the opinion.

Messrs. **Frans E. Lindquist** and **William P. Borland** submitted the cause for appellant. Messrs. Martin J. Ostergard, Charles S. McLane, Edwin J. Shannahan, Oscar F. Wimmer, Herman D. Kissenger, Leonard Waddell, Luther N. Dempsey, and Ira S. Gardner were on the brief:

The court had no jurisdiction to impose more than one sentence.

Crepps v. Durden, Cowp. pt. 2, p. 640; Re Snow, 120 U. S. 283, 284, 30 L. ed. 662, 7 Sup. Ct. Rep. 556; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Halligan v. Wayne, 102 C. C. A. 410, 179 Fed. 112; Munson v. McClaughry, 42 L.R.A. (N.S.) 302, 117 C. C. A. 180, 198 Fed. 72; Stevens v. McClaughry, 51 L.R.A.(N.S.) 390, 125 C. C. A. 102, 207 Fed. 18; O'Brien v. McClaughry, 126 C. C. A. 540, 209 Fed. 816.

The six counts charge but one offense.

Com. v. Prescott, 153 Mass. 396, 26 N. E. 1005; Hurst v. State, 86 Ala. 604, 11 Am. St. Rep. 79, 6 So. 120; People v. Stephens, 79 Cal. 428, 4 L.R.A. 845, 21 Pac. 856; State v. Larson, 85 Iowa, 659, 52 N. W. 539; Storrs v. State, 3 Mo. 9; Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179; State v. Daniels, 32 Mo. 558; State v. Wagner, 118 Mo. 626, 24 S. W. 219; State v. O'Connell, 144 Mo. 393, 46 S. W. 175; State v. Maggard, 160 Mo. 469, 83 Am. St. Rep. 483, 61 S. W. 184, 14 Am. Crim. Rep. 437; State v. Soper, 207 Mo. 502, 106 S. W. 3; State v. Egglesht, 41 Iowa, 574, 20 Am. Rep. 612; People v. Van Keuren, 5 Park. Crim. Rep. 66; State v. Benham, 7 Conn. 414; Furnace v. State, 153 Ind. 93, 54 N. E. 441; State v. Colgate, 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346, 5 Am. Crim. Rep. 71; Nichols v. Com. 78 Ky. 180; Wilson v. State, 45 Tex. 76, 23 Am. Rep. 602, 2 Am. Crim. Rep. 356; State v. Williams, 10 Humph. 101; State v. Moore, 86 Minn. 422, 61 L.R.A. 819, 90 N. W. 787; People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; People v. Stephens, 79 Cal. 428, 4 L.R.A. 845, 21 Pac. 856; Fisher v. Com, 1 Bush, 211, 89 Am. Dec. 620; State v. Larson, 85 Iowa, 659, 52 N. W. 539; Vining v. State, — Tex. Crim. Rep. —, 146 S. W. 909; State v. Sampson, 157 Iowa, 257, 42 L.R.A.(N.S.) 967, 138 N. W. 473; Com. v. Prescott, 153 Mass. 396, 26 N. E. 1005; Hurst v. State, 86 Ala. 604, 11 Am. St. Rep. 79, 6 So. 120.

Assistant Attorney General **Wallace** argued the cause and field a brief for appellee:

The unit of offense under § 189 of the Criminal Code is the breaking into the mail bag with intent to rob it of its contents.

1 Whart. Crim. Law, 11th ed. § 34; Re Hartley, 31 L. J. Mag. Cas. N. S. 232; Re Henry, 123 U. S. 372, 374, 31 L. ed. 174, 175, 8 Sup. Ct. Rep. 142; United States v. Clark, 125 Fed. 93; Walker v. United States, 81 C. C. A. 111, 152 Fed. 113; Chadwick v. United States, 72 C. C. A. 343, 141 Fed. 225; Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 103, 55 L. ed. 384, 387, 31 Sup. Ct. Rep. 368; State v. Broeder, 90 Mo. App. 169; State v. Heard, 107 La. 60, 31 So. 384; State v. Shafer, 20 Kan. 226; Benson v. State, — Tex. Crim. Rep. —, 44 S. W. 168; People v. New York C. R. Co. 13 N. Y. 78; Chicago & A. R. Co. v. People, 82 Ill. App. 679; Southern R. Co. v. State, 165 Ind. 613, 75 N. E. 272.

The unit of offense being the breach of a bag, there can be no identity of offense in the breach of successive bags.

Carter v. McClaughry, 183 U. S. 365, 394, 46 L. ed. 236, 250, 22 Sup. Ct. Rep. 181; Burton v. United States, 202 U. S. 344, 377, 50 L. ed. 1057, 1069, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; Gavieres v. United States, 220 U. S. 338, 342-344, 55 L. ed. 489-491, 31 Sup. Ct. Rep. 421.

Mr. Justice Day delivered the opinion of the court:

The appellant, Ebeling, was convicted in the United States district court for the eastern district of Missouri of violations of § 189 of the Criminal Code [35 Stat. at L. 1124, chap. 321, Comp. Stat. 1913, § 10,359]. The indictment contains seven counts. The second, third, fourth, fifth, sixth, and seventh charge that, on the 21st day of January, 1910, said Ebeling did wilfully, knowingly, and feloniously tear, cut, and injure a certain bag then and there used for the conveyance of mails of the United States, each count describing the mail pouch so torn, cut, and injured by its lock and rotary number, and in each count it was alleged that the pouch in such count [628] named was in a certain railway postal car, then and there in transit on a certain railroad, and that the act was done with intent to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the pouch. Ebeling entered a plea of guilty, and was sentenced to pay a fine of $500 and be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a period of three years on the second count; and a like fine and imprisonment were imposed because of each the third, fourth, fifth, sixth, and seventh counts, to run consecutively with the sentence under the second count; but it was provided that the imprisonment as to the seventh count should begin, run, and terminate concurrently with the sentences imposed under the other counts, making in all a period of fifteen years' imprisonment. Ebeling, having served the sentence of three years imposed under the second count, applied to the district court of the United States for the district of Kansas for a writ of habeas corpus to procure his release from further imprisonment, upon the ground that he had endured all the punishment that could be legally imposed upon him by imprisonment under said indictment. The district court denied the application, and refused to issue the writ, and appeal was then prosecuted to this court.

This case raises the question whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a single offense, or of additional offenses because of each successive cutting with the criminal intent charged. If the successive cuttings into the different bags constitute different offenses, then the court below was right in refusing the writ of habeas corpus. If but a single offense was committed, notwithstanding separate mail bags were successively cut with the felonious intent named in the statute, then the appellant was entitled to the writ, and should have been discharged by order of the court upon the proceedings below.

[629] Section 189, under which this indictment was prosecuted, provides:

"Whoever shall tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break any staple or loosen any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both."

Reading the statute with a view to ascertaining its meaning, it is apparent that it undertakes to make an offender of anyone who shall cut, tear, or otherwise injure any mail bag, or who shall draw or break any staple or loosen any part of any lock, chain, or strap attached thereto, with the felonious intent denounced by the statute. These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut, or injured, the offense is complete. Although the transaction of cutting the mail bags was in a sense continuous, the complete statutory offense was committed every time a mail

bag was cut in the manner described, with the intent charged. The offense as to each separate bag was complete when that bag was cut, irrespective of any attack upon, or mutilation of, any other bag. The words are so plain as to require little discussion or further amplification to ascertain their meaning. The separate counts each charged by its distinctive number the separate bag, and each time one of them was cut there was, as we have said, a separate offense committed against the statute. Congress evidently intended to protect the mail in each sack, and to make an attack thereon in the manner described a distinct and separate offense.

The case is not like those charges of continuous offenses [630] where the crime is necessarily, and because of its nature, a single one, though committed over a period of time. Such is the English case of Crepps v. Durden, Cowp. pt. 2, p. 640, wherein Lord Mansfield held that one who was charged with exercising his ordinary trade on the Lord's Day could not be convicted of separate offenses because of a number of acts performed on that day which made up the offense of exercising his trade. It was there said that every stitch that a tailor takes and everything that a shoemaker or carpenter may do for different customers at different times on the same Sunday did not constitute separate offenses, for the offense was one and entire of exercising the trade and calling upon the Lord's Day, and the object of the legislation was to punish a man for exercising his trade on Sunday, and not to make a separate offense of each thing he did in the exercise of that trade. So, in Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556, where an attempt was made to divide into separate periods of time the offense of continuous cohabitation with more than one woman, when the facts showed that there was but one offense committed between the earliest day charged and the end of the continuing time attempted to be charged in separate indictments. These and similar cases are but attempts to cut up a continuous offense into separate crimes in a manner unwarranted by the statute making the offense punishable.

As we interpret the statute, the principle applied in Gavieres v. United States, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421, is applicable, where this court held that when, in the same course of conduct, and upon the same occasion, certain rude and boisterous language was used, and an officer insulted, two offenses were committed, separate in their character, and this, notwithstanding the transaction was one and the same. The principle stated by the supreme judicial court of Massachusetts, in Morey v. Com, 108 Mass. 433, was applied, where it was held that a conviction upon one indictment would not bar a conviction and sentence [631] upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact, and it was there declared that a single act might be an offense against each statute, if each required proof of an additional fact which the other did not, and that conviction and punishment under one does not exempt the defendant from conviction and punishment under the other statute.

So, here, proof of cutting and opening one sack completed the offense, and although defendant continued the operation by cutting into other sacks, proof of cutting one sack would not have supported the counts of the indictment as to cutting the others; nor was there that continuity of offense which made the several acts charged against the defendant only one crime.

We find no error in the judgment of the District Court, and the same is affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[632] T. W. MORGAN, Warden of the United States Penitentiary at Leavenworth, Kansas, Appt.,

v.

ALFONSO J. DEVINE, alias Ollie Devine, and Charles Pfeiffer, alias Chilli Pfeiffer.

(See S. C. Reporter's ed. 632-642.)

Criminal law — continuous or separate offenses.

1. Persons who steal postage stamps and postal funds from a postoffice of the United States after having burglariously entered such postoffice with intent to commit a larceny therein commit two distinct offenses, which may be separately charged and punished under the provisions of U. S. Penal Code, § 190, making it a criminal offense to steal any mail bag or other property belonging to the Postoffice Department, and of § 192, declaring that whoever shall forcibly break into or attempt to break into any postoffice with intent to commit therein

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NOTE.—On the right to convict for several offenses growing out of the same facts —see note to Hughes v. Com. 31 L.R.A. (N.S.) 693.

On former jeopardy, generally—see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenburg v. Com. 4 L.R.A. 543; Ex parte Lange, 21 L. ed. U. S. 872; United States v. Perez, 6 L. ed. U. S. 165; and Silsby v. Foote, 14 L. ed. U. S. 394.

any larceny or other depredation shall be punished by fine and imprisonment.

[For other cases, see Criminal Law, I. g, in Digest Sup. Ct. 1908.]

Criminal law — former jeopardy — identity of offenses.

2. The conviction and sentence as for two distinct offenses, of persons who steal postage stamps and postal funds from a postoffice of the United States, having first burglariously entered the postoffice with intent to commit a larceny therein, do not put them twice in jeopardy within the meaning of U. S. Const., 5th Amend., since the offenses, though committed in the same transaction, are made separate and distinct by the provisions of U. S. Penal Code, § 190, making it a criminal offense to steal any mail bag or other property belonging to the Postoffice Department, and of § 192, declaring that whoever shall forcibly break into or attempt to break into any postoffice with intent to commit therein any larceny or other depredation shall be punished by fine and imprisonment.

[For other cases, see Criminal Law, II. in Digest Sup. Ct. 1908.]

[No. 685.)

Submitted April 7, 1915. Decided June 1, 1915.

APPEAL from the District Court of the United States for the District of Kansas to review an order granting a discharge on habeas corpus. Reversed and remanded with instructions to dismiss the petition.

The facts are stated in the opinion.

Assistant Attorney General **Wallace** submitted the cause for appellant:

If, at the time of breaking into a postoffice, with intent to commit larceny (in violation of § 192, Penal Code), the entrant continues the transaction and actually steals property (in violation of § 190, same Code), he has committed two offenses.

1 Bishop, New Crim. Law, § 1053, p. 630; Ex parte Peters, 2 McCrary, 403, 12 Fed. 461; Anderson v. Moyer, 193 Fed. 499; Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; Carter v. McClaughry, 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181; Morey v. Com. 108 Mass. 433; Gavieres v. United States, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421.

Mr. **A. E. Dempsey** submitted the cause for appellees. Messrs. Turner W. Bell and Robert B. Troutman were on the brief:

Separate punishments cannot be inflicted for offenses of the same nature, committed at the same time, or as a part of the same continuing criminal act.

Munson v. McClaughry, 42 L.R.A.(N.S.) 202, 117 C. C. A. 180, 198 Fed. 72; Stevens v. McClaughry, 51 L.R.A.(N.S.) 390, 125 C. C. A. 102, 207 Fed. 18; O'Brien v. McClaughry, 126 C. C. A. 540, 209 Fed. 816; Halligan v. Wayne, 102 C. C. A. 410, 179 Fed. 112; Triplett v. Com. 84 Ky. 193, 1 S. W. 84; 1 Bishop, New Crim. Law, § 1062; Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640; Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; State v. Lewis, 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741; State v. Mikesell, 70 Iowa, 176, 30 N. W. 474; State v. Ingles, 3 N. C. (2 Hayw.) 4; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672.

If the statutes require proof of the same ingredients in each crime, the accused can be placed in jeopardy but once for these ingredients, although it be necessary to prove some additional elements and facts in order to sustain the second charge.

Bell v. State, 103 Ga. 397, 68 Am. St. Rep. 102, 30 S. E. 294.

The felonious intent was necessary to the conviction on the larceny count.

Sorenson v. United States, 94 C. C. A. 181, 168 Fed. 785.

There is another rule which makes the crimes of burglary and larceny the same by nature, and that is the fact that they may be joined in the same count of the same indictment.

United States v. Yennie, 74 Fed. 221; State v. McClung, 35 W. Va. 280, 13 S. E. 654; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340.

Mr. Justice **Day** delivered the opinion of the court:

This case was submitted at the same time with number 736, just decided [237 U. S. 625, ante, 1151, 35 Sup. Ct. Rep. 710], and involves to a considerable extent the same questions. The appellees, Devine and Pfeiffer, pleaded guilty to an indictment containing two counts in the district court of the United States for the eastern division of the southern district of Ohio, the first count being under § 192 of the Penal Code [35 Stat. at L. 1125, chap. 321, Comp. Stat. 1913, § 10,362], charging that the appellees did, on the 13th of January, 1911, in the county of Delaware, in the state of Ohio, unlawfully and forcibly break into and enter a building used in whole as a postoffice of the United States, with the intent then and there to commit larceny in such building and postoffice, to wit, to steal and purloin property and funds then and there in use by and belonging to the Postoffice Department of the United States. The second count was drawn under § 190 of the Penal Code, charging that the appellees, on the same date and at the same place, did un-

lawfully and knowingly steal, purloin, take, and convey away certain property and moneys of the United States, then and there in use by and belonging to the Postoffice Department of the United States, to wit, postage stamps and postal funds, etc. One was sentenced to confinement in the United States Penitentiary at Leavenworth, Kansas, for four years on the first count, and for two years on the second count of the indictment, the sentence to be cumulative, and not concurrent. The other appellee was likewise sentenced for three and one-half [637] years' imprisonment and a fine of $100 on the first count, and two years on the second count. It is admitted that the acts set forth in the second count were performed by the appellees in the postoffice under the burglarious entry charged in the first count. Having served the larger part of their sentences under the first count, appellees filed their petition in the district court of the United States for the district of Kansas, asking for a writ of habeas corpus, and to be discharged from confinement at the expiration of the sentence under the first count. The district court, believing the case to be controlled by the case of Munson v. McClaughry, 42 L.R.A.(N.S.) 302, 117 C. C. A. 180, 198 Fed. 72, decided by the circuit court of appeals for the eighth circuit, entered an order discharging the appellees from imprisonment at the expiration of their term of confinement under the first count of the indictment.

It is the contention of the appellees that protection against double jeopardy set forth in the 5th Amendment to the Constitution of the United States required their discharge, because the several things charged in the two counts were done at the same time and as a part of the same transaction.

The statutes under which the indictment was found are as follows:

"Sec. 190. Whoever shall steal, purloin, or embezzle any mail bag or other property in use by or belonging to the Postoffice Department, or shall appropriate any such property to his own or any other than its proper use . . . shall be fined not more than $200, or imprisoned not more than three years, or both."

"Sec. 192. Whoever shall forcibly break into, or attempt to break into any postoffice . . . with intent to commit in such postoffice . . . any larceny or other depredation, shall be fined not more than $1,000, and imprisoned not more than five years."

Whether, under these sections of the statute, two offenses [638] in the same transaction may be committed and separately charged and punished, has been the subject of consideration in the Federal courts, and the cases in those courts are in direct conflict. In Halligan v. Wayne (C. C. A. 9th C.) 102 C. C. A. 410, 179 Fed. 112, and Munson v. McClaughry, supra, it was held that upon conviction on an indictment containing two counts, one charging burglary with intent to commit larceny, and the other larceny, upon a general verdict of guilty, there can be but a single sentence, and that for the burglary only; and that after the defendant has served a sentence for that offense he is entitled to release on habeas corpus. The rule has been held to be otherwise in Ex parte Peters (C. C. W. D. Mo.) 2 McCrary, 403, 12 Fed. 461, and in Anderson v. Moyer (D. C. N. D. Ga.) 193 Fed. 499.

We think it is manifest that Congress, in the enactment of these sections, intended to describe separate and distinct offenses, for in § 190 it is made an offense to steal any mail bag or other property belonging to the Postoffice Department, irrespective of whether it was necessary, in order to reach the property, to forcibly break and enter into a postoffice building. The offense denounced by that section is complete when the property is stolen, if it belonged to the Postoffice Department, however the larceny be attempted. Section 192 makes it an offense to forcibly break into or attempt to break into a postoffice, with intent to commit in such postoffice a larceny or other depredation. This offense is complete when the postoffice is forcibly broken into, with intent to steal or commit other depredation. It describes an offense distinct and apart from the larceny or embezzlement which is defined and made punishable under § 190. If the forcible entry into the postoffice has been accomplished with the intent to commit the offenses as described, or any one of them, the crime is complete, although the intent to steal or [639] commit depredation in the postoffice building may have been frustrated or abandoned without accomplishment. And so, under § 190, if the property is in fact stolen, it is immaterial how the postoffice was entered, whether by force or as a matter of right, or whether the building was entered into at all. It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses. Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself. This is the result of the authorities as stated in Mr. Bishop in his new work on Criminal Law, 8th ed.:

"If in the night a man breaks and enters a dwelling house to steal therein, and steals,

he may be punished for the two offenses or one, at the election of the prosecuting power. An allegation simply of breaking, entering, and stealing states the burglary in a form which makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. But equally well a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate thing, and thereon the defendant may be convicted and sentenced for both." Vol. 1, § 1062, p. 638.[1] "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; [640] when there could not, it can be." Section 1052, p. 630.

That the two offenses may be joined in one indictment is made plain by § 1024 of the Revised Statutes of the United States, Comp. Stat. 1913, § 1690, which provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them consolidated."

The reason for the rule that but a single offense is committed and subject to punishment is stated in Munson v. McClaughry, supra, as follows:

"A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post-office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act."

But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress. In Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, the defendant was charged in separate counts with receiving compensation in violation of the act, and also agreeing to receive compensation in violation of the same statute. In that case the contention was that the defendant could not legally be indicted for two separate offenses, one agreeing to receive compensation, [641] and the other receiving such compensation, in violation of the statute, but this court held that the statute was so written, and said:

"There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. In this case, the subject-matter of the sixth count, which charged an agreement to receive $2,500, was more extensive than that charged in the seventh count, which alleged the receipt of $500. But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. 'It is the legislature, not the court, which is to define a crime, and ordain its punishment.' United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. ed. 37, 42; Hackfeld & Co. v. United States, 197 U. S. 442, 450, 49 L. ed. 826, 829, 25 Sup. Ct. Rep. 456."

As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to Carter v. McClaughry, 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181; Burton v. United States, 202 U. S. 344, 377,

[1] This view was held in the following state cases:

Wilson v. State, 24 Conn. 57; Dodd v. State, 33 Ark. 517; Speers v. Com. 17 Gratt. 570; State v. Hackett, 47 Minn. 425, 28 Am. St. Rep. 380, 50 N. W. 472; Josslyn v. Com. 6 Met. 236; State v. Ingalls, 98 Iowa, 728, 68 N. W. 445; Gordon v. State, 71 Ala. 315; Clark v. State, 59 Tex. Crim. Rep. 246, 29 L.R.A.(N.S.) 323, 128 S. W. 131; State v. Hooker, 145 N. C. 581, 59 S. E. 866; People v. Parrow, 80 Mich. 567, 45 N. W. 514; State v. Martin, 76 Mo. 337, 4 Am. Crim. Rep. 134.

50 L. ed. 1057, 1069, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, and the recent case of Gavieres v. United States, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421.

[642] It follows that the judgment of the District Court, discharging the appellees, must be reversed, and the case remanded to that court with instructions to dismiss the petition.

Reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

GLENN R. BOTHWELL, Plff. in Err.,
v.
BINGHAM COUNTY, Idaho, et al.

(See S. C. Reporter's ed. 642–648.)

Taxes — Federal property — arid lands.

Proceedings for the acquisition of title to arid lands under the Carey act of August 18, 1894 (28 Stat. at L. 422, chap. 301, Comp. Stat. 1913, § 4685), § 4, and the amendatory acts of June 11, 1896 (29 Stat. at L. 434, chap. 420), and March 3, 1901 (31 Stat. at L. 1188, chap. 853, Comp. Stat. 1913, § 4687), § 3, have reached the point where the land may be taxed by the state when nothing remains to be done by the entryman in order to entitle him to a patent, and the United States has no longer any beneficial interest in the land, having patented the same to the state, which has received the legal title as trustee for the entryman, but has not yet discharged its duty to give him a patent.

[For other cases, see Taxes, I. c, 2, b, in Digest Sup. Ct. 1908.]

[No. 266.]

Argued May 6, 1915. Decided June 1, 1915.

IN ERROR to the Supreme Court of the State of Idaho to review a decree which affirmed a decree of the District Court for Bingham County, in that state, in favor of defendants in a suit to enjoin a proposed sale for taxes. Affirmed.

See same case below, 24 Idaho, 125, 132 Pac. 972.

The facts are stated in the opinion.

Mr. William A. Lee argued the cause, and, with Messrs. Jedediah D. Skeen, William H. Wilkins, and Edward B. Critchlow, filed a brief for plaintiff in error:

The Constitution of the state of Idaho provides that the property of the United States, the state, counties, towns, cities, and other municipal corporations, and public libraries, shall be exempt from taxation. This constitutional provision but affirms the law of the United States.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670.

The principle is qualified, however, to the extent that where the United States holds only the naked legal title to the land, and the full equitable title has passed by the performance of every act going to the foundation of the right, the land is subject to state taxation.

Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Central Colorado Improv. Co. v. Pueblo County, 95 U. S. 259, 24 L. ed. 495; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

It follows that if, as in this case, the United States conveys land to a state in trust for a specific purpose, something more than a mere naked title is retained until the trust is fully executed by the trustee. Every act going to the foundation of the right is not performed until the trustee divests itself of the trust property, and in this case it could be done only by the issuance of patent.

Tucker v. Ferguson, 22 Wall. 572, 22 L. ed. 815.

The issuance of the patent by the United States to the state of Idaho did not terminate the control over the land by the United States. By the terms of the grant its control was continued until actually disposed of by the issuance of the patents to the individual entrymen. While it continued to hold the title in trust, appeals to the Interior Department might have been made by the entrymen, and during the course of such appeals, action by the state land board, acting for the trustee, would have been stayed.

McDaid v. Oklahoma, 150 U. S. 209, 37 L. ed. 1055, 14 Sup. Ct. Rep. 59; Sioux City & St. P. R. Co. v. United States, 159 U. S. 350, 40 L. ed. 177, 16 Sup. Ct. Rep. 17.

Mr. William A. Lee also filed a separate brief for plaintiff in error:

The mere fact that a complainant accepted and recorded a deed purporting to convey to it lands, the legal and equitable title to which were both, in fact, in the United States, does not estop it to maintain a suit in equity to enjoin the collection of taxes levied on said lands by the taxing officers of the county.

Clearwater Timber Co. v. Nez Perce County, 155 Fed. 633; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612.

The status of property within the state for purposes of taxation is fixed on the second Monday in January, and real estate exempt from taxation on the second Monday of January of any given year does not be-

come subject to taxation during that year even though transferred to a person in whose hands it is no longer exempt under the law.

Clearwater Timber Co. v. Nez Perce County, supra.

When the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property, then the donee or purchaser will be treated as the beneficial owner of the land, and the same shall be held subject to taxation as his property.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17; Sioux City & St. P. R. Co. v. Osceola County, 43 Iowa, 318.

But where lands have been granted by Congress to the state to aid in the construction of internal improvements, with conditions annexed to the grant, the issuance of patent by the state is the only competent evidence that the lands have been earned, and such lands are not taxable until such patents have been issued.

Iowa Falls & S. C. R. Co. v. Cherokee County, 37 Iowa, 483; Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 17 L. ed. 147; United States v. Michigan, 190 U. S. 279, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742; Wisconsin C. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833.

Before land granted or sold by the United States can be taxed by the state or other local taxing body as the property of the beneficial owner, a perfect equitable title must be vested, and the consideration and other conditions of the grant or sale fully paid and performed. As long as the government retains the legal title as security for any part of the purchase money, or to secure the performance of other conditions of the grant or sale, the land is not subject to taxation.

Pitts v. Clay, 27 Fed. 635; United States v. Milwaukee, 100 Fed. 828; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612; Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Central Colorado Improv. Co. v. Pueblo County, 95 U. S. 259, 24 L. ed. 495; Northern P. R. Co. v. Traill County (Northern P. R. Co. v. Rockne) 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201; State v. Itasca Lumber Co. 100 Minn. 355, 111 N. W. 276.

Under the laws of Idaho, as construed by numerous decisions of the supreme court of that state, public lands cannot be taxed while the title of the same remains vested in the state.

State v. Stevenson, 6 Idaho, 367, 55 Pac. 886; Salisbury v. Lane, 7 Idaho, 373, 63 Pac. 383; Inland Lumber & Timber Co. v. Thompson, 11 Idaho, 522, 114 Am. St. Rep. 274, 83 Pac. 933, 7 Ann. Cas. 862.

The subsequent completion of the works and the furnishing of an ample supply of water for their reclamation late in 1910 could not relate back to the certificate and make it effective for any purpose.

Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; State v. Itasca Lumber Co. 100 Minn. 355, 111 N. W. 276.

Mr. R. W. Adair and Mr. J. H. Peterson, Attorney General of Idaho, argued the cause, and, with Mr. E. G. Davis, filed a brief for defendants in error:

Plaintiff in error is estopped from asserting the insufficiency of the representations upon which he obtained title to his land.

Kirk v. Hamilton, 102 U. S. 68, 26 L. ed. 79; Maricopa & P. R. Co. v. Arizona, 156 U. S. 347, 39 L. ed. 447, 15 Sup. Ct. Rep. 391; Sample v. Barnes, 14 How. 70, 14 L. ed. 330; Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; United States v. Memphis, 97 U. S. 284, 24 L. ed. 937; Cavender v. Cavender, 114 U. S. 464, 29 L. ed. 212, 5 Sup. Ct. Rep. 955; McGillin v. Bennett, 132 U. S. 445, 33 L. ed. 422, 10 Sup. Ct. Rep. 122.

It being admitted that at the time this patent was issued the plaintiff in error had made all payments and performed all acts necessary to entitle him to patent, and the state having accepted the proof of reclamation and settlement, it is entirely clear that the plaintiff in error was, on the day the patent was issued by the United States, the equitable owner of his land, and that the naked legal title only was in the state of Idaho, as agent for the Federal government in transferring patent to the plaintiff in error. This being true, and the equitable title having passed to the plaintiff in error by the performance of every act going to the foundation of the right, the land was on that date subject to state taxation.

Northern P. R. Co. v. Patterson, 154 U. S. 130, 38 L. ed. 934, 14 Sup. Ct. Rep. 977; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Northern P. R. Co. v. Clark, 153 U. S. 252, 38 L. ed. 706, 4 Inters. Com. Rep. 641, 14 Sup. Ct. Rep. 809; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit to enjoin a proposed sale

for taxes of 150 acres of land in Idaho acquired under the Carey act of August 18, 1894, 28 Stat. at L. 422, chap. 301, § 4, Comp. Stat. 1913, § 4685, and the amendatory [645] acts of June 11, 1896, 29 Stat. at L. 434, chap. 420, and March 3, 1901, 31 Stat. at L. 1188, chap. 853, § 3, Comp. Stat. 1913, § 4687, the objection urged against the sale being that the proceedings for the acquisition of the title had not at the time of the tax assessment reached the point where the land could be taxed by the state. At a hearing upon an agreed statement of facts the defendants prevailed and the supreme court of the state affirmed the judgment. 24 Idaho, 125, 132 Pac. 972.

The tract was part of upwards of 50,000 acres of arid lands which were segregated from the public domain in July, 1899, pursuant to an agreement, sanctioned by the Carey act, whereby the state engaged to have the lands irrigated, reclaimed, and brought under cultivation, and to dispose of them only to actual settlers in tracts of not exceeding 160 acres. Originally the act required that the reclamation be accomplished within ten years after the date of the act, but the amendment of 1901 directed that the ten years be computed from the approval of the state's application for the segregation, and empowered the Secretary of the Interior, in his discretion, to prolong the period five years.

In the original act there was a provision that "as fast as any state may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed and settled," and the amendment of 1896 brought into the act a further provision that "when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state without regard to settlement or cultivation."

Following the segregation in 1899 the state took appropriate steps to provide canals and a supply of water [646] whereby the lands could be irrigated, reclaimed, and brought under cultivation, and before December, 1910, caused to be completed a suitable system of canals actually furnishing an ample supply of water to irrigate and reclaim 49,858.16 acres, including the tract in question. Proof of this was made to the Secretary of the Interior in the mode prescribed by existing regulations (see 26 Land Dec. 74; 37 Land Dec. 624, 631), and that officer, finding the proof sufficient, directed that the 49,858.16 acres be patented to the state. This direction was given December 21, 1910, and the patent was issued January 9, 1911.

While the canal system was in process of completion, and after water was provided for some of the lands, the plaintiff, who possessed the necessary qualifications and had acquired the requisite perpetual water right, applied to the state to make entry of the tract in question and made the prescribed preliminary payments. See Idaho Rev. Codes 1908, § 1626. The entry was allowed and the plaintiff settled upon the tract, made it his place of residence, irrigated and reclaimed it, and brought it under actual cultivation. Thereafter, on June 25, 1909, he submitted to the state due proof of what he had done, paid the balance of the purchase price, and received from the state a certificate of final entry. See Rev. Codes, § 1628. Nothing more was required of him by the Carey act, by the law of Idaho, or by any regulation made under either. He received a patent from the state February 11, 1911, about a month after it received one from the United States.

January 9, 1911, the day the state received a patent from the United States, was the date as of which property was required by the law of Idaho to be assessed for taxation for the ensuing year. Rev. Codes, § 1653. This tract was so assessed, and the tax in question was based upon that assessment. The assessment, the tax, and the intended sale were all free from objection, if the tract was [647] within the taxing power of the state on January 9, 1911.

At that time the United States no longer had any beneficial interest in the tract. Every condition upon which the ownership was to be transferred to the plaintiff had been fully performed. Thus the equitable title had passed to him and he had a present right to the legal title. The state received the latter as a trustee for him and was in duty bound to give him a patent,—a duty which it promptly discharged, although not until after the time for the assessment.

Neither the Carey act nor the agreement thereunder with the state purported to exempt the land from taxation, or to take it out of the settled rule respecting the taxing of lands acquired under the public land laws. According to that rule, as this court frequently has said, when the proceedings for the acquisition of the title have reached the point where nothing more remains to be done by the entryman, and the government no longer has any beneficial interest in the land, and does not exclude the entryman from the use of it, he is regarded as the

beneficial owner and the land as subject to taxation, even though the duty of passing the legal title to him has not been discharged,—the principle underlying the rule being that one who has acquired the beneficial ownership of the land, and is not excluded from its enjoyment, cannot be permitted to use the fact that the naked legal title remains in the government to avoid his just share of state taxation. Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 505, 33 L. ed. 687, 692, 10 Sup. Ct. Rep. 341; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 530, 40 L. ed. 247, 249, 16 Sup. Ct. Rep. 83; Hussman v. Durham, 165 U. S. 144, 147, 41 L. ed. 664, 665, 17 Sup. Ct. Rep. 253; Sargent v. Herrick, 221 U. S. 404, 406, 55 L. ed. 787, 788, 31 Sup. Ct. Rep. 574.

That the title was being passed through the state to the entryman or purchaser rather than by a direct conveyance is immaterial, the determinative fact being the [648] absence of any beneficial interest in the land on the part of the United States at the time of the assessment. It follows that no Federal law or right was infringed by the tax.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

J. T. CRAFT, Administrator, etc.

(See S. C. Reporter's ed. 648–661.)

Evidence — sufficiency — conscious suffering.

1. The jury reasonably could find that a railway employee endured conscious pain and suffering during the half hour which he survived after a car had passed partly over his body, where there was evidence that while he was pinned beneath the car he was "groaning every once in a while," and that during the efforts of others to extricate him from his position "he would raise his arm" and "try to pull himself."

[For other cases, see Evidence, XII. f. in Digest Sup. Ct. 1908.]

Damages — under Federal employers' liability act — conscious suffering.

2. Such pain and suffering as are substantially contemporaneous with death, or are mere incidents to it, as well as the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), amending the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), by providing that any right of action given by that act to the person suffering injury shall survive to the personal representative for the benefit of the same beneficiaries in whose behalf the right of action created by the original act is given, but that there shall be only one recovery for the same injury.

[For other cases, see Damages, VI. j, in Digest Sup. Ct. 1908.]

Damages — under Federal employers' liability act — conscious suffering — pecuniary loss to beneficiary.

3. The recovery in an action brought by the personal representative of a deceased railway employee under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), may include both damages for the decedent's conscious pain and suffering during the period intervening between fatal injuries and death, and damages for the pecuniary loss sustained by the relative or next of kin for whose benefit the action is brought, in view of the provision of the amendatory act that any right of action given by the original act to a person suffering injury shall survive to the personal representative for the benefit of the same beneficiaries in whose behalf the right of action for death is given, although the amendment concludes with the clause, "but in such cases there shall be only one recovery for the same injury."

[For other cases, see Damages, VI. j, in Digest Sup. Ct. 1908.]

Error to the state court — scope of review — excessive verdict.

4. The excessiveness of an award for pain and suffering of a deceased railway employee in an action brought under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), is a question of fact which is not open to revision in the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

[No. 776.]

Argued May 12, 1915. Decided June 1, 1915.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which modified, and affirmed as modified, a judgment of the Circuit Court of Jackson County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, — Ark. —, L.R.A. —, —, 171 S. W. 1185.

The facts are stated in the opinion.

Mr. Troy Pace argued the cause, and, with Messrs. E. B. Kinsworthy and Edward J. White, filed a brief for plaintiff in error:

There can be only one action for damages caused by the wrongful act of another.

Holton v. Daly, 106 Ill. 131; Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; McCarthy v. Chicago, R. I. & P. R. Co. 18 Kan. 46, 26 Am. Rep. 742; Martin v. Missouri P. R. Co. 58 Kan. 475, 49 Pac. 605, 3 Am. Neg Rep. 165; Hulbert v. Topeka, 34 Fed. 510; Conner v. Paul, 12 Bush, 144; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236; Hendricks v. American Exp. Co. 138 Ky. 704, 32 L.R.A.(N.S.) 867, 128 S. W. 1089; Henderson v. Kentucky C. R. Co. 86 Ky. 389, 5 S. W. 875; McCafferty v. Pennsylvania R. Co. 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693; Edwards v. Gimbel, 202 Pa. 30, 51 Atl. 357; Fritz v. Western U. Teleg. Co. 25 Utah, 263, 71 Pac. 209; Consolidated Coal Co. v. Dombroski, 106 Ill. App. 641; Hartigan v. Southern P. Co. 86 Cal. 142, 24 Pac. 851; Munro v. Pacific Coast Dredging & Reclamation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; Andrews v. Hartford & N. H. R. Co. 34 Conn. 57; Putman v. Southern P. Co. 21 Or. 239, 27 Pac. 1033; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Daubert v. Western Meat Co. 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244; Wood v. Gray [1892] A. C. 576, 67 L. T. N. S. 628; St. Louis, I. M. & S. R. Co. v. Needham, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371; McGovern v. New York C. & H. R. R. Co. 67 N. Y. 417; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291.

There was not sufficient proof of conscious suffering.

Carolina R. Co. v. Shewalter, 128 Tenn. 363, 161 S. W. 1136; Sweetland v. Chicago & G. T. R. Co. 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648; Tiffany, Death by Wrongful Act, § 74; Kearney v. Boston & W. R. Corp. 9 Cush. 108; Kennedy v. Standard Sugar Refinery, 125 Mass. 90, 28 Am. Rep. 214; Tully v. Fitchburg R. Co. 134 Mass. 499; St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Mulchahey v. Washburn Car Wheel Co. 145 Mass. 281, 1 Am. St. Rep. 458, 14 N. E. 106; The Corsair (Barton v. Brown) 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949; Burch v. St. Louis, I. M. & S. R. Co. 108 Ark. 396, 158 S. W. 139.

The verdict is excessive.

St. Louis, I. M. & S. R. Co. v. Stamps, 84 Ark. 241, 104 S. W. 1114; St. Louis, I. M. & S. R. Co. v. Pate, 90 Ark. 136, 118 S. W. 260; St. Louis, I. M. & S. R. Co. v. Scott, 102 Ark. 417, 144 S. W. 917; St. Louis, I. M. & S. R. Co. v. Robertson, 103 Ark. 361, 146 S. W. 482; Chicago, R. I. & P. R. Co. v. White, — Ark. —, 165 S. W. 627; The Robert Graham Dun, 17 C. C. A. 90, 33 U. S. App. 297, 70 Fed. 270.

Mr. William E. Richardson argued the cause, and, with Messrs. Jackson H. Ralston, Gustave Jones, and Lon L. Campbell, filed a brief for defendant in error:

The term "injury" designates the result of the wrongful act rather than the act itself.

Thornton v. Thornton, 63 N. C. 211; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; State v. Reddington, 7 S. D. 368, 64 N. W. 170; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; State v. Moore, 69 N. H. 99, 39 Atl. 584.

The amendment permits one recovery upon these two combined causes of action.

Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Cain v. Southern R. Co. 199 Fed. 211; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; St. Louis & S. F. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93; Kansas City Southern R. Co. v. Leslie, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834.

On writ of error to the highest court of a state, the findings of fact of the state court are accepted as conclusive.

Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; Jenkins v. Neff, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; Gardner v. Bonestell, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Thayer v. Spratt, 189 U. S. 346, 47 L. ed.

845, 23 Sup. Ct. Rep. 576; Quimby v. Boyd, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147.

Moreover, it is held that the verdict of a jury settles all questions of fact on a writ of error from this court to a state court.

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Shauer v. Alterton, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442.

This rule also applies to the question whether the evidence was sufficient to be submitted to the jury for decision.

Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 72.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action under the employers' liability act of April 22, 1908, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657, and the amendment of April 5, 1910, 36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662, by an administrator to recover for injuries to and the death of his intestate. The action was for the benefit of the father, there being no surviving widow, child, or mother, and the damages sought were for (a) pecuniary loss to the father by reason [654] of the death and (b) conscious pain and suffering of the decedent before the injuries proved fatal. In the trial court the plaintiff had a verdict and judgment awarding $1,000 for the pecuniary loss to the father and $11,000 for the pain and suffering of the decedent, and the supreme court of the state, after reducing the latter sum to $5,000, affirmed the judgment, L.R.A. —, —, 171 S. W. 1185.

Without questioning that the evidence justified an assessment of damages for the father's pecuniary loss, the defendant insists, as it did in both state courts, that the recovery could not include anything for pain and suffering of the decedent, first, because there was no evidence that he endured any conscious pain or suffering, and, second, because the statute requires that the recovery in such cases be restricted to either the pecuniary loss to the designated beneficiaries or the damage sustained by the injured person while he lived, and does not permit a recovery for both.

The first objection must, as we think, be overruled. The record discloses that the decedent survived his injuries more than a half hour, and that they were such as were calculated to cause him extreme pain and suffering, if he remained conscious. A car passed partly over his body, breaking some of the bones, lacerating the flesh and opening the abdomen, and then held him fast under the wheels with a brake rod pressing his face to the ground. It took fifteen minutes to lift the car and release his body, and fifteen minutes more to start him to the hospital in an ambulance. It was after this that he died, the time not being more definitely stated. As to whether he was conscious and capable of suffering pain the evidence was conflicting. Some of the witnesses testified that he was "groaning every once in a while," and that when they were endeavoring to pull him from under the car "he would raise his arm" and "try to pull himself," while others testified that they did not notice these indications [655] of consciousness, and that he seemed to be unconscious from the beginning. The jury found that he was conscious, and both state courts accepted that solution of the dispute. Of course, the question here is not which way the evidence preponderated, but whether there was evidence from which the jury reasonably could find that while he lived he endured conscious pain and suffering as a result of his injuries. That question, we are persuaded, must be answered in the affirmative. But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here. The Corsair (Barton v. Brown), 145 U. S. 335, 348, 36 L. ed. 727, 731, 12 Sup. Ct. Rep. 949; Kearney v. Boston & W. R. Corp. 9 Cush. 108; Kennedy v. Standard Sugar Refinery, 125 Mass. 90, 28 Am. Rep. 214; Tully v. Fitchburg R. Co. 134 Mass. 499, 504; Mulchahey v. Washburn Car Wheel Co. 145 Mass. 281, 1 Am. St. Rep. 458, 14 N. E. 106; St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1, 4, 56 S. W. 46; Burch v. St. Louis, I. M. & S. R. Co. 108 Ark. 396, 408, 158 S. W. 139.

By the common law the death of a human being, although wrongfully caused, affords no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured. Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 756, 24 L. ed. 580, 582; The Harrisburg, 119 U S. 199, 204, 213, 30 L. ed. 358, 359, 362, 7 Sup. Ct. Rep. 140; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.), 151 U. S. 673, 697, 38 L. ed. 311, 320, 14 Sup. Ct. Rep. 533; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 67, 68, 57 L. ed. 417, 420, 421, 33 Sup. Ct. Rep. 192. Therefore in cases like this the right of recovery depends entirely upon statute law. Here the state statute is not applicable because superseded

ed, as respects the class of cases to which this one belongs, by the Federal employers' liability act. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53–55, 56 L. ed. 327, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep, 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 67, 68, 57 L. ed. 417, 420, 421, 33 Sup. Ct. Rep. 192; St. Louis, S. F. & T. [656] R. Co. v. Seale, 229 U. S. 156, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436. So, it is by that act that we must test the objection that the recovery could not include damages for the decedent's conscious pain and suffering along with damages for the father's pecuniary loss.

The original act was adopted by Congress April 22, 1908. In its 1st section it provides for two distinct rights of action based upon altogether different principles, although primarily resting upon the same wrongful act or neglect. It invests the injured employee with a right to such damages as will compensate him for his personal loss and suffering,—a right which arises only where his injuries are not immediately fatal. And where his injuries prove fatal, either immediately or subsequently (Michigan C. R. Co. v. Vreeland, 227 U. S. 68, 57 L. ed. 421, 33 Sup. Ct. Rep. 192; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 238, 38 L. ed. 422, 424, 14 Sup. Ct. Rep. 579), it invests his personal representative, as a trustee for designated relatives, with a right to such damages as will compensate the latter for any pecuniary loss which they sustain by the death. At first there was no provision for a survival of the right given to the injured person, and so, under the operation of the rule of the common law, it would die with him.

Of the right given to the personal representative we said in the Vreeland Case, p. 68: "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only." And in American R. Co. v. Didricksen, 227 U. S. 145, 149, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224, we said, referring to the original act: "The cause of action which was created in behalf of the injured employee did not survive [657] his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."

If the matter turned upon the original act alone it is plain that the recovery here could not include damages for the decedent's pain and suffering, for only through a provision for a survival of his right could such damages be recovered after his death. But the original act is not alone to be considered. On April 5, 1910, prior to the decedent's injuries, the act was "amended by adding the following section:"

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

No change was made in § 1. Taylor v. Taylor, 232 U. S. 363, 370, 58 L. ed. 638, 641, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436. It continues, as before, to provide for two distinct rights of action: one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person "shall survive" to his personal representative "for the benefit of" the same relatives in whose behalf the other right is given. Brought into the [658] act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives, and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid

to the relatives indicated. And when this provision and § 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong. Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; Com. v. Metropolitan R. Co. 107 Mass. 236; Bowes v. Boston, 155 Mass. 344, 349, 15 L.R.A. 365, 29 N. E. 633; Stewart v. United Electric Light & P. Co. 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Nemecek v. Filer & S. Co. 126 Wis. 71, 105 N. W. 225; [659] Eichorn v. New Orleans & C. R. Light & P. Co. 112 La. 236, 104 Am. St. Rep. 437, 36 So. 335; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537.

Much stress is laid upon the concluding clause in the new section, "but in such cases there shall be only one recovery for the same injury." Passing and reserving the question of its application where there has been a recovery by the decedent in his lifetime (see Michigan C. R. Co. v. Vreeland, supra, p. 70), we think this clause, as applied to cases like the present, is not intended to restrict the personal representative to one right to the exclusion of the other, or to require that he make a choice between them, but to limit him to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action. This view gives full effect to every word in the clause, and ascribes to it a reasonable purpose without bringing it into conflict with other provisions the terms of which are plain and unequivocal. Had Congress intended that the personal representative should make an election between the two rights of action and sue upon one only, it is not easy to believe that it would have chosen the words in this clause to express that intention.

In Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1, an injured employee brought an action under the statute to recover for his injuries, and shortly thereafter died by reason of them. The action was revived in the name of his personal representative, and by an amended and supplemental petition damages were sought for the suffering of the deceased while he lived, and also for the pecuniary loss to his widow and children by his death. Over an objection that there should be an election between the two rights of action, the plaintiff secured a verdict and judgment assessing the total damages at $9,576.80, being $936.80 on the first right of action and $8,640 on the second. The recovery was sustained by the circuit court of appeals [660] for the ninth circuit, the court saying that "the plain meaning" of the new section is that damages for the deceased's personal loss and suffering and for the pecuniary loss to the designated beneficiaries by the death, "not only may be recovered by the personal representative of the deceased in one action, but *must* be recovered in one action only, if at all." So far as we are advised by the reported decisions, this is the view which has been taken by all the courts, Federal and state, that have had occasion to consider the question.

A brief reference to the particular circumstances in which the new section was adopted will show that they give material support to the conclusion to which we come after considering its terms.

The original act, as we have said, made no provision for the survival of the right of action given to the injured person, although such a provision existed in the statutes of many of the states. Shortly after the act two cases arose thereunder in each of which the personal representative of an injured employee, who died from his injuries, sought to recover damages for the employee's personal loss and suffering while he lived as well as for the pecuniary loss to the beneficiaries named in the act. In both cases—one in the circuit court for the western district of Arkansas and the other in the circuit court for the district of Massachusetts—the right of the injured employee would have survived if the local statutes were applicable, and the ruling in both was that the Federal act was exclusive and superseded the local statutes, that it made no provision for a survival, and therefore that the recovery should be confined to damages for the pecuniary loss resulting to the designated beneficiaries from the death. Fulgham v. Midland Valley R. Co. 167 Fed. 660; Walsh v. New York, N. H. &

H. R. Co. 173 Fed. 494. Following these decisions the amendment embodying the new section was proposed in Congress. In reporting upon it the [661] Committees on the Judiciary in the Senate and House of Representatives referred at length to the opinions delivered in the two cases, to the absence from the original act of a provision for a survival of the employee's right of action, and to the presence of such a provision in the statutes of many of the states, and then recommended the adoption of the amendment, saying that the act should be made "as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the states, which are superseded in their operation by force of the Federal legislation upon the subject." Senate Report No. 432, 61st Cong. 2d Sess. pp. 12–15; House Report No. 513, 61st Cong. 2d Sess. pp. 3–6. While these reports cannot be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted.

For these reasons we think the second objection is not tenable.

Finally, it is said that the award of $5,000 as damages for pain and suffering, even though extreme, for so short a period as approximately thirty minutes, is excessive. The award does seem large, but the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here. New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 31, 25 L. ed. 531, 534; Supreme Justices v. Murray (Supreme Justices v. United States), 9 Wall. 274, 19 L. ed. 658; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. ed. 71, 80, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690; Herencia v. Guzman, 219 U. S. 44, 55 L. ed. 81, 31 Sup. Ct. Rep. 135; Southern Railway-Carolina Division v. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566.

Judgment affirmed.

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[662] HARTFORD LIFE INSURANCE COMPANY, Hartford, Conn., Plff. in Err.,

v.

ELIZA IBS.

(See S. C. Reporter's ed. 662–674.)

Judgment — full faith and credit — representative suit — identity of issues.

A decree of a court of the home state of a life insurance company issuing benefit certificates on the assessment plan by which it is adjudged, in a suit brought against the company by a number of certificate holders for the benefit of all, that the company had the right to make advances from its mortuary fund to pay death claims, and to replenish the fund by collections from a subsequent assessment upon its members, is denied the full faith and credit to which it is entitled by U. S. Const., art. 4, § 1, where a court of another state excludes such decree from evidence in a suit which a beneficiary not a party to the former suit brings against the company upon a certificate, and in which the beneficiary's reply to the company's defense of a forfeiture for nonpayment of an assessment is that such assessment was void because the mortuary fund was sufficient to pay all the claims which the assessment was levied to meet.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

[No. 213.]

Argued March 19, 1915. Decided June 1, 1915.

IN ERROR to the District Court in and for the County of Ramsey in the State of Minnesota to review a judgment affirmed by the Supreme Court of the state in favor of plaintiff in an action upon a benefit certificate issued by a life insurance company. Reversed.

See same case below, 121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798.

The facts are stated in the opinion.

Mr. Frederick W. Lehmann argued the cause, and, with Messrs. James C. Jones and George F. Haid, filed a brief for plaintiff in error:

The issue as to the right and propriety of maintaining a mortuary fund was involved in both the Connecticut and the Minnesota cases.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662.

NOTE.—Generally as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

On the effect of assessment on stockholders, made under order of court in another state, as *res judicata*—see note to Mutual F. Ins. Co. v. Phœnix Furniture Co. 34 L.R.A. 694.

The plaintiff in the Minnesota case stood as to the Connecticut case in privity with her husband, and he was by representation a party to the Connecticut case.

Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942; Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; 2 Perry, Tr. § 885; 2 Beach, Tr. § 498; Scott v. Donald, 165 U. S. 116, 41 L. ed. 654, 17 Sup. Ct. Rep. 262.

The Connecticut court was a competent jurisdiction to determine the question of the right of the company to maintain the mortuary fund, and its decree was binding upon the company and all its members.

Condon v. Mutual Reserve Fund Life Asso. 89 Md. 99, 44 L.R.A. 149, 73 Am. St. Rep. 169, 42 Atl. 944; Clark v. Mutual Reserve Fund Life Asso. 14 App. D. C. 154, 43 L.R.A. 390; Taylor v. Mutual Reserve Fund Life Asso. 97 Va. 60, 45 L.R.A. 621, 33 S. E. 375; State ex rel. Hartford L. Ins. Co. v. Shain, 245 Mo. 78, 149 S. W. 479.

The Minnesota court did not give full faith and credit to the judicial proceedings in Connecticut, and refused to give any effect whatever to the decree of the Connecticut court.

Nations v. Johnson, 24 How. 195, 16 L. ed. 628; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Mutual Ins. Co. v. Harris, 97 U. S. 331, 24 L. ed. 959; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; Selig v. Hamilton, 234 U. S. 652, 58 L. ed. 1518, 34 Sup. Ct. Rep. 926.

The privity between the parties involved here is a privity of contract, and if no privity existed between them, Mrs. Ibs would not be entitled to maintain this suit.

Monaghan v. Agricultural F. Ins. Co. 53 Mich. 244, 18 N. W. 797; Hartley v. Phillips, 198 Pa. 13, 47 Atl. 929.

The insured was bound by the Connecticut decree.

Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Hawkins v. Glenn, 131 U. S. 319, 329, 33 L. ed. 184, 191, 9 Sup. Ct. Rep. 739; Howarth v. Lombard, 175 Mass. 570, 47 L.R.A. 301, 56 N. E. 888; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Beals v. Illinois, M. & T. R. Co. 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314.

Messrs. James C. Jones, John M. Holmes, and George F. Haid also filed a brief for plaintiff in error in opposition to a motion to dismiss or affirm.

Mr. O. E. Holman argued the cause, and, with Mr. C. D. O'Brien, filed a brief for defendant in error:

The Federal questions claimed to be involved are frivolous and unsubstantial, and the petition for the writ must necessarily have been made for the purpose of delay.

Douglas v. Wallace, 161 U. S. 346, 40 L. ed. 727, 16 Sup. Ct. Rep. 485; Lowe v. Williams, 94 U. S. 650, 24 L. ed. 216; Ruckman v. Bergholz, 131 U. S. cxliii, Appx. and 23 L. ed. 1008; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 344, 46 L. ed. 941, 22 Sup. Ct. Rep. 691; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Chanute v. Trader, 132 U. S. 212, 33 L. ed. 345, 10 Sup. Ct. Rep. 67.

The defendant in error was not in privity with her husband, the insured.

24 Am. & Eng. Enc. Law, 2d ed. 750; Union Cent. L. Ins. Co. v. Buxer, 62 Ohio St. 385, 49 L.R.A. 737, 57 N. E. 66; Central Nat. Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; Equitable Life Assur. Soc. v. Patterson, 1 Fed. 126; Jurgens v. New York L. Ins. Co. 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; Bigelow v. Old Dominion Copper Min. & S. Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875; Hart v. Moulton, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 601; 23 Cyc. 1253–1261.

The insured was not a party to the Connecticut suit by representation.

Re Strauts, 126 N. Y. 201, 27 N. E. 259; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843; Carey v. Brown, 92 U. S. 171, 23 L. ed. 469; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182; 23 Cyc. 1246; Re Howard, 9 Wall. 175, 19 L. ed. 634; Williams v. Gribbes, 17 How. 239, 15 L. ed. 135.

Neither the beneficiary nor the insured was bound by the Connecticut decrees; neither was served with process therein, either personal or constructive; nor did either appear.

Empire Twp. v. Darlington, 101 U. S. 87, 25 L. ed. 878; Webster v. Reid, 11 How. 437, 13 L. ed. 761; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Boswell v. Otis, 9 How. 348, 13 L. ed. 169; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

The issues in the two actions were not the same.

Vicksburg v. Henson, 231 U. S. 259, 58 L. ed. 209, 34 Sup. Ct. Rep. 95; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Johnson v. Hartford L. Ins. Co. 166 Mo. App. 261, 148 S. W. 631.

The Minnesota court was at liberty to determine for itself the jurisdictional questions whether, under the general law, the defendant in error was a party to the Dresser suit, and whether the issues in the two suits were the same, and was under no

obligation to treat the Connecticut decrees as a bar or estoppel to this action.

Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875.

The decision of the supreme court of Minnesota is not against the title, privilege, or immunity especially set up or claimed by the plaintiff in error under the United States Constitution.

Blount v. Walker, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606.

Mr. Justice Lamar delivered the opinion of the court:

On April 4, 1885, the Hartford Life Insurance Company issued to Herman Ibs a certificate of membership in its Safety Fund Department which was conducted on the mutual assessment plan. The certificate provided that if the policy was kept in force, by the payment of *all assessments duly levied upon all the members to create a mortuary fund*, his wife should be entitled to receive at his death an indemnity of $2,000, *payable out of such mortuary fund.*

On May 2, 1910, under call 127, he was assessed $35.95 to meet 145 claims which matured during the quarter ending March 31. He failed to pay and his policy was canceled June 23, 1910. He died June 27, and thereafter his wife brought suit in a Minnesota court against the company. It defended on the ground that the policy had been forfeited by reason of Ibs's failure to pay the assessment levied to meet the 145 claims. To this the plaintiff replied that most of these claims had been paid out of the mortuary fund during the quarter, and that the balance of cash on hand March 31 was sufficient to have paid all of the other claims. Because of these facts she claimed the assessment of May 2 was both unnecessary and void.

In answer to this the company insisted that the fund was maintained as a source from which to make prompt [666] settlement of claims, but that such advances did not prevent the levy of the quarterly assessment, which, when collected, was to be used in replenishing the fund. In support of this defense it offered a certified copy of the decree of a Connecticut court, in the case of Dresser v. Hartford L. Ins. Co. in which it was adjudged that the company had the right so to maintain and use the fund. The plaintiff objected to the admission of this decree on the ground, among others, that she was not a party to the proceeding in which it was rendered. The court sustained her objections, excluded the decree, and directed a verdict in her favor. That ruling having been affirmed by the supreme court of the state (121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798), the case was brought here by the insurance company on a record which raises the sole question as to whether the Minnesota courts failed to give full faith and credit to the judicial proceedings of another state, as required by art. 4, § 1 of the Constitution.

In order to answer that question it becomes necessary to make a brief statement of the facts giving rise to the suit and to the terms of the decree,—not for the purpose of determining whether the decision was correct, but in order to decide whether the Connecticut court had jurisdiction to enter a decree binding on a beneficiary who was not a party to the proceeding.

The Hartford Life Insurance Company, though a stock corporation under the laws of Connecticut, had what was known as the "Safety Fund Department," conducted on the mutual assessment plan. The company kept the books, levied the assessments, deposited the collections in the mortuary fund, and paid claims therefrom as they matured. It was not otherwise liable on the policies.

The mutual insurance plan contemplated the creation of a safety fund of $1,000,000 from membership fees. In addition to this there was to be a mortuary fund, raised [667] by graduated assessments levied on all the members for use in payment of death claims. These assessments were levied periodically and provision was made that in fixing the amount to be levied an allowance should be made "for discontinuance in membership." It so happened that the lapses were not so numerous as had been estimated, and consequently each assessment realized something more than was needed to pay the matured claims. This difference between the collections and the insurance paid was retained in the mortuary fund, and, in time, the "excess margins" amounted to nearly $400,000.

In 1908 the Hartford Life Insurance Company determined to discontinue the Safety Fund Department and to write no more insurance on the assessment plan. Thereafter no new members were admitted. This change of policy was the occasion of a disagreement between the certificate holders and the company. Accordingly, Dresser and thirty other members, residing in different states, brought suit in a Connecticut court, "in their own behalf and on behalf of all others similarly situated," against the company, its directors and trustees. The bill attacked the management of the company, and, among other things, insisted that it had been and was still levying assessments too many in number and too large in amount. The bill also alleged that

the company had recently decided to discontinue writing insurance on the assessment plan, and was endeavoring to induce members to surrender their certificates and to take out ordinary life policies in the company's stock department. By reason of this change of policy and the consequent decrease in membership in the Safety Fund Department and the increase in assessments the bill alleged that the present certificate holders, who had created the mortuary fund, were entitled to an immediate distribution of the moneys therein.

The company's demurrer was sustained and the bill [668] dismissed. Dresser and the other certificate holders then took the case to the supreme court of Connecticut, where the judgment was reversed. 80 Conn. 681, 70 Atl. 39. The case having been remanded there was an answer and a hearing. On March 23, 1910, the court made findings of law and fact, many of which are not material to the matter involved in the present litigation. In reference to the mortuary fund, the trial court found that, though acting in good faith, the company, in making assessments, had overestimated the number of lapses in membership, and, consequently, the assessments had raised more than was needed to pay claims; that these excesses or margins had accumulated and amounted to many thousands of dollars; that these excess collections were in the mortuary fund and

"are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments—by which receipts the fund is constantly reimbursed.

"The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate holders; but it is held that it is proper and reasonable that the company should hold such fund for the purpose of enabling it to pay losses promptly, but that it was not necessary to hold more than the amount of an average quarterly assessment for the previous year.

". . . The mortuary fund arising as above described or from any other source, together with all income or interest thereon, belongs to the men's division of the Safety Fund Department, and the insurance company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department, and that any [669] excess above the average of the quarterly assessment for the previous year shall be distributed in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment."

From other evidence in the present case it appeared that 145 members died during the quarter which ended March 31, 1910. Their certificates amounted to $323,919.95. The cash in the mortuary fund was sufficient to meet all of these claims, and out of it $198,994.19 had been paid prior to March 31, leaving therein more than enough to settle the remaining certificates, aggregating $124,925.76, which, though accruing during the quarter, had not been finally proved on March 31.

It required at least thirty days in which to adjust claims, levy the assessment, make the calculation of the amount due by each of the more than 12,000 members, and send out the proper notices. Having made the necessary calculations, the company, on May 2, 1910, made an assessment of $323,919.95, as of March 31, 1910, with which to meet the 145 claims specified. It gave notice to Ibs that his dues and assessment to meet these 145 claims was $35.95, payable on June 5. He failed to pay, and a second notice was given that unless the company received the assessment by June 20, 1910, his policy would be forfeited. He still neglected to pay, and on June 23 the company canceled the policy. Ibs died on June 27. The widow then sued; and in answer to the company's claim that the policy had been forfeited she contended, as already stated, that the assessment of $323,919.95 was void because $198,473.58 had, in fact, been paid out of the mortuary fund before March 31, and there was on that date a balance therein sufficient to pay all of the other claims included in the call.

1. But if the mortuary fund had been thus finally appropriated to the payment of claims, without the right of a reimbursement from the next assessment, the fund [670] would have been permanently destroyed, and the company would have been deprived of the right to maintain and use it as a source from which thereafter to make prompt settlement. That the company had such right was expressly recognized and adjudged in the Connecticut decree. To exclude it from evidence and to decline to enforce its provisions was to deny it the full faith and credit to which it was entitled under the provisions of art. 4, § 1 of the Constitution of the United States.

2. The plaintiff insists, however, that she was not a party to the proceedings in which the decree was entered, and, therefore, not bound by its terms. But in this regard she was in privity with her husband. For while, under the terms of the contract embodied in the certificate, he may not have

had the right to assign the policy, or to change the beneficiary, or to lessen the amount payable at his death, yet, whether treated as an expectancy or as a contingent interest, her right to receive an indemnity depended upon her husband being a member at the time of his death, since failure to pay the assessments would work a forfeiture. As the members were the owners of a mortuary fund which had been created under the terms of a plan which was, in effect, a contract between themselves, there was no reason why they and the company might not enter into a further contract as to its present distribution or future use. If they failed in making an arrangement among themselves, there was no reason why—in case of such disagreement—their conflicting claims and rights could not be determined by the judgment of a tribunal of competent jurisdiction.

3. The fund was single, but having been made up of contributions from thousands of members their interest was common. It would have been destructive of their mutual rights in the plan of mutual insurance to use the mortuary fund in one way for claims of members residing in one state, and to use it in another way as to claims of [671] members residing in a different state. To make advances replenished by assessments against those living in Connecticut, and to make advances without the right to replenish against those living in Wisconsin, would have destroyed the very equality the assessment plan was intended to secure. Manifestly the question as to the ownership and proper administration of the fund could not be left at large for collateral decision in every suit on certificates held by those who had failed to pay the assessment. For—whether the members of the "Safety Fund Department" are regarded as occupying a position analogous to that of shareholders, or are treated as beneficiaries of trust property in the hands of the company, as trustee, in the state of Connecticut, the courts of that state had jurisdiction of all questions relating to the internal management of the corporation. Selig v. Hamilton, 234 U. S. 652, 58 L. ed. 1518, 34 Sup. Ct. Rep. 926; Mutual L. Ins. Co. v. Harris, 97 U. S. 336, 24 L. ed. 962; Condon v. Mutual Reserve Fund Life Asso. 89 Md. 99, 44 L.R.A. 149, 73 Am. St. Rep. 169, 42 Atl. 944; Maguire v. Mortgage Co. 122 C. C. A. 83, 203 Fed. 858. It was for the court of the state where the company was chartered and where the fund was maintained to say what was the character of the members' interest—whether they were entitled to have it distributed in cash, or used in paying the next assessment, or retained as a fund for the prompt settlement of claims, with the right and duty on the part of the company, as their trustee, to replenish the same by collections from succeeding assessments. But it was impossible for the company to bring a suit against 12,000 members living in different parts of the United States. It was equally impossible for the 12,000 members to bring a suit against the company to determine the questions involved. Under these circumstances Dresser and thirty other members, holding certificates, brought suit "in their own behalf and in behalf of all others similarly situated."

4. That allegation, of course, would not by itself determine the character of the proceeding. Wabash R. Co. v. [672] Adelbert College, 208 U. S. 58, 52 L. ed. 388, 28 Sup. Ct. Rep. 182. For, in order that the decree should be binding upon those certificate holders, who were not actually parties to the proceeding, it had to appear that Dresser and the other complainants had an interest that was, in fact, similar to that of the other members of the class, and that it was impracticable for all concerned to be made parties. But, when such common interest in fact did exist, it was proper that a class suit should be brought in a court of the state where the company was chartered and where the mortuary fund was kept. The decree in such a suit, brought by the company against some members, as representatives of all, or brought against the company by thirty certificate holders for "the benefit of themselves and all others similarly situated," would be binding upon all other certificate holders.

"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." Smith v. Swormstedt, 16 How. 303, 14 L. ed. 948. See also Hawkins v. Glenn, 131 U. S. 330, 33 L. ed. 191, 9 Sup. Ct. Rep. 737; Beals v. Illinois, M. & T. R. Co. 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843; Supreme Council, R.

A. v. Green, this day decided [237 U. S. 531, ante, 1089, 35 Sup. Ct. Rep. 724]. The principle is recognized both in England and in this country. 1 Pom. Eq. Jur. 3d ed. §§ 267, 268. In Corey v. Sherman, 96 Iowa, 115, 32 L.R.A. 490, 64 N. W. 828, and [673] Carlton v. Southern Mut. Ins. Co. 72 Ga. 371 (2), 379 (5–10), the rule was applied in cases involving the rights of those interested in mutual insurance funds raised by collections from many policy holders.

5. It is said, however, that even if the decree determining the status and use to be made of the mortuary fund was binding upon members and beneficiaries, it could not be offered in evidence in a suit on a policy of insurance, since the cause of action and the thing adjudged in the two cases was different,—one involving the status of the fund and the rights of members therein while the present case related to the right of a beneficiary to recover on a policy and the power of the company to declare a forfeiture. But the defendant's contention that the policy had lapsed because of the failure of Ibs to pay the assessment, and the plaintiff's reply that the assessment was void because the mortuary fund was sufficient to meet call 127, raised an issue as to the right of the insurance company to levy the assessment. On that issue the Connecticut decree was admissible, since it adjudged that the company had the right to make advances to pay claims, and could subsequently collect the amount of such claims by an assessment levied as in the present case. Its right so to do having been determined by a court of competent jurisdiction, the decree was binding between the parties or their privies in any subsequent case in which the same right was directly or collaterally involved. For "*even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remain unmodified.*" Southern P. R. Co. v. United States, 168 U. S. 48, 49, 42 L. ed. 376, 377, 18 Sup. Ct. Rep. 18. So also it was held in Forsyth v. Hammond, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665, that "though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one [674] action is conclusive between the parties in all subsequent actions."

There are other questions in the case which present no Federal question, but for error in refusing to admit the decree of the Connecticut court the judgment is *reversed.*

W. H. SAWYER and Frances Sawyer, His Wife, and Alfred C. Tuxbury and Lena B. Tuxbury, His Wife, Appts.,

v.

RAYMOND S. GRAY and Sena Gray, His Wife, et al.

(See S. C. Reporter's ed. 674–678.)

This case is governed by the decision in Daniels v. Wagner, ante, 1102.

[No. 632.]

Argued April 22, 1915. Decided June 14, 1915.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the Western District of Washington, sustaining a demurrer to the bill in a suit to establish the ownership of real property, and to subject defendants holding under United States patents to a trust in favor of complainants. Reversed.

See same case below, 129 C. C. A. 666, 213 Fed. 1022.

The facts are stated in the opinion.

Mr. Francis W. Clements argued the cause, and, with Messrs. Evans Browne and Alexander Britton, filed a brief for appellants:

Ordinary principles of equity are applicable to selections under the act of 1897.

United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282.

The rights of one who is a bona fide purchaser of a party claiming title to the property obtained from the government, whether under deed, patent, or conditional selections or entries, or otherwise, must be governed according to the ordinary rules that would be applied as between individuals buying and selling property.

United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 332, 50 L. ed. 499, 503, 26 Sup. Ct. Rep. 282; Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727; Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; Gertgens v. O'Connor, 191 U. S. 237, 243, 48 L. ed. 163, 168, 24 Sup. Ct. Rep. 94.

Conveyance under the act of 1897 and selection in lieu constitute a contract and appropriate the land selected.

Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297.

Lands embraced in a homestead entry of record are severed from the mass of the public lands and appropriated from other disposition.

United States v. Buchanan, 232 U. S. 72–76, 58 L. ed. 511–514, 34 Sup. Ct. Rep. 237.

It would be contrary to the spirit and letter of the law to say that between the time the lieu selections were filed by the railway company and the time or date the selections were approved, third parties could enter upon the land as being still open to purchase or entry.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300; Svor v. Morris, 227 U. S. 524, 57 L. ed. 623, 33 Sup. Ct. Rep. 385.

The reserved right of the Land Department to consider and approve selections offered in exchange under the forest lieu act is not an arbitrary right, and the selection can only be disapproved for substantial legal reasons, and such disapproval, when given, is subject to review in a proper court.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; Weyerhaeuser v. Hoyt, supra; Garfield v. United States, 211 U. S. 249, 262, 53 L. ed. 168, 174, 29 Sup. Ct. Rep. 62; Wisconsin C. R. Co. Forsythe, 159 U. S. 46, 61, 40 L. ed. 71, 76, 15 Sup. Ct. Rep. 1020; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; Doolan v. Carr, 125 U. S. 618, 624, 31 L. ed. 844, 846, 8 Sup. Ct. Rep. 1228; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103.

An application to enter land embraced in the canceled entry may be allowed during the period accorded for the exercise of the preference right of a successful contestant, subject, however, to the exercise of such preferential right.

Shanley v. Moran, 1 Land Dec. 162; Re Phillips, 2 Land Dec. 321; Cleveland v. Banes, 4 Land Dec. 534; Boorey v. Lee, 6 Land Dec. 643; Re Premo, 9 Land Dec. 70; Re Gauger, 10 Land Dec. 221; Mayers v. Dyer, 21 Land Dec. 187; Alger v. Wood, 22 Land Dec. 571; Re Korba, 24 Land Dec. 408; McDade v. Hively, 27 Land. Dec. 185.

The Land Department has, by repeated decisions, recognized and allowed rights initiated by presentation of claims after an application by a state for survey, and prior to expiration of the time of preferred right of selection in the state.

Idaho v. Northern P. R. Co. 37 Land Dec. 70; Swanson v. Northern P. R. Co. 37 Land Dec. 74; Irwin v. Idaho, 38 Land Dec. 219.

The selection of March 3, 1902, was and is a legal appropriation of the land, and is still pending before the Land Department, undisposed of. The bill alleges that this selection was made in strict conformity with the rules and at a time when there was no possible claim under the state's application for survey. The only possible excuse for disregarding this selection was because it was made in the name of F. A. Hyde & Company, and that shortly after the selection was made, an order was issued by the Land Department suspending all selections made on what is known as Hyde scrip. That it was a valid selection and is still pending is admitted by the pleadings, and this fact alone would support a suit by the United States to cancel and annul the patents issued to the defendants under their purchases, made long subsequent to said selection.

Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337.

The failure of the official of the Land Department, charged with the duty to give approval to a selection under the forest lieu act, in all respects valid, is not conclusive upon the rights of the selector, and where, by mistake in the interpretation of the law, or through oversight, approval of such a selection is withheld and patent caused to be issued to a subsequent claimant under the public land laws, the selector is entitled to maintain a suit in equity to have the patentee declared a trustee for his use and benefit.

Hannibal & St. J. R. Co. v. Smith, 9 Wall 95, 19 L. ed. 599; Lee v. Johnson, 116 U. S. 48, 49, 29 L. ed. 570, 6 Sup. Ct. Rep. 234; Great Northern R. Co. v. Hower, 236 U. S. 702, ante, 798, 35 Sup. Ct. Rep. 465.

Mr. H. H. Field argued the cause, and, with Mr. F. M. Dudley, filed a brief for certain appellees:

Parties who do not connect themselves with the United States, showing a right or interest derived from the United States, cannot be heard to assail the judgment of the Interior Department, or the conveyance issued by the United States pursuant thereto. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect thereto, and one who fails to connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, cannot be heard to complain.

Bohall v. Dilla, 114 U. S. 47, 50, 51, 29 L. ed. 61–63, 5 Sup. Ct. Rep. 782; Lee v. Johnson, 116 U. S. 48–50, 29 L. ed. 570, 571, 6 Sup. Ct. Rep. 249; Sparks v. Pierce, 115 U. S. 408, 412, 413, 29 L. ed. 428–430, 6 Sup. Ct. Rep. 102; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 647, 26 L. ed. 875, 879; Duluth & I. Range R. Co.

v. Roy, 173 U. S. 587, 590, 43 L. ed. 820, 822, 19 Sup. Ct. Rep. 549; Burke v. Southern P. R. Co. 234 U. S. 669, 692, 711, 58 L. ed. 1527, 1549, 1556, 34 Sup. Ct. Rep. 907; Campbell v. Weyerhaeuser, 88 C. C. A. 412, 161 Fed. 332.

This does not mean that complainant must show that he was entitled to the patent at the time it was issued to defendant, but it requires that the claimant against the patent must show such a condition of facts existing as would have enabled him to secure the patent for the land, if not obstructed or prevented.

Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 590, 591, 43 L. ed. 820, 822, 823, 19 Sup. Ct. Rep. 549; Loney v. Scott, 57 Or. 378, 32 L.R.A.(N.S.) 466, 112 Pac. 172.

Every presumption in favor of the correctness of the action of the officers of the Interior Department is to be indulged, and only upon allegations showing that such action was erroneous can it be attacked. And inasmuch as the court is unable to see from the allegations of fact, independent of the pleader's conclusions, that there was erroneous action upon the part of the public officials, or that appellants had any interest in the lands which would support an attack upon the patents so issued, the complaint is insufficient.

James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 597; Durango Land & Coal Co. v. Evans, 25 C. C. A. 523, 49 U. S. App. 305, 80 Fed. 425; Le Marchel v. Teagarden, 152 Fed. 662; Moran v. Bonynge, 157 Cal. 295, 107 Pac. 312.

By the mere filing of a selection with proper proofs in the Land Office, a selector under the act of 1897 acquires no interest in the lands which he is seeking to select.

Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 310, 47 L. ed. 1064, 1071, 23 Sup. Ct. Rep. 692; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; Pacific Live Stock Co. v. Isaacs, 52 Or. 54, 96 Pac. 460; United States v. McClure, 174 Fed. 510, 111 C. C. A. 1, 187 Fed. 265; Daniels v. Wagner, 194 Fed. 973, affirmed in 125 C. C. A. 93, 205 Fed. 235; Campbell v. Weyerhaeuser, 88 C. C. A. 412, 161 Fed. 332.

The claims of appellants are barred by their laches.

Curtis v. Lakin, 36 C. C. A. 222, 94 Fed. 251, 20 Mor. Min. Rep. 35; Felix v. Patrick, 145 U. S. 317, 332, 36 L. ed. 719, 726, 12 Sup. Ct. Rep. 862; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Wood v. Carpenter, 101 U. S. 137, 139, 25 L. ed. 807, 808.

Mr. Chief Justice White delivered the opinion of the court:

This case is controlled by Daniels v. Wagner, No. 239, 237 U. S. 547, ante, 1102, L.R.A.—, —, 35 Sup. Ct. Rep. 740, recently decided. The suit was brought for [675] the purpose of obtaining a decree recognizing the claim of ownership of the complainants to the west half of section 32, township 11 north, range 4 east of the Willamette meridian, county of Lewis, state of Washington, and of further having it decreed that the defendants, holding under patents of the United States, were subject to a trust in favor of the complainants because the Land Department, by a mistake of law, had patented the land to the defendants or their assignors when, if the law had been complied with, the patents should have been issued to the complainants. Some of the defendants were the original patentees and others held under assignments of right based upon such patents, and as to all the bill explicitly charged actual notice or such a state of fact as would constitute constructive notice and want of good faith.

The facts as alleged in the complaint were briefly these: On March 29, 1900, the complainants, or F. A. Hyde & Company, under whom they held, applied to the local land officer at Vancouver, Washington, to enter 1,120 acres of unappropriated public lands under the act of June 4, 1897 [30 Stat. at L. 11, chap. 2], in lieu of lands in California owned by F. A. Hyde & Company, which had been included in the Pine Mountain and Zaca Lake Forest Reserve. The bill alleged that all the necessary steps to comply with the law and regulations concerning the selection of the lieu land had been complied with. It was further averred that at the time this application was filed there was pending in the local land office an application of the state of Washington for a survey of the township in which the lieu land applied for was situated to enable the state to make selections of land which it was entitled under the law to make, and which it was the duty of the state to make within sixty days after survey. It was alleged that the lieu land application was forwarded by the local land officers to the Commissioner of the General Land Office, as it was their duty under the law to do, and that the same was rejected by the Commissioner [676] of the General Land Office on the ground that the land was not subject to the lieu entry because of the pendency of the application of the state for survey, and that the action of the Commissioner was affirmed by the Secretary of the Interior. The bill charged that under the law and the settled practice of the Land Department the rejection of the application was wrong, as it should have been held in abeyance to await the completion of the survey and the selection to be made by the state within the limits of the survey under its asserted

rights, and, after the selection by the state, should have then attached to the land, provided the land was not included in the selection made by the state. The bill further alleged that on March 2, 1902, after the action of the Secretary of the Interior above stated, the complainants, or F. A. Hyde & Company, under whom they claimed, made a further application to be allowed to enter the land in controversy; that is, the west half of section 32, township 11 north, range 4 east of the Willamette meridian in Lewis county, Washington, as lieu land, the land to which said entry related being included in the larger area previously applied for and rejected under the circumstances stated. It was averred that at the time said application was made the survey asked for by the state of Washington was no longer pending because it had been completed, and the state had made its selection of lands within the area of the survey, which selections did not include the land in question. The existence of notice, actual or constructive, and the want of good faith, was also charged as against the defendants concerning the fact of this application. It was moreover alleged that it had become a custom in the Department to allow persons who owned land which had been included in forest reserves, on full compliance with all the provisions of law, to give a power of attorney to make selections of lieu lands under the act of 1897, and that the papers establishing the surrender to the United States of [677] the land and the power of attorney evidencing the right to make a new selection in lieu thereof were known as lieu scrip; but that the Department had passed an order suspending all right to make lieu entries based upon what was known as Hyde scrip, that is, the surrender by F. A. Hyde & Company of land situated in a reserve as a basis for the selection of lieu land. It was alleged that under this order, without rejecting the particular application of the complainants which was pending for action, the Land Department, in violation of law and the rights of the complainants, had patented the land covered by the second application to the defendants, or those under whom they held. Hence the relief which we have at the outset stated was prayed.

The bill was demurred to for want of equity. The demurrer was sustained. The case was taken to the circuit court of appeals, where the judgment was affirmed, the court resting its opinion in express terms upon the ruling which had been previously made by it in Daniels v. Wagner, which ruling has been here since reversed in the case referred to at the outset.

In the discussion at bar reference is made by the appellees to the first application to enter the land pending the request of the state for a survey, and reliance is placed upon that fact to establish that the decree below rests upon an independent ground of law and fact not involving the existence of the discretionary power passed upon in the Daniels Case. But conceding, for the sake of the argument only, the soundness of the contention, this does not control the case, as the rights of the complainants are in addition based upon the second application to make the lieu entry, which, as we have seen, was filed after the survey and after the state had made such selections as it desired, and after the time for selections by it had expired. The case, therefore, must necessarily rest upon the general action of the Department concerning what was known as Hyde [678] scrip, and this, in view of the manner in which the right was asserted, necessarily raises the question of the existence of the discretionary power which was passed upon in the Daniels Case,—a result clearly indicated by the action of the court below in basing its ruling in this case upon that which it had previously made in the Daniels Case. We think, therefore, that as our previous decision in the Daniels Case unmistakably establishes that the ground upon which the court maintained the demurrer in this case was an erroneous one, it must follow, as there is no ground independent of that upon which the action of the court can be sustained, that the decree must be reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed.

STATE OF GEORGIA, Complainant,

v.

TENNESSEE COPPER COMPANY and the Ducktown Sulphur, Copper, & Iron Company, Limited.

(See S. C. Reporter's ed. 678-680.)

Injunction — against pollution of air — suit by state.

Injunctive relief to the state of Georgia against the discharge of noxious gases from copper smelters in Tennessee in such quantities as are destructive to vegetation in Georgia awarded by final decree.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 1, Original.]

Form of decree submitted May 17, 1915.
Decree entered June 1, 1915.

ON MOTION to enter a final decree in an original suit in equity by the state of Georgia to enjoin the discharge of noxi-

ous gases from copper smelters in Tennessee so as to injure vegetation in Georgia. Decree entered.

See ante, p. 1054.

Mr. Warren Grice for complainant.

Mr. Chief Justice White announced the following decree.

Decree.

On consideration of the motion of complainant for final injunction, the application of defendant Ducktown Sulphur, Copper, & Iron Company, Limited, to show changed conditions, the proof submitted thereon, and of the argument of counsel thereupon had, and the court being [679] of opinion that, by reducing the amount of sulphur discharged into the air, said defendant probably can operate its plant without subjecting the territory of Georgia to serious danger of immediate injury, and deeming it desirable to be more fully informed concerning the true conditions and results which may be obtained by subduing the noxious gases discharged,

It is accordingly ordered, adjudged, and decreed:

(1) That the defendant Ducktown Sulphur, Copper, & Iron Company, Limited, shall hereafter keep daily records showing fully and in detail the course and result of its operations.

(2) That Dr. John T. McGill, of Vanderbilt University, Nashville, Tennessee, is hereby appointed inspector to observe the operations of said defendant's plant and works. He shall be given by it at all times free and full access to its books, records, and premises, and during the next six months he shall make frequent and careful observations—at least once each fortnight—of the conditions of the plant and works, the manner of their operation, the quantity and character of smoke emitted therefrom, and the resulting effect upon vegetation within the vicinity and in the state of Georgia. At the end of that time he shall make a full report of his observations, accompanied by recommendations as to appropriate future action. To cover necessary costs and expenses incident to these services and the reasonable compensation of the inspector, the defendant Ducktown Sulphur, Copper, & Iron Company, Limited, is hereby directed to deposit with the clerk of this court, within ten days, the sum of $5,000. Of this sum not exceeding $2,000 shall be paid from time to time, prior to October 12th next, by the clerk to the inspector, upon his written application, to cover costs, expenses, and on account of his services, etc.

(3) That said defendant hereafter shall not permit the [680] escape into the air from its works of fumes carrying more than 45 per cent of the sulphur contained in the green ore subjected to smelting.

(4) That it shall not hereafter permit escape into the air of gases the total sulphur content of which shall exceed 20 tons during one day from April 10th to October 1st of each year, or exceed 40 tons in one day during any other season.

(5) That the cause will be retained upon the docket for such further action as may be proper, and either party may at any time hereafter apply for relief as it may be advised.

June 1, 1915.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1914.

Vol. 238.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1914.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and Nashville, Chattanooga, & St. Louis Company, Appts.,
v.
UNITED STATES, Interstate Commerce Commission, City of Nashville, et al.

(See S. C. Reporter's ed. 1-21.)

Interstate Commerce Commission — review of rate order — findings.

1. The Federal Supreme Court on an appeal taken under the act of October 22, 1913 (38 Stat. at L. 220, chap. 32, Comp. Stat. 1913, § 998), from an order of a Federal district court denying an interlocutory injunction to restrain the enforcement of an order of the Interstate Commerce Commission reducing an existing freight rate, will determine whether, as a matter of law, the Commission's findings of fact sustain its order.

[For other cases, see Interstate Commerce Commission, 8-14; Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

NOTE.—On burden of proof as to the reasonableness of railroad rates prescribed by the state—see notes to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177; Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 108; and Andrews v. Northwestern Nat. Bank, 25 L.R.A.(N.S.) 1001.

On the duty of carrier to furnish equal connecting facilities to other carriers—see note to Pennsylvania Co. v. United States, ante, 616.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Evidence — burden of proof — unreasonableness of rate.

2. The burden is upon the complainant attacking an existing freight rate to establish that it is unreasonable in fact, especially where such rate has been in force for a long period, during which the traffic has greatly increased in volume.

[For other cases, see Evidence, II, k, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — review of rate order — sufficiency of findings.

3. An order of the Interstate Commerce Commission reducing the freight rate on coal from the mines to a specified city as unreasonable is supported by the Commission's findings that such rate is higher than the coal rates between other points on the same road, and that it yields a higher return per car mile than the coal rates of any of the railroads entering that point, or the average earnings of such roads on all traffic loaded and empty, and greater than that yielded by all the other rates examined, among which were some which the Commission itself had prescribed, and that during the time the rate had been in force the earning capacity of fully loaded trains had been doubled.

[For other cases, see Interstate Commerce Commission, 8-14, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — compelling switching service.

4. So long as two railway carriers furnish switching service to each other in their yards in a certain city on all business and to a third carrier on all except coal and competitive business, they may be compelled by the Interstate Commerce Commission, under the equal facilities requirement of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563),

§ 3, respecting interchange of traffic, to discontinue such discrimination against such third carrier, and to switch for it as they do for each other, since the carriers, having opened their yards for most purposes, cannot claim the protection of the proviso to that section that it shall not be construed as requiring any carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

[For other cases, see Interstate Commerce Commission; Carriers, III. h, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compelling switching service.

5. The property of two railway carriers which are furnishing switching service to each other in their yards in a certain city on all business, and to a third carrier on all except coal and competitive business, is not taken without due process of law by an order of the Interstate Commerce Commission, made under the authority of the equal facilities requirement of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 3, respecting the interchange of traffic, commanding them to discontinue such discrimination against the other carrier, and to switch for it as they do for each other.

[For other cases, see Constitutional Law, 458–466, in Digest Sup. Ct. 1908.]

[No. 673.]

Argued March 1, 1915. Decided June 1, 1915.

APPEAL from the District Court of the United States for the Middle District of Tennessee to review a decree which refused an application for a temporary injunction to restrain the enforcement of orders of the Interstate Commerce Commission reducing a rate, and requiring the discontinuance of an alleged discriminatory switching practice. Affirmed.

See same case below, 216 Fed. 672.

The facts are stated in the opinion.

Mr. William A. Colston argued the cause, and, with Messrs. Henry L. Stone, Claude Waller, John B. Keeble, and William A. Northcutt, filed a brief for appellants:

If the facts found do not, as a matter of law, support the orders made, or if the Commission was without jurisdiction to make the orders, or if the orders result in taking appellants' property without due process of law, the interlocutory injunction should have been granted.

Intermountain Rate Cases (United States v. Atchison T. & S. F. R. Co.) 234 U. S. 476, 490, 491, 58 L. ed. 1408, 1423, 1424, 34 Sup. Ct. Rep. 986; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608; 30 Sup. Ct. Rep. 417; Florida East Coast R. Co. v. United States, 234 U. S. 167, 58 L. ed. 1267, 34 Sup. Ct. Rep. 867; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940. 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Clyde S. S. Co. 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Interstate Commerce Commission v. Chicago, B. & Q. R. Co. 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Tap Line Cases (United States v. Louisiana & P. R. Co.) 234 U. S. 1, 58 L. ed. 1185, 34 Sup. Ct. Rep. 741; Chicago Live Stock Exch. v. Chicago G. W. R. Co. 10 Inters. Com. Rep. 428; Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 101, 54 L. ed. 946, 954, 30 Sup. Ct. Rep. 651; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; 2 Wigmore, Ev. § 1353, p. 1666; 1 Pollock & M. History of English Law, p. XXVII; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 456, 33 L. ed. 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 980; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Florida East Coast R. Co. v. United States, 234 U. S. 167, 58 L. ed. 1267, 34 Sup. Ct. Rep. 867.

The facts found with respect to the coal rates do not, as a matter of law, support the order fixing rates.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed.) 92, 22 Sup. Ct. Rep. 30; Interstate Commerce Commission v. Louisville & N. R Co. 73 Fed. 409; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 283, 47 L. ed. 1047, 1055, 23 Sup. Ct. Rep. 687.

The Commission was without jurisdiction to make the order fixing rates.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155.

The enforcement of the Commission's order fixing rates takes appellants' property without due process of law.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493.

The power of a Federal court of equity to enjoin one who is about to do or is threatening to enforce an unlawful act is not confined to cases where the unlawful act is the act of a legislative body, but applies equally to every case where the act is violative of the Constitution, whether the act be that of a legislative body, or of an executive body, or of a judicial body, or of an administrative board or commission.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 90–92, 57 L. ed. 431–434, 33 Sup. Ct. Rep. 185.

The Commission was without jurisdiction to make the order as to switching practices.

Waverly Oil Works Co. v. Pennsylvania R. Co. 28 Inters. Com. Rep. 625; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351; 37 Fed. 567; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 2 Inters. Com. Rep. 763, 41 Fed. 559, 4 Inters. Com. Rep. 537, 59 Fed. 400; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 139, 53 L. ed. 444, 29 Sup. Ct. Rep. 246.

Appellants have made out their case for a temporary injunction.

22 Cyc. 751, 755, 782, 783, 822; High, Inj. §§ 5, 13, pp. 8, 9, 19, 20; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Pacific Teleph. & Teleg. Co. v. Los Angeles, 192 Fed. 1009; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952; Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245; Buffalo Gas Co. v. Buffalo, 156 Fed. 370; Spring Valley Water Co. v. San Francisco, 165 Fed. 667; 22 Cyc. 751, 941.

Solicitor General Davis, argued the cause and filed a brief for the United States:

The granting or refusing of an interlocutory injunction is a matter in the sound discretion of the court, and is not to be reviewed unless this discretion has been abused. No such abuse here appears.

Buffington v. Harvey, 95 U. S. 99, 100, 24 L. ed. 381, 382; Thompson v. Nelson, 18 C. C. A. 137, 37 U. S. App. 478, 71 Fed. 339; Vogel v. Warsing, 77 C. C. A. 199, 146 Fed. 949; American Grain Separator Co. v. Twin City Separator Co. 120 C. C. A. 644, 202 Fed. 202; Samson Cordage Works v. Puritan Cordage Mills, L.R.A.—, —, 128 C. C. A. 203, 211 Fed. 603.

The order of the Commission declaring the coal rate unreasonable involves a question of fact, and is neither without substantial evidence to support it, nor contrary to the indisputable character of the evidence.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 455, 51 L. ed. 1128, 1134, 27 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 58 L. ed. 1319, 34 Sup. Ct. Rep. 814; United States v. Louisville & N. R. Co. 235 U. S. 314, 59 L. ed. 245, 35 Sup. Ct. Rep. 113.

The order of the Commission as to discriminatory switching practices likewise involves a question of fact, as to which the finding of the Commission is neither without substantial evidence to support it, nor contrary to the indisputable character of the evidence; nor does it violate any constitutional or statutory right of appellants.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 196, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; United States v. Louisville & N. R. Co. 235 U. S. 314, 59 L. ed. 245, 35 Sup. Ct. Rep. 113; Pennsylvania Co. v. United States, 236 U. S. 351, ante, 616, 35 Sup. Ct. Rep. 370.

Mr. Charles W. Needham argued the cause for the Interstate Commerce Commission.

Messrs. A. G. Ewing, Jr., and T. J. McMorrough filed a brief for the Traffic Bureau of Nashville.

[9] Mr. Justice Lamar delivered the opinion of the court:

The Traffic Bureau of Nashville instituted proceedings before the Commerce Commission against the Louisville & Nashville, Nashville, Chattanooga, & St. Louis, Tennessee Central, Illinois Central R. R. Companies, and the Nashville Terminal Company, seeking (1) a reduction of the $1 rate on coal and (2) to require a discontinuance of what was alleged to be a discriminatory switching practice in the yard at Nashville. After an elaborate hearing, in which volumes of testimony were taken, the Commission found that the $1 coal rate was unreasonable, and established an 80 cent rate. It also passed an order requiring the railroad companies to discontinue the discrimination in furnishing switching facilities. Thereupon the two railroad companies, first named, appellants herein, filed a bill in the district court for the middle district of Tennessee against the United States, the Commerce Commission, and others, attacking the validity of these two orders. The application for a temporary injunction having been denied, the case was appealed to this court.

1. On the argument here the appellants insisted that under the decisions in Florida East Coast R. Co. v. United States, 234 U. S. 167, 58 L. ed. 1267, 34 Sup. Ct. Rep. 867; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185, this court will determine whether the facts found do, as a matter of law, support the order of the Commission. The government, on the other hand, contended that the case should be disposed of in conformity with the principle that an appellate court will not interfere with the decision of a chancellor, refusing to grant an interlocutory injunction, unless it clearly appears that there has been an abuse of discretion. There can, of course, be no doubt that such is the general rule. But where the order of the Commission operates to reduce revenue it is manifest that the chancellor's discretion should be influenced by the [10] fact that, though the application is for an interlocutory injunction, the decision thereon may, in many respects, be the equivalent of a final decree. On such a hearing the court should, therefore, consider that fact with all others, and grant the injunction, grant it on terms, or refuse it, as the equity of the case may warrant.

It was no doubt because of the limited time in which orders of the Commission would be operative, and that there might be cases in which irreparable injury would result if an interlocutory injunction was not granted, that Congress, by the act of October 22, 1913 (38 Stat. at L. 220, chap. 32), provided that "*an appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction. . . .*" This clause and the reasons above mentioned were evidently taken into consideration by the three judges who heard this case. For, in passing upon the application, the court made a full statement of the facts, delivered a carefully prepared opinion discussing the various contentions of the complainants, and then made a decision on the merits of the case as submitted.

2. The facts involved have been so fully stated by the Commission (28 Inters. Com. Rep. 533) and by the court below (216 Fed. 672) that it is unnecessary here to repeat them. The railroad companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submitted to the Commission, but—conceding that the evidence was conflicting and tended to support the findings of the Commission—they insist that the facts found were insufficient in law to sustain the orders which were made. This most commendable practice not only saved the expense of printing many volumes of testimony, but saved the substantial points in the case from being submerged in a flood [11] of testimony—much of which was explanatory before the Commission and most of which was wholly immaterial in an appellate court which cannot reverse findings when supported by substantial—though conflicting—evidence. The practice is also in compliance with the spirit of the new equity rules (75–77) which call for just such a winnowing out of the useless; the presentation of only the relevant parts of exhibits, documents, tables, and reports, the elimination of all reduplications in written and oral testimony, and a condensation into narrative form of what is material to the then issue before the court.

3. By virtue of this conformity to the rules, we are in a position to consider the sharp-cut issue as to whether, as a matter of law, the Commission's findings of fact sustain its order, and shall discuss first the rate on coal, which, being treated as typical, was principally argued by counsel.

Where an existing freight rate is attacked, the burden is on the complainant to establish that it is unreasonable in fact. This is especially so where, as here, the rate has been in force for a long period during which time the traffic greatly in-

creased in volume. In order to carry this burden in the present case, the Traffic Bureau, while alleging that the rate was unreasonable in itself and by comparison with other like rates, does not seem to have attempted to prove the cost or value of the carrier's service, but apparently relied largely on proof showing that the Nashville rate was higher than that charged for a similar haul to other points.

While some elements of value are fixed, the market price of property and work is affected by so many and such varying factors as to make it impossible to lay down a rule by which to determine what any article or service is worth. But one of the most common measures by which to value the property or service of A is to compare it with the amount charged for the same thing by B, C, and D. But [12] this method, if made the sole basis for ascertaining values, may often lead to improper results. For B, C, and D may charge too much, or they may have been forced to charge too little. The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low, because compelled by conditions over which the carrier had no control. Water competition, rail competition, and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a determining factor; indeed, the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road. But while all this be true, it is, nevertheless, a fact that a comparison of rates between two points on the same road, or with the charges on other roads, may furnish evidence of probative value.

In the present case the Commission pointed out that many facts had to be considered in applying the evidence offered for the purpose of showing that the $1 rate to Nashville was high by comparison with the charge made to other points. It found that coal was shipped over the Louisville & Nashville R. R. from Kentucky mines to Nashville, Memphis, and Louisville. It also found that there was no substantial dissimilarity in the conditions at those three points, and instituted a special comparison between the rates to those three cities. The result may be indicated by the following tabulation:

From mines—

To Nashville, *via* L. & N., 109 miles $1 per ton, or 9.2 mills per mile.

To Memphis, *via* L. & N., 276 miles, $1.10 per ton, or 4 mills per mile.

To Louisville, *via* L. & N. 142 miles, 65 cents per ton, or 4.5 mills per mile.

[13] The defendants insisted that its $1.10 rate to Memphis did not furnish a fair criterion because it had been made low and reduced in order to meet competition. The Commission, however, found that the *river rate* to Memphis was $1.40 per ton, so that the appellant's "not unreasonable" (26 Inters. Com. Rep. 402) rate of $1.10 was not compelled by water competition. It further found that the rail competition at Memphis was not compelling. On these facts, and after giving a history of the increase and decrease in that rate (26 Inters. Com. Rep. 402), the Commission seems to have treated the $1.10 rate, for 276 miles to Memphis, as in the nature of a voluntary charge, which would tend to indicate that the $1 rate for 109 miles to Nashville was too high. A similar view was taken of the situation at Louisville, where water competition existed and where the 60-cent rate from the mine to Louisville, 142 miles, was practically the same as that of the Illinois Central, which charged the same rate for a haul of 125 miles to Louisville.

Of course, competition by rail as well as by water may compel such a reduction in rates as altogether to destroy their value for purposes of comparison. But, as we understand, the Commission held that while there should be no parity between these cities, the rate of $.60 charged by the Illinois Central for a haul of 125 miles to Louisville was, in view of all of the facts, some indication of what a road like the Louisville & Nashville should charge on a haul of 109 miles to Nashville.

Among many other details briefly discussed in the report, the Commission dealt with the question of the earnings on the coal business to Nashville. It found that the Louisville & Nashville's coal cars had an average capacity of 41 tons, so that on shipments from the mines to Nashville there was a car revenue of $41, or a per-car-mile earning of 37.78 cents. If the car was returned empty there would be a per-car-mile earning [14] of 18.87 cents. With this as a basis there was a comparison of the Nashville coal earnings with those on all traffic over the other roads entering that city. It showed—

L. & N. $1 rate on *coal* to Nashville, per car-mile earnings 37.78 cents.

N., C. & St. L., *coal* to Nashville, per car-mile earnings 24.64 cents.

Illinois Central on *coal* to Nashville, per car-mile earnings 24.00 cents.

Average of *all traffic*, loaded and unloaded:

L. & N., per car-mile earnings, 10.54 cents.

N., C. & St. L., car-mile earnings, 10.08 cents.

Illinois Central car-mile earnings, 7.78 cents.

Tennessee Central car-mile earnings, 16.43 cents.

In addition to these comparisons of coal rates and average earning on all traffic, loaded and empty, the Commission found that while the $1 rate to Nashville had been in force many years, the carrying capacity of the cars had increased from 16 to 41 tons and the tractive power of engines from 660 to 1,165 tons. This practically doubled the earning capacity of fully loaded trains; and if, as argued, there has been a much larger increase in cost of labor, material, taxes, and operating expenses, no proof of that fact was made to the Commission, for it found that "there was little more than a suggestion in the record as to the increased cost of labor and material, and no attempt . . . to show operating cost." At the hearing of the application for a temporary injunction an affidavit was offered to show that the increase in cost of operation had largely exceeded the increase in earning capacity. But such evidence, important in itself and on the issue of reasonableness, cannot be considered here for the reason that it shifts the issue, for the case was submitted to the district court not to pass on the facts, but on the theory [15] that though the conflicting evidence might sustain the finding, the *facts found* did not, as matter of law, sustain the order.

It further appeared in the report and finding of the Commission that the Nashville Bureau[1] had offered innumerable exhibits comparing on ton- and car-mile bases the Nashville rate with that to points in the southeast and on the Ohio and Mississippi rivers. *Among these were certain rates which the Commission had prescribed.* There was also a general comparison on the Nashville rate with the charge for coal and other commodities to Nashville and other destinations. This evidence showed that "*in all these instances the Nashville rate yields the greatest earnings.*"

Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a prima facie standard, [16] which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate. No one of those facts was conclusive, for the character of the country through which the two roads had been built might differ. One might run through a level, thickly populated territory,—the other might have steep grades, long tunnels and a roadway expensive to maintain. The capital invested, the traffic hauled, the cost of operation and the earnings might differ, but nevertheless what was shown to be a reasonable rate on one, might, after allowing for the dissimilarity in conditions, earnings, and cost, be a factor in determining the reasonableness of the rate on the other. The report in this case shows that the rate-making body had before it much and varied evidence of this character. After considering it as a whole, the Commission found that the $1-rate on coal shipped from the Kentucky mines to Nashville was unreasonable. In the light of these findings we cannot say that the facts set out in the report do not support the order. And since there is no contention, at this time, that the reduced rate is confiscatory, we can but repeat what was said in Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185:

"The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to

[1] "In support of their contentions complainants offered innumerable exhibits comparing on ton, car, and train mile bases the Nashville rate with the rates on coal obtaining north of the Ohio river; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Mississippi rivers from mines in Kentucky, Tennessee, and Virginia; with rates on coal prescribed by this Commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per-ton and per-car-mile rate received by defendants and other carriers on all traffic. In all of these instances the Nashville rate yields the greatest earnings. In elaborate detail defendants sought to analyze and rebut these comparisons in an endeavor to show that none was of any value in determining the reasonableness of the rate in issue."

rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies, and history of rate-making in each section of the country."

5. In its complaint before the Commission the Traffic [17] Bureau also attacked the practice of the appellants by which, under filed tariffs, each made a charge of $3 per car for switching *noncompetitive business* between industries within the terminal limits and in conjunction with the Tennessee Central.

The Bureau insisted that this practice was discriminatory and designed to prevent the switching of coal between the Tennessee Central and private industries, located on sidings and reached through the terminals. The defendants admitted the practice and the intention, but insisted that the yards had never been thrown open to such business. They claimed that they had the right to the exclusive use of their own terminals, and could not be required to switch cars loaded with "coal or competitive freight" to and from the Tennessee Central.

In considering this branch of the case the Commission found that the Louisville & Nashville and the Nashville, Chattanooga, & St. Louis, by reason of indorsements on bonds, and by an agreement to pay 4 per cent on the capital stock of the Nashville Terminal Company, had leased the yards for 999 years,—the rental being paid by the two lessees in proportion to the business done by each. That while the Louisville & Nashville owned 70 per cent of the stock of the Nashville, Chattanooga, & St. Louis, the two roads were not only separate corporate entities, but were competitors at Nashville—particularly in the transportation of coal. It found that each switched for the other and both switched for the Tennessee Central, except as to "coal and competitive business." It found that such a switching practice was unreasonable and unjustly discriminatory, and that a "reasonable practice would permit the switching of coal from the interchange of each carrier to industries on the rails of each other." It thereupon issued an order requiring appellants to cease the discrimination found to exist and to maintain "a practice which will permit the interswitching of such [18] shipments from and to the lines of each and every defendant" [including Tennessee Central].

The appellants attack this order as being void because (1) it compels them to admit the Tennessee Central into an arrangement for operating joint terminals at Nashville under a contract guarantying interest on bonds and prorating operating expenses; (2) takes their property in the yards without due process of law; (3) violates § 15 of the commerce act (34 Stat. at L. 589, chap. 3591, [§ 4, amending § 15], Comp. Stat. 1913, § 8583) in compelling them, in effect, to make through routes and joint rates with the Tennessee Central when the appellants themselves have already established "a reasonable and satisfactory through route; and (4) violates § 3 of the same act, which, after requiring carriers to afford equal facilities for the interchange of traffic, declares that the section "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." [24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565.]

These objections treat the order as being broader than its terms. The Commission did not, as in Waverly Oil Works Co. v. Pennsylvania R. Co. 28 Inters. Com. Rep. 626, 627, pass upon the question as to what was a proper switching charge as affected by the rental of the yard and the cost of operation. Neither did it direct the appellants to establish a joint rate and a through route with the Tennessee Central. Neither did it order the appellants to give the use of their terminals to the Tennessee Central, but only required them to render to the latter the same service that each of the appellants furnishes the other in switching cars to industries located in and near the yard.

Disregarding the complication arising out of joint ownership and the fact that each of the appellants switches for the other, it will be seen that the Commission is not dealing with an original proposition, but with a condition brought about by the appellants themselves. [19] Under the provisions of the commerce act (24 Stat. at L. 380, chap. 104, Comp. Stat. 1913, § 8565) the reciprocal arrangement between the two appellants would not give them a right to discriminate against any person or "particular description of traffic." For § 3 requires railroad companies to furnish "equal facilities for the interchange of traffic between their respective lines . . ." provided that this should "not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." If the carrier, however, does not rest behind that statutory shield, but chooses voluntarily to throw the terminals

open to many branches of traffic, it to that extent makes the yard public. Having made the yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers cannot say that the yard is a facility open for the switching of cotton and wheat and lumber, but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance, whatever may be the case if the yard was put back under the protection of the proviso of § 3, the appellants cannot open the yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others. This feature of the case was thus dealt with by the district court:

"We think it clear that this order does not require the petitioners to give the use of their tracks and terminal facilities to the Tennessee Central Railroad, within the meaning of the proviso contained in § 3 of the act to regulate commerce, or constitute an appropriation of [20] such tracks and terminals for the use of the Tennessee Central Railroad.

. . . . . .

"There is furthermore no evidence that the switching practices prescribed will violate the constitutional provision against taking property without due process of law. See Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 468, 58 L. ed. 317, 34 Sup. Ct. Rep. 152. And it may well be assumed that the petitioners will not themselves establish a switching charge so low as to be confiscatory."

The question as to power of the Commission to make this part of the order is settled by the decision in Pennsylvania Co. v. United States, 236 U. S. 351, ante, 616, 35 Sup. Ct. Rep. 370, recently decided. The appellants, however, insist that that case did not involve *switching*, but *transportation;* and further, they claim that the Pennsylvania road was there ordered to *discontinue* discrimination—while here the appellants are required by an affirmative order to *devote* their property to the use of a parallel and competing carrier. But the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing.

In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time furnishing switching service to each other on *all* business, and to the Tennessee Central on all except coal and competitive business. As long as the yard remained open and was used as a facility for switching purposes the Commission had the power to pass an order not only prohibiting discrimination, but requiring the appellants to furnish equal facilities "to all persons and corporations without undue preference to any particular class of persons." The question as to what is a proper practice, the [21] amount of charge therefor, and the length of time such switching service is to continue, are matters not presented for decision on this record. The judgment of the District Court is affirmed.

Mr. Justice **Pitney** concurs in the result.

Mr. Justice **McReynolds** took no part in the consideration and decision of this case.

GEORGE KREITLEIN, Plff. in Err.,
v.
CHARLES FERGER.

(See S. C. Reporter's ed. 21–41.)

Evidence — burden of proof — prima facie case — discharge in bankruptcy.

1. A prima facie defense to a suit against a bankrupt on a debt existing at the time of filing the petition in bankruptcy is made out by the introduction in evidence of the order of discharge in bankruptcy, the burden being then cast upon the plaintiff to show that because of the nature of the claim, failure to give notice, or other statutory reason, the debt sued upon was by law excepted from the operation of the discharge.

[For other cases, see Evidence, XII. h; II. i, 3, in Digest Sup. Ct. 1908.]

Bankruptcy — provable debts — judgment in trover.

2. A judgment for damages in favor of plaintiff in a suit in the nature of an action of trover for the recovery of goods purchased by the defendant when insolvent, in which the special findings of the jury showed that in making the purchase the defendant had not made any fraudulent concealment or misrepresentation as to his financial condition, is a provable debt within the meaning of the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), § 63a (4) as founded upon a contract, express or implied.

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — prima facie effect of discharge in bankruptcy.

3. The prima facie effect of an order of discharge in bankruptcy proceedings begun in 1905, in which an account for merchandise for $271 is scheduled by the bankrupt as owed in 1895, as discharging a judgment in trover for $300 rendered in 1897 in favor of the same creditor, is not defeated merely because there may have been a difference between the account and the judgment, since the creditor is charged with the burden of proving that there was such difference.

[For other cases, see Evidence, XII. h; II. l, 3, in Digest Sup. Ct. 1908.]

Bankruptcy — listing creditor by initials — discharge.

4. The listing of a creditor by an initial instead of by his Christian name is not such an insufficient compliance with the requirement of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), § 7 (8) as to the listing of creditors as to deprive the bankrupt of the benefit of the order discharging provable debts.

[For other cases, see Bankruptcy, XI. a, in Digest Sup. Ct. 1908.]

Bankruptcy — scheduling creditors — residence — street and house number — discharge.

5. A schedule listing a creditor's residence as Indianapolis, Ind., without giving the street and house number, is prima facie at least a sufficient compliance with requirement of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), § 7 (8), that bankrupts list their creditors, "showing their residence if known, if unknown that fact to be stated," and such omission, therefore, does not, as a matter of law, render the discharge inoperative under § 17, on the theory that the debt was not "duly scheduled."

[For other cases, see Bankruptcy, XI. a, in Digest Sup. Ct. 1908.]

[No. 157.]

Submitted January 22, 1915. Decided June 1, 1915.

IN ERROR to the Appellate Court of the State of Indiana to review a judgment which affirmed a judgment of the Superior Court of Marion County, in that state, in favor of plaintiff in an action on a judgment in which defendant pleaded a discharge in bankruptcy as a defense. Reversed and remanded for further proceedings.

See same case below, 52 Ind. App. 199, 97 N. E. 819, 98 N. E. 1005.

The facts are stated in the opinion.

Mr. John B. Elam submitted the cause for plaintiff in error. Messrs. James W. Fesler and Harvey J. Elam were on the brief:

A certified copy of an order granting a discharge should be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

Hays v. Ford, 55 Ind. 52; Begein v. Brehm, 123 Ind. 160, 23 N. E. 496; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 645, 44 L. ed. 619, 621, 20 Sup. Ct. Rep. 506.

If the plaintiff claimed his debt was within any of the exceptions to § 17, the burden was on him to prove it.

Goddin v. Neal, 99 Ind. 334; Thompkins v. Williams, 137 App. Div. 521, 122 N. Y. Supp. 152, affirmed in 206 N. Y. 744, 100 N. E. 1134; Anthony v. Sturdivant, 174 Ala. 521, 56 So. 571; Hallagan v. Dowell, — Iowa, —, 139 N. W. 883; B. F. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 So. 875; Alling v. Straka, 118 Ill. App. 184; Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654; Van Norman v. Young, 228 Ill. 430, 81 N. E. 1060; Bailey v. Gleason, 76 Vt. 115, 56 Atl. 537; New York Inst. v. Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412; Re Peterson, 64 Misc. 217, 118 N. Y. Supp. 1077; Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379; 1 Stephen, Pl. p. 120; Works' Indiana Pl. Pr. & Forms, § 365; Sherwood v. Mitchell, 4 Denio, 435; Imhoff v. Whittle, — Tex. Civ. App. —, 81 S. W. 814.

The fact that the creditor did not have actual knowledge of the bankruptcy does not keep the discharge from being effective.

Wiley v. Pavey, 61 Ind. 457, 28 Am. Rep. 677; Beck & G. Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242.

The mere fact that the original judgment was given without exemption does not show that it is within any of the excepted classes.

Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9.

The evidence, so far as introduced, showed that the plaintiff's debt was properly scheduled, because the description of the debt given in the schedule, so far as it goes, is a description of the plaintiff's debt.

Matteson v. Dewar, 146 Ill. App. 523.

The evidence, so far as introduced, showed that the debt was properly scheduled as to name.

Bridges v. Layman, 31 Ind. 384; Matteson v. Dewar, supra; Finnell v. Armoura, 39 Utah, 316, 117 Pac. 49; Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379; Longfield v. Minnesota Sav. Bank, 95 Minn. 54, 103 N. W. 706.

The debt was duly scheduled with the residence of the creditor, and it was not necessary to give any street address.

Miller v. Guasti, 226 U. S. 170, 57 L. ed. 173, 33 Sup. Ct. Rep. 49, 203 N. Y. 259, 96 N. E. 416; Finnell v. Armoura, 39 Utah, 316, 117 Pac. 49; Northern Commercial Co.

v. Hartke, 110 Minn. 338, 125 N. W. 508; Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379.

Messrs. Charles W. Appleman and William E. Reiley submitted the cause for defendant in error.

Mr. Justice Lamar delivered the opinion of the court:

In 1897 Ferger brought suit against Kreitlein in an Indiana court. The pleadings in that case are not set out in the record and the nature of the suit does not appear except as it may be inferred from the special findings [25] of the jury, copied in this record, which show that "when Kreitlein purchased the flour in November, 1895, he was insolvent. He made no false representations as to his financial condition. . . . the plaintiff understood that the sale was for cash." These answers, and the fact that the judgment was for "$300 damages," indicate that that suit was in the nature of an action of trover for the recovery of flour. This judgment, rendered November 23, 1897, was not paid; and in 1907, ten years later, Ferger brought the present suit against Kreitlein on that judgment, alleging that it "was not for any debt growing out of or founded upon a contract, express or implied." The defendant filed a plea that in 1905 he had received his discharge in bankruptcy.

At the trial the plaintiff introduced the judgment of 1897; testified that it had not been paid, and that "until lately he did not know that Kreitlein had gone through bankruptcy, having had no notice of it." The defendant then introduced a certified copy of his discharge, dated November 11, 1905. He also offered a copy of the record in the bankruptcy proceedings, including the "Schedule of Creditors," in which appeared an entry showing a debt in 1895 of $271.85, for merchandise, to C. Ferger, Indianapolis.

The plaintiff objected to the admission of this record "for the reason that the testimony shows that he [Ferger] has not had any notice of this bankruptcy proceeding . . . and for the further reason that this is an action on a judgment. The schedule shows that it is on an account. The records show that this was reduced to a judgment in 1897 and this schedule was not filed until 1905." The objection was overruled and the record admitted. No further evidence was offered and thereupon the court entered judgment for the plaintiff. That judgment having been affirmed by the appellate court of Indiana, the case was brought here by Kreitlein, who insists [26] that by the Federal law he was relived from liability on the pre-existing judgment.

1. Under the provisions of § 30 of the bankruptcy act [30 Stat. at L. 554, chap. 541, Comp. Stat. 1913, § 9614] this court has prescribed the form [59] of the "Order of Discharge," which, among other things, contains a recital that the bankrupt has been discharged from all provable debts existing at the date of the filing of the petition, "excepting such as are by law excepted from the operation of a discharge in bankruptcy." Section 21f further declares that a certified copy of such order "shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." This provision of § 21f was made in contemplation of the fact that the bankrupt might thereafter be sued on debts existing at the date of the filing of the petition in bankruptcy; and was intended to relieve him of the necessity of introducing a copy of the entire proceedings, so that he might obtain the benefit of his discharge by the mere production of a certified copy of the order.

There are only a few cases dealing with the subject, but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a prima facie defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice, or other statutory reason, the debt sued on was by law excepted from the operation of the discharge. B. F. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 So. 815; Tompkins v. Williams, 206 N. Y. 744, 100 N. E. 1134, affirming the opinion in 137 App. Div. 521, 122 N. Y. Supp. 152; Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Beck & G. Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242; Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654. Compare Hancock Nat. Bank v. Farnum, 176 U. S. 645, 44 L. ed. 621, 20 Sup. Ct. Rep. 506. There were some decisions to the contrary under the act of 1841 [5 Stat. at L. 440, chap. 9]. Among them was Sorden v. Gatewood, 1 Ind. 107, which held that when the bankrupt was sued on a valid claim, he was obliged to show that the plaintiff's debt was [27] among those which had in law and in fact been discharged. It was probably because of this decision of the state court that the defendant Kreitlein felt compelled to offer the schedule in order to show that Ferger was one of the creditors listed in the bankruptcy proceedings. The issue now is whether the prima facie defense made out by the production of the certified copy of the order was disproved by the introduction

of the bankruptcy record. That question can best be answered by considering the various reasons the defendant in error advances in support of his contention that the discharge of 1905 did not operate to relieve Kreitlein from the debt now presented by the judgment of 1897.

2. On the part of Ferger it said that this suit is on a judgment for $300, rendered in an action not "founded upon a contract, express or implied," — and it seems to have been claimed that the judgment was not a provable debt within the meaning of § 63a (4), of the bankruptcy act. But the special finding of the jury in that case showed that in purchasing the flour Kreitlein had not made any fraudulent concealment or misrepresentation as to his financial condition. Besides, the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action in trover, as for a fraudulent conversion, instead of assumpsit for a balance due on open account. Crawford v. Burke, 195 U. S. 177, 193, 49 L. ed. 147, 153, 25 Sup. Ct. Rep. 9.

3. Ferger next insists that there is a want of identity between the debt sued on and that said to have been discharged. This contention is based upon the fact that the schedule lists an "account for merchandise for $271 in 1895 in favor of C. Ferger," while the present suit is on a "judgment for $300 damages rendered in favor of Charles Ferger in 1897." The difference between the two amounts is probably explained by the fact that there had been an accrual of two years' interest before the judgment was rendered. Besides, the books of the debtor and of the [28] creditor may not have exactly agreed, and in the absence of fraud and injury such discrepancy would not invalidate the schedule or vitiate the effect of the discharge. Nor would the bankrupt be deprived of the benefit of the order because the debt was described as an "account for merchandise" rather than as a judgment into which the liability for the flour had been merged. See Matteson v. Dewar, 146 Ill. App. 523, where it was held not to be a fatal defect for the bankrupt to schedule the debt as an "account," even though a note had been given in settlement.

The prima facie effect of the order, to relieve the bankrupt from liability on all debts prior to 1905, was not defeated because there may have been a difference between the account and the judgment. The burden of showing that there was such difference was upon the creditor, and in this case there was not only no evidence tending to sustain such a contention, but the two claims seem to have been treated as identical in the trial court, for there the objection to the admission of the schedule was based on the contention that it referred to an account "which had been reduced to a judgment in 1897."

4. Another question—and the one on which the appellate court based its decision—was whether the schedule, listing the creditor as C. Ferger, Indianapolis,—using an initial and omitting the street number of his residence,—met the requirements of § 7 (8), making it the duty of bankrupts to "prepare, make oath to, and file . . . a list of his creditors showing their residences if known, if unknown that fact to be stated."

While this only involves a determination of what is a sufficient designation of a person's name and residence, yet it is one of those apparently simple questions which have been the occasion of an immense amount of controversy. The difficulty grows out of the impossibility of applying a general and uniform rule where there are so many varying [29] methods by which men's names and residences are designated. Some men have a well-known and constantly used Christian name; others are addressed by an abbreviation for the Christian name; others by initials for the Christian name; others are known by nickname. Some men use one name in business and another among their acquaintances. Some men, while personally addressed by their full Christian name, use initials in signing letters, notes, checks, and other papers.

The bankruptcy act fails to prescribe which form of designation shall be used in listing creditors in the schedule. The statute must be construed in the light of the fact that it not only applies to transactions growing out of dealings between those personally acquainted, but, in large degree, relates to matters growing out of transactions between persons living in distant states, and who may never have met. In many instances the only knowledge the debtor has as to the name of his creditor is derived from signatures, letterheads, drafts, and like instruments—in which the name of the creditor may be designated by initials, or by abbreviation, or by full Christian name. To say that the use of an initial in listing a creditor was improper when the creditor himself may have used an initial in signing letters addressed to the bankrupt, or may himself have constantly received letters addressed to him in that manner, would not only ignore a common business practice, but would, in many instances, work a great hardship. This has been recognized in other branches of the law; for while, of course, in all legal

proceedings it is safest to designate persons by their Christian names,—and in some states this is even required by statute, —yet it has likewise been held that the use of the initials is an irregularity, and not a fatal defect. Reg. v. Dale, 17 Q. B. 64, 20 L. J. Mag. Cas. N. S. 240, 15 Jur. 657; State v. Webster, 30 Ark. 166; Perkins v. McDowell, 3 Wyo. 203, 19 Pac. 440; Minor v. State, 63 Ga. 320; State v. Johnson, 93 Mo. 73, 5 S. W. 699.

[30] There have, no doubt, been multitudes of instances in which initials have been used in listing creditors in bankrupt schedules, but the only decision found which deals with this question is Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379. It holds that the listing of the creditor by an initial, instead of the full Christian name, is not sufficient to deprive the debtor of the benefit of the order discharging provable debts. See also Matteson v. Dewar, supra.

5. Of a like nature, and to be governed by the same principle, is the contention that, even if C. Ferger is a sufficient listing of the name, the schedule was fatally defective because it failed to give the street and number of his residence in Indianapolis. This objection is more difficult of solution than any of the others presented by this record. But, like them, must be considered in the light of the fact that the statute was intended for business men, and should receive not only a practical but a uniform construction. Its provisions are applicable to creditors who live in the country, in villages, in towns and cities. The statute is general in its terms and the courts cannot add to its requirements.

All of the cases dealing with the subject recognize the necessity of having claims properly listed, and point out that failure to comply with the statutory requirement to file a list of his creditors, showing their residence, if known, will render the discharge inoperative against any who did not receive actual notice of the bankruptcy proceeding in time to have their claims allowed. Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. Rep. 38; Troy v. Rudnick, 198 Mass. 567, 85 N E. 177. The authorities, however, differ as to whether, under § 17 (3), the burden is on the plaintiff to show that he had no notice, or on the bankrupt to show that the creditor had notice in time to have proved his claim and had it allowed. Steele v. Thalheimer, 74 Ark. 518, 86 S. W. 305; Van Norman v. Young, 228 Ill. 430, 81 N. E. 1060; Alling v. Straka, 118 [31] Ill. App. 184 (2); Hallagan v. Dowell, — Iowa, —, 139 N. W. 883; Parker v. Murphy, 215 Mass. 72, 102 N. E. 85; Wineman v. Fisher, 135 Mich. 608, 98 N. W. 404; Laffoon v. Kerner, 138 N. C. 285, 50 S. E. 654; Fields v. Rust, 36 Tex. Civ. App. 351, 82 S. W. 331; Bailey v. Gleason, 76 Vt. 117, 118, 56 Atl. 537; Custard v. Wigderson, 130 Wis. 414, 110 N. W. 263, 10 Ann. Cas. 740. In view of the scope of his testimony that he did not know of the bankruptcy, it is not necessary in this case to discuss that mooted point, unless it must be held that, because of the failure to set out the number of Ferger's house in Indianapolis, his claim was not duly scheduled.

The question as to the necessity of giving the street address has sometimes arisen in suits against indorsers, who claimed that they were relieved from liability because the notice of nonpayment and protest was addressed to them at the city where they lived, but without adding the street and number of their residence. It seems generally to have been held that mailing a notice thus addressed is prima facie sufficient. True v. Collins, 3 Allen, 438; Clarke v. Sharpe, 3 Mees. & W. 166, 1 Horn & H. 35; Mann v. Moors, Ryan & M. 250; People's Bank v. Scalzo, 127 Mo. 188, 29 S. W. 1032; Marton v. Westcott, 8 Cush. 425; Bartlett v. Robinson, 39 N. Y. 187. See also Bank of Columbia v. Lawrence, 1 Pet. 578, 581, 7 L. ed. 269, 270; Bank of United States v. Carneal, 2 Pet. 550, 551, 7 L. ed. 516, There are only a few instances, under the bankrupt act, in which the courts have had occasion to deal with the subject, or to construe § 7 (8),—requiring claims to be duly listed,—in connection with § 17, which provides that a discharge shall release the debtor from all provable debts "except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy . . ." It has been held that a claim is not duly scheduled if the name of the creditor is improperly spelled (Custard v. Wigderson, 130 [32] Wis. 416, 110 N. W. 263, 10 Ann. Cas. 740); or if the street number is given, but the name of the city of his residence is omitted (Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177); or if the creditor is listed as residing in one city when he actually lives in another (Marshall v. English-American Loan & T. Co. 127 Ga. 376, 56 S. E. 449); or if the creditor's name is given, but the schedule falsely recites "Residence unknown" (Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. Rep. 38; Miller v. Guasti, 226 U. S. 170, 57 L. ed. 173, 33 Sup. Ct. Rep. 49; Parker v. Murphy, 215 Mass. 72, 102 N. E. 85). These decisions, however, were based on extrinsic proof and on a finding that,

as a matter of fact, the name was misspelled, or the creditor's residence was improperly listed, or that the bankrupt knew the creditor's address and falsely stated that the residence was "Unknown." None of them holds that, as a matter of law, the discharge was rendered inoperative merely because the street number was not given in the schedule.

6. Indeed, it is not claimed that the act requires that this street address should be stated in every instance where the creditor lives in a city having a postal delivery system. Evans v. Fleming & A. Co. 62 Kan. 813, 64 Pac. 591. But it is argued that this should be done where he resides in one of the very large cities of the country. And we find that in some districts the referee examines the schedule, and, in his discretion, requires it to be amended so as to give the street number (Re Brumelkamp, 95 Fed. 814; Re Dvorak, 107 Fed. 76). We also find that the bankruptcy rules of force in the southern district of New York provide (italics ours) that the schedules "as respects creditors *in the city of New York* should state the street and number of their address or place of business so far as known." Weidenfeld v. Tillinghast, 54 Misc. 93, 104 N. Y. Supp. 712. See also Cagliostro v. Indelle, 17 Am. Bankr. Rep. 685; McKee v. Preble, 154 App. Div. 156, 138 N. Y. Supp. 915.

But without considering the effect of such rule, it is sufficient to say that, in the present case, there was nothing to show that any similar regulation had been made in the [33] Indiana district, nor is there proof as to what was Ferger's street address; or that Kreitlein knew such address at the time he made the schedule; or that the notice may not have been delivered during Ferger's absence from the city, and not received by him on his return. Nor is there any evidence to show that Ferger did not constantly and promptly receive letters addressed to him at Indianapolis without the street number being given.

7. It is said that Kreitlein might have examined the directory, but the suggestion presupposes that at the time of making the schedule the bankrupt had access to a directory, and overlooks the fact that even if the address given therein was correct when made, the creditor may have moved before the book was issued, so that if notice was mailed to an incorrect street address the creditor might contend that such specific address was not required by statute, and that the burden of the mistake was cast on the bankrupt. We are here dealing with a general rule applicable to cases where the parties reside in different parts of the country, as well as to instances where they lived in the same city. The rule is the same as to both. There certainly is no presumption that bankrupts have access to directories containing the street addresses of their creditors throughout the land: and, if the fact was essential, the question as to whether the bankrupt had access to a directory, or whether it was correct, were matters of proof, none of which was made in the present case.

8. Both as to the use of initials and omission of street address the act must be given a general construction, as in the light of the fact that letters directed to persons by their initials are constantly, properly, and promptly delivered in the greatest cities of the country even when the street number is not given. When it is considered that the schedule must not only include claims of recent origin, but debts which have accrued many years before, and where the creditor may have changed his residence, [34] it becomes evident that to lay down the general rule that the schedule must give the name of the creditor and the city and street number of the residence of those living in the largest cities would, in a multitude of cases, destroy the beneficent effect of the bankruptcy act.

These schedules are often hurriedly prepared, long after the date of the transaction out of which the debt grew, and when books and papers which might otherwise have furnished a fuller and more complete address have been lost or destroyed. Bearing in mind the general purpose of the statute to relieve honest bankrupts, considering that the act does not expressly require the street address to be stated or the residence to be given unless known, and giving proper legal effect to the order of discharge, we hold that a schedule listing the creditor's residence as Indianapolis is, at least, prima facie sufficient. In view of this conclusion the judgment of the Appellate Court of Indiana is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Day, dissenting:

I am unable to agree with the conclusion just announced. It seems to me to establish a rule by which many creditors will find their debts paid by a discharge in bankruptcy when they have had no knowledge or means of knowing that such proceedings were pending, and are not able to participate in such dividends as are paid to creditors.

It is admitted in this record that Ferger, the creditor, had a provable claim against Kreitlein in the bankruptcy proceeding. After the institution of this suit, the de-

fendant Kreitlein pleaded his discharge in bankruptcy, and the state court refused to permit it to avail as a defense, because it did not appear that Ferger's debt was properly [35] scheduled, or that he had been given the notice which the bankruptcy act declares shall be given to creditors of the pendency of the proceedings. The fact that Ferger had no notice of the proceedings is not contested. In that situation, under the act of 1898 [30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585], in order to bar the claim sued upon, it was essential for the bankrupt to show that he had complied with the act, in so far as he could, by giving or attempting to give Ferger notice of the pendency of the proceedings.

Under the bankruptcy act of 1867 [14 Stat. at L. 517, chap. 176, Comp. Stat. 1913, § 991], creditors who had provable claims were barred by the bankrupt's discharge, although such creditors' names were omitted from the schedules or so incorrectly given that they had no actual notice of the bankruptcy proceedings, unless the omission or incorrect statement was fraudulent or intentional. (See the cases under the former act, collected in Black on Bankruptcy, § 727.)

As this court pointed out in Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. Rep. 38, the act of 1898 devolved upon the bankrupt certain duties, "all directed to the purpose of a full and unreserved exposition of his affairs, property, and creditors." Under § 7, he is required to prepare, make oath to, and file in the court, within ten days, a schedule of his property containing, among other things, "a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to." These schedules were to be in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee. "To the neglect of this duty," this court declared in the Birkett Case, "the law attaches a punitive consequence," which is set forth in § 17, and provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . have not been duly scheduled in time for proof and allowance, [36] with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . ." It follows from this decision that, if a discharge is to have the effect to cancel the debt of a creditor who had no notice of the proceedings, the burden is upon the bankrupt to show a compliance with the act. The provisions of the act (§ 21f) making the certified copy of the discharge evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order was made, should be read in connection with the provisions of § 17, excepting from the benefit of a discharge claims which the bankrupt has failed to duly schedule.

To this effect are a number of well-considered cases in the state courts. In Columbia Bank v. Birkett, 174 N. Y. 112, 102 Am. St. Rep. 478, 66 N. E. 652, affirmed in 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. Rep. 38, the court, speaking through Judge Gray, said: "While there may be some difficulty in the way of statutory construction, I think the plaintiff's claim has never been discharged, as the result of the bankruptcy proceedings. In my opinion, there are features in the present bankruptcy act which differentiate it from preceding acts, and which indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy. It is provided that the voluntary bankrupt must file 'a list of his creditors, showing their residence, if known,' and that notices must be sent to the creditors at 'their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed . . . by the creditors.' . . . While in the previous act of 1841 [5 Stat. at L. 440, chap. 9] and 1867, substituted service of notices by publication was provided for; in the present act it is actual notice that is required to be given. The schedule of debts, which the bankrupt is to file with his petition, furnishes the basis for the notices which the referee, or the court, is to give thereafter to the creditors, and thus the bankrupt appears [37] to be made responsible for the correctness of the list of his creditors. That he is to suffer in the case of his failure to state the name of the creditor, to whom his debt is due, if known to him, seems to me very clear from the reading of § 17 of the act. That excepts from the release of the discharge all debts which 'have not been duly scheduled in time for proof and allowance, with the name of the creditor.' That is very emphatic language, and how is it possible to obviate its effect by the argument that the plaintiff still had time left, after the discharge was granted, to prove his claim? . . . I think it was intended that the decree discharging the voluntary bankrupt should be confined in its operations to the creditors who had been duly listed and who were enabled to receive the notices which the act provides for."

In Parker v. Murphy, 215 Mass. 72, 102

N. E. 85, this question was discussed, and the court said:

"Section 17 of the bankruptcy act provides that a discharge in bankruptcy shall release the debtor from all provable debts 'except such as . . . have not been duly scheduled . . . unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.' Claims are not duly scheduled unless the names of the debtor's 'creditors, showing their residences, if known,' are on the list of creditors filed. Section 7, cl. 8. The burden of proving that he did all things required of him under the bankruptcy law to give notice to the respondent creditor of the bankruptcy proceedings, or that the latter had actual knowledge of them, rests upon the plaintiff [the bankrupt] in this case. Wylie v. Marinofsky, 201 Mass. 583, 88 N. E. 448. Wineman v. Fisher, 135 Mich. 604, 608, 98 N. W. 404.

"The requirement for duly scheduling the names and residences of creditors is a most important one. It is in compliance with the generally recognized principle that one shall not be barred of his claim without the opportunity [38] of having his day in court. It is for the benefit of the creditors and in the interest of fair dealing with them, and is to be construed in harmony with this purpose. It is essential in order that notices in the bankruptcy proceedings may be sent him. It has been construed with some strictness. Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. Rep. 38; Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740."

In Custard v. Wigderson, supra, the court said: "Under the bankruptcy law of 1867 this court held, in harmony with the general current of authority, that a debt was discharged, even though not scheduled. . . . But it will be seen that under the act of 1867 debts not scheduled were not excepted from the operation of discharge, while under the bankruptcy act of 1898 they are. . . . This provision is a marked departure from former bankruptcy acts, and decisions under such acts to the effect that scheduling was not necessary in order to bring the debt within the order of discharge [are not pertinent]. The words of the present act, however, are plain and unambiguous, and there can be no doubt that they mean what they say; and, if so, unless the debt is duly scheduled in time for proof and allowance, or the creditor had notice or actual knowledge of the proceedings in bankruptcy, it is not affected by the discharge."

In McKee v. Preble, 154 App. Div. 156, 138 N. Y. Supp. 915, the schedules had given the address as 212, 9th avenue, New York, which was the place of business. Plaintiff's residence was elsewhere, with the correct address given in the city directory, where the bankrupt might have discovered it with a slight effort. The creditor swore he received no notice. The discharge was held ineffective as against this creditor.

In Cagliostro v. Indelle, 17 Am. Bankr. Rep. 685, the residence, as stated in the schedules, was "Mulberry street, New York city." Creditor's residence, in fact, was 141 Mulberry street, where he had resided for fifteen years last past.

[39] This fact appeared in the directory, and could have easily been discovered. It was held that the bankrupt did not use due effort to ascertain the address of the creditor, and the discharge did not affect this debt, the court saying: "I am satisfied that the petitioner, when he made up the schedules, failed to use due efforts to learn the street number of the judgment creditor, and that it was owing to such failure on his part that the judgment creditor received no notice. Such failure deprives him of the right to a discharge of such judgment. Columbia Bank v. Birkett, 174 N. Y. 112, 102 Am. St. Rep. 478, 66 N. E. 652, 9 Am. Bankr. Rep. 481; Sutherland v. Lasher, 41 Misc. 249, 84 N. Y. Supp. 56, 11 Am. Bankr. Rep. 780, affirmed in 87 App. Div. 633, 84 N. Y. Supp. 1148. It may be that, in the absence of other evidence, there is a presumption that the postal authorities would deliver a letter to the plaintiff addressed, simply, 'Mulberry street,' without any addition of the street number; but such presumption cannot prevail as against the positive statement of the plaintiff that he never received such notice."

It seems to me that the same rule in scheduling creditors cannot be applied to those who reside in large cities, where it may be essential, in order that the creditor receive notice, that street and number shall be given, as is applied to creditors residing in small communities where the postal authorities may be presumed to know the residence of the creditor by a more general form of address.

If it is sufficient to give the name of the city, without more, the bankrupt, when making out his schedules which are to be the basis of informing creditors of the proceedings, may have before him the list of his creditors, and the street and number of their addresses, but being only required to give the name and residence of the creditor, he may omit to state the street and number, although known.

It is true that in view of the efficiency of the postal service such notices may reach the creditor, and may inform him of the proceedings, with the consequent opportunity to prove his claim; but, because of

the omission of [40] street and number the notice may fail to reach the creditor, and the estate may be administered and divided without his knowledge or any opportunity to participate in the distribution. It seems to me that the only consistent conclusion in view of the provisions of the present bankruptcy act requires that the consequences of such negligence of the bankrupt be visited upon him, and not upon the innocent creditor. If the notice reaches the creditor, well and good; but if not, the loss should fall upon him upon whom the law has placed the burden of complying with the requirement to duly schedule the debt of each creditor, so far as known.

It is a question of due diligence in every case, with the burden of showing such diligence upon the bankrupt, and there is nothing in this case to show that Kreitlein did not know of Ferger's address in Indianapolis, nor is there a showing of diligence on his part to discover what it actually was, if in fact it was unknown. In view of their former dealings, it is fair to presume that Ferger's address was known to Kreitlein.

Obviously, the same rule may not apply to all places, and of course the schedules showing street and number are only to be complied with so far as practicable. "Thus, failure to look in the city directory of a great city, both creditor and bankrupt being residents, is not due scheduling." 3 Remington, Bankr. p. 2504.

"By far the most important schedule is that of creditors. Its purpose is threefold: (a) to give the court information as to the persons entitled to notice, (b) to inform the trustee as to the claims against the estate and the considerations on which they rest, and (c) to an extent, at least, to limit the effect of the bankrupt's discharge to parties to the proceeding. It follows that the requirements of the statute, . . . should be strictly observed. . . . The names of creditors should be written with care. . . . Even greater care should be [41] observed in addresses. Schedules are defective if they do not contain the addresses of creditors, stating street and number, in case the creditors reside in large cities, or unless the schedules show that after diligent effort no better addresses can be obtained. If the residence cannot be ascertained, that fact must be stated, and the proper practice requires that the bankrupt shall state what efforts he has made to ascertain the residence." Collier, Bankr. 9th ed. p. 234. To the same effect is Loveland on Bankruptcy, vol. 1, 4th ed. 374.

It seems to me that in this case there is an utter lack of that diligence to ascertain and state the residence of the creditor which is required to give the discharge the effect of barring this claim.

Indianapolis is a large city. The imperfectly addressed notice never reached Ferger. Moreover, Kreitlein had probable knowledge of Ferger's true address, or might have obtained it by the exercise of due diligence. In my opinion the judgment of the Indiana court should be affirmed.

Mr. Justice McKenna concurs in this dissent.

MALLINCKRODT CHEMICAL WORKS, Plff. in Err.,
v.
STATE OF MISSOURI, AT THE RELATION OF SEEBERT G. JONES, Circuit Attorney of the City of St. Louis.

(See S. C. Reporter's ed. 41–56.)

Error to state court — Federal question — how raised.

1. A Federal question must be deemed to have been raised in the state courts with sufficient definiteness to comply with the provisions of the Judicial Code, § 237, governing writs of error from the Federal Supreme Court to state courts, where it appears from the opinion of the state supreme court that a question of the equal protection of the laws, under U. S. Const., 14th Amend., was treated as sufficiently raised.

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to what constitutes due process of law, generally,—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

and was specifically dealt with and ruled against the plaintiff in error.

[For other cases, see Appeal and Error, 1168–1248, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity — ambiguity.

2. The validity under the due process of law clause of U. S. Const., 14th Amend., of the provision of Mo. Rev. Stat. 1909, § 10,322, requiring an affidavit from managing officers of corporations that the corporation "has not issued and does not own any trust certificates," cannot be attacked on the ground of the uncertain meaning of the term "trust certificates" by a corporation whose refusal to file the affidavit was based upon the general theory that the corporation was not obliged to make any such disclosure as is required by that section, and not upon the ground of any ambiguity respecting that term.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — impossibility of compliance with statute.

3. There is nothing inconsistent with the due process of law guaranteed by U. S. Const., 14th Amend., in requiring from the managing officers of a corporation organized prior to 1900 the affidavit, prescribed by Mo. Rev. Stat. 1909, § 10,322, setting forth the nonparticipation of the corporation in any pool, trust, agreement, combination, etc., although the statute prescribes a form of affidavit which states the year "19—" as the year of incorporation, and the form transmitted to the corporation in question was accompanied with official instructions that it "will not be accepted if any changes or erasures are made."

[For other cases, see Constitutional Law, IV. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — impossibility of compliance with statute.

4. Exacting from a corporation located and transacting its business in the city of St. Louis, which, under the Constitution and laws of Missouri, is not part of any county, the affidavit prescribed by Mo. Rev. Stat. 1909, § 10,322 of nonparticipation by the corporation in pools, trusts, agreements, combinations, etc., does not deny the due process of law guaranteed by U. S. Const., 14th Amend., although the prescribed form of affidavit has a venue and jurat in a county—especially since by § 8057 it is provided that whenever the word "county" is used in any general law, it shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of the law, or of some law specially applicable to the city.

[For other cases, see Constitutional Law, IV. b, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — affidavit from corporate officers.

5. Requiring from managing officers of corporations an affidavit setting forth the nonparticipation of the corporation in pools, trusts, agreements, combinations, etc., as is done by Mo. Rev. Stat. 1909, § 10,322, does not deny the equal protection of the laws guaranteed by U. S. Const., 14th Amend., because individuals, partnerships, and associations of individuals, although equally within the law against monopolies, are not required to make similar exculpatory affidavits.

[For other cases, see Constitutional Law, IV. a, 3, in Digest Sup. Ct. 1908.]

[No. 187.]

Argued March 10, 1915. Decided June 1, 1915.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of the City of St. Louis, forfeiting a charter of a corporation for failure of its officers to file an affidavit setting forth nonparticipation in any pool, trust, agreement, combination, etc. Affirmed.

See same case below, 249 Mo. 702, 156 S. W. 967.

The facts are stated in the opinion.

Mr. Shepard Barclay argued the cause, and, with Messrs. S. Mayner Wallace and William R. Orthwein, filed a brief for plaintiff in error:

The requirement of an affidavit that the company has not issued and does not own any trust certificates is not due process of law.

Collins v. Kentucky, 234 U. S. 638, 58 L. ed. 1511, 34 Sup. Ct. Rep. 924; International Harvester Co. v. Kentucky, 234 U. S. 223, 58 L. ed. 1288, 34 Sup. Ct. Rep. 853; Wilmington City R. Co. v. Taylor, 198 Fed. 159.

"Trust certificates" and "trust receipts" are ordinary kinds of business documents representing interests in property, and are not illegal in themselves. They often are mentioned as legitimate evidences of title.

Re Coe, 106 C. C. A. 181, 183 Fed. 745; Re E. Reboulin Fils & Co. 165 Fed. 246; Hamilton v. Billington, 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904.

A law requiring an impossibility is not "due process."

Bishop, Statutory Crimes, 2d ed. § 41; 26 Am. & Eng. Enc. Law, 2d ed. p 656; International Harvester Co. v. Kentucky, 234 U. 223, 58 L. ed. 1288, 34 Sup. Ct Rep. 853; Collins v. Kentucky, 234 U. S. 638, 58 L. ed. 1511, 34 Sup. Ct. Rep. 924; State ex rel. Crow v. West Side Street R. Co. 146 Mo. 175, 47 S. W. 959; Maxwell, Interpretation of Statutes, 4th ed. pp. 577, 578.

The demand of this law for an affidavit of innocence by managing officers of corporations, to disprove guilt under the law against

pools and conspiracies in restraint of trade, is an unjust discrimination against them, and denies them, as well as defendant, the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Wilmington City R. Co. v. Taylor, 198 Fed. 159; Paddock v. Missouri P. R. Co. 155 Mo. 537, 56 S. W. 453; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Ex parte Young, 13 L.R.A.(N.S.) 932, note; Soon Hing v. Crowley, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Southern R. Co. v. Greene, 216 U. S. 412, 417, 54 L. ed. 539, 541, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247; Connolly v. Union Sewer Pipe Co. 184 U. S. 556, 46 L. ed. 688, 22 Sup. Ct. Rep. 431; Niagara F. Ins. Co. v. Cornell, 110 Fed. 823; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; State ex rel. Wyatt v. Ashbrook, 154 Mo. 395, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

Mr. Lee B. Ewing argued the cause, and, with Messrs. William M. Fitch and Shrader P. Howell, and Mr. John T. Barker, Attorney General of Missouri, filed a brief for defendant in error:

The authority of the general assembly of the state of Missouri to pass laws prohibiting agreements or combinations in restraint of trade, or the carrying out in the state of such agreements or combinations, is absolute and complete.

International Harvester Co. v. Missouri, 234 U. S. 199, 210–212, 214, 215, 58 L. ed. 1276, 1281–1284, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Berea College v. Kentucky, 211 U. S. 45, 53, 54, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220, s. c. 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Standard Oil Co. v. Tennessee, 217 U. S. 415, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Carroll v. Greenwich Ins. Co. 199 U. S. 410, 50 L. ed. 250, 26 Sup. Ct. Rep. 66.

The state of Missouri has the absolute right and power to prescribe punishment for violations of her anti-trust laws.

International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 111, 53 L. ed. 417, 430, 29 Sup. Ct. Rep. 220; Coffey v. Harlan County, 204 U. S. 659, 51 L. ed. 666, 27 Sup. Ct. Rep. 305; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Western U. Teleg. Co. v. Indiana, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406.

The presumption is always in favor of the validity of a state statute.

Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; Erb v. Morasch, 177 U. S. 584, 586, 44 L. ed. 897, 898, 20 Sup. Ct. Rep. 819; Fischer v. St. Louis, 194 U. S. 361, 371, 48 L. ed. 1018, 1023, 24 Sup. Ct. Rep. 673; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 529, 24 L. ed. 734, 737.

Before a state statute will be annulled by the United States Supreme Court as arbitrary or unreasonable, and therefore in violation of the Federal Constitution, or of the Amendments thereto, it must clearly appear to be in violation thereof.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66; International Harvester Co. v. Missouri, 234 U. S. 199, 210, 214, 58 L. ed. 1276, 1281, 1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Bachtel v. Wilson, 204 U. S. 36, 37, 41, 51 L. ed. 357–359, 27 Sup. Ct. Rep. 243.

The state has extremely wide latitude and great power in providing classes which may be subject to legislative enactment, regulation, or control; and discretion, when exercised by a state in such matters, will be enforced unless the enforcement thereof would be extremely unjust and clearly in violation of some provision of the Federal Constitution. Such classification may, within certain degrees, discriminate to great length and still be valid under the Federal Constitution.

International Harvester Co. v. Missouri, 234 U. S. 199, 210, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Standard Oil Co. v. Tennessee, 217 U. S. 420, 54 L. ed. 820, 30 Sup. Ct. Rep. 543; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 106, 107, 43 L. ed. 909, 913, 914, 19 Sup. Ct. Rep. 609; Hammond Packing Co. v. Arkansas, 212 U. S. 343, 53 L. ed. 541, 29 Sup. Ct. Rep. 370; Clark v. Kansas City,

176 U. S. 114, 120, 44 L. ed. 392, 397, 20 Sup. Ct. Rep. 284; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 277, 53 L. ed. 176, 184, 29 Sup. Ct. Rep. 50.

The immunity clause of the 14th Amendment to the Federal Constitution is purely personal; it has been held that an attorney cannot raise the question for the witness.

Hale v. Henkel, 201 U. S. 43, 70, 50 L. ed. 652, 663, 26 Sup. Ct. Rep. 370; Brown v. Walker, 161 U. S. 596, 40 L. ed. 820, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Best, Ev. 9th ed. p. 113; 3 Taylor, Ev. § 1453; 1 Greenl. Ev. 16th ed. § 469d; Phillipps, Ev. 4th Am. ed. p. 935; Starkie, Ev. 10th Am. ed. p. 4; Wigmore, Ev. § 2263; Com. v. Shaw, 4 Cush. 594, 50 Am. Dec. 813; State v. Wentworth, 65 Me. 241, 20 Am. Rep. 688.

If the decision of the Missouri supreme court has accorded plaintiff in error every right, benefit, and privilege guaranteed to it by the United States Constitution, then the judgment must be affirmed by this court.

Berea College v. Kentucky, 211 U. S. 45, 53, 54, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33.

The "equal protection of the law" as guaranteed by the 14th Amendment to the Federal Constitution is satisfied if the law applies equally to all persons in like situation and condition.

Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 163, 24 L. ed. 94, 95; International Harvester Co. v. Missouri, 234 U. S. 199, 210–214, 58 L. ed. 1276, 1281–1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Duncan v. Missouri, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Mutual Loan Co. v. Martell, 222 U. S. 225, 233, 236, 56 L. ed. 175, 178, 180, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Aluminum Co. v. Ramsey, 222 U. S. 251, 255, 56 L. ed. 185, 189, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 251.

"Due process of law" has been given the plaintiff in error under the Missouri statutes and the proceedings involved in the case at bar as fully as is guaranteed to it by the Federal Constitution; it has been given its day in court after due notice.

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 350, 53 L. ed. 530, 544, 29 Sup. Ct. Rep. 370; Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 270, 271, 56 L. ed. 1082, 1086, 1087, 32 Sup. Ct. Rep. 828; Twining v. New Jersey, 211 U. S. 79, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936; Jordan v. Massachusetts, 225 U. S. 167, 56 L. ed. 1038, 32 Sup. Ct. Rep. 651; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200; Paddell v. New York, 211 U. S. 446, 450, 53 L. ed. 275, 277, 29 Sup. Ct. Rep. 139, 15 Ann. Cas. 187; Blinn v. Nelson, 222 U. S. 1, 56 L. ed. 65, 32 Sup. Ct. Rep. 1, Ann. Cas. 1913B, 555; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 Sup. Ct. Rep. 303.

No provision of the Federal Constitution is violated by the Missouri statute, which requires an affidavit of innocence to be furnished by all domestic corporations in Missouri, when such affidavit is not required by persons or partnerships engaged in the same or similar lines of business as such corporations.

Mutual Loan Co. v. Martell, 222 U. S. 225, 233, 236, 56 L. ed. 175, 178, 180, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; International Harvester Co. v. Missouri, 234 U. S. 199, 210, 214, 58 L. ed. 1276, 1281, 1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Berea College v. Kentucky, 211 U. S. 45, 53, 54, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 343, 344, 53 L. ed. 530, 541, 542, 29 Sup. Ct. Rep. 370; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 319, 55 L. ed. 229, 236, 31 Sup. Ct. Rep. 246.

Mr. Justice **Pitney** delivered the opinion of the court:

This was an action brought by the state of Missouri, at the relation of the circuit attorney of the city of St. Louis, against the Mallinckrodt Chemical Works (a Missouri corporation), to forfeit its charter for failure of its officers to file with the secretary of state in the year 1910 the affidavit prescribed by § 10,322, Missouri Rev. Stat. 1909, setting forth the nonparticipation of defendant in any pool, trust, agreement, combination, etc. The supreme court of the state affirmed a judgment of forfeiture (249 Mo. 702, 156 S. W. 967), and the case is brought here **[49]** upon the contention that the statute as thus enforced is repugnant to the 14th Amendment of the Constitution of the United States in that it denies to defendant and its managing officers the equal protection of the laws and deprives them of property without due process of law.

There is a motion to dismiss, based upon the ground that the Federal questions here set up were not raised in the trial court, or in the supreme court of the state, with sufficient definiteness to comply with § 237, Judicial Code (act of March 3, 1911, 36 Stat. at L. 1087, 1156, chap. 231, Comp. Stat. 1913, §§ 968, 1214). It appears,

however, from the opinion of the supreme court (249 Mo. 704 (8), 733), that the question of equal protection under the 14th Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against plaintiff in error. This is sufficient to confer jurisdiction upon this court, and the motion to dismiss must be denied. North Carolina R. Co. v. Zachary, 232 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

Section 10,322, Missouri Rev. Stat. 1909 (enacted in this form in 1907, Laws, p. 374), is set forth in full in the margin.[1] It forms part of article 3 of chapter 98, which [50] relates to "Pools, Trusts, Conspiracies, and Discriminations." Article 1 of the same chapter contains sections prohibiting combinations in restraint of trade or competition, and the like, under prescribed penalties. But in the present case the supreme court held (249 Mo. 726-729) [51] that article 3 is complete in itself and independent of article 1, and has for its object the discouragement of the formation of pools, etc., and requires a disclosure of existing combinations by the filing of annual affidavits under the penalty of forfeiture of the charter or certificate of incorporation, or the right or privilege to do business in the state, "even though the company may never have [52] entered into any such pool, trust, conspiracy, or combination mentioned in the first article."

It appears that on or about July 1, 1910, the secretary of state, in obedience to the requirements of § 10,322, addressed to the president of plaintiff in error a proper letter of inquiry, requiring an answer under oath, and inclosing the form of affidavit prescribed by that section, and that the corporation wilfully failed and refused to make answer by filing or causing to be filed the affidavit. Proof of these facts was held sufficient to sustain the judgment of forfeiture.

Assuming, without deciding, that all of the grounds upon which the validity of § 10,322 is here attacked were properly saved in the state courts, we will discuss them in their order.

(1) It is insisted that the statute is repugnant to the "due process" clause, in that it requires an oath of the corporation's officer that the corporation "has not issued and does not own any trust certificates," without explaining or defining the term "trust certificates," or otherwise indicating the meaning of the requirement, or limiting it to such certificates as are declared unlawful by the statute. It is very plain, however, that the term "trust certificates" in the prescribed affidavit must be construed

[1] Sec. 10,322. Secretary of state to make inquiry—form of affidavit.—It shall be the duty of the secretary of state, on or about the 1st day of July of each year, to address to the president, secretary or managing officer of each incorporated company in this state, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of article 1 of this chapter, and to require an answer, under oath, of the president, secretary or managing officer of said company. A form of affidavit shall be inclosed in said letter of inquiry, as follows:

Affidavit.

State of Missouri, } ss.
County of ———— }

I, ————, do solemnly swear that I am the ———— (president, secretary or managing officer) of the corporation known and styled ————, duly incorporated under the laws of ————, on the — day of ———— 19—, and now transacting or conducting business in the state of Missouri, and that I am duly authorized to represent said corporation in the making of this affidavit, and I do further swear that the said ————, known and styled as aforesaid, is not now, and has not at any *time* within one year from the date of this affidavit, created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer or employee, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manu-

in the light of § 10,306, found in article 1 of the same chapter, which declares:

"It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employee, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, [53] with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. (Laws 1907, p. 377.)"

The evident purpose of that part of the affidavit to which the present criticism relates is to require an assurance under the oath of a responsible officer of the corporation that the provisions of § 10,306 have not been violated.

The Century Dictionary gives as a specific definition of the commercial term "trust" the following: "An organization for the control of several corporations under one direction by the device of a transfer by the stockholders in each corporation of at least a majority of the stock to a central committee or board of trustees, who issue in return to such stockholders respectively certificates showing in effect that, although they have parted with their stock and the consequent voting power, they are still entitled to dividends or to share in the profits, —the object being to enable the trustees to elect directors in all the corporations, to control and suspend at pleasure the work of any, and thus to economize expenses, regulate production, and defeat competition. In a looser sense the term is applied to any combination of establishments in the same line of business for securing the same ends by holding the individual interests of each subservient to a common authority for the common interests of all."

We need not adopt this or any other precise definition of the disputed term, for if the legislative meaning be doubtful in this respect there is nothing in the record to show that this is of the least consequence to plaintiff in error. From the undisputed evidence it appears that the refusal to file the affidavit was based upon the general theory that the corporation was not obliged to make any such disclosure as is required by § 10,322, and not upon the ground of any ambiguity respecting the term "trust certificate." [54] As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitu-

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factured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or prevent, restrict or diminish the manufacture or output of any article; and that it has not made or entered into any arrangement, contract or agreement with any person, association of persons or corporation designed to lessen or which tends to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this state, or under the terms of which it is proposed, stipulated, provided, agreed or understood that any particular or specified article, product or commodity shall be dealt in, sold or offered for sale in this state to the exclusion, in whole or in part, of any competing article, product or commodity.

_____,
(President, secretary or managing officer.)

Subscribed and sworn to before me, a _____ within and for the county of _____, this —day of _____, 19—.

(Seal) _____

And thereupon it shall become the duty of such corporation to make answer to such inquiry by filing or causing to be filed the affidavit prescribed herein. And on refusal to make oath in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, the secretary of state shall certify said fact to the prosecuting attorney of the county or the circuit attorney in the city of St. Louis, wherein said corporation is located, and it shall be the duty of such prosecuting attorney or circuit attorney, at the earliest practicable moment, in the name of the state, and at the relation of said prosecuting or circuit attorney, to proceed against such corporation for the forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this state: Provided, however, that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the court may assess against such corporation, in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in this state, a fine not to exceed $5,000 and not less than $100: Provided, however, that at any time before final judgment, if such corporation shall file or cause to be filed with the secretary of state the affidavit herein prescribed, the trial court may, in his discretion, and for good cause shown, upon the payment of all costs, together with the attorney's fees of $10, to be paid to the prosecuting attorney or the circuit attorney in the city of St. Louis, remit the penalty herein prescribed. (Laws 1907, p. 374.)

tion must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359, and cases cited.

And it is to be assumed, in the absence of any construction of the statute by the courts of the state, that those courts will adopt such a construction as will render the enactment consistent with constitutional limitations. Bachtel v. Wilson, 204 U. S. 36, 40, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243.

The present case is altogether different from International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853, and Collins v. Kentucky, 234 U. S. 634, 58 L. ed. 1510, 34 Sup. Ct. Rep. 924, for there the local statutes had already been construed by the highest court of the state, and, as so construed, were held by this court to prescribe no standard of conduct that it was possible to know, and to violate the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable.

(2) It is said that § 10,322, as applied to plaintiff in error, is inconsistent with due process of law because it prescribes "an inflexible and immutable form of affidavit," and that the form transmitted to plaintiff in error was accompanied with official instructions that it "will not be accepted if any changes or erasures are made in the form;" and that the statutory form includes in the jurat the year "19—," and hence is not applicable to corporations organized, as plaintiff in error was, prior to the year 1900. The objection hardly merits serious treatment. It might as well be said that the blanks in the affidavit could not be filled up without departing from the form prescribed by the legislature. Of course, neither the statute [55] nor the official caution reasonably admits of any such construction.

(3) A similar contention is based upon the circumstance that the prescribed form of affidavit "has a venue and jurat in a county," whereas plaintiff in error is located and transacts business in the city of St. Louis, which, under the Constitution and laws of Missouri, is not part of any county. This is sufficiently answered by what we have just said; but we may add that, as pointed out in the opinion of the Missouri supreme court (249 Mo. 732, 156 S. W. 967), § 8057, Rev. Stat. 1909, which prescribes rules for the construction of statutes, provides that "whenever the word 'county' is used in any law, general in its character to the whole state, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city."

(4) It is insisted that to require an affidavit of innocence by the managing officers of corporations is an unjust discrimination against them, and hence repugnant to the "equal protection" provision, because individuals, partnerships, and associations of individuals, although equally within the law against monopolies (§§ 10,299, 10,303), are not required to make similar exculpatory affidavits. The question is whether, for the purpose of such a disclosure as is required by § 10,322, corporations may be placed in one class and individuals in another. The answer is not at all difficult. Of course, corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject. Classification must be reasonable; that is to say, it must be based upon some real and substantial distinction having a just relation to the legislative object in view. But here, as in other questions of alleged conflict with constitutional requirements, every reasonable intendment is in favor of the validity of the legislation [56] under attack. Corporations, unlike individuals, derive their very right to exist from the laws of the state; they have perpetual succession; and they act only by agents, and often under circumstances where the agency is not manifest. The legislature may reasonably have concluded that, for these and other reasons, corporations are peculiarly apt instruments for establishing and effectuating those trusts and combinations against which the prohibition of the statute is directed, that their business affiliations are not so easily discovered and traced as those of individuals, and that there was therefore a peculiar necessity and fitness in annually requiring from each corporation a solemn assurance of its nonparticipation in the prohibited practices. The act is, in this respect, fairly within the wide range of discretion that the states enjoy in the matter of classification. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 650, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678, and cases cited.

Judgment affirmed.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plff. in Err.,
v.
J. B. VOSBURG.

(See S. C. Reporter's ed. 56–62.)

Constitutional law — equal protection of the laws — police regulations.

1. A police regulation is, like any other law, subject to the equal protection of the laws clause of the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. a, 1; IV. c, 1, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — attorney's fees.

2. The equal protection of the laws guaranteed by U. S. Const., 14th Amend., is denied to railway companies by Kansas Laws 1905, chap. 345, under which, as amended by Laws 1907, chap. 275, a reasonable attorney's fee is allowed to a shipper who successfully sues a railroad company for failure to furnish cars, while no such allowance may be made in favor of a railway company in the event of its successful prosecution of a suit brought by it under such statute against a shipper who has failed to use the cars promptly.

[For other cases, see Constitutional Law, IV. a, 6, in Digest Sup. Ct. 1908.]

[No. 189.]

Submitted March 10, 1915. Decided June 1, 1915.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Edwards County, in that state, allowing an attorney's fee in an action successfully prosecuted by a shipper against a railway company for the latter's failure to furnish cars. Reversed and remanded for further proceedings.

See same case below, 89 Kan. 114, 130 Pac. 667.

The facts are stated in the opinion.

Messrs. **Gardiner Lathrop** and **Robert Dunlap** submitted the cause for plaintiff in error. Messrs. William R. Smith and William Osmond were on the brief:

This "reciprocal demurrage law" is so lacking in all reciprocity as to bring it wholly within the condemnation of Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. See also San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Wilder v. Chicago & W. M. R. Co. 70 Mich. 382, 38 N. W. 289; Randolph v. Builders' & Painters' Supply Co. 106 Ala. 501, 17 So. 721; Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A. (N.S.) 102, 32 Sup. Ct. Rep. 493.

Attorneys' fees in no respect constitute a part of the damage which may be suffered by one through the wrongful or unlawful act of another, because obviously the alleged wrongdoer may avoid the same by settling the claimant's demand by yielding to his terms, and thus avoid a resort to the courts.

Stewart v. Sonneborn, 98 U. S. 187, 197, 25 L. ed. 116, 120; Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 230, 231, 21 L. ed. 45; Hicks v. Foster, 13 Barb. 663; Good v. Mylin, 8 Pa. 51, 49 Am. Dec. 493.

The classification is based upon persons, and not upon the character of the litigation. It is capricious and arbitrary.

Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641.

Mr. **Arthur M. Jackson** submitted the cause for defendant in error. Mr. Wilber E. Broadie was on the brief:

The constitutionality of an act classifying and penalizing certain persons or corporations depends upon whether such act is arbitrary, a meddling with purely private affairs, and without natural or obvious justification, or whether it is fair and reasonable and intended to regulate matters affecting the public interest. The right of a state to classify and to impose special duties and penalties where public interest and welfare justify such action is well recognized as a valid exercise of police power.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; 8 Cyc. 1101; Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70, 57 L. ed. 734, 33 Sup. Ct. Rep. 437; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301; Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; Seaboard

NOTE.—As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On the validity of statutory provisions for attorney's fee—see note to Builders' Supply Depot v. O'Connor, 17 L.R.A. (N.S.) 910.

On unconstitutional inequality or discrimination in statutes allowing attorneys' fees—see note to Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 821.

Air Line R. Co. v. Seegers, 207 U. S. 78, 52 L. ed. 110, 28 Sup. Ct. Rep. 28; Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co. 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088.

Mr. Justice Pitney delivered the opinion of the court:

The Federal question involved in this case is concisely stated in the opening paragraph of the opinion of the supreme court of Kansas (89 Kan. 114, 130 Pac. 667), whose judgment we have under review:

"Chapter 345 of the Laws of 1905, as amended by chapter 275 of the Laws of 1907 (Gen. Stat. 1909, §§ 7201 et seq.), concerns the furnishing of cars by railway companies to shippers of freight. When cars applied for under this statute are not duly furnished, the railway company is liable to the shipper for all actual damages suffered, for a penalty of $5 per day for each car not supplied, and for a [58] reasonable attorney fee. Shippers who fail to use cars placed at their disposal are subject to a penalty for their detention, but are not liable for attorney fees. The plaintiff [Vosburg] recovered a judgment against the defendant for a violation of this statute, including an attorney fee, and the defendant appeals on the ground that the provision relating to attorney fees denies it the equal protection of the law guaranteed by the Federal Constitution."

Upon a review of certain decisions of this court, *viz.*, Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Fidelity Mut. L. Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, and Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565, the state court held (p. 130), that since the act in question is a police regulation prescribing duties properly enforceable by penalties in the form of *per diem* forfeits and attorney fees recoverable in suitable actions, and because of the control of railroad companies over their cars, their capacity to disturb and obstruct trade, and the helplessness of shippers when cars are carelessly or arbitrarily withheld, railroad companies might properly be placed in a class by themselves for the purpose of securing sufficient car service, and that the equal protection of the law required no more than that all railway companies should be penalized alike. The court, in conclusion, said: "It is true that shippers may offend somewhat by failing to make expeditious use of cars when furnished them. Whether or not they too shall be penalized, and if so to what extent, is a fit subject for legislative consideration. But the railroad companies cannot complain if the legislature chooses to exempt shippers from any punishment, or chooses to prescribe some penalty suitable to the nature of their delinquency, but different from that imposed upon the companies themselves."

The enactment in question is commonly called the "reciprocal" or "mutual" demurrage law. (82 Kan. 260, 108 Pac. 137, 85 [59] Kan. 282, 116 Pac. 906.) It provides that a railway company failing to furnish cars upon proper application shall pay, to the party applying, "$5 per day for each car failed to be furnished as exemplary damages, . . . and all actual damages that such applicant may sustain for each car failed to be furnished, together with reasonable attorney fees." At the same time it requires the applicant to load the cars within forty-eight hours after they are placed, "and upon failure to do so he shall pay to the company the sum of $5 per day for each car not used, while held subject to the applicant's order. . . . And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the said applicant to use said cars." [Gen. Stat. 1909, §§ 7203, 7204.]

We agree that this legislation is properly to be regarded as a police regulation, and in that respect differs from the act that was under consideration in the Ellis Case, supra, which simply imposed a penalty upon railroad corporations for a failure to pay certain debts. But we cannot at all agree that a police regulation is not, like any other law, subject to the "equal protection" clause of the 14th Amendment. Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. Thus, in Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, the responsibility imposed upon railroad companies for attorneys' fees in addition to damages was sustained [60] because designed to enforce care on the part of those companies to prevent the communica-

tion of fire and the destruction of property along their lines,—a duty imposed upon them, and not upon the owners of the property. We need not review the decisions, the subject being so familiar that extended discussion is unnecessary.

The precise question now presented is: What is there in the object of the legislation under consideration that furnishes a ground of distinction between railway company and shipper upon which it is reasonable to say that the latter should be allowed to recover attorney fees when it successfully sues the former, and not *vice versa?* The statute recognizes that the duty of the company to promptly furnish cars, and the duty of the shipper to promptly use them, are reciprocal, and for a breach of either duty the delinquent is penalized in favor of the other party in precisely the same amount—$5 per day per car. The shipper may also recover his actual damages, if any. The company recovers actual damages, in addition to the penalty, only under special circumstances. No complaint is now made that this is a denial of equal protection, and we lay no stress upon it. But the statute clearly recognizes that either party may be obliged to sue the other in order to recover the penalty, or damages, or both. No reason is suggested, and none occurs to us, why the railroad company, when plaintiff in such an action, will not require the services of an attorney as well as the shipper when he is plaintiff. There is nothing in the nature of the cause of action that renders the burden of preparation more onerous, as a rule, to the shipper when he is plaintiff than to the company when it is plaintiff. There is nothing discernible, therefore, in the purposes of the legislation—which are: to require the prompt furnishing of cars for use, and the prompt use of cars when furnished, and to redress a disregard of either of these requirements by suit when necessary—to give ground for a distinction granting attorney's [61] fees to the shipper when he sues, and denying attorney's fees to the company when it sues. In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate prosecution in court of actions respecting car service.

In Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 650, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678, we had under consideration a Texas statute respecting claims of certain classes against persons or corporations doing business in the state, which provided that if any such claim were not paid within a limited time after presentation, suit might be instituted thereon, and if plaintiff obtained judgment for the full amount of the claim as presented he should recover the amount claimed and costs, and in addition a reasonable amount as attorney's fees. In sustaining the act we said (p. 650): "If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs." (Citing Atchison, T. & S. F. R. Co. v. Matthews, supra, and Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.)

The present case is essentially different, for in the Kansas statute the distinction is not rested upon the fact that the plaintiff, whether shipper or company, has a special burden in the litigation that may reasonably be compensated [62] by allowance of attorney's fees; on the contrary, the act, while recognizing the existence of such burden, allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to the like burden. This, in our opinion, is a denial of the equal protection of the laws guaranteed by the 14th Amendment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

TONY ROSSI, Plff. in Err.,
v.
COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 62–67.)

Commerce — in intoxicating liquors — deliveries to complete executory sales — Wilson act.

The delivery in Pennsylvania of intoxicating liquors transported in interstate commerce to complete executory sales of the same negotiated within the state may not

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Glou-

be punished under Pa. Pamph. Laws 1887, p. 113, forbidding the sale of intoxicating liquors without a license, although the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, Comp. Stat. 1913, § 8738), subjects intoxicating liquors upon their arrival in a state to the operation and effect of its laws enacted in the exercise of the police power to the same extent and in the same manner as though the liquors had been produced in the state.

[For other cases, see Commerce, IV. b, 2, in Digest Sup. Ct. 1908.]

[No. 193.]

Argued March 11, 1915. Decided June 1, 1915.

IN ERROR to the Superior Court of the State of Pennsylvania to review a judgment which affirmed a conviction in the Court of Quarter Sessions of Lawrence County, in that state, for selling intoxicating liquors without a license. Reversed and remanded for further proceedings.

See same case below, 53 Pa. Super. Ct. 210.

The facts are stated in the opinion.

Mr. **H. C. McClintock** argued the cause and filed a brief for plaintiff in error:

Delivery of the liquor being an essential element in the alleged crime, and delivery having been accomplished by transportation in interstate commerce, the transaction was not subject to the police power of Pennsylvania under the Wilson act.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

The fact that title did not pass until delivery to the purchaser in Pennsylvania is insufficient to bring the transaction within the operation of the state law.

American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151.

It is immaterial that the liquor was transported from Ohio to Pennsylvania in the seller's own wagon, instead of by common carrier.

The Daniel Ball, 10 Wall. 557, 565, 19 L. ed. 999, 1002; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Com. v. Hess, 148 Pa. 98, 17 L.R.A. 176, 33 Am. St. Rep. 810, 23 Atl. 977.

Mr. **Thomas W. Dickey** argued the cause, and, with Mr. Clyde V. Ailey, filed a brief for defendant in error:

The sale took place in Pennsylvania.

Com. v. Guinzburg, 46 Pa. Super. Ct. 488; Com. v. Holstine, 132 Pa. 357, 19 Atl. 273; Com. v. Hess, 148 Pa. 98, 17 L.R.A. 176, 33 Am. St. Rep. 810, 23 Atl. 977; Com. v. Guja, 28 Pa. Super. Ct. 58; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151.

The statute of Pennsylvania of May 13, 1887, P. L. 108, 113, was enacted in the exercise of the police powers of the commonwealth of Pennsylvania.

Phillips v. Mobile, 208 U. S. 478, 52 L. ed. 581, 28 Sup. Ct. Rep. 370; Vance v. W. A. Vandercook Co. 170 U. S. 438, 446, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. ed. 269, 21 Sup. Ct. Rep. 201; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25, 49 L. ed. 925, 928, 25 Sup. Ct. Rep. 552; Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; Com. v. Zelt, 138 Pa. 627, 11 L.R.A. 602, 21 Atl. 7.

While Congress has the power to regulate commerce under art. 1, § 8, of the Constitution, the states may validly affect commerce in two ways.

First. In the exercise of their inherent and inalienable police power.

Second. Under the taxing power.

Munn v. Illinois, 94 U. S. 113, 135, 24 L.

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cester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On the constitutional right to prohibit the sale of intoxicating liquors—see note to *State v.* Durein, 15 L.R.A.(N.S.) 908.

ed. 77, 87; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Com. v. Paul, 170 Pa. 284, 30 L.R.A. 396, 5 Inters. Com. Rep. 506, 33 Atl. 82; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

The Wilson act gives the right to the state of Pennsylvania to exercise its police powers upon arrival in the state of intoxicating liquors transported into the state, and remaining therein for use, consumption, sale, or storage.

Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; Lang v. Lynch, 4 L.R.A. 831, 38 Fed. 489; Brown v. Wieland, 116 Iowa, 711, 61 L.R.A. 418, 89 N. W. 17.

Mr. Justice **Pitney** delivered the opinion of the court:

Plaintiff in error was convicted in the court of quarter sessions of Lawrence county, in the state of Pennsylvania, of the crime of selling intoxicating liquors in that county without a license, contrary to § 15 of an act of May 13, 1887 (P. L. p. 113), [65] which declares: "Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced," etc. The superior court affirmed the conviction (53 Pa. Super. Ct. 210), the supreme court of the state refused an appeal, and this writ of error was allowed.

The facts are these: Plaintiff in error is a liquor dealer having his place of business in the county of Mahoning, in the state of Ohio, which immediately adjoins Lawrence county, Pennsylvania. He had no license to sell in Lawrence county, nor any place of business there, but went into that county and there took an order for liquor, with the understanding that the liquor should be thereafter delivered from his stock in Ohio to the residence of the purchaser in Pennsylvania. He returned to Ohio, there loaded the goods upon his own wagon, and either by himself or his employee drove across the state line and delivered the liquor to the residents of the purchaser, pursuant to the contract. Thus the sale was negotiated in Pennsylvania, but contemplated and required for its fulfilment a transaction in interstate commerce, which afterwards took place, with resulting delivery in Pennsylvania.

The charge, as will be observed, was selling, not offering for sale. And it is admitted that by the Pennsylvania decisions the act of taking orders for future delivery is not punishable under the statute cited, or any other, and that it is not the making of an executory contract, but the executed sale, that is punishable. Com. v. Smith, 16 Pa. Co. Ct. 644, 646, 647; Star Brewing Co.'s License, 43 Pa. Super. Ct. 577, 580; Com. v. Guinzburg, 46 Pa. Super. Ct. 488, 497; and see Garbracht v. Com. 96 Pa. 449, 453. And so, in the present case, the superior court (53 Pa. Super. Ct. 220) recognized that it was not the making of the executory contract, but [66] the execution of it, that involved a violation of the law of the state.

The Federal question presented is whether, under the act of Congress approved August 8, 1890, chap. 728 (26 Stat. at L. 313, Comp. Stat. 1913, § 8738), known as the Wilson act, the state of Pennsylvania may punish plaintiff in error for delivering in that state liquors transported in interstate commerce, under the circumstances stated. The case arose before the passage of the act of March 1, 1913, chap. 90 (37 Stat. at L. 699, Comp. Stat. 1913, § 8739), known as the Webb-Kenyon act, and the effect of this legislation is therefore not now involved.

As has been recently pointed out in Kirmeyer v. Kansas, 236 U. S. 568, 572, ante, 419, 35 Sup. Ct. Rep. 419, the transportation of intoxicating liquor, as of other merchandise, from state to state, is interstate commerce, and state legislation which penalizes it or directly interferes with it, otherwise than as permitted by an act of Congress, is in conflict with the commerce clause of the Federal Constitution; and while Congress, in the Wilson act, declared in substance that liquors transported into any state, or remaining therein for use, consumption, etc., shall, upon arrival in such state, be subject to the operation and effect of its laws enacted in the exercise of the police power, to the same extent and in the same manner as though the liquors had been produced in such state, and shall not be exempt therefrom by reason of being introduced in original packages, this does not subject liquors transported in interstate commerce to state regulation until after their arrival at destination and delivery to consignee or purchaser. Leisy v. Hardin, 135 U. S. 100, 110, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Rhodes v. Iowa, 170 U. S. 412, 423, 42 L. ed. 1088, 1095, 18 Sup. Ct. Rep. 664; American Exp. Co. v. Iowa, 196 U. S. 133, 142, 143, 49 L. ed. 417, 421, 422, 25 Sup. Ct. Rep. 182; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 82, 56 L. ed. 355, 358, 32 Sup. Ct. Rep. 189.

The Pennsylvania superior court deemed

that the present case was controlled by Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733, where a statute imposing an annual license charge upon the business of selling or offering for sale [67] intoxicating liquors within the state by traveling salesmen soliciting orders was held to be enforceable in view of the Wilson act, even as applied to the business of soliciting, within the borders of the state, proposals for the purchase of liquors, which were to be consummated by the delivery within the state of liquors to be brought from without. That case, however, has no present pertinency, since the prohibition of the Pennsylvania statute is not addressed to the business of soliciting contracts for the purchase of liquor, but to the sale of the liquor itself; and by the terms of the Wilson act, as previously construed, the control of this subject by the several states is postponed until after the delivery of the liquor within the state.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CHICAGO & ALTON RAILROAD COMPANY, Plff. in Err.,
v.
HENRY A. TRANBARGER.

(See S. C. Reporter's ed. 67–78.)

Constitutional law — ex post facto laws.

1. The penalty feature of Mo. Laws 1907, p. 169, amending Rev. Stat. 1899, § 1110, so as to compel railway companies to construct transverse openings in rights of way and roadbeds to take care of surface water, is not *ex post facto* as applied to a railroad already in existence, where such railroad is subjected by that amendment to the penalty incurred for noncompliance not because of the manner in which its railroad embankment was originally constructed, nor for anything else done or omitted before the passage of the amendatory act, but because after that time the embankment was maintained in a manner prohibited by that act.

[For other cases, see Constitutional Law, IV. f, 1, in Digest Sup. Ct. 1908.]

Statutes — construction — retrospective effect.

2. The requirement of Mo. Laws 1907, p. 169, amending Rev. Stat. 1899, § 1110, so as to make it the duty of every corporation owning, operating, or constructing any railroad in the state within three months after the completion of the same to construct transverse openings in its right of way and roadbed to take care of surface water, should be construed as allowing railways already in existence some time—either three months or a reasonable time more or less than that period—after the passage of the amendatory act within which to construct the openings.

[For other cases, see Statutes, II. v, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — changing common-law rule.

3. The common-enemy doctrine of the common law respecting surface water was not so imported into a railway company's irrepealable charter, or the contracts between the railway company and the landowners from whom its right of way was acquired, as to be protected by the contract clause of the Federal Constitution against legislative abrogation.

[For other cases, see Constitutional Law, IV. g, 1, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — due process of law — police power — compelling construction of surface-water outlets.

4. Compelling railway companies to construct transverse openings in rights of way and roadbeds to take care of surface water, as is done by the amendment of Mo. Laws 1907, p. 169, to Rev. Stat. 1899, § 1110, does not impair the obligations of

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NOTE.—Generally, as to what laws are *ex post facto*—see notes to Anderson v. O'Donnell, 1 L.R.A. 632; State v. Cooler, 3 L.R.A. 181; Calder v. Bull, 1 L. ed. U. S. 648; Sturges v. Crowninshield, 4 L. ed. U. S. 529; Otoe County v. Baldwin, 28 L. ed. U. S. 331; Re Medley, 33 L. ed. U. S. 835; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

As to retrospective statutes, generally—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331, and Barnitz v. Beverly, 41 L. ed. U. S. 94.

Generally as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers' & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

As to what constitutes due process of law, *generally*—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

the railway companies' charters nor take their property without compensation, contrary to the due process of law clause of U. S. Const., 14th Amend., since the statute in question was passed under the police power of the state for the general benefit of the community at large, and for the purpose of preventing unnecessary and widespread injury to property.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 2; IV. g, 2, b, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — railway operation.

5. The equal protection of the laws is not denied by the provisions of Mo. Laws 1907, p. 169, amending Rev. Stat. 1899, § 1110, so as to compel the construction of transverse openings in railway rights of way and roadbeds to take care of surface water, although for all purposes except those covered by this act the state has adhered to the common-enemy doctrine of the common law respecting surface waters, since railway embankments differ materially from other artificial constructions and improvements to which the common-enemy doctrine applies, and the statute applies alike to corporations, companies, and persons owning and operating railways that are so constructed as to obstruct the flow of drainage and surface waters.

[For other cases, see Constitutional Law, IV. a, 3, b, in Digest Sup. Ct. 1908.]

[No. 214.]

Argued March 19, 1915. Decided June 1, 1915.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which modified, and affirmed as modified, a judgment of the Circuit Court of Callaway County, in that state, in favor of plaintiff in an action to recover damages and a penalty from a railway company for its failure to construct transverse openings in its right of way and roadbed to take care of surface water. Affirmed.

See same case below, 250 Mo. 46, 156 S. W. 604.

The facts are stated in the opinion.

Mr. Elliott H. Jones argued the cause, and, with Messrs. Charles M. Miller and William C. Scarritt, filed a brief for plaintiff in error:

The overflow water which damaged plaintiff's land was surface water.

Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 271, 53 Am. Rep. 581; Schneider v. Missouri P. R. Co. 29 Mo. App. 71.

As to surface water, the rule of the common law is in force in Missouri; namely, that it is a common enemy against which every land owner may protect himself as best he can.

McCormick v. Kansas City, St. J. & C. B. R. Co. 57 Mo. 433; Paddock v. Somes, 102 Mo. 226, 10 L.R.A. 254, 14 S. W. 746; Ready v. Missouri P. R. Co. 98 Mo. App. 467, 72 S. W. 142; Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 271, 53 Am. Rep. 581; Collier v. Chicago & A. R. Co. 48 Mo. App. 398; Schneider v. Missouri P. R. Co. 29 Mo. App. 68; Jones v. St. Louis, I. M. & S. R. Co. 84 Mo. 151.

And under the statute in question (prior to the amendment of March 14, 1907), it was perfectly lawful for a railroad company to build its road across lowlands upon a solid embankment, without opening or drains for surface water. Such a solid embankment was a lawful structure and any damage caused thereby from surface water was *damnum absque injuria.*

Collier v. Chicago & A. R. Co. 48 Mo. App. 398; Schneider v. Missouri P. R. Co. 29 Mo. App. 68; Kenney v. Kansas City, P. & G. R. Co. 69 Mo. App. 569.

This act of 1907 declares unlawful and prescribes a penalty for a thing done in the past and which was not unlawful at the time it was done. Such an act comes clearly within the meaning of the term "*ex post facto* law" as used in § 10 of art. 1 of the Constitution of the United States, and is therefore violative of such provision, which forbids any state to enact an *ex post facto* law.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Fletcher v. Peck, 6 Cranch, 137, 3 L. ed. 178; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

The settled doctrine of the state of Missouri as to surface water entered into and formed a part both of the contract between the state and the railroad company as embodied in its franchise; and also between the railroad company and the owners of land through which the railroad right of way was acquired.

Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; Dartmouth College v. Woodward, 4 Wheat. 656, 4 L. ed. 664; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Under the law of Missouri, when the railroad company secured its right of way across the bottoms in question, it acquired and paid for the right to construct its railroad upon a solid embankment, and in such payment was included any damage that might thereafter accrue to the adjoining property by reason of the obstruction of drainage. This is true whether the right

of way was secured by condemnation proceedings or by purchase.

Harrelson v. Kansas City & A. R. Co. 151 Mo. 482, 52 S. W. 368; Clark v. Hannibal & St. J. R. Co. 36 Mo. 202; 3 Elliott, Railroads, § 937; Moss v. St. Louis, I. M. & S. R. Co. 85 Mo. 89; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38.

The act of March 14th, 1907, is unconstitutional and void because it takes the property of defendant railroad company without due process of law.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673; Lake Erie & W. R. Co. v. Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636; Re Theresa Drainage Dist. 90 Wis. 301, 63 N. W. 288; Chicago & G. T. R. v. Hough, 61 Mich. 507, 28 N. W. 532; Chicago & G. T. R. Co. v. Chappell, 124 Mich. 72, 82 N. W. 800; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The police power of the state will not serve to validate or justify the act of March 14, 1907.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; St. Louis & S. F. R. Co. v. Gordon, 157 Mo. 71, 57 S. W. 742; Re Cheesebrough, 78 N. Y. 232; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013, 1135; Chronic v. Pugh, 136 Ill. 539, 27 N. E. 415; Payson v. People, 175 Ill. 267; Lake Erie & W. R. Co. v. Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636; Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673; Anderson v. Kerns Draining Co. 14 Ind. 199, 77 Am. Dec. 63; Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094; Coster v. Tide Water Co. 18 N. J. Eq. 54; Re Tuthill, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; McQuillen v. Hatton, 42 Ohio St. 202; Cooley, Const. Lim. 7th ed. p. 835; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593; Sloan v. Pacific R. Co. 61 Mo. 24, 21 Am. Rep. 397; Freund, Pol. Power, §§ 511, 512; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

Mr. Charles M. Hay argued the cause, and, with Messrs. Patrick H. Cullen and Thomas T. Fauntleroy, filed a brief for defendant in error:

The statute in question is not *ex post facto* law.

Calder v. Bull, 3 Dall. 386, 390, 1 L. ed. 648, 650; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; Cooley, Const. Lim. 6th ed. p. 318; Re Clark, 86 Kan. 539, 39 L.R.A.(N.S.) 680, 121 Pac. 492, Ann. Cas. 1913C, 317; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247; State v. Tyree, — Kan. —, 77 Pac. 291; League v. Telas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; State v. Schaeffer, 129 Wis. 459, 109 N. W. 522; Diamond State Iron Co. v. Husbands, 8 Del. Ch. 205, 68 Atl. 240; Watson v. Mercer, 8 Pet. 88, 109, 8 L. ed. 876, 884; Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Orr v. Gilman, 183 U. S. 278, 285, 46 L. ed. 196, 200, 22 Sup. Ct. Rep. 213; Arbuckle v. Kelley, 144 Fed. 278.

The charter of plaintiff in error was subject to amendment within the discretion of the legislative body of Missouri.

Brown v. Louisiana & M. River R. Co. 256 Mo. 533, 165 S. W. 1060; Missouri P. R. Co v. Kansas, 216 U. S. 262, 274, 54 L. ed. 472, 477, 30 Sup. Ct. Rep. 330; Northern C. R. Co. v. Maryland, 187 U. S. 258, 267, 47 L. ed. 167, 172, 23 Sup. Ct. Rep. 62; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

Whatever view may be taken of the contract right acquired by plaintiff in error in 1870, it cannot be held that it was thereafter exempt from such regulations as from time to time might be made by the state, with a view to guard properly the public interest and the rights of other individuals or corporations. Whether its contract be subject to amendment, as such, or not, all its rights are held subject to the police power of the state.

Cooley, Const. Lim. 7th ed. p. 835.

There is an implied reserved power in the state legislature which creates a corporation, that the corporation shall be subject to such reasonable regulations as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts)

94 U. S. 155, 24 L. ed. 94; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Eagle Ins. Co. v. Ohio, 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. Rep. 868; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

Grants of immunity to a corporation from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way; and unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require.

Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Illinois C. R. Co. v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 839; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

Exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear, with express words.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Christ Church v. Philadelphia County, 24 How. 300, 16 L. ed. 602; Gilman v. Sheboygan, 2 Black, 510, 17 L. ed. 305; Tucker v. Ferguson, 22 Wall. 527, 22 L. ed. 805; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Newton v. Mahoning County, 100 U. S. 548, 25 L. ed. 710; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; Minneapolis Eastern R. Co. v. Minnesota, 134 U. S. 467, 33 L. ed. 985, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95.

The regulations to which a corporation is subject include not only such as conduce to the public health, safety, and morals, but also such as promote the public convenience or general prosperity.

Bacon v. Walker, 204 U. S. 272, 51 L. ed. 482, 27 Sup. Ct. Rep. 270; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. ed. 96, 100; Pound v. Turck, 95 U. S. 459, 464, 24 L. ed. 525, 527.

The enactment of this measure was but the prescribing of a reasonable regulation for the government of railroads in the matter of the construction and maintenance of their line of road with a view to the proper protection of adjacent property and other public interests.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 585, 50 L. ed. 596, 606, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Wurts v. Hoagland, 114 U. S. 606, 611, 29 L. ed. 229, 230, 5 Sup. Ct. Rep. 1086; Lake Erie & W. R. Co. v. Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34.

The statute assailed in this case involves identically the same principle as statutes enacted in many states making railroads absolutely liable for damage by fire from railroad engines; statutes requiring railroads to fence their right of way; and statutes requiring them to burn or remove from the right of way dry vegetation and Johnson grass or other accumulations calculated to damage adjacent property. All of these measures are supported as regulations imposed upon the exercise of the franchise, the support resting upon the rights and interest of owners of property adjacent to the railroads.

St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 367, 37 L. ed. 769, 771, 13 Sup. Ct. Rep. 870; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup.

Ct. Rep. 638; Baltimore & O. R. Co. v. Kreager, 61 Ohio St. 312, 56 N. E. 203, 7 Am. Neg. Rep. 341; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Indianapolis & C. R. Co. v. Kercheval, 16 Ind. 84; Mobile & M. R. Co. v. Steiner, 61 Ala. 559; McCandless v. Richmond & D. R. Co. 38 S. C. 103, 18 L.R.A. 440, 447, 16 S. E. 429; Checkley v. Illinois C. R. Co. 257 Ill. 491, 44 L.R.A.(N.S.) 1127, 100 N. E. 942, Ann. Cas. 1914A, 1202.

Statutes such as the one in question and those now considered in nowise impair the obligation of the railroad's contract, or interfere with the exercise of the franchise.

Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870.

The measure here in question is of the same character as the police regulations heretofore sustained by this court, and is itself a proper regulation in the public interest.

Cox v. Hannibal & St. J. R. Co. 174 Mo. 603, 74 S. W. 854; McFarland v. Mississippi River & B. T. R. Co. 175 Mo. 422, 75 S. W. 152; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 585, 50 L. ed. 596, 606, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The act here cannot be held to make an unreasonable requirement of railroads in the construction of their roadbeds.

As applicable to all save surface water, it is but declaratory of the common law in force in Missouri.

Webb v. Carter, 121 Mo. App. 154, 98 S. W. 776; Edwards v. Missouri, K. & T. R. Co. 97 Mo. App. 103, 71 S. W. 366.

As applicable to surface water, it requires that the civil-law rule govern in those cases in which the water can be allowed to flow into a ditch or drain or watercourse. The civil law rule obtains in many states.

Farris v. Dudley, 78 Ala. 124, 56 Am. Rep. 24; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Goldsmith v. Elsas, 53 Ga. 186; Peck v. Herrington, 109 Ill. 611, 50 Am. Rep. 627; Grinstead v. Sanders, 22 Ky. L. Rep. 51, 56 S. W. 665; Martin v. Jett, 12 La. 501, 32 Am. Dec. 120; Philadelphia, W. & B. R. Co. v. Davis, 68 Md. 281, 6 Am. St. Rep. 440, 11 Atl. 822; Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595; Boyton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Meixell v. Morgan, 149 Pa. 415, 34 Am. St. Rep. 614, 24 Atl. 216; Garland v. Aurin (Carland v. Aurin) 103 Tenn. 555, 48 L.R.A. 862, 76 Am. St. Rep. 699, 53 S. W. 940; Alabama Great Southern R. Co. v. Prouty, 149 Ala. 71, 43 So. 352; Kroeger v. Twin Buttes R. Co. 14 Ariz. 269, 127 Pac. 735, Ann. Cas. 1914A, 1289.

The effort of the legislature seems to be to establish a reasonable rule applicable to railroads.

Payne v. Morgan's L. & T. R. & S. S. Co. 38 La. Ann. 164, 58 Am. Rep. 174; Laumier v. Francis, 23 Mo. 181; McCormick v. Kansas City, St. J. & C. B. R. Co. 70 Mo. 359, 35 Am. Rep. 431; Shane v. Kansas City, St. J. & C. B. R. Co. 71 Mo. 238, 36 Am. Rep. 480.

Mr. Justice Pitney delivered the opinion of the court:

Tranbarger, owner of 60 acres of farming land in Callaway county, Missouri, brought this action against the railroad company in a Missouri state court to recover damages and a penalty under § 1110 of the Missouri Revised Statutes of 1899, as amended by act of March 14, 1907, Sess. Acts, p. 169, of which the portion now pertinent is as follows:

[71] "It shall be the duty of every corporation, company or person owning or operating any railroad or branch thereof in this state, and of any corporation, company or person constructing any railroad in this state, within three months after the completion of the same through any county in this state, to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad, and suitable ditches and drains along each side of the roadbed of such railroad, to connect with ditches, drains, or water courses, so as to afford sufficient outlet to drain and carry off the water, including surface water, along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad; . . . and any corporation, company or person failing to comply with the provisions of this section shall incur a penalty not to exceed $500, and be liable for all damages done by said neglect of duty."

A judgment for damages and a penalty of $100 was sustained by the supreme court of the state (250 Mo. 46, 156 S. W. 694), and the case comes here upon questions respecting the validity of the statute, as construed and applied, in view of familiar provisions of the Federal Constitution.

The facts found by the Missouri supreme court to be within the pleadings and proofs, and to be sustained by the verdict of the jury, are these: Plaintiff's lands lie in

what are known as the Missouri river bottoms. It is the habit of that river to overflow the bottoms from the west to the east in times of high water. Defendant's railroad extends across the bottoms from southwest to northeast, and along the easterly boundary of plaintiff's land. The roadbed is constructed of a solid earth embankment, varying in height from 4 to 7 feet, and is not provided with transverse culverts, openings, or drains of any kind for the escape of surface water, but constitutes a solid barrier [72] for collecting such waters, and causes them to back over and flood plaintiff's lands, which would not be overflowed except for that obstruction. The road was maintained in this condition for more than three months before a stated day in June, 1908, when the river overflowed its banks and the water ran across the bottoms until it reached the railroad embankment, which repelled it, so that it backed over, upon, and flooded plaintiff's land, causing substantial damage, which was attributable solely to the negligent failure of defendant to construct suitable openings across and through the solid embankment upon which its railroad tracks were laid, and suitable ditches and drains along the side of the roadbed, to connect with an existing ditch which would have afforded an outlet into the river or elsewhere without flooding plaintiff's land. It further appears from undisputed evidence cited in the brief of plaintiff in error that the railroad was constructed about the year 1872, and originally was carried by a trestle for a distance of 20 to 25 feet over a certain low spot in the river bottom, but that this opening was filled in about the year 1895, since which time the railroad bed has been maintained as a solid embankment across the bottom.

The statutory requirement of "openings across and through the right of way and roadbed" originated in the 1907 amendment of § 1110. Before that, and dating from the year 1874, the statute merely required railroads to construct ditches along each side of the roadbed. Laws 1874, p. 121; Rev. Stat. 1879, § 810; Laws 1883, p. 50; Rev. Stat. 1889, § 2614; Laws 1891, p. 82; Rev. Stat. 1899, § 1110; Collier v. Chicago & A. R. Co. (1892) 48 Mo. App. 398, 402; Kenney v. Kansas City, P. & G. R. Co. (1897) 69 Mo. App. 569, 571. It is upon the clause added in 1907 that the present action is founded, and upon that clause the questions before us are raised. It is attacked as an *ex post facto* law, as a law impairing the obligation of the contract between the state and the railroad company, [73] and as repugnant to the "due process" and "equal protection" provisions of the 14th Amendment.

(1) The argument that in respect of its penalty feature the statute is invalid as an *ex post facto* law is sufficiently answered by pointing out that plaintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act of 1907, but because after that time it maintained the embankment in a manner prohibited by that act. The argument to the contrary is based upon a reading of the section that applies the limiting clause "within three months after the completion of the same" to railroads already in existence as well as to those to be constructed thereafter. The result is, according to the argument, that as the road of plaintiff in error was constructed upon a solid embankment at least as early as the year 1895, the act was violated as soon as enacted. This construction is so unreasonable that we should not adopt it unless required to do so by a decision of the state court of last resort. The language of the section as it now stands: "It shall be the duty of every corporation . . . owning or operating any railroad or branch thereof in this state, and of any corporation . . . constructing any railroad in this state, within three months after the completion of the same through any county in this state, to cause to be constructed and maintained suitable openings," etc., seems to us to be more reasonably construed as prescribing the express limit of three months only with respect to railroads afterwards constructed, and as allowing to railroads already in existence a reasonable time after the passage of the enactment within which to construct the openings. In adopting this meaning, we have regard not merely to the phrases employed, but to the previous course of legislation, which is set forth in the briefs, but need not be here repeated. Whether we are [74] right or wrong about this, the duty to construct transverse outlets having originated with the act of 1907, the statute is of course to be construed as allowing some time—either three months, or a reasonable time more or less than that period—for their construction by railroads already in existence. The law had been upon the statute books for more than a year before the flood that gave rise to this action. Whether three months or a year was a reasonable time, or whether more time would reasonably be required for the construction of the prescribed opening across the railroad of plaintiff in error at the place in question, is a matter that we need not determine, since no such issue was raised in the state

courts, plaintiff in error having contented itself with asserting that the legislature had no power to require it at any time after the act of 1907 to construct such an opening.

(2) Upon the question of impairment of contract, it appears that the railroad in question was constructed and afterwards leased to plaintiff in error in perpetuity by virtue of a charter and franchise granted to the Louisiana & Missouri River Railroad Company in the year 1870 (Laws, p. 93, §§ 22, 23, 43), by § 33 of which the company was exempted from the provisions of § 7 of article I. of the general corporation act of 1855 (Rev. Stat. 1855, p. 371), and thereby, it is claimed, relieved from the legislative power of alteration, suspension, and repeal. And while by the Constitution of 1865 (in force at the time the railroad in question was authorized and constructed), railroad corporations could be formed only under general laws subject to amendment or repeal, it is contended that this did not apply to subsequent amendments of charters previously granted (State ex rel. Circuit Atty. v. Cape Girardeau & S. L. R. Co. 48 Mo. 468; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 569, 17 S. W. 581), and it is pointed out that the charter of 1870 is an amendment of one enacted in 1868 (Laws, p. 97), and this in turn an amendment of [75] of one enacted in 1859 (Laws 1859, 1st Sess. p. 400). It is further insisted that even if the state reserved to itself by the Constitution of 1865 the right to alter or amend the corporate charter, this was relinquished when the Constitution of 1875 went into effect, which contains no similar reservation. And hence, it is argued that, as applied to this company, the act of 1907 cannot be sustained as a charter amendment. This is disputed; but for present purposes we will assume the charter was irrepealable.

Next, it is insisted that for all purposes except those covered by the act of 1907, Missouri has at all times adhered to the common-law rule that surface water is a common enemy, against which every landowner may protect himself as best he can, and that this applies to and protects railroads as well as other landowners. Abbott v. Kansas City, St. J. & C. B. R. Co. (1884) 83 Mo. 271, 280 et seq., 53 Am. Rep. 581; Jones v. St. Louis, I. M. & S. R. Co. 84 Mo. 151, 155; Schneider v. Missouri P. R. Co. 29 Mo. App. 68, 72; Ready v. Missouri P. R. Co. 98 Mo. App. 467, 72 S. W. 142. The conclusion sought to be drawn is that the common-law rule, as it existed at the time the railroad was built and the right of way acquired, entered into the contract between the state and the company, and into the contracts between the company and the landowners from whom its right of way was acquired, and that the immunity from prosecution and from private action alike was in the nature of an appurtenance to the land, the enjoyment of which could not be impaired by subsequent legislation.

Of the cases cited in support of this contention the only one that has a semblance of pertinency is Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, and this is readily distinguishable. There the right in question was the easement of light and air, which of course pertains closely to the use and enjoyment of the land. But the right to maintain a railroad embankment or other artificial structure in such a manner as to deflect surface water from its [76] usual course, and thereby injure the land of another, has little reference to the substantial enjoyment of the railroad right of way. Nor is it at all essential to the protection of the railroad itself from surface water. It cannot reasonably be contended that a railroad cannot be maintained and operated as safely and as conveniently over a bridge, trestle, culvert, or other opening calculated to admit the passage of surface water, as upon a solid embankment, or that there is any substantial advantage in favor of the latter except that it avoids the expenditure necessary to be made for the construction and maintenance of openings in order that the embankment shall no longer be the occasion of injury to the lands of others. The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Hurtado v. California, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292: Buttfield v. Stranahan, 192 U. S. 470, 493, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87), so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract. See Gross v. United States Mortg. Co. 108 U. S. 477, 488, 27 L. ed. 795, 798, 2 Sup. Ct. Rep. 940; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 83, 33 L. ed. 267, 272, 10 Sup. Ct. Rep. 34.

(3) But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the

contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the state for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.

It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [77] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the commnity; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Bacon v. Walker, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289.

We deem it very clear that the act under consideration is a legitimate exercise of the police power, and not in any proper sense a taking of the property of plaintiff in error. The case is not at all analogous to those which have held that the taking of a right of way across one's land for a drainage ditch, where no water course exists, is a taking of property within the meaning of the Constitution. The present regulation is for the prevention of damage attributable to the railroad embankment itself, and amounts merely to an application of the maxim *Sic utere tuo ut alienum non lædas*. Of course, compliance with it involves the expenditure of money; but so does compliance with regulations requiring a railroad company to keep its roadbed and right of way free from combustible matters; to provide its locomotive engines with spark arresters; to fence its tracks; to provide cattle guards and gates at crossings, or bridges or viaducts, or the like. Such regulations as these are closely analogous in principle, and have been many times sustained as constitutional. Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 31, 32 L. ed. 585, 587, 9 Sup. Ct. Rep. 207; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 367, 37 L. ed. 769, 771, 13 Sup. Ct. Rep. 870; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; [78] Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 438, 58 L. ed. 671, 674, 34 Sup. Ct. Rep. 400; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 560, 561, 58 L. ed. 721, 727, 728, 34 Sup. Ct. Rep. 364.

And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the 14th Amendment. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 255, 41 L. ed. 979, 991, 17 Sup. Ct. Rep. 581; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 462, 49 L. ed. 831, 835, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 591, 50 L. ed. 596, 608, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

(4) The contention that the statute in question denies to plaintiff in error the equal protection of the laws is not seriously pressed, and is quite unsubstantial. Railroad embankments, stretching unbroken across tracts of land that are liable to injury from surface waters, differ so materially from other artificial constructions and improvements to which the doctrine of the "common enemy" applies, that there is very plainly a substantial ground for classification with respect to the object of the legislation. The statute applies alike to corporations, companies, and persons owning or operating railroads that are so constructed as to obstruct the flow of drainage and surface waters, and we deem it unexceptionable in this regard.

Judgment affirmed.

UNITED STATES, Plff. in Err.,
v.
WILLIAM RABINOWICH.

(See S. C. Reporter's ed. 78-89.)

Limitation of actions — conspiracy — offense arising under bankruptcy statute.

A conspiracy to commit against the United States, contrary to the Federal Criminal Code (35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, § 10,201), § 37, an offense made criminal by the bankrupt act of July 1, 1898 (30 Stat. at L. 554, chap. 541, Comp. Stat. 1913, § 9613), is not of itself an offense "arising under" that act within the meaning of § 29d, which limits to one year prosecutions for "any offense arising under this act," but such prosecution is governed by the three years' limitation prescribed by U. S. Rev. Stat. § 1044,

Comp. Stat. 1913, § 1708, for offenses not capital.

[For other cases, see Limitation of Actions, III. 1, in Digest Sup. Ct. 1908.]

[No. 748.]

Argued April 7, 1915. Decided June 1, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment sustaining on demurrer a special plea in bar to an indictment for a conspiracy to commit an offense against the United States. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Assistant Attorney General **Warren** argued the cause and filed a brief for plaintiff in error:

The offense of conspiracy, as defined by U. S. Rev. Stat. § 5440 (Federal Penal Code, § 37), although the object of such conspiracy be the commission of an offense defined and made punishable by the bankruptcy act, is not an "offense arising under" the bankruptcy act, but a separate and distinct offense.

United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539; Rabinowitz v. United States, C. C. A. 2d C. March 9, 1915; United States v. Comstock, 162 Fed. 416; United States v. Cassidy, 67 Fed. 698; Thomas v. United States, 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 902; Ryan v. United States, 132 C. C. A. 257, 216 Fed. 32; United States v. Sanche, 7 Fed. 715; Gantt v. United States, 47 C. C. A. 210, 108 Fed. 62; United States v. Richards, 149 Fed. 446; Houston v. United States, 133 C. C. A. 562, 217 Fed. 852.

A person may be guilty of conspiring to commit an offense against the United States although he could not himself commit the objective offense.

Williamson v. United States, 207 U. S. 425, 447, 52 L. ed. 278, 290, 28 Sup. Ct. Rep. 163; United States v. Holte, 236 U. S. 140, ante, 504, 35 Sup. Ct. Rep. 271; United States v. Bayer, 4 Dill. 407, Fed. Cas. No. 14,547; United States v. Lyman, 190 Fed. 416.

The object of the conspiracy need not be consummated; and in the case of a conspiracy to commit the offense of concealing, while a bankrupt, property of the bankrupt estate from the trustee, it is not necessary to aver or prove either that bankruptcy proceedings were instituted or that a trustee was actually appointed.

Williamson v. United States, 207 U. S. 425, 447, 52 L. ed. 278, 290, 28 Sup. Ct. Rep. 163; United States v. Cohn, 142 Fed. 983; United States v. Burkett, 150 Fed. 208; Alkon v. United States, 90 C. C. A. 116, 163 Fed. 811; Radin v. United States, 111 C. C. A. 6, 189 Fed. 568; Roukous v. United States, 115 C. C. A. 255, 195 Fed. 353.

It is no objection that the conspiracy may be punished more severely than the objective offense, for the offenses are separate, and the evils to be guarded against are distinct.

Clune v. United States, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; United States v. Stevenson, 215 U. S. 200, 203, 54 L. ed. 157, 158, 30 Sup. Ct. Rep. 37.

The parties to the conspiracy may be prosecuted, even though the substantive offense at which the conspiracy aimed shall have been accomplished. The liability for conspiracy is not taken away by its success.

Heike v. United States, 227 U. S. 131, 144, 57 L. ed. 450, 455, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128.

The conspiracy is not merged where both the conspiracy and the offense which is its object are misdemeanors, or where both are felonies.

United States v. Scott, 139 Fed. 697; United States v. Thomas, 145 Fed. 74; United States v. Gardner, 42 Fed. 829; Berkowitz v. United States, 35 C. C. A. 379, 93 Fed. 452.

Acquittal upon the charge of conspiracy to commit an offense against the United States does not bar a prosecution for the objective offense.

Berkowitz v. United States, 35 C. C. A. 379, 93 Fed. 457.

Upon the same principle, an indictment which charges the defendants with conspiracy to commit two different offenses is not duplicitous.

John Gund Brewing Co. v. United States, 124 C. C. A. 268, 206 Fed. 386.

Mr. **William R. Harr** argued the cause, and, with Mr. Charles H. Bates, filed a brief for defendant in error:

To say that, although the bankrupt is absolved from prosecution for concealing his property from the trustee in bankruptcy after the lapse of one year (United States v. Phillips, 196 Fed. 574; Warren v. United States, 43 L.R.A.(N.S.) 278, 118 C. C. A. 191, 199 Fed. 753), as also anyone who aids or abets him in such concealment (Kaufman v. United States, 129 C. C. A. 149, 212 Fed. 613), yet that he and others may still be prosecuted thereafter for conspiring to commit such offense, presents an anomaly that is wholly inconsistent with the purpose of Congress as declared in § 29b of the bankruptcy act.

The provisions of the bankruptcy act must be included in the description of the conspiracy offense, and hence form a component part of said conspiracy offense.

United States v. Comstock, 162 Fed. 415.

This is a case for the application of the principle that where there is a general and a special statute dealing with the same subject, the special statute controls.

Wechsler v. United States, 86 C. C. A. 37, 158 Fed. 579, 19 Am. Bankr. Rep. 1; A. J. Phillips Co. v. Grand Trunk Western R. Co. 236 U. S. 662, ante, 774, 35 Sup. Ct. Rep. 444.

The special statute of limitations contained in the bankruptcy act applies to the offense of conspiring to violate the provisions of that statute.

United States v. Samuels, Fed., decided in October, 1914.

Statutes of limitations are beneficial statutes. The interests of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning.

United States v. Kissel, 173 Fed. 828.

Mr. Justice Pitney delivered the opinion of the court:

This is a writ of error, taken under the criminal appeals act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704), to review a judgment of the district court sustaining, on demurrer, a special plea in bar to an indictment for conspiracy found June 24, 1912, and based upon § 37 of the Criminal Code of March 4, 1909 (35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, § 10,201), formerly § 5440, [84] Rev. Stat. The indictment embraces six individuals, including defendant in error, and contains two counts, of which the first recites that three of the defendants, K., R., and F., were doing business as copartners, and had on hand a large quantity of goods; that they and the other named defendants contemplated and planned that the copartners should commit an act of bankruptcy, an involuntary petition in bankruptcy should be filed against them, they should be adjudged bankrupts, and thereafter a trustee in bankruptcy should be appointed; and avers that, under these circumstances, the defendants named, including K., R., and F., conspired and agreed together that K., R., and F. should conceal, while bankrupts, from the trustee of the estate in bankruptcy, certain specified property belonging to said estate in bankruptcy. Overt acts are alleged. The second count differs in its recitals, but does not differ in any respect now material in setting forth the conspiracy. In each count the conspiracy and overt acts are stated to have taken place in March and April, 1911, more than a year before the finding of the indictment. Neither count avers a continuing conspiracy. The plea sets up the alleged bar of the statute of limitations contained in § 29d of the bankruptcy act (30 Stat. at L. 554, chap. 541, Comp. Stat. 1913, § 9613), in that the indictment was not found within one year after the commission of the alleged offenses. The district court held, upon a construction of the applicable statutes, that the prosecution upon the charges contained in the indictment was limited by the section thus invoked, and not by § 1044, Rev. Stat., Comp. Stat. 1913, § 1708.

The pertinent statutory provisions are set forth in the margin.[1] Section 1044, which of course antedated the [85] bankruptcy act, declares that no person shall be prosecuted for any offense (with exceptions not now material), unless the indictment is found or information instituted within three years next after such offense shall have been committed; while § 29d of the bankruptcy act limits to one year the prosecution "for any offense arising under this act." The narrow question presented is,

[1] Section 37 of the Criminal Code is as follows:

Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Section 29 of the bankruptcy act, so far as material, is as follows:

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy;

d. A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Section 1044 of the Revised Statutes as amended April 13, 1876 [19 Stat. at L. 32, chap. 56, Comp. Stat. 1913, § 1708], is as follows: No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, Comp. Stat. 1913, § 1710 [referring to the revenue laws] unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws.

whether a conspiracy having for its object the commission of an offense denounced as criminal by the bankruptcy act is, in itself, an offense "arising under" that act, within the meaning of § 29d.

It is apparent from a reading of § 37, Crim. Code (§ 5440 Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. Callan v. Wilson, 127 U. S. 540, 555, 32 L. ed. 223, 228, 8 Sup. Ct. Rep. 1301; Clune v. United States, 159 U. S. 590, 595, 40 L. ed. 269, 271, 16 Sup. Ct. Rep. 125; Williamson v. United States, 207 U. S. 425, 447, 52 L. ed. 278, 290, 28 Sup. Ct. Rep. 163; United States v. Stevenson, 215 [86] U. S. 200, 203, 54 L. ed. 157, 158, 30 Sup. Ct. Rep. 37. And see Burton v. United States, 202 U. S. 344, 377, 50 L. ed. 1057, 1069, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; Morgan v. Devine, No. 685, decided this day [237 U. S. 632, ante, 1153, 35 Sup. Ct. Rep. 712]. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. Williamson v. United States, 207 U. S. 425, 447, 52 L. ed. 278, 290, 28 Sup. Ct. Rep. 163. And it is punishable as conspiracy, though the intended crime be accomplished. Heike v. United States, 227 U. S. 131, 144, 57 L. ed. 450, 455, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128.

Nor do we forget that a mere conspiracy, without overt act done in pursuance of it, is not criminally punishable under § 37, Crim. Code. United States v. Hirsch, 100 U. S. 33, 34, 25 L. ed. 539, 540; Hyde v. Shine, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760; Hyde v. United States, 225 U. S. 347, 359, 56 L. ed. 1114, 1123, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614. There must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. United States v. Holte, 236 U. S. 140, 144, ante, 271, 35 Sup. Ct. Rep. 271; Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 536, ante, 705, 707, 708, 35 Sup. Ct. Rep. 291. Nor need it appear that all the conspirators joined in the overt act. Bannon v. United States, 156 U. S. 464, 468, 39 L. ed. 494, 496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338. A person may be guilty of conspiring, although incapable of committing the objective offense. Williamson v. United States, and United States v. Holte, supra. And a single conspiracy might have for its object the violation of two or more of the criminal laws, the substantive offenses having, perhaps, different periods of limitation. (See Joplin Mercantile Co. v. United States, 236 U. S. 531, 547, 548, ante, 705, 35 Sup. Ct. Rep. 291, for an instance of a conspiracy with manifold objects.)

It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in § 29b (1) of the bankruptcy act, can be perpetrated by any other than a bankrupt or one who has received a discharge as such. Counsel for defendant in error refers to § 1, subdivision 19, of the act, which gives the following definition: "(19) 'Persons' [87] shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." But the circuit court of appeals for the eighth circuit has held that this does not broaden the interpretation of § 29b (1) and that present or past bankruptcy is an attribute of every person who may commit the offense therein denounced. Field v. United States, 69 C. C. A. 568, 137 Fed. 6. And see Kaufman v. United States, 129 C. C. A. 149, 212 Fed. 613, 617.

But, if there be doubt about this, we are not now called upon to solve it. For, as appears from what has been said, the defendants here accused include six individuals, only three of whom (not including defendant in error) were the owners of the property that was to be unlawfully concealed; and the conspiracy, as alleged in each count, was that these three, and they only, should, while bankrupt, conceal the property. Of course, an averment that the others were parties to the conspiracy is by no means equivalent to an averment that they were to participate in the substantive offense. And so we have the typical case of a conspiracy that is in every way distinct from the contemplated crime that formed its object.

Defendant in error, while conceding, for the purposes of the argument, that the conspiracy and the substantive offense are separate and distinct, insists that the question still remains whether such a conspiracy offense as is here charged "arises under" the bankruptcy act, within the meaning of the special statute of limitations contained therein. The argument is that this bar is not by its terms limited to offenses enumerated or fully defined in the act, but extends to all offenses "arising under" it; that without a law creating the substantive offense of [88] "concealing," etc., a conspiracy to do the acts contemplated by the present defendants would not be a crime; and hence, that it is this law, rather than the conspiracy stat-

ute, which "gives rise" to the conspiracy offense.

The argument is ingeniously elaborated, but it has not convinced us. We deem it more reasonable to interpret "any offense arising under this act" as limited to offenses created and defined by the same enactment. In reaching this conclusion, we have not merely had regard to the proximity of the clause to the context, but have attributed to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different,—a distinction whose practical importance in the criminal law is not easily overestimated.

We cannot agree that there is anything unreasonable, or inconsistent with the general policy of the bankruptcy act, in allowing a longer period for the prosecution of a conspiracy to violate one of its penal clauses than for the violation itself. For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

United States v. Hirsch, 100 U. S. 33, 34, 25 L. ed. 539, 540, is in principle quite like the case at bar. There the indictment contained four counts, of which the first and second, drawn under § 5440, Rev. Stat., charged a conspiracy to defraud the United States out of the duties on certain merchandise theretofore imported and thereafter [89] to be imported. The other counts were drawn under § 5445, and charged the entry of goods at the customhouse by fraudulent invoice and false classification. The question was as to the validity of a plea that the offenses charged had been committed more than three years before the finding of the indictment, and this turned upon whether § 1044 (Comp. Stat. 1913, § 1708), applied, or § 1046 (Comp. Stat. 1913, § 1710), which prescribed a limitation of five years for a prosecution "for any crime arising under the revenue laws." This court held that, with respect to the first two counts, the three-year limitation prescribed by § 1044 was applicable, saying (100 U. S. p. 35): "Specific acts which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; but a conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws." This was said in spite of the fact, pointed out in the opinion, that § 5440 was originally § 30 of the act of March 2, 1867 (14 Stat. at L. 484, chap. 169, Comp. Stat. 1913, § 10,201), which was a revenue law.

It is not necessary to extend the discussion. In our opinion, a conspiracy to commit an offense made criminal by the bankruptcy act is not of itself an offense "arising under" that act within the meaning of § 29d, and hence the prosecution is not limited by that section.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[90] J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller, & Company, Appt.,
v.
TEXAS TRANSPORT & TERMINAL COMPANY, Compagnie Générale Transatlantique, and Bank de Mulhouse. (No. 226.)

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller, & Company, Appt.,
v.
TEXAS TRANSPORT & TERMINAL COMPANY, Compagnie Générale Transatlantique, and Comptoir D'Escompte de Mulhouse. (No. 227.)

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller, & Company, Appt.,
v.
TEXAS TRANSPORT & TERMINAL COMPANY, Compagnie Générale Transatlantique, and Paul Chardin. (No. 228.)

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller, & Company, Appt.,
v.
TEXAS TRANSPORT & TERMINAL COMPANY, Compagnie Générale Transatlantique, and Société Générale. (No. 229.)

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller, & Company, Appt.,
v.
TEXAS TRANSPORT & TERMINAL COMPANY, Compagnie Générale Transatlantique, and Credit Havrais. (No. 230.)

(See S. C. Reporter's ed. 90-98.)

Bankruptcy — preferences — knowledge of intent.

Foreign bankers having accepted and paid in due course and in entire good faith

drafts with forged railroad bills of lading attached, covering alleged through shipments of cotton by rail and water to a foreign port, are not chargeable with knowledge that a preference was intended or given contrary to the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541), §§ 60a, 60b, as amended by the act of February 5, 1903 (32 Stat. at L. 797, chap. 487, Comp. Stat. 1913, § 9644), when the bankrupt consignors substituted in place of the fictitious bills of lading genuine bills of lading issued by an ocean carrier covering cotton subsequently shipped by such consignors to prevent the discovery of their dishonest methods, the physical possession of such cotton having passed during transit from a responsible railroad to a trustworthy steamship company, and the bankers having no actual knowledge of the fraud practised upon them.
[For other cases, see Bankruptcy, VI. b, in Digest Sup. Ct. 1908.]

[Nos. 226, 227, 228, 229, 230.]

Argued April 16 and 19, 1915. Decided June 1, 1915.

FIVE APPEALS from the United States Circuit Court of Appeals for the Fifth Circuit to review decrees which affirmed decrees of the District Court for the Eastern District of Louisiana, dismissing the bills in suits by a trustee in bankruptcy attacking certain transactions with the bankrupts as constituting unlawful preferences. Affirmed.

See same case below, 121 C. C. A. 664, 203 Fed. 1023.

The facts are stated in the opinion.

Mr. **William C. Dufour** argued the cause, and, with Messrs. W. J. Lamb, H. Generes Dufour, and George Janvier, filed a brief for appellant:

The case does not admit of the application of any theory of "appropriation."

2 Cyc. 565; The St. Joze Indiano, 1 Wheat. 208, 4 L. ed. 73; 24 Am. & Eng. Enc. Law, 2d ed. 1066; The Carlos F. Roses, 177 U. S. 671, 44 L. ed. 935, 20 Sup. Ct. Rep. 803; Hoover v. Maher, 51 Minn. 269, 53 N. W. 646.

It is simply necessary to show that at the time of the substitution of these bills of lading the defendant banks were advised of the insolvency of Steele, Miller, & Company to establish a presumption *jure et de jure* that they knew, or should have known, that a preference was intended.

Re Virginia Hardwood Mfg. Co. 139 Fed. 209; Parker v. Black, 143 Fed. 561; Re Gesas, 77 C. C. A. 291, 146 Fed. 734; Parker v. Black, 143 Fed. 560; Coleman v. Decatur Egg Case Co. 108 C. C. A. 248, 186 Fed. 136; Re Houghton Web Co. 185 Fed. 213; Re *Thomas Deutschle* & Co. 182 Fed. 435; Alexander v. Redmond, 103 C. C. A. 446, 180 Fed. 96; Re C. J. McDonald & Sons, 178 Fed. 487; Lewis v. Julius, 212 Fed. 225.

Kiting is the first signal of insolvency,—it is the danger signal for fraud.

First Nat. Bank v. Abbott, 91 C. C. A. 538, 165 Fed. 853.

A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so, made more than four months before the filing of the petition.

Re Great Western Mfg. Co. 81 C. C. A. 341, 152 Fed. 123; Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475.

The transaction here complained of was nothing more nor less than substitution of securities at a time when the insolvency of one of the parties was common property. It, therefore, comes within the principle clearly announced by all the text writers and supported by abundant authority.

Remington, Bankr. p. 774; Re Manning, 123 Fed. 180; Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. 125 Fed. 974; Re Reese Hammond Fire Brick Co. 104 C. C. A. 371, 181 Fed. 643; Sawyer v. Turpin, 91 U. S. 114, 120, 23 L. ed. 235, 237; Stewart v. Platt, 101 U. S. 731, 742, 25 L. ed. 816, 819.

Mr. **Victor Leovy** argued the cause, and, with Messrs. Joseph Paxton Blair and George Denègre, filed a brief for appellees:

There must have been an actual intention on the part of the debtor to give a preference, and such an intention cannot be presumed from the fact alone that he knew himself to be insolvent, or from the fact alone that a preference was given. No one can reasonably be charged with reasonable cause to believe something unless the something existed to which the belief is supposed to relate. Guilty intention on the part of the transferrer is just as essential as guilty knowledge on the part of the transferee. Like any other fact, the intention may be established by circumstantial evidence, by just and necessary inferences from proven facts; but it must be shown to exist. It is not a presumption of law arising from proof of payment or transfer at a time of known insolvency.

Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; Clarke v. Rogers, 106 C. C. A. 64, 183 Fed. 526; Tumlin v. Bryan, 21 L.R.A. (N.S.) 960, 91 C. C. A. 200, 165 Fed. 168; Re First Nat. Bank, 84 C. C. A. 16, 155 Fed. 104; Rutland County Nat. Bank v. Graves, 156 Fed. 170; Re McLoom, 162 Fed. 578; Debus v. Yates, 193 Fed. 435; Re Freeman Cotting Coat Co. 212 Fed. 551; Wilson v.

City Bank, 17 Wall. 486, 21 L. ed. 727; Grant v. First Nat. Bank, 97 U. S. 81, 24 L. ed. 972; Barbour v. Priest, 103 U. S. 296, 26 L. ed. 480.

Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion, especially when the evidence shows that every effort was made by the bankrupts to allay suspicion, and that such efforts were successful.

Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166; Grant v. First Nat. Bank, 97 U. S. 80, 24 L. ed. 971; Stucky v. Masonic Sav. Bank, 108 U. S. 74, 27 L. ed. 640, 2 Sup. Ct. Rep. 219.

A belief that a debtor was insolvent does not necessarily create reasonable cause for belief that he intended a preference.

Re First Nat. Bank, 84 C. C. A. 16, 155 Fed. 104; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 168.

The application of the law of appropriation to the facts leaves nothing of the trustee's case.

The Idaho, 93 U. S. 575, 581–583, 23 L. ed. 978, 980, 981; Lovell v. Isidore Newman & Son, 192 Fed. 758; Benjamin, Sales, pp. 343, 350; 24 Am. & Eng. Enc. Law, 2d ed. pp. 1059, 1071; Williston, Sales, pp. 398–400; United States v. Andrews, 207 U. S. 240, 52 L. ed. 190, 28 Sup. Ct. Rep. 100; Henry Hentz & Co. v. Lovell, 113 C. C. A. 48, 192 Fed. 762.

The rights of a bank which has accepted a draft and received therewith a negotiable bill of lading representing the goods for the value of which the draft is drawn are similar to those of a purchaser, and are to be worked out on the same principles as should be applicable to purchasers for use.

Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Means v. Bank of Randall, 146 U. S. 627, 36 L. ed. 1110, 13 Sup. Ct. Rep. 186; Merchants' Exch. Bank v. McGraw, 22 C. C. A. 622, 48 U. S. App. 55, 76 Fed. 933; Re E. Reboulin Fils & Co. 165 Fed. 245; Charavay v. York Silk Mfg. Co. 170 Fed. 819; Re Cattus, 106 C. C. A. 171, 183 Fed. 735; New Haven Wire Co. Case, 57 Conn. 352, 5 L.R.A. 300, 18 Atl. 266; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Farmers' & M. Nat. Bank v. Logan, 74 N. Y. 569; Moors v. Kidder, 106 N. Y. 42, 12 N. E. 818; Drexel v. Pease, 133 N. Y. 129, 30 N. E. 732; Moors v. Drury, 186 Mass. 424, 71 N. E. 810; Moors v. Wyman, 146 Mass. 60, 15 N. E. 104; Hamilton v. Billington, 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904; Neill v. Rogers Bros. Produce Co. 41 W. Va. 37, 23 S. E. 702.

The banks had such rights in, to, or in respect to, the cotton that a delivery thereof by Steele, Miller, & Company, even after suspension of payment, would not constitute a preference; taking possession or transfer under such circumstances relates back to the time of the original transaction, and is supported by the original consideration, which must be considered as a present consideration.

Sexton v. Kessler & Co. 225 U. S. 90, 91, 56 L. ed. 995, 32 Sup. Ct. Rep. 657, affirming 40 L.R.A.(N.S.) 639, 97 C. C. A. 161, 172 Fed. 535; Re Automobile Livery Service Co. 176 Fed. 792; Mills v. Virginia-Carolina Lumber Co. 21 L.R.A.(N.S.) 901, 90 C. C. A. 154, 164 Fed. 168; Re Brown, 99 C. C. A. 345, 175 Fed. 769; Wood v. United States Fidelity & G. Co. 143 Fed. 424; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466.

Ignorance of the acts constituting the alleged voidable transfer precludes the existence of ground for belief that an intended preference is thereby received. One cannot have any belief as to the character of an unknown transfer.

McNaboe v. Columbian Mfg. Co. 83 C. C. A. 81, 153 Fed. 967; Wright v. Sampter, 152 Fed. 196; Reber v. Shulman, 106 C. C. A. 110, 183 Fed. 564; Sexton v. Kessler & Co. 40 L.R.A.(N.S.) 639, 97 C. C. A. 161, 172 Fed. 535.

Delivery of the goods to the carrier and mailing of the indorsed bills of lading put an end to the *jus disponendi* in Steele, Miller, & Company. They could not thereafter regain possession. No creditor of theirs could levy on the cotton.

2 Dan. Neg. Inst. 5th ed. § 1743; Fetter v. Field, 1 La. Ann. 83; Flash v. Schwabacker, 32 La. Ann. 356; First Nat. Bank v. Meyer, 43 La. Ann. 1, 8 So. 433; Scheuermann v. Monarch Fruit Co. 123 La. 55, 48 So. 647; William T. Hardie & Co. v. Vicksburg, S. & P. R. Co. 118 La. 253, 42 So. 793; Lovell v. Isidore Newman & Son, 113 C. C. A. 39, 192 Fed. 758; White v. Pollock, 117 Mo. 467, 38 Am. St. Rep. 671, 22 S. W. 1077; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

Mr. Justice McReynolds delivered the opinion of the court:

These causes, begun at the same time, were tried and decided together in the United States district court, eastern district of Louisiana (192 Fed. 725), and also in the circuit court of appeals (121 C C. A. 664, 203 Fed. 1023). [92] The original bills, except as to details concerning times, amounts, etc., are essentially identical; by stipulation the evidence in each one became part of the record in the others; and all the appeals may be conveniently considered in a single opinion.

The proceedings were instituted August 18, 1910, by Pyle, trustee in bankruptcy of Steele, Miller, & Company, to recover 2,494 bales of cotton in custody of an ocean carrier at New Orleans, transfer of which by the bankrupts to appellee banks, acceptors of their twenty-five drafts aggregating $183,048.46, it is alleged, constituted a preference voidable under §§ 60a and 60b of the bankrupt law (30 Stat. at L. 544, 562, chap. 541) as it stood after amendments of February 5, 1903 (32 Stat. at L. 797, 799, 800, chap. 487), and prior to June 25, 1910 (36 Stat. at L. 838, 842, chap. 412, Comp. Stat. 1913, §§ 9586, 9644). These sections are copied in the margin.[1]

Steele, Miller, & Company were merchants at Corinth, Mississippi, engaged in exporting cotton. Scheuch & Company were merchants and importers domiciled at [93] Havre, France. The Bank de Mulhouse, Comptoir D'Escompte de Mulhouse, Société Générale, and Credit Havrais are French banks doing business at Havre; and Paul Chardin is a banker and cotton merchant in that city. The Compagnie Générale Transatlantique is an ocean carrier. It owned the steamship Texas; and Texas Transport & Terminal Company was its agent at New Orleans.

In 1909 the bankrupts engaged to consign large quantities of cotton to Scheuch & Company for sale, and the latter on their own responsibility arranged for reimbursement credits with the banks, who, according to established trade custom, undertook to accept drafts drawn on themselves by consignors for value of shipments when accompanied by proper bills of lading, insurance papers, etc., "all necessary documents." In the honest course Steele, Miller, & Company delivered 100 bales of cotton to a railroad carrier for through shipment to Havre, taking therefor a bill of lading to their own order containing marks, numbers of bales, etc., and direction to notify Scheuch & Company. The bill with accompanying documents was then annexed to a draft for the consignment's approximate market price, addressed to the Havre bank and specifying (marks being changed to meet the circumstances) "value received and charged to account R. D. A. R. 1/100 bales cotton." This was discounted and ultimately accepted and paid. Upon arrival at Havre the drawee bank received and held the cotton until reimbursed by Scheuch & Company.

Finding themselves in financial difficulties Steele, Miller, & Company, prior to September, 1909, began to forge and use through railroad bills of lading resembling genuine ones in all respects. Having utilized one of these to procure discount of a draft they would thereafter assemble 100 bales marked with a combination of four letters identically as designated in the false instrument, forward [94] these to New Orleans, and there deliver them to an ocean carrier, receiving a port or ocean bill of lading to their own order, bearing the same identifying marks, etc. The genuine bill would then be sent by mail to Scheuch & Company with instructions to deliver to the bank holding corresponding forged one and return the latter. Such requested exchanges were made through a considerable period, the banks having been satisfied by a plausible explanation that bankrupts had made some arrangement with the carriers, and that shipments were thus expedited, given through Scheuch & Company, who, although at first ignorant of the frauds, were fully informed as early as March, 1910.

During December, 1909, and January and February, 1910, the bankrupts drew the twenty-five drafts—each for about $7,300, approximate market value of 100 bales—here involved on the separate appellee banks, attaching to each a fictitious through railroad bill of lading; and in due course these were accepted and paid in entire good faith. Prior to April 6, 1910, while insolvent, the bankrupts assembled in Mississippi and Tennessee the number of bales specified by the several forged bills marked as therein stated, shipped them to New Orleans, and there delivered them to the Compagnie Générale Transatlantique for transportation to Havre. The ocean car-

[1] Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

Sec. 60b. If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, *shall* have concurrent jurisdiction.

rier issued to bankrupts for each 100 bales a port or ocean bill with same marks, etc., and placed cotton aboard the Texas. The bankrupts promptly indorsed the genuine bills and forwarded them by mail to Scheuch & Company, with directions to deliver to banks holding corresponding fictitious ones and return the latter. Deliveries were made in Havre on April 26th, May 3d and 7th; but because of disquieting rumors concerning wrongful practices by others the banks retained both forged and genuine documents. They had no actual knowledge of the frauds practised upon them until May 8th, when information was received [95] concerning the receiver's bill filed during the preceding day.

About April 20, 1910, the failure of Knight, Yancey, & Company, large exporting cotton merchants at Decatur, Alabama, was announced, and shortly thereafter wide publicity was given to the fact that they had made extensive use of forged through railroad bills of lading with foreign drafts. Steele, Miller, & Company suspended payment April 29th; bankruptcy proceedings were instituted against them May 4th; removal from New Orleans of cotton covered by the above-described ocean bills was enjoined in a proceeding by the receiver filed May 7th; and on August 18th the instant causes were begun.

The bill in No. 226 (typical of all) alleges: "Steele, Miller, & Company, being then insolvent, with intent to prefer said bank of Mulhouse or Scheuch & Company, or both of them, over their other creditors, did deposit in the United States' mail the said port bills of lading, the said bills of lading being addressed to Scheuch & Company, and the same having been indorsed by Steele, Miller, & Company, the object and purpose of forwarding said port bills of lading being to substitute the same for the forged and worthless bill or bills of lading attached to the drafts held by the said Bank of Mulhouse or Scheuch & Company, or both of them, and that said port bills of lading in due course were received by Scheuch & Company and delivered to the Bank of Mulhouse. . . . Your orator avers that the transmission of said port bills of lading to be substituted for the said fradulent bills of lading was done with the intent to prefer the said bank of Mulhouse, and that when the said bills of lading were mailed to the said Scheuch & Company for delivery to the bank of Mulhouse, and were received by the said Scheuch & Company and delivered to the bank of Mulhouse, the said Scheuch & Company and the said bank of Mulhouse, in accepting the said bills of lading and permitting the substitution [96] of the said valid and port or custody bills of lading for the worthless bills of lading then held, knew or should have known, and had reasonable cause to believe, that a preference was thereby given and intended, and knew or should have known that Steele, Miller, & Company was at said time insolvent, and that the effect of the mailing, the receipt and acceptance and substitution of said bills of lading, was to enable the said Scheuch & Company or the said Bank of Mulhouse to obtain payment of its said draft; and your orator now charges that the effect of the act hereinabove described, if maintained and permitted by this honorable court, will be to enable the said Bank of Mulhouse or Scheuch & Company, or both of them, to obtain a greater per cent of their said debt than any other creditor of said bankrupt, and that such acts should be set aside. Your orator charges the acts hereinabove complained of were performed within four months prior to the filing of the petition of involuntary bankruptcy herein, and your orator is advised that the act or acts complained of are voidable at his election, and he does now elect to avoid the same and files this his bill to avoid said transfer." And it prays "that upon the final hearing of this bill this court will set aside the transfer of the said 900 bales of cotton by the said bankrupt to the said bank of Mulhouse or Scheuch & Company, or both of them, and hold the same void and of no effect, and decree that the title to the said cotton and the right of possession thereof is in your orator, and will permit your orator to take possession of said cotton and administer the same, or the proceeds thereof, for the benefit of the creditors."

Appellant trustee maintains that he is seeking to set aside a preference as authorized by statute; that the French banks became mere ordinary unsecured creditors of Steele, Miller, & Company by paying drafts with forged bills of lading attached as security; and that when genuine bills were substituted for spurious ones these banks had [97] positive information of the bankrupts' insolvency, and knew or should have known that they were receiving an intended preference.

In behalf of the appellee banks it is insisted that the transactions between them and bankrupts were in the nature of sales, and by marking and shipping the cotton before bankruptcy it was appropriated to the contracts; that bankrupts had no purpose to give a preference; and certainly the banks had no reasonable cause to believe they were receiving an intended preference.

The trial judge, relying upon The Idaho, 93 U. S. 575, 23 L. ed. 978, held the cotton was appropriated before bankruptcy to prior contracts between the parties. He

further said: "I am not convinced that Steele, Miller, & Company intended a preference, as it seems to me they uniformly discounted drafts purporting to be secured by bills of lading for cotton, which were in reality forged, and thereafter shipped the cotton to prevent discovery of their dishonest methods, and that their transactions with the bank were in the usual course of business and without any intention on their part other than to conceal their true methods. Furthermore, while the facts on which they might be charged with notice ought to have excited the suspicion of the bank, I am not prepared to say that they had knowledge, constructive or actual, of Steele, Miller, & Company's insolvency, or that a preference was intended." The bill was accordingly dismissed and the circuit court of appeals affirmed this action upon authority of Lovell v. Isidore Newman & Son, 113 C. C. A. 39, 192 Fed. 753, and Henry Hentz & Co. v. Lovell, 113 C. C. A. 48, 192 Fed. 762.

Admitting that title to the cotton in question passed, the trustee now seeks annulment of the consummated transfer because a preference would result therefrom. In Lovell v. Isidore Newman & Son, supra, recovery was asked upon the theory that the title had remained in the bankrupts. By the statute's very words in order to set aside such a [98] transfer and recover the property it must appear that "the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference." Whether such "reasonable cause to believe" existed is a question of fact and the burden of proof is upon the trustee. Coder v. Arts, 213 U. S. 223, 240, 53 L. ed. 772, 780, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Wright v. Sampter, 152 Fed. 196, 198; McNaboe v. Columbian Mfg. Co. 83 C. C. A. 81, 153 Fed. 967, 968; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166-168; Reber v. Shulman 106 C. C. A. 110, 183 Fed. 564, 565; Kimmerle v. Farr, 111 C. C. A. 27, 189 Fed. 295, 299-300; Mayes v. Palmer, 125 C. C. A. 325, 208 Fed. 97, 98, 101.

Considering the whole record we are unable to conclude that appellee banks had reasonable cause to believe that, by transferring the genuine bills of lading to them, a preference was intended or given; and accordingly, without undertaking to decide other interesting questions raised, we must affirm the decree of the court below. Prior to May 8, 1910, the banks thought the forged bills in their keeping represented cotton actually moving from designated points of shipment. They were unaware of the bankrupts' crimes; and in the circumstances we cannot say they either believed or ought to have believed that they were receiving anything more than new receipts for their own property, physical possession of which had passed during transit from a responsible railroad to a trustworthy steamship company.

Affirmed.

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[99] JOSÉ McMICKING, Appa.,
v.
ROBERT G. SCHIELDS.

(See S. C. Reporter's ed. 99-107.)

Appeal — from Philippine supreme court — habeas corpus proceeding.

1. The Federal Supreme Court has jurisdiction, under the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369, Comp. Stat. 1913, § 3804), § 10, of an appeal from a final decree of the supreme court of the Philippine Islands in a habeas corpus proceeding which involves the application of § 5 of that statute.

[For other cases, see Appeal and Error, III. d, 5, in Digest Sup. Ct. 1908.]

Habeas corpus — substitute for writ of error — revising errors of law.

2. The denial of the accused's request for time to answer and to prepare a defense, even if contrary to general order No. 58, in force in the Philippine Islands, did not warrant his discharge on habeas corpus on the ground that he was thereby deprived of his right, under the Philippine organic act of July 1, 1902 (32 Stat. at L. 691, chap. 1369, Comp. Stat. 1913, § 3804), § 5, to due process of law, but is at most a mere error of law which cannot be revised by habeas corpus, where the cause—admitted to be within the jurisdiction of the court—stood for trial on an appeal from a judgment of a municipal court, and the accused had known for weeks the nature of the charge, had notice of the hearing, was present in person and represented by counsel, testified in his own behalf, introduced other evidence, and seems to have received an im-

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NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the supreme court of the Philippine Islands—see note to Martinez v. International Bkg. Corp. 55 L. ed. U. S. 438.

On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 491; Ex parte Carll, 27 L. ed. U. S. 288; Re Oteiza y Cortes, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

partial hearing, and there is nothing to show that he needed further time for any proper purpose, and there is no allegation that he desired to offer additional evidence, or suffered substantial injury by being forced to trial.

[For other cases, see Habeas Corpus, I. b, 3; II. a, in Digest Sup. Ct. 1908.]

[No. 285.]

Submitted May 12, 1915. Decided June 1, 1915.

APPEAL from the Supreme Court of the Philippine Islands to review a decree in a habeas corpus proceeding discharging appellee from custody. Reversed and remanded for further proceedings.

See same case below, 23 Philippine, 526.

The facts are stated in the opinion.

Mr. S. T. Ansell submitted the cause for appellant:

This court has jurisdiction of this appeal. Fisher v. Baker, 203 U. S. 180, 51 L. ed. 143, 27 Sup. Ct. Rep. 135, 7 Ann. Cas. 1018.

A judgment is not subject to collateral attack by habeas corpus unless it is clearly void by reason of its having been rendered by a court without jurisdiction, or by reason of the court's having exceeded its jurisdiction. Whether the judgment is absolutely void or not is merely a question of jurisdiction.

Ex parte Watkins, 3 Pet. 202, 7 L. ed. 653; Re Frederich, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; Re Moran, 203 U. S. 102, 51 L. ed. 108, 27 Sup. Ct. Rep. 25; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870.

The right to time for preparation for trial is not a fundamental right affecting jurisdiction, but is a matter resting in the sound discretion of the court.

Franklin v. South Carolina, 218 U. S. 161, 168, 54 L. ed. 980, 985, 30 Sup. Ct. Rep. 640; Ratcliffe's Case, Fost. C. L. 41; Isaacs v. United States, 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. Rep. 51; Woods v. Young, 4 Cranch, 238, 2 L. ed. 607; Ex parte Haase, 5 Cal. App. 541, 90 Pac. 946; People v. Fredericks, 106 Cal. 554, 39 Pac. 944; People v. Winthrop, 118 Cal. 85, 50 Pac. 390; People v. Harper, 139 App. Div. 344, 124 N. Y. Supp. 12; Evans v. State, 36 Tex. Crim. Rep. 32, 35 S. W. 169; Reed v. State, 31 Tex. Crim. Rep. 35, 19 S. W. 678; Johnson v. State, — Tex. Crim. Rep. —, 49 S. W. 618; King v. State, — Tex. Crim. Rep. —, 56 S. W. 926; Counts v. State, 49 Tex. Crim. Rep. 329, 94 S. W. 220; Templeton v. State, — Tex. Crim. Rep. —, 146 S. W. 933; Partridge v. State, — Tex. Crim. Rep. —, 147 S. W. 234; Stephens v. State, — Tex. Crim. Rep. —, 147 S. W. 235; State v. Harris, 100 Iowa, 188, 69 N. W. 413; State v. King, 97 Iowa, 440, 66 N. W. 735; State v. Jordan, 87 Iowa, 86, 54 N. W. 63; State v. De Wolfe, 29 Mont. 418, 74 Pac. 1084; Nokes v. State, 6 Coldw. 297; Taylor v. State, 11 Lea, 712; Gonzales v. Cunningham, 164 U. S. 621, 41 L. ed. 575, 17 Sup. Ct. Rep. 182; State v. Hunter, 171 Mo. 435, 71 S. W. 675; Re Barton, 6 Utah, 264, 21 Pac. 998; Crawford v. Independent Stone Pipe Works, 83 Cal. 631, 24 Pac. 836; Boulter v. State, 6 Wyo. 66, 42 Pac. 606; Logan v. United States, 144 U. S. 302, 36 L. ed. 442, 12 Sup. Ct. Rep. 617; Hickory v. United States, 151 U. S. 303, 308, 38 L. ed. 170, 173, 14 Sup. Ct. Rep. 334.

The requirements of due process of law were fully met in the trial court.

Ong Chang Wing v. United States, 218 U. S. 272, 280, 54 L. ed. 1040, 1041, 31 Sup. Ct. Rep. 15; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; Felts v. Murphy, 201 U. S. 123, 129, 50 L. ed. 689, 692, 26 Sup. Ct. Rep. 366; Brown v. New Jersey, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Valentina v. Mercer, 201 U. S. 131, 50 L. ed. 693, 26 Sup. Ct. Rep. 368.

Habeas corpus was not the proper remedy, and the supreme court not only abused the writ, but violated its own jurisdictional power.

State ex rel. Schulman v. Phillips, 73 Minn. 77, 75 N. W. 1029; State ex rel. Scott v. Crinklaw, 40 Neb. 759, 59 N. W. 370; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; State ex rel. Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541; Ex parte Mitchell, 104 Mo. 121, 24 Am. St. Rep. 324, 16 S. W. 118; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; Humphries v. District of Columbia, 174 U. S. 190, 43 L. ed. 944, 19 Sup. Ct. Rep. 637; Re Manning, 139 U. S. 504, 35 L. ed. 264, 11 Sup. Ct. Rep. 624; Garland v. Washington, 232 U. S. 642, 58 L. ed. 772, 34 Sup. Ct. Rep. 456; Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366.

No appearance for appellee.

Mr. Justice McReynolds delivered the opinion of the court:

The Philippine supreme court by final decree in a habeas corpus proceeding discharged appellee from custody [102] and the director of prisons has appealed. The controversy fairly involves the application of § 5, organic act of the Islands (act of Congress, July 1, 1902, chap. 1369, 32 Stat. at L. 691, 692, 695, Comp. Stat. 1913, §§ 3804, 3808, 3818); and under § 10 of that

statute we have jurisdiction of the appeal. Fisher v. Baker, 203 U. S. 174, 51 L. ed. 142, 27 Sup. Ct. Rep. 135, 7 Ann. Cas. 1018; Paraiso v. United States, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127.

Appellee, Schields, presented a petition to the supreme court January 4, 1911, wherein, after setting out his alleged wrongful imprisonment under a judgment entered in the court of first instance, city of Manila, he further alleged and prayed: "That said imprisonment and deprivation of his liberty are illegal, because said court of first instance denied him the due process of law guaranteed by the Philippine Bill of Rights. The said illegalities are as follows: That on December 21st, 1910, the petitioner appealed from a judgment of the lower court sentencing him for the crime of theft. That on December 23d the petitioner, without having been asked to answer the complaint, was notified that the case would be heard at 10 A. M. on the 24th. When the case was called at 10 A. M. on December 24th, and while the petitioner was arraigned, he asked for time in which to answer the complaint, which request was denied by the court, who ordered the clerk to enter on the record that the petitioner pleaded 'Not guilty' to the complaint. Thereupon the petitioner's attorney also asked for time in which to prepare a defense, which petition was also denied by the same court, to which ruling the petitioner's attorney excepted and asked that the exceptions, together with the requests of the petitioner which had been denied, be entered on the record. Wherefore, the petitioner prays the Honorable supreme court to issue a writ of habeas corpus in his favor, reversing the judgment pronounced by the lower court as being contrary to law, and that the petitioner be set at liberty."

Responding to a rule to show cause why the writ should [103] not issue, appellant answered that by virtue of an order of the court of first instance petitioner was in his custody in Bilibid prison to serve a sentence of four months and one day of *arresto mayor* imposed upon conviction of theft. Copies of the commitment and judgment were made parts of the return. In course of that judgment the judge said: "At the beginning of the trial the defendant asked for further time to prepare, and invoked certain sections of general order 58, which, in our judgment, were not applicable to this case. The prosecution did not file a new complaint in this court. Defendant was tried on the identical complaint which was presented in the court below as long ago as December 1st. To that complaint, as the record shows, he pleaded not guilty, and having further brought this case here on appeal, the presumption is that such plea continued, and to allow delays for the reiteration of such a plea would be an empty formality. The law does not require a vain and useless thing, and the provision in question must be construed as applying to cases where a new complaint is filed in this court. But aside from this, we think that the time of trial caused no prejudice to the accused. As we have seen, the complaint was filed on December 1st, and the accused had more than three weeks to prepare before the trial in this court. During this period there were evidently one or more continuances, and finally, it seems, the defendant had to be called into the municipal court by a bench warrant. Upon bringing the case here it was incumbent upon him to follow it up and to be ready and waiting its disposition by this court. Notice of the trial was sent both to him and to his counsel the day before, and it was not claimed that defendant could have produced any further testimony if the case had been postponed. On the contrary, it appears that he called one witness who did not testify in the court below. After all, the question in the case is mainly one of law. The principal controversy as to the [104] facts relates to the question of the alleged permission to take articles, and this, as we have seen, would not have excused the defendant, even had it been proved, though he admits that himself and Frandon are the only witnesses on that point."

General order No. 58, promulgated from the office of the United States military governor April 23, 1900, and now in effect, amended the Code of Criminal Procedure theretofore in force within the Islands. Kepner v. United States, 195 U. S. 100, 111 49 L. ed. 114, 117, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655. It provides: "Sec. 19. If on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the complaint or information. He may, in his answer to the arraignment, demur or plead to the complaint or information. . . .

"Sec. 30. After his plea the defendant shall be entitled, on demand, to at least two days in which to prepare for trial."

Sec. 528 of the Code of Civil Procedure enacted by the Philippine Commission August 7, 1901, provides: "If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of a judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or if the jurisdiction

appear after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order."

The pertinent part of § 5 of the organic act, approved July 1, 1902, "The Philippine Bill of Rights," is as follows: "That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of [105] the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. . . ." Kepner v. United States, 195 U. S. 117, 118, 49 L. ed. 119, 120, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655.

The supreme court having heard the cause upon petition and reply held—one judge dissenting—that the writ of habeas corpus should be allowed, and discharged the prisoner. Among other things it declared: "The denial to the accused of the time, at least two days, to prepare for trial, expressly given to him by mandatory statute, there being absolutely no discretion lodged in the court concerning the matter, is in effect the deprivation of the constitutional right of due process of law, to a trial before condemnation, said statute being for the purpose of making practically effective in benefit of the accused said constitutional provision. . . . The denial to the accused of a constitutional right does one of two things,—it either ousts the court of jurisdiction to enter a judgment of conviction, or it deprives the record of all legal virtue, and a judgment of conviction entered thereon is a nullity, it having nothing to support it. . . . He applied for a writ of habeas corpus upon the ground that the judgment was void as a matter of law, as he had been convicted without due process of law. . . . The refusal of the time in which to prepare for trial, and the consequent forcing of the defendant to his defense on the instant, is, under the provisions of our law, equivalent, in our judgment, to a refusal of a legal hearing. It amounts in effect to a denial of a trial. It is an abrogation of that due process of law which is the country's embodied procedure, without which a defendant has, in law, no trial at law. . . . Nobody has denied the initial jurisdiction of the trial court. It has never been discussed or even questioned in this court. That jurisdiction has always been freely conceded. The decision of this court rested upon something which [106] occurred after the jurisdiction referred to had attached and after the trial had begun. It rested upon the proposition that, while the trial court had jurisdiction in the first place, it either lost that jurisdiction during the progress of the trial, or so transcended its powers as to render its judgment void."

We are unable to agree with the conclusion of the supreme court that the judgment pronounced by the court of first instance was void and without effect. Under the circumstances disclosed denial of the request for time to answer and to prepare defense was at most matter of error which did not vitiate the entire proceedings. The cause—admitted to be within the jurisdiction of the court—stood for trial on appeal. The accused had known for weeks the nature of the charge against him. He had notice of the hearing, was present in person and represented by counsel, testified in his own behalf, introduced other evidence, and seems to have received an impartial hearing. There is nothing to show that he needed further time for any proper purpose, and there is no allegation that he desired to offer additional evidence or suffered substantial injury by being forced into trial. But for the sections in respect of procedure quoted from general order No. 58, it could not plausibly be contended that the conviction was without due process of law. The court of first instance placed no purely fanciful or arbitrary construction upon these sections and certainly they are not so peculiarly inviolable that a mere misunderstanding of their meaning or harmless departure from their exact terms would suffice to deprive the proceedings of lawful effect and enlarge the accused. Ex parte Harding, 120 U. S. 782, 784, 30 L. ed. 824, 825, 7 Sup. Ct. Rep. 780; Re Wilson, 140 U. S. 575, 585, 35 L. ed. 513, 517, 11 Sup. Ct. Rep. 870; Felts v. Murphy, 201 U. S. 123, 129, 50 L. ed. 689, 692, 26 Sup. Ct. Rep. 366; Re Moran, 203 U. S. 96, 104, 105, 51 L. ed. 105, 108, 109, 27 Sup. Ct. Rep. 25; Frank v. Mangum, 237 U. S. 309, ante, 969, 35 Sup. Ct. Rep. 582.

"Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction [107] over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. Ex parte Parks, 93 U. S. 18, 21, 23 L. ed. 787, 788; Ex parte Siebold, 100 U. S. 371, 375, 25 L. ed. 717, 718; Ex parte Royall, 117 U. S. 241, 250, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; Re Frederich, 149 U. S. 70, 75, 37 L. ed. 653, 656, 13 Sup. Ct. Rep. 793; Baker v. Grice, 169 U. S. 284, 290, 42 L. ed. 748, 750, 18 Sup. Ct.

Rep. 323; Tinsley v. Anderson, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76." Frank v. Mangum, 237 U. S. 309, ante, 969, 35 Sup. Ct. Rep. 582. Henry v. Henkel, 235 U. S. 219, 229, ante, 203, 206, 35 Sup. Ct. Rep. 54.

The decree of the Supreme Court of the Philippine Islands, granting the writ of habeas corpus, and discharging the prisoner, must be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

JOHN P. HERRMANN, Appt.,
v.
BENJAMIN F. EDWARDS et al.

(See S. C. Reporter's ed. 107-118.)

Federal courts — jurisdiction — suit against national bank.

1. In the absence of diverse citizenship, an action by a stockholder of a national bank, in behalf of himself and of all other stockholders who may join, against the bank and its directors and officers, to recover moneys lost to the bank as the result of misconduct of such directors and officers, was not justiciable by a Federal district court, under the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, Comp. Stat. 1913, § 1033) § 4, declaring national banking associations to "be deemed citizens of the states in which they are respectively located," and providing that in actions by or against them the Federal courts "shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state," where the general statements made in the bill to the effect that Federal considerations were essential to the determination of the cause of action were but conclusions of law, affording no jurisdiction apart from the right to entertain the cause which would arise from the substantive and essential facts upon which the bill was based.

[For other cases, see Courts, 576-596, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — suit against national bank.

2. The omission in the re-enactment by the Judicial Code, § 24, ¶ 16, of the provision of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866), § 4, defining the original Federal jurisdiction of suits by and against national banks, of the words "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state," cannot be deemed to extend the jurisdiction of the Federal courts to suits based upon the common-law *liability of* the directors and officers of such banks in which there is no diversity of citizenship, since the re-enacted section instead of generally stating what was excluded from jurisdiction and then creating exceptions, as was done in the earlier enactment, gave Federal jurisdiction only in those classes of cases which were kept within that jurisdiction by the concluding clause of the earlier section, and then proceeded to declare that in all other cases within the contemplation of the section there should be no jurisdiction.

[For other cases, see Courts, 576-596, in Digest Sup. Ct. 1908.]

[No. 222.]

Argued and submitted April 14, 1915. Decided June 14, 1915.

APPEAL from the District Court of the United States for the Eastern District of Missouri to review a decree dismissing, for want of jurisdiction, the bill in a suit against a national bank and its directors and officers to recover the moneys lost to the bank as the result of the misconduct of such officers and directors. Affirmed.

The facts are stated in the opinion.

Mr. Shepard Barclay submitted the cause for appellant. Messrs William R. Orthwein and S. Mayner Wallace were on the brief:

The mere fact that these banking institutions are incorporated under the acts of Congress would formerly have been sufficient to confer jurisdiction.

Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; Texas & P. R. Co. v. Howell, 224 U. S. 577, 56 L. ed. 892, 32 Sup. Ct. Rep. 601.

But, after the Federal legislation making those banks "citizens of the state in which they are respectively located," the sole fact that such a bank is a party does not confer jurisdiction. Yet where the whole case presented, as in the case at bar, depends on rights, duties, and liabilities, and upon powers conferred or denied by Federal statutes whose interpretation must furnish the rules of law for decision of the case, then the latter is one arising under the laws of the United States, just as was accordingly held (in circumstances by no means so clear as those at bar) with reference to Federal statutes incorporating railways.

Pacific Railroad Removal Cases, 115 U. S. 12, 29 L. ed. 323, 5 Sup. Ct. Rep. 1113.

The facts of the bill here show that it is based entirely upon the laws of the United States. Hence the suit arises under those laws.

Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79;

Huff v. Union Nat. Bank, 173 Fed. 335; First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. ed. 679; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306; Citizens' Central Nat. Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364; Cohens v. Virginia, 6 Wheat. 379, 5 L. ed. 285; Osborn v. Bank of United States, 9 Wheat. 822, 6 L. ed. 224; Lesser v. Gray, 236 U. S. 70, ante, 471, 35 Sup. Ct. Rep. 227; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. ed. 379, 35 Sup. Ct. Rep. 146; Bailey v. Mosher, 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 488; National Bank v. Wade, 84 Fed. 10; Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. Rep. 495; International Trust Co. v. Weeks, 203 U. S. 364, 51 L. ed. 224, 27 Sup. Ct. Rep. 69; Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; American Nat. Bank v. Tappan, 174 Fed. 431; Larabee v. Dolley, 175 Fed. 365; Milkman v. Arthe, 213 Fed. 642; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325.

The officers of a national bank are not technical trustees of express trusts, but they are the agents of the bank, charged under the national banking laws with an implied trust to use the funds of the bank for the purposes specified in these laws only, and to preserve them for their creditors and stockholders; and they are personally liable to the bank for losses caused by their use of its funds for unauthorized purposes, as well as for culpable negligence in their use, and for their fraudulent appropriation.

National Bank v. Wade, 84 Fed. 10; Cockrill v. Abeles, 30 C. C. A. 223, 58 U. S. App. 648, 86 Fed. 505; Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 590; Briggs v. Spaulding, 141 U. S. 147, 35 L. ed. 698, 11 Sup. Ct. Rep. 924; Cockrill v. Cooper, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 13; Stephens v. Overstolz, 43 Fed. 771.

Citation of the Federal Constitution is not necessary, and certainly not as against motions directed broadly at a supposed want of jurisdiction, and not at any obscurity or vagueness in the petition itself.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; State ex rel. Campbell v. St. Louis Court of Appeals, 97 Mo. 281, 10 S. W. 874.

How can the alleged want of power to do the acts charged to have been done (inflicting damage on the Federal corporations) be determined otherwise than by construing the Federal banking laws, which alone confer, withhold, or deny those powers? It has been held that only such powers are granted by the Federal statutes (concerning banking) which are expressed in these laws; but what is, and what is not, within the fair and reasonable incidence of the language conferring those powers, is often a question of nicety, as many decisions exhibit, even at a casual reading.

Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Seligman v. Charlottesville Nat. Bank, 3 Hughes, 647, Fed. Cas. No. 12,642; First Nat. Bank v. National Exch. Bank, 92 U. S. 127, 23 L. ed. 681; Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572; Nebraska v. First Nat. Bank, 88 Fed. 947.

It was not essential to cite or to set forth the banking laws of the United States on which rests the liability of the chief defendants.

Bridge Props. v. Hoboken Land & Improv. Co. 1 Wall. 142, 17 L. ed. 575; 3 Enc. Pl. & Pr. 356; Story, Eq. Pl. 8th ed. § 24; Owings v. Hull, 9 Pet. 625, 9 L. ed. 252; Gormley v. Bunyan, 138 U. S. 635, 34 L. ed. 1090, 11 Sup. Ct. Rep. 453.

The duties of directors are defined by various sections of the banking law, which also limit the scope of their powers, and thus lay down the law of their conduct as directors. The special powers conferred by the banking act operate to restrain the use of other powers, but the extent of the effect of such legislation requires an exposition of the Federal statutes in which all the law of the subject appears.

Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613; First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306; Commercial Nat. Bank v. Weinhard, 192 U. S. 243, 48 L. ed. 425, 24 Sup. Ct. Rep. 253.

The Federal courts are the only proper courts to adjudicate the exclusive questions of Federal law arising on the facts in this bill. Jurisdiction in such a case has been often assumed, without question.

Corsicana Nat. Bank v. Johnson, 134 C. C. A. 510, 218 Fed. 822; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 299, 50 L. ed. 1039, 26 Sup. Ct. Rep. 613; Third Nat. Bank v. Buffalo German Ins. Co. 193 U. S. 581, 48 L. ed. 801, 24 Sup. Ct. Rep. 524.

Mr. C. D. Corum argued the cause, and, with Mr. Sam B. Jeffries, filed a brief for appellees:

The record fails to raise any Federal question.

Western U. Teleg. Co. v. Ann. Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Montana Catholic Missions v. Missoula County, 200 U. S. 126, 50 L. ed. 402, 26 Sup. Ct. Rep. 197; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; Theurkauf v. Ireland, 27 Fed. 769; Nelson v. Southern R. Co. 172 Fed. 478; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

The liability of directors of a national bank is substantially the same under the banking law as under the common law.

Clews v. Bardon, 36 Fed. 617.

The jurisdiction of the Federal courts over suits by or against such banks cannot be asserted on the ground of their Federal origin.

Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777; Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592; Ex parte Jones, 164 U. S. 693, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; Re Chetwood, 165 U. S. 457, 41 L. ed. 787, 17 Sup. Ct. Rep. 385; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325.

Messrs. Daniel N. Kirby, Eugene S. Wilson, Joseph W. Lewis, Charles M. Rice, John F. Lee, and Charles M. Polk also filed a brief for appellees:

Prior to 1882, the district court had jurisdiction of all cases by or against national banks.

Petri v. Commercial Nat. Bank, 142 U. S. 644, 649, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325.

After the act of 1882, the district court only had jurisdiction of actions by or against national banks where it would have had jurisdiction of actions by or against citizens of the respective states.

Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 781, 30 L. ed. 816, 818, 7 Sup. Ct. Rep. 777; Petri v. Commercial Nat. Bank, supra; Ex parte Jones, 164 U. S. 691, 692, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; Re Chetwood, 165 U. S. 443, 459, 41 L. ed. 782, 787, 17 Sup. Ct. Rep. 385; Continental Nat. Bank v. Buford, 191 U. S. 119, 123, 48 L. ed. 119, 120, 24 Sup. Ct. Rep. 54.

The district court has no jurisdiction in a suit against the directors of national banks for acts alleged to have been in fraud and in violation of the national bank acts, where there is not a substantial and meritorious controversy as to the construction or effect of some provision of the national bank act.

Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592.

In order that the district court may have jurisdiction in a case involving a construction of the national bank act, the bill must show (a) that there was an actual meritorious dispute; (b) that the result of the suit depended upon the construction of the act.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357.

It is conceded that it is *ultra vires* for national banks to purchase for investment stocks of other national banks.

First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 128, 23 L. ed. 679, 681; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; Shaw v. National German-American Bank, 199 U. S. 603, 50 L. ed. 328, 26 Sup. Ct. Rep. 750; First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306.

[111] Mr. Chief Justice White delivered the opinion of the court:

If the statutes which control the question for decision in this case and their significance as settled by the decisions of this court long prior to the commencement of this suit be at once stated, it will serve to clarify and facilitate the analysis of the issue to be decided. Section 4 of the act of

Congress of August 13, 1888 (chap. 866, 25 Stat. at L. 433, Comp. Stat. 1913, § 1033), provided as follows:

"That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; ~~and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.~~ The provisions of this section shall not be held to affect the jurisdiction of the Courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." (A line is drawn through certain words for reasons hereafter referred to.)

This section was but a re-enactment of an identical provision contained in the 4th section of the act of Congress of March 3, 1887 (chap. 373, 24 Stat. at L. 552, Comp. Stat. 1913, § 1033), and again this was but the re-enactment of an identical provision contained in the 4th section of the act of July 12, 1882 (chap. 290, 22 Stat. at L. 162, Comp. Stat. 1913, § 9665).

Under the provisions of the act of 1882, long prior to their re-enactment in 1888, it had been conclusively established that because a corporation was a national bank, created under an act of Congress, gave it no greater right to remove a case than if it had been organized under a state law. Leather Mfrs.' Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777. And after the re-enactment in 1888 a case [112] (Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. ed. 1002, 10 Sup. Ct. Rep. 592) was decided involving a controversy controlled by the act of 1882, but the decision of which was necessarily also an interpretation of the act of 1888, as the two were identical. The case was this: A stockholder of a national bank, on his own behalf and of all others who might join, sued in a circuit court of the United States the directors of the bank, making the bank also a party defendant, to hold the directors liable for an act of alleged maladministration committed by them. The prayer was that the directors be decreed to pay back to the bank for the benefit of its stockholders the amount of money lost by the bank as the result of their misconduct. There was no diversity of citizenship upon which the jurisdiction of the circuit court could rest, and therefore its power to entertain the case rested alone upon the fact that the defendant bank was a national banking association, that the other defendants were directors of such an association, and that the liability sought to be enforced arose from misconduct on their part in relation to their duties to the bank. The circuit court, not passing upon these questions, dismissed the bill because there had not been a compliance with equity rule 94. But this court concluding that the act of 1882 excluded jurisdiction as a Federal court, the action of the court below in dismissing for want of compliance with the equity rule was reversed and the case remanded with directions to dismiss for want of jurisdiction as a Federal court. Of course this conclusion involved deciding that, in the absence of a Federal controversy concerning the interpretation of some provision of the national bank act raising what might be considered by analogy a Federal question in the sense of § 709, Rev. Stat., a mere assertion of liability on the part of directors for wrongs for which they might be responsible at common law afforded no basis for jurisdiction. Indeed, that this conception was the one upon which the decision was [113] rested is shown by the fact that in the course of the opinion it was pointed out that neither the provisions of § 5209, Rev. Stat. (Comp. Stat. 1913, § 9772), providing for criminal punishment of directors of national banks in certain cases, nor § 5239, Rev. Stat. (Comp. Stat. 1913, § 9831), giving certain powers to the Comptroller of the Currency in certain instances, were involved in the cause of action so as to give rise to a Federal question upon which the jurisdiction could be based.

This ruling during the many years which have elapsed has never been questioned and the fundamental principle upon which it rested has been applied in various aspects. Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed 1144, 12 Sup. Ct. Rep. 325; Ex parte Jones, 164 U. S. 693, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638; Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403.

By § 24 of the Judicial Code of 1911 [36 Stat. at L. 1092, chap. 231, Comp. Stat. 1913, § 991 (16)] the jurisdiction of the district courts is provided for. The 16th paragraph of that section gives those courts original jurisdiction as follows:

"Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the

court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located."

The statutory law with the concluded interpretation affixed to it to which we have referred being in force, this suit was commenced in the court below in March, 1913. [114] The complainant, as a stockholder in the National Bank of Commerce, a national banking association established and carrying on business in St. Louis, Missouri, on his own and on behalf of all other stockholders who might elect to join in the suit, sought recovery from the defendants, George Lane Edwards and Benjamin F. Edwards, of an amount exceeding $1,300,000 for the benefit of the complainant and the other stockholders of the National Bank of Commerce upon substantially the following grounds: That the defendants, as directors and officers of the National Bank of Commerce, having also a large interest, direct or indirect, in another national bank known as the Fourth National Bank, had devised a scheme by which the National Bank of Commerce would buy out the Fourth National Bank for a sum utterly disproportionate to the value of the property and rights to be transferred, thus despoiling the National Bank of Commerce and its stockholders and wrongfully enriching the Fourth National Bank and its stockholders to the extent of the inordinate price which was paid. It was charged that this scheme of fraud and wrong was a breach of trust on the part of the two main defendants, and was accomplished by them by a wrongful and fraudulent exercise and perversion of the power possessed by them over the business of the National Bank of Commerce. It was alleged that demand had been made upon the directors and officers of the National Bank of Commerce to sue the main defendants for a recovery of the amount by which they had wrongfully enriched themselves to the detriment and injury of the National Bank of Commerce and its stockholders, but they had refused to do so, and the directors of the bank were joined as defendants. The prayer was for an accounting, for a fixing of the amount by which the National Bank of Commerce had been despoiled, and for a decree against the defendants to pay the sum so fixed for the benefit of the stockholders of the National Bank of Commerce. There [115] was no diversity of citizenship, and jurisdiction over the suit therefore depended upon whether there was a Federal cause of action stated upon which the authority of the court to entertain the cause could be based.

Except in so far as it may be conceived that a Federal cause of action giving jurisdiction existed because of the averment that the National Bank of Commerce was a United States corporation, and the reiterated charges of wrongdoing and breach of trust by the two main defendants, there was nothing in the bill from which it could be considered that a Federal right adequate to give jurisdiction was asserted unless it be a passage from the bill which we quote:

"The acts and transactions of said defendants Benjamin F. Edwards and George Lane Edwards in the matter of the transfer of the assets and property of the Fourth National Bank to the National Bank of Commerce were contrary to the laws of the United States and beyond the powers, under the acts of Congress in such case made and provided, of the National Bank of Commerce as an incorporated banking association under the laws of the United States, and that the acts and doings of the said Benjamin F. Edwards and George Lane Edwards in promoting, effecting, and executing the transfer of the assets and property of the Fourth National Bank, aforesaid, to the National Bank of Commerce, were in violation of the National Banking laws governing said banking institutions, and were furthermore a breach of trust on the part of said Benjamin F. Edwards and George Lane Edwards as directors of the Bank of Commerce, and the facts and circumstances of their interest in the Fourth National Bank as stockholders and otherwise render their action as directors in the National Bank of Commerce in St. Louis in promoting, effecting, and executing the transfer of the assets and property of the Fourth National Bank to the National Bank of Commerce, a breach of [116] trust, in that said defendants, Benjamin F. Edwards and George Lane Edwards, as directors of the National Bank of Commerce in St. Louis, were in duty bound to execute the trust which said office provided, in such a manner as not to promote their own pecuniary and personal interest; and therefore their acts as aforesaid were in violation of the national banking laws of the United States as well as contrary to equity and good conscience, and for the consequences and damages resulting therefrom said Benjamin F. Edwards and George Lane Edwards were and are liable to the National Bank of Commerce for all damages ensuing on account thereof."

There were demurrers for want of jurisdiction which were maintained, and the bill

was dismissed, and the case is here on a direct appeal upon the theory that the power of the court as a Federal court to entertain the cause is involved, and that that single question is to be determined.

It is apparent that the general statements made in the bill to the effect that Federal considerations were essential to the determination of the cause of action were but conclusions of law affording no jurisdiction apart from the right to entertain the cause which would arise from the substantive and essential facts upon which the bill was based. Indeed, when the averments of the bill are analyzed there is no escape from the conclusion that the jurisdiction to entertain it could not have been exerted without disregarding the plain letter of the statute in force since 1882. In fact, this inevitable result does not depend upon the mere text of the statutes referred to, since there is an absolute legal identity between this and the Whittemore Case, and that case hence forecloses every contention here relied upon.

But it is said that conceding these conclusions inevitably result from the statute law as it existed prior to the Judicial Code, the Judicial Code has made a radical change in the law, which now requires a different interpretation. [117] But we think the contention on the face of the statute is without foundation, and that a brief consideration of the text of the act of 1888 and of paragraph 16 of § 24 of the Judicial Code will make this clear.

The proposition rests upon the omission from the Judicial Code of the certain words in the act of 1888 through which in the quotation which we have previously made a line has been passed. But when paragraph 16 of § 24 of the Judicial Code and § 4 of the act of 1888 are considered together, the omission of the words referred to serves at once to destroy the proposition here relied upon for these reasons: Section 4 of the act of 1888, as will be seen, opened with the provisions which excluded national banks from the Federal jurisdiction which otherwise would have attached to controversies concerning them. This being done, the statute proceeded to provide that the exclusion previously specified should not include certain classes of controversies which it was deemed best should come under the Federal jurisdiction, thus leaving those classes of cases under the general rule, since they were carved out by the last clause of the section from the provisions as to exclusion which were found in the first. In re-enacting these provisions of the act of 1888 in paragraph 16 of § 24 of the Judicial Code, obviously to make the purpose of the re-enacted statute clearer, just the opposite form of statement was resorted to, since paragraph 16 opens by conferring Federal jurisdiction only in those classes of cases which were kept within that jurisdiction by the concluding clause of § 4 of the act of 1888, and hence no jurisdiction was given as to the other classes of cases which were excluded from such jurisdiction by the act of 1888. The re-enacted section in other words, instead of generally stating what was excluded from jurisdiction and then carving out exceptions, as was done in the act of 1888, gave jurisdiction only in the cases where it was intended to give it, and then proceeded to declare that in all other cases within the [118] contemplation of the section there should be no jurisdiction, thus making the lines clear and broad and leaving no room for controversy or doubt. Aside from this it is to be moreover observed that the intention of Congress to make by the adoption of the Judicial Code so radical a change from the rule which had prevailed for so long a period is not to be indulged in without a clear manifestation of such purpose. Besides, as there is no ground for distinguishing between the restrictions as to jurisdiction imposed by paragraph 16 of § 24, it must follow that the argument now made, based upon the omission of the words which were found in the act of 1888, would apply to all of paragraph 16, and therefore none of the restrictions as to jurisdiction in that paragraph would be operative. Thus in both aspects the contention must come to this: that on the one hand, because the provisions of paragraph 16 are comprehensively all-embracing, they must be held to be restrictive, and on the other hand, that because the provisions of the act of 1888 were re-enacted, they were repealed.

As it follows that the court below was right in dismissing the bill for want of jurisdiction as a Federal court to consider it, its decree is therefore affirmed.

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[119] KAPIOLANI ESTATE, Limited, Appt.,

v.

MARY H. ATCHERLEY, Lyle A. Dickey, and E. M. Watson.

(See S. C. Reporter's ed. 119–139.)

Judgment — res judicata — land titles — fraud of guardian.

1. The right of a minor ward upon coming of age to obtain relief in equity under

NOTE.—On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Mor-

the Hawaiian laws, against his guardian, who had, in fraud of the ward, presented a claim and obtained in his own name an award by the Hawaiian board of land commissioners of a title in fee simple to the ward's land, was not foreclosed by an affirmance in the Federal Supreme Court of a decree of the Hawaiian supreme court adjudging that the award in question could only be attacked by a direct appeal by a party who had presented his claims to the board, where the vitally important fact of guardianship was not included in the findings of fact certified to the Federal Supreme Court.

[For other cases, see Judgment, III. j, 2, b, in Digest Sup. Ct. 1908.]

Appeal — from Hawaiian courts — following decision below.

2. The Federal Supreme Court will ordinarily defer to the rulings of the local courts with respect to the validity under the Hawaiian laws of a judgment of the Hawaiian courts.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Judgment — res judicata — persons not parties — notice.

3. Notice of the suit and opportunity to defend it must be given to the warrantor of a title, or a judgment against the title in a suit against his grantee will not be available against him, if available at all, in favor of the successful assailant of the title.

[For other cases, see Judgment, III. k, 2, in Digest Sup. Ct. 1908.]

[No. 174.]

Argued April 30, 1915. Decided June 14, 1915.

APPEAL from the Supreme Court of the Territory of Hawaii to review a decree which reversed a decree of the Circuit Court of the First Judicial Circuit in that territory, enjoining the prosecution of an action of ejectment brought by one of the defendants, and requiring that defendants execute a conveyance to complainant. Reversed and remanded for further proceedings.

See same case below, 21 Haw. 441.

The facts are stated in the opinion.

Mr. **David L. Withington** argued the cause, and, with Messrs. Alfred L. Castle, W. A. Greenwell, and William R. Castle, filed a brief for appellant:

A minor, on coming of age, could obtain relief in equity against a guardian who had, in fraud of his ward, presented a claim and obtained in his own name an award from the land commission of title to the minor's land.

Re Kaniu, 2 Haw. 82; Re Kekauluohi, 6 Haw. 172; Kalakaua v. Keaweamahi 4 Haw. 577; Nakookoo v. Noholoa 19 Haw. 667; Wood v. Stark, 1 Haw. 9; Cockett v. Hubbard, 1 Haw. 101; Alo v. Blair, 1 Haw. 153; Dana v. Angel, 1 Haw. 196; Re Turner, 1 Haw. 266; Williams v. Kaea, 1 Haw. 236; Laanui v. Pouhu, 2 Haw. 161; Kapaakea v. Morrison, 2 Haw. 277; Montgomery v. Coady, 2 Haw. 329; Montgomery v. Montgomery, 2 Haw. 553; Ainini v. Kala, 6 Haw. 18; Kapea v. Moehonua, 6 Haw. 51; Davis v. Brewer, 3 Haw. 273; Davis v. Brewer, 3 Haw. 363; Wei See v. Young Sheong, 3 Haw. 489; Akeau v. Iakona, 13 Haw. 216; Norris v. Herblay, 9 Haw. 514; Mills v. Briggs, 4 Haw. 506; See Hop v. Parke, 6 Haw. 688; Hackfeld v. Bal, 6 Haw. 364; Sanford v. Sanford, 139 U. S. 642, 644, 35 L. ed. 290, 291, 11 Sup. Ct. Rep. 666; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; White v. Cannon, 6 Wall. 443, 18 L. ed. 923; Stark v. Starr, 6 Wall. 402, 419, 18 L. ed. 925; Ringo v. Binns, 10 Pet. 269, 9 L. ed. 420; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; United States v. California & O. Land Co. 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458; Johnson v. Waters, 111 U. S. 640, 665, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Felix v. Patrick, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Cook v. Tullis, 18 Wall. 332, 342, 21 L. ed. 933, 938; Thompson v. Los Angeles Farming & Mill. Co. 180 U. S. 72, 77, 45 L. ed. 432, 435, 21 Sup. Ct. Rep. 289; Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; Ainsa v. New Mexico & A. R. Co. 175 U. S. 76, 44 L. ed. 78, 20 Sup. Ct. Rep. 28; Barker v. Harvey, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690; Thurston v. Bishop, 7 Haw. 421; Rose v. Yoshimura, 11 Haw. 30; Kenoa v. Meek, 6 Haw. 63; Kekiekie v. Dennis, 1 Haw. 42; Townsend v. Greeley, 5 Wall. 326, 335, 18 L. ed. 547, 549; Carpentier v. Montgomery, 13 Wall. 480, 20 L. ed. 698.

Kinimaka as guardian had absolute control and management of the ward's property, with the power of disposition.

Kamehameha v. Kahookano, 2 Haw. 118; Laanui v. Pouhu, 2 Haw. 161.

It was his duty to present the land to the land commission for award.

Thurston v. Bishop, 7 Haw. 421.

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rill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

His failure to present the land forfeited Kalakaua's right.

Ibid.

A guardian is not allowed to set up title against his ward.

Perry, Tr. § 863; Lono v. Phillips, 5 Haw. 357.

The guardian is under an equitable obligation to account.

New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580; 21 Cyc. 166; Coulson v. Walton, 9 Pet. 62, 9 L. ed. 51; Dexter v. Hall, 15 Wall. 9, 21 L. ed. 73; White v. Joyce (White v. Miller) 158 U. S. 128, 39 L. ed. 921, 15 Sup. Ct. Rep. 788; Griffith v. Godey, 113 U. S. 89, 93, 28 L. ed. 934, 937, 5 Sup. Ct. Rep. 383; Barney v. Saunders, 16 How. 535, 542, 14 L. ed. 1047, 1051; Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Colt v. Colt, 111 U. S. 566, 28 L. ed. 520, 4 Sup. Ct. Rep. 553.

The ward in the accounting can elect to take the property.

Yerger v. Jones, 16 How. 30, 37, 14 L. ed. 832, 835; Oliver v. Piatt, 3 How. 333, 401, 11 L. ed. 622, 653; May v. Le Claire, 11 Wall. 217, 235, 20 L. ed. 50, 54; Taylor v. Plumer, 3 Maule & S. 562, 2 Rose, 415, 16 Revised Rep. 361; United States v. State Nat. Bank, 96 U. S. 30, 34, 24 L. ed. 647, 648; Duncan v. Jaudon, 15 Wall. 165, 21 L. ed. 142; Cleveland v. Sprowl, 12 Rob. (La.) 172; Darlington v. Turner, 202 U. S. 231, 50 L. ed. 1007, 26 Sup. Ct. Rep. 630; 1 Bl. Com. p. 461; Eyre v. Shaftsbury, 2 P. Wms. 103.

The right of the ward is a contractual or quasi contractual right against the guardian, not affected by a land commission award.

Justinian, bk. 3, title 27, quoted in Scott's Cases on Quasi-Contracts, p. 1; Henry of Bracton, Laws and Customs of England, bk. 3, Folio 100, ¶ 10 (Scott, p. 4.); Keelikolani v. Robinson, 2 Haw. 514, 549; Laanui v. Pouhu, 2 Haw. 161; Kaaihue v. Crabbe, 3 Haw. 768; Jones v. Meek, 2 Haw. 9.

This court should follow the law of the case decided by the supreme court of Hawaii when it was the court of last resort.

Williams v. Conger, 125 U. S. 397, 415, 418, 31 L. ed. 778, 787, 788, 8 Sup. Ct. Rep. 933; Cleaver v. Traders' Ins. Co. 40 Fed. 711; Hill v. Chicago & E. R. Co. 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; Henning v. Eldridge, 146 Ill. 305, 33 N. E. 754; Re Warner, 158 Cal. 441, 111 Pac. 352; Campbell v. Perth Amboy Mut. Loan, Homestead & Bldg. Asso. 76 N. J. Eq. 347, 74 Atl. 144; Silva v. Pickard, 14 Utah, 245, 47 Pac. 144; St. Croix Lumber Co. v. Mitchell, 4 S. D. 487, 57 N. W. 236.

This is a matter of local law and custom, in which this court should follow the local courts, which have in this action three times ruled the law with appellant.

John II. Estate v. Brown, 235 U. S. 342, ante, 259, 35 Sup. Ct. Rep. 106; Lewers & Cooke v. Atcherley, 222 U. S. 285, 292, 56 L. ed. 202, 205, 32 Sup. Ct. Rep. 94.

This court should not interfere with the exercise of discretion by the supreme court of Hawaii in refusing to open up the decree of 1858 in aid of a speculator claiming title under a breach of trust by a wrongdoer, where this would result in mischief to innocent parties, and is not essential to the equities of the case.

Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402; Kapiolani v. Atcherly, 14 Haw. 663; Lewers & Cooke v. Atcherley, 222 U. S. 285, 56 L. ed. 202, 32 Sup. Ct. Rep. 94; Gay v. Parpart, 106 U. S. 679, 696, 699, 27 L. ed. 256, 263, 264, 1 Sup. Ct. Rep. 456; New Orleans v. Fisher, 180 U. S. 185, 45 L. ed. 485, 21 Sup. Ct. Rep. 347; Hopkins v. Hebard, 235 U. S. 287, 59 L. ed. 232, 35 Sup. Ct. Rep. 26.

The minor never had his day in court until the actions in 1858.

21 Cyc. 186; Woerner, Guardianship, § 21; Schouler, Dom. Rel. p. 469; Galpin v. Page, 18 Wall. 350, 366, 21 L. ed. 959, 963; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Ochoa v. Hernandez y Morales, 230 U. S. 139, 159, 57 L. ed. 1427, 1437, 33 Sup. Ct. Rep. 1033.

Mr. Lyle A. Dickey, *pro se*, argued the cause, and with Mr. E. M. Watson and Mrs. Mary H. Atcherley, *in propriis personis*, filed a brief for appellees:

The supreme court of Hawaii did not err in holding that it must follow a United States Supreme Court decision, though that decision upholds a decision of the lower court on a matter of local law.

26 Am. & Eng. Enc. Law, 2d ed. 153; Steele v. Boley, 7 Utah, 66, 24 Pac. 755; Zerulla v. Supreme Lodge, O. M. P. 223 Ill. 520, 79 N. E. 160.

A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law.

Kapiolani v. Atcherly, 14 Haw. 661.

In the Lewers & Cooke Case both the Hawaiian court and this thoroughly understood that the case was an equitable one, making an attack in equity on a judgment because of constructive fraud arising out of fiduciary relations between a ward and guardian.

Lewers & Cook v. Atcherley, 18 Haw. 626,

222 U. S. 292-294, 56 L. ed. 204, 205, 32 Sup. Ct. Rep. 94.

The rule of the "law of the case" is not involved here.

King v. West Virginia, 216 U. S. 92, 100, 101, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225; Lewers & Cooke v. Atcherly, 222 U. S. 285, 295, 56 L. ed. 202, 205, 32 Sup. Ct. Rep. 94; William W. Bierce v. Waterhouse, 219 U. S. 320, 337, 55 L. ed. 237, 243, 31 Sup. Ct. Rep. 241; 2 Cyc. 520; Hertz v. Woodman, 218 U. S. 205, 212, 54 L. ed. 1001, 1005, 30 Sup. Ct. Rep. 621, 31 Cyc. 350; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 341, 40 L. ed. 991, 992, 16 Sup. Ct. Rep. 850; Hamilton v. Marks, 63 Mo. 172; Jungk v. Read, 12 Utah, 196, 42 Pac. 292; Reeves v. Petty, 44 Tex. 254; Norton v. Knapp, 64 Iowa, 112, 19 N. W. 867; Hastings v. Foxworthy, 45 Neb. 697, 34 L.R.A. 321, 63 N. W. 955; Pennsylvania Co. v. Platt, 47 Ohio St. 379, 25 N. E. 1028.

The status of the Lewers & Cooke Case is that of a prior case, because judgment was first reached in it.

23 Cyc. 1113; 1 Van Fleet, Former Adjudication, 87, § 9.

Appellant, having sold all equitable title in the land to Lewers & Cooke, Ltd., has no equitable interest in the subject-matter to sustain this suit.

Dick v. Foraker, 155 U. S. 414, 416, 39 L. ed. 205, 206, 15 Sup. Ct. Rep. 124; Bissell v. Kellogg, 60 Barb. 629; Chapman v. Jones, 149 Ind. 438, 47 N. E. 1065, 49 N. E. 347; Smith v. Brittenham, 109 Ill. 550; Glos v. Goodrich, 175 Ill. 25, 51 N. E. 643; Page County v. Burlington & M. R. Co. 40 Iowa, 525; Gilbert v. Cooley, Walk. Ch. (Mich.) 494; Huntington v. Allen, 44 Miss. 654; Hutchinson v. Howe, 100 Ill. 19.

A multiplicity of suits is against the principles of equity. If this suit be allowed, a separate one might be brought by every grantor in a chain of title who might be injured by a decree against his grantee, each waiting until the conclusion of the suit of his grantee.

Albert v. Hamilton, 76 Md. 304, 25 Atl. 343; Roby v. Eggers, 130 Ind. 424, 29 N. E. 365.

The Lewers & Cooke decree should be followed in this case because it is *res judicata*.

McCandless v. Castle, 19 Haw. 515; Spear v. Hill, 54 N. H. 89; William W. Bierce v. Waterhouse, 219 U. S. 334, 335, 55 L. ed. 242, 243, 31 Sup. Ct. Rep. 241; Leslie v. Bonte, 130 Ill. 498, 6 L.R.A. 62, 22 N. E. 594; Soward v. Coppage, 10 Ky. L. Rep. 436, 9 S. W. 389; Pace v. Maxwell, 62 Ga. 98; Chew v. Brumagen, 13 Wall. 497, 505, 20 L. ed. 663, 666; Lovejoy v. Murray, 3 Wall. 1, 18, 19, 18 L. ed. 129, 134; Tootle v. Coleman, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41; 1 Greenl. Ev. §§ 522, 523; 23 Cyc. 1406; Paahao v. Swinton, 20 Haw. 355; The Apollon, 9 Wheat. 362, 6 L. ed. 111.

Awards of the land commission have been held conclusive against every form of attack heretofore made on them. Claims of fraud, false testimony, infancy, and even the admission of the King that a party had a right to an award, have been of no avail.

Kekiekie v. Dennis, 1 Haw. 42; Kukilahu v. Gill, 1 Haw. 54; Bishop v. Namakalaa, 2 Haw. 240; Keelikolani v. Robinson, 2 Haw. 539; Kanaina v. Long, 3 Haw. 335; Kahoomana v. Moehonua, 3 Haw. 640; Kalakaua v. Keaweamahi, 4 Haw. 579; Kaai v. Mahuka, 5 Haw. 354; Kenoa v. Meek, 6 Haw. 67; Kekauluohi's Estate, 6 Haw. 178; Thurston v. Bishop, 7 Haw. 428. See also Meader v. Norton, 11 Wall. 442, 457, 20 L. ed. 184, 187; Carpentier v. Montgomery, 13 Wall. 480, 495, 20 L. ed. 698, 701.

Mr. Justice McKenna delivered the opinion of the court:

Appeal to review a decree of the supreme court of Hawaii which reversed a decree of the circuit judge of the first judicial circuit, enjoining the prosecution of an action of ejectment brought by Mary H. Atcherley, one of the appellees, against appellant for the recovery of certain described lands, decreeing that appellant had the equitable title to the lands, and that appellees, including Dickey and Watson, who were made parties pending the suit, held the naked legal title thereto as tenants in common, one half thereof by Mary H. Atcherley and one quarter thereof by each of the other appellees, as trustees of appellant. The decree required that the appellees execute a conveyance of such title to appellant.

The bill alleges that one David Kalakaua, under and through whom the appellant company (designated hereinafter as complainant) claims, on or about December 29, 1856, litigated his title with the following parties, under whom defendant Atcherley claims title, to wit: Kinimaka, Pai, his wife, and their children, in the supreme court of the Hawaiian Islands, in equity, alleging that Kinimaka held title to the lands in trust and as guardian [125] of Kalakaua, and not otherwise, and praying that he, Kinimaka, be declared trustee of the lands for Kalakaua, and be decreed to convey the same in fee to Kalakaua; that summons was duly issued and served on Kinimaka, who, before filing answer, died, leaving a will devising the lands to his children, whom he left surviving him, and his widow, Pai; that these facts were suggested to the court, and it was prayed that

the widow and children be made parties to the suit, and a guardian *ad litem* be appointed for the children, it being alleged that they became trustees of the property in the same manner and under the same trust as Kinimaka.

That subsequently (March 8, 1858) Kalakaua filed a petition for administration upon the estate of one Kaniu, deceased, under whom he claimed title to the lands, and for the appointment of a guardian *ad litem* for the minor children of Kinimaka. That upon the filing of such petition George E. Beckwith, administrator of the estate of Kinimaka, was appointed guardian *ad litem* of the minor children of Kinimaka, and notice was served on him as such administrator and guardian, and upon Pai to show cause why letters of administration might not issue to Kalakaua upon the estate of Kaniu, deceased.

That upon proceedings being had a decree was rendered adjudging Kalakaua to be the devisee of Kaniu, and directing letters to be issued to him.

That on June 19, 1858, Kalakaua filed a further petition alleging the same facts substantially which he had alleged in the petitions of December 29, 1856, and March 16. 1857, with the additional fact that one Richard Armstrong had been appointed guardian of the minor children of Kinimaka, and prayed that he might be ordered to convey the lands to Kalakaua; and that a summons was duly served upon Armstrong as guardian of the children and upon Pai; that Armstrong and Pai subsequently answered; that evidence was taken, the case heard upon [**126**] the merits, and on November 2, 1858, the court duly entered the following decree:

"David Kalakaua against Richard Armstrong, guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased. The court did order, adjudge, and decree in this matter that Mr. Armstrong, the guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this case, the land named Onoulimaloo, on the island of Molokai, and the first Apana of land set forth in Royal Patent 1602 filed in this cause."

That it did not appear either from the records of the court or from the registry of deeds in Honolulu that the decree of the court was in fact obeyed, but, it is alleged, that after the decree Kalakaua "ceased to be molested in any way by either the widow and heirs aforesaid of said Kinimaka, or by the said Armstrong in their behalf, and retained open, notorious, and indisputable possession and dealt with the said land in all ways as his own, and continued to do so until he disposed of said property."

The bill here made "all the papers, pleadings, and exhibits of whatever kind in said equity proceedings" a part of it, and asked leave to refer to them as if actually incorporated therein. Then came the following: "And in this connection the plaintiff attaches hereto a copy of the original Land Commission award and royal patent [they were not previously referred to in the bill] and copies of the original record of evidence given before the Land Commission in support of said Land Commission award and royal patent, the same being referred to and made part of the evidence in said equity proceedings instituted in the years 1856 and 1857 above referred to, which said copies are made part of this bill."

That the successors in title of Kalakaua (the conveyances being set out) had retained and had been in the same kind of possession and exercised the same disposition [**127**] as he. That such possession in Kalakaua and his successors was known to the children of Kinimaka; that they attained their majority respectively in 1867, 1871, and 1877, and at no time did they or any of them assert any claim to the land or deny the rights of Kalakaua or his successors, but acquiesced in his and their possession.

The manner by which defendants obtained the title they assert was set out, and it was alleged that owing to the failure of Armstrong to obey the decree of the court and convey the interest of the children of Kinamaka, as ordered by the court, complainant's required chain of title was incomplete, and that the action in ejectment of Mary H. Atcherley, one of the defendants, sought "to take unconscionable advantage of the above-mentioned technical error in the chain of title." A cloud upon the title of complainant was asserted hence to follow, and that it would be inequitable to permit her to prosecute her action of ejectment, and that as naked trustee of the title she should be required to convey it to appellant.

An injunction, temporary and permanent, was prayed, and that Mary H. Atcherley, the defendant, be declared trustee and be required to convey the property to complainant.

Copies of the proceedings referred to in the bill were annexed to it as exhibits. Among these, we have seen, were the award of the Land Commission and the royal title. The latter recites that—

"Whereas the Board of Commissioners to Quiet Land Titles has awarded to Kinimaka by award No. 129 a freehold estate

less than allodial in the premises mentioned below, and,

"Whereas, Kinimaka has paid into the government treasury eighty-two and 50/100 dollars for the government's rights in said land,

"Therefore, by this Royal Patent Kamehameha III. . . . shows . . . that he has conveyed and [128] granted in fee simple to Kinimaka that land at Honolulu on the Island of Oahu with these boundaries . . . It is granted in fee simple to him, his heirs and devisees . . ."

The lands in suit were part of the lands conveyed.

Mary H. Atcherley, then being sole defendant, demurred to the bill on the ground that it did not set out a cause of action.

By stipulation of the parties, in order to determine the question whether the decree of 1858 was *res judicata*, the circuit judge made a *pro forma* ruling sustaining the demurrer to the bill and dismissing it.

The complainant appealed to the supreme court of the territory, it being stipulated that complainant should do so.

The supreme court reversed the decree. 14 Haw. 651. In its opinion it recited the facts with great fullness, completed the allegations of the bill by the exhibits attached, and then disposed of the contentions as follows:

1. The decree adjudging Kalakaua to be the owner of the land, and requiring conveyance of it to be made to him by Armstrong as guardian of the children of Kinimaka, was not ambiguous, but it took certainty from the averments of the bill and the record, and there could "be no doubt that it was the intention of the court to order the conveyance of the interests of the minors."

2. The minors were bound by the decree notwithstanding "they were not named as parties defendant in the suit." This was decided on the authority of Hawaiian cases and the power of guardians over the estates of their wards established by them, and upon the general principle of collateral attacks upon judgments. And specifically replying to the contention that the decree was not binding because of "the lack of service and upon the merits," and that the court should refuse to enforce the decree, it was said:

[129] "It is not contended that the court must in all such cases re-examine the former proceedings, but merely that it may, in its discretion, do so. Assuming that to be so, we decline to retry the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interests were not permitted to go by default, but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill, by all concerned, and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious, and undisturbed possession of the land. Under the circumstances, and after a lapse of more than forty years, we do not think that the court should examine into the merits of the former proceedings, or refuse to enforce the decree for the reasons suggested."

Upon the filing of the mandate of the supreme court in the court below, Mary H. Atcherley filed an answer in which she admitted many of the allegations of the bill, denied some—among others, the undisturbed possession of the land in Kalakaua and his successors, as alleged, and the inferences from it—asserted the validity of her title, and the staleness of complainant's demand, it having been "brought forty-three years, or more than four times the term of the statute of limitations, since the alleged date of the alleged decree ordering Richard Armstrong to give a conveyance." That to enforce a conveyance from her without giving her an opportunity to be heard upon the matters set forth in the bill would deprive her of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

By a supplemental answer she alleged the following, which we state narratively:

Since the filing of the answer the complainant Kapiolani [130] Estate, Limited, has parted with all of its estate in the land by a deed of a small portion to certain named parties and the balance, with covenants of warranty, to Lewers and Cooke, Limited, a Hawaiian corporation.

June 29, 1906, that corporation brought suit in the court of land registration to register its title to the land conveyed. September 16, 1907, it was decreed that the corporation had a good title which was entitled to registration. The decree was reversed by the supreme court of the territory March 5, 1908, that court holding that the corporation had no title, legal or equitable, to the land. 18 Haw. 625. The case was remitted to the court of land registration for further proceedings, and that court dismissed the petition of the corporation. The latter appealed from the decision to the supreme court of the territory, which court modified the decree, and, on March 24, 1909, entered a final decree that the corporation had no title, legal or equitable, to the land. 19 Haw. 334. Upon

appeal to this court the decision was affirmed. [222 U. S. 285, 56 L. ed. 202, 32 Sup. Ct. Rep. 94.]

The decree of the supreme court of Hawaii is in full force and effect, and it is alleged that "the proceedings in the court of land registration, the supreme court of Hawaii, and the Supreme Court of the United States were upon the merits of the case, and the cause of action so finally adjudicated was the same right and cause of action as that on which complainant in this case has founded its bill."

There was a replication to the answer and an amendment to the amended bill, and it appears that Mary H. Atcherley conveyed an undivided half of the property to Lyle A. Dickey and Edward M. Watson, two of the defendants. They were made parties by consent and answered in the case, in effect repeating the answers of their grantor.

It was decreed that (1) the allegations of the bill and replication of complainant were true. (2) The defendants [131] and each of them were estopped from litigating against or in opposition to the claim of complainant. (3) The defendants held the legal title to the land as tenants in common, one half by Mary Atcherley and one fourth by each of the other defendants. (4) Such title and titles were held by the defendants respectively as trustees for complainant, and that each of them should be decreed to execute conveyance thereof to complainant, all and singular, the matters appertaining to the title having theretofore been litigated between the predecessors in title of the complainant and defendants respectively, and that the same were *res judicata*. (5) Defendants should be permanently enjoined from further prosecuting that certain action in ejectment then pending on the law side of the court, wherein Mary H. Atcherley was plaintiff and complainant was defendant.

A conveyance was decreed to be made accordingly, and in case of default after thirty days the clerk of the court as its commissioner should make such deed. Further prosecution of the action in ejectment was enjoined.

The decree was reversed by the supreme court of the territory.

The opinion is somewhat difficult of condensation. It rapidly reviews the steps in the litigation exhibited in 14 Haw. 651; 18 Haw. 625; 19 Haw. 47 and 334; and 222 U. S. 285. Then this comment was made:

"Notwithstanding the statement made in the Lewers & Cooke Case (19 Haw. 48) that there had been no reversal of the facts found by the court of land registration, the fact found by that court that Kinimaka 'was the natural guardian of the minor' was not included in the findings of fact certified up by this court on the appeal to the United States Supreme Court. And the fact that the guardianship relation existed, vitally important though it was, seems to have received scant consideration in that case. That Kinimaka was the testamentary guardian of [132] Kalakaua's property seems to be beyond the range of dispute at this time. If the relation existed in fact a question as to the regularity of the appointment would not prevent the assertion of any rights the ward would otherwise have against the guardian. 'It is not essential that a legal guardianship should exist; the doctrine (constructive fraud) applies wherever the relation subsists in fact.' 2 Pom. Eq. Jur. § 961.

"We are satisfied that this court fell into error in the Lewers & Cooke Case in taking the view that the equity suit before Chief Justice Allen constituted an attack on the award of the Land Commission, and that the decree in that suit amounted to a setting aside of the award. None of the prior decisions in this jurisdiction which were cited in support of the view taken are authority for the conclusion reached, as an examination of them will show." [21 Haw. 445, 446.]

Hawaiian cases were reviewed and the court said:

"The question now presented is whether a minor on coming of age could obtain relief in equity against a guardian who had, in fraud of his ward, presented a claim and obtained in his own name an award from the Land Commission of title to the minor's land. This question was neither involved nor discussed in any of those cases.

"The case of the guardian of a minor obtaining an award in his own name of land belonging to his ward is analogous to the case of a guardian who purchases land with money belonging to the ward, and, in violation of his fiduciary duty, intentional or otherwise, takes the title in his own name. In such a case it is well settled, equity, regarding the land as being the property of the ward, will declare and enforce a constructive trust in favor of the ward, and order the conveyance of the legal title. 3 Pom. Eq. Jur. §§ 1052, 1058."

After further review of the case and consideration of the rights of Kalakaua, the action and duty of Kinimaka, the character and effect of the proceedings which he had instituted [133] and which were instituted against him by Kalakaua, and, after his death, against his devisees, the court declared that certain principles resulted therefrom, and that "within these principles,

then, the decree of 1858 was not erroneous, but right."

The character of the awards of the Land Commission was considered and described and their proper relation to the questions and rights of the parties in the case; and this was said: "If the decree in Kalakaua v. Pai and Armstrong was right it ought to be enforced. If the decision in the Lewers & Cooke Case was correct the present bill should be dismissed, but if it was wrong, in justice to the appellee, it ought not to be followed if it can be avoided.

"Being of the opinion that this court was wrong in the conclusion reached in the Lewers & Cooke Case, and that the decree of 1858 was not 'erroneous in a fundamental principle,' and, for the reasons stated in the former opinion in the case at bar, should not be reopened, we should feel inclined to depart from the ruling made in the Lewers & Cooke Case were we not bound by it because of its having been affirmed by the United States Supreme Court.

. . . . . .

"It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of local law (222 U. S. 294), and that we now believe that that opinion was not well founded. If the former ruling is to be reversed, the reversal is to be made by that court, and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done, believing it was our duty to do it, and with this our duty in the premises ends."

We have been at pains to recite the pleadings in the case, the steps in the litigation they detail, and the ruling and comments of the supreme court in order to bring the factors of judgment under review in proper connection [134] and to estimate the constraint the court deemed that it was under to follow the decision of this court in the Lewers & Cooke Case, and whether the court was justified in its view of that case.

The case at bar easily resolves itself into a few simple facts and principles which may be summarized from the pleadings and findings of fact. Kaniu, whose adopted son Kalakaua was, on the day of her death, by oral will and according to the custom of the country, appointed him her heir and left him all of her property. Kinimaka was Kalakaua's guardian, and, at a session of the Board of Land Commissioners, procured the land to be awarded to himself. Then followed litigation—commenced by Kalakaua, to declare Kinimaka his trustee of the title—which continued after the latter's death against his children, properly represented, and his widow, which resulted in the decree (November 2, 1858) establishing Kalakaua's title to the land.

The decree was not complied with as directed, but was in effect obeyed, and Kalakaua retained possession of the land, and he and his successors have ever since continued in the open possession of it, of which possession the children of Kinimaka were aware and at no time asserted any claim to the lands or denied the rights of Kalakaua and his successors thereto, but at all times acquiesced in the possession of Kalakaua and his successors in title.

Then came the action of ejectment by defendant Atcherley and this suit to enjoin its prosecution.

The bill was dismissed upon demurrer and the case carried to the supreme court of Hawaii, which reversed the decree.

Pending the suit the complainant transferred its interest by warranty deed to Lewers & Cooke, Limited. The latter instituted suit in the court of land registration to register its title, and it was decreed by that court that it had a good title which was entitled to be registered. The [135] decree was reversed by the supreme court of Hawaii, and subsequently this court affirmed the judgment of the supreme court.

The determining proposition in the case (Lewers & Cooke Case) was that the award of the Land Commission was "conclusive against every form of attack" except by appeal by a party who had presented his claims to the board. The court considered it immaterial from whom Kinimaka received the lands, or whether he was guilty of actual fraud or had an honest belief in his title. And it was said: "The objection to the decree of 1858 appears to go to the jurisdiction of the court over the subject-matter, for the Land Commission's award was the final decision of a court of record which was the only court of competent jurisdiction to decide claims to land accruing prior to its establishment, and its decision could not be attacked except by appeal provided by law." But the court further said that even if the objection did not go to the jurisdiction of the court, the result would be the same because of the finality of the Land Commission's award. 18 Haw. 625, 638, 639. See also 19 Haw. 47, 334.

The suit in the court of land registration and the action of the courts thereunder were set up in the present suit as *res judicata*. The trial court decided against the defense and other defenses, and decreed the relief prayed by complainant. The decree was reversed by the supreme court.

We have given excerpts from the opinion of the court showing the grounds of its action. It will be observed that the court frankly declared that it had fallen into

error in the Lewers & Cooke Case by deciding that the equity suit in which the decree of 1858 in favor of Kalakaua was rendered was an attack on the award of the Land Commission, and that the decree amounted to a setting aside of the award, but felt that it was its duty to adhere to the decision as it had been affirmed by this court, and, explaining [136] our affirmance, said that the "vitally important" fact that Kinimaka "was the natural guardian of the minor [Kalakaua] was not included in the findings of fact certified up." And the court (supreme court of Hawaii) declared: "That Kinimaka was the testamentary guardian of Kalakaua's property seems to be beyond the range of dispute at this time." This relationship necessarily was the important fact. Without it Kalakaua had no claim of title; with it his right and the right of complainant as his successor are established and the decree of 1858, establishing his title, was correct and the decree in the Lewers & Cooke Case erroneous.

But defendants say, granting the latter decree was erroneous, the decree of 1858 was also erroneous, and that the case then presents the opposition of one erroneous judgment to another, and the last should prevail. And to establish that the decree of 1858 was erroneous they enter into a discussion of the laws of Hawaii, the consideration of the principles upon which the Hawaiian Monarchy was established in 1845-47, the abolition of the old feudal tenures of land, the creation of a court (the Board of Land Commissioners) to quiet land titles, the awards of which were to be final, and the foundation of fee-simple titles to the Kingdom. But the contentions thus presented have intricate character, and can only have clear comprehension in local experience and understanding, and are best determined by local interpretation and the decisions of the courts "on the spot;" and this we recognized when we affirmed the decree in the Lewers & Cooke Case. The powers of the Land Commission, we said, "involved obscure local history concerning a time when the forms of our law were just beginning to superimpose themselves upon the customs of the islanders. Such customs are likely to be distorted when transmitted into English legal speech."

And such consideration and defense moved or tended to move to the decision in the case. A reference, it is true, [137] was made to the contention that Kinimaka was guardian of Kalakaua, but the fact was dismissed as being a suggestion having no substantial foundation, and also, again deferring to the local judgments, it was said of the suggestion that "it would be going very far to apply the refined rules of the English Chancery concerning fiduciary duties to the relations between two Sandwich islanders in 1846 on the strength of such a fact."

This relationship has since been cleared up and given definite obligations and duties, and even in 1846, under the law of the islands a guardian could not, through the instrumentality of an award of the Land Commission, obtain a title to the property of his ward which was immune from subsequent attack, and the wrong of it be without redress The fact of guardianship being established, and such being its legal consequences under the law of Hawaii, according to the latest decision of the supreme court of Hawaii, it would be going far to say that a decision was intended to be made against it by the comment which we have mentioned or by the other comments in the opinion.

For instance, the present case was referred to as pending, and it was said that, as it had not passed to a final decree, there was nothing in the form of action of the court to hinder the court from adopting the principle laid down, even though it thereby should overrule an interlocutory decision previously reached. And we may add that there was nothing to hinder the court from changing its action, which it did, we have seen, on a different view of the law, or the complainant from availing itself of such change, unless, indeed, the first decision had the finality of *res judicata*.

This is contended, it being urged that the decision of the Land Commission had such binding effect as well on complainant as on Lewers & Cooke, Limited. The contention is based on the following findings of fact:

"In the suit of Lewers & Cooke, Limited, referred to in [138] these findings, C. W. Ashford, then vice president of Kapiolani Estate, Limited, and now its counsel in this case, appeared at the trial in the court of land registration and assisted counsel for Lewers & Cooke, Limited, in the conduct of the case by examining three witnesses, and did this at the request of John F. Colburn, who was the treasurer of Kapiolani Estate, Limited, and the officer of Kapiolani Estate, Limited, who, in the regular course of business, employed attorneys for it. Said John F. Colburn was a witness on behalf of Lewers & Cooke, Limited, at that trial.

"Messrs. Kinney, Marx, Prosser, & Anderson, while attorneys for Kapiolani Estate, Limited, in this case, were retained by Kapiolani Estate, Limited, through John F. Colburn, its treasurer, to appear as counsel for Lewers & Cooke, Limited, at two hearings before the supreme court of Hawaii subsequent to the final decision, and so appeared, and also, on such retainer, signed the assignment of errors upon appeal from

the supreme court of Hawaii by Lewers & Cooke, Limited, to the Supreme Court of the United States. The Kapiolani Estate, Limited, was not, however, named as a party to said suit of Lewers & Cooke, Limited, and its counsel took no further part by its direction in the proceedings."

In passing on the contention the supreme court of Hawaii said: "Counsel for appellants [appellees here] contend that under the decree in the Lewers & Cooke Case the whole matter is *res judicata*. But as the appellee [appellant here] was not a party to that case and is not a privy of Lewers & Cooke, Limited, the ground is untenable." As to the last proposition, that is, that complainant was not a privy of Lewers & Cooke, Limited, the view of the court seems to be sustained by Wood v. Davis, 7 Cranch. 271, 3 L. ed. 339, and Cadwallader v. Harris, 76 Ill. 370. The first proposition is one of fact. There was a distinct issue upon the fact, and the conclusion of the court was [139] virtually a decision upon the issue that the acts described were not authorized by the complainant corporation, but were individual. And we may say it is disputable besides if they constituted an appearance of the complainant. Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801.

The principle invoked by defendants is that one who warrants a title is concluded by a judgment against the title in a suit brought against his grantee, even when the title is aggressively used. Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565. But in favor of whom and under what conditions? In favor of the grantee undoubtedly when he brings suit on his covenant against his vendor. But will it be available in favor of the successful assailant of the title? Wood v. Davis and Cadwallader v. Harris, supra, are authority against the proposition.

But, granting this is disputable, and cases may be cited the other way, it is well established that in order to make the judgment available even to the grantee of the title, his covenantor must receive notice of the suit and an opportunity to defend it. Such notice was not proven in this case. We certainly cannot assume that notice was given against the decision of the supreme court virtually to the contrary, accepting, indeed, the finding of the trial court. The trial court, as we have seen, found that the allegations of fact contained in complainant's bill of complaint, as finally amended herein, and in its said replication, were true. The replication contained a denial of the averment of the supplemental answer that complainant had notice of the proceedings in the court of land registration, the supreme court of Hawaii, or the Supreme Court of the United States, though it admitted "that certain of its officers and directors in their capacity as individuals (but not in their capacity as such officers or directors of said complainant corporation) were aware of the pendency of said proceedings."

Decree reversed and cause remanded for further proceedings in accordance with this opinion.

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[140] UNITED SURETY COMPANY, Plff. in Err.,
v.
AMERICAN FRUIT PRODUCT COMPANY.

(See S. C. Reporter's ed. 140–142.)

Error to District of Columbia court of appeals — frivolous Federal question.

The contention that due process of law is denied to the surety in an undertaking for the release of attached property because the form of the undertaking, as prescribed by D. C. Code, § 454 (31 Stat. at L. 1261, chap. 854), requires the submission of the parties to the undertaking to the jurisdiction of the court, with an agreement on their part to abide by and perform the judgment of the court in relation to the property attached, while under § 455, if the judgment goes for the plaintiff, "it shall be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property," is so lacking in merit, even where the value of the property is not appraised, but is fixed by the court, as not to serve as the basis of a writ of error from the Federal Supreme Court to the court of appeals of the District of Columbia,—especially where there is no question but that the property attached was worth more than the judgment.

[For other cases, see Appeal and Error, III. d, 6, b, in Digest Sup. Ct. 1908.]

[No. 203.]

Submitted May 12, 1915. Decided June 14, 1915.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action on an undertaking for the release of attached property. Dismissed for want of jurisdiction.

See same case below, 40 App. D. C. 239.

The facts are stated in the opinion.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

Messrs. Wade H. Ellis, R. Golden Donaldson, Charles Cowles Tucker, and Abner H. Ferguson submitted the cause for plaintiff in error.

Messrs. George E. Hamilton, John W. Yerkes, and John J. Hamilton submitted the cause for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit originally brought by the defendant in error against the Semmes-Kelly Company in the supreme court of the District to recover $10,596.45 for goods sold. There was an attachment of a stock of goods that were worth much more than the judgment finally recovered, but never were formally appraised, and the next day the plaintiff in error, as surety to the Semmes-Kelly Company, signed an undertaking to release the property attached, in the form provided in the District Code, § 454 [31 Stat at L. 1261, chap. 854]. By that instrument it in terms submitted to the jurisdiction of the court and undertook "to abide by and perform the judgment of the court in the premises in relation to said property, which judgment may be rendered against all the parties whose names are hereto subscribed." By § 455, if the judgment goes for the plaintiff "it shall be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property." After a second trial, judgment was entered against the Semmes-Kelly Company and the plaintiff in error for $9,937.90, that sum being found to be far less than the value of the property, as we have said. 40 App. D. C. 239.

The jurisdiction of this court is invoked upon a contention that the above §§ 454 and 455, as applied, deprive the plaintiff of its property without due process of law. In American Secur. & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553, it was held that the right to re-examine a judgment of the court of appeals, given by the Judicial Code, § 250 [36 Stat. at L. 1159, chap. 231, Comp. Stat. 1913, § 1227],—"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant,"—was confined to the construction of laws having general application throughout the United States. But in [142] the same case it was left open whether the 3d clause, "Cases involving . . . the constitutionality of any law of the United States," did not have a wider meaning, and that suggestion is relied upon for the present attack upon the two sections of the District Code.

There is no occasion to discuss it in this case. That a man may contract to be bound by a judgment in which he has no right to be heard, and that a statute may authorize him to make himself a party to such a judgment, was decided, if it needed a decision, in Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292. It is argued that there is a difference if the value of the property is not appraised, but fixed by the court. But there is nothing to hinder a man from assenting to that as well as to the rest if the statute permits it. The suggestion that there is a constitutional difficulty has no foundation. It is true that the section of the Code speaks only of appraised value, but if by a reasonable construction appraisal is held to be a superfluous form when there is no question that the property attached is worth much more than the judgment, the omission must be taken to have been contemplated by the surety when he signed. The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here. That pretext is not allowed to succeed (Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580), and therefore we shall not deal with the attempt to obtain a reversal of the decision upon a construction of the local statute by the local court, not so manifestly absurd as to extend the surety's liability in a way that could not have been foreseen, or matters of local practice, such as holding that when the first verdict against the Semmes-Kelly Company and a joint judgment were set aside and the case put on the trial calendar, on the motion of the plaintiff in error, "as against" it, the whole judgment was annulled.

Writ of error dismissed.

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[143] EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plff. in Err.,

v.

COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 143-147.)

Constitutional law — due process of law — taxation of foreign life insurance company.

The annual 2 per cent privilege tax imposed by Pa. act of June 28, 1895, upon the gross premiums received by a foreign

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall,

life insurance company from the business done within the state, may be levied upon premiums paid to the company outside the state by residents of Pennsylvania, without rendering the tax invalid as taking property without due process of law.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

[No. 263.]

Argued May 5 and 6, 1915. Decided June 14, 1915.

IN ERROR to the Court of Common Pleas of Dauphin County in the State of Pennsylvania to review a judgment entered pursuant to the mandate of the Supreme Court of that state, which reversed a judgment of the former court, holding that a foreign life insurance company need not pay the annual privilege tax upon premiums paid to the company outside the state by residents of Pennsylvania. Affirmed.

See same case below, in the Supreme Court of Pennsylvania, 239 Pa. 288, 86 Atl. 787.

The facts are stated in the opinion.

Messrs. **Charles W. Pierson** and **W. S. Snyder** argued the cause, and, with Mr. Thomas De Witt Cuyler, filed a brief for plaintiff in error:

The assumption by a state court of a fact not in evidence as a basis for a decision is a denial of due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58.

The tax sought to be collected is a property tax.

Firemen's Relief Asso. v. Scranton, 217 Pa. 585, 66 Atl. 1103; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Postal Teleg. Cable v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Insurance Co. of N. A. v. Com. 87 Pa. 173, 30 Am. Rep. 352.

The tax being a property tax, it cannot be collected.

Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

The construction given to the act of 1895 deprives the society of its property without due process of law.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 Sup. Ct. Rep. 879; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236.

A state may not impose on a foreign corporation seeking to enter its borders such conditions as deprive it of rights guaranteed by the Federal Constitution.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Com. v. Standard Oil Co. 101 Pa. 147; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, L.R.A. —, —, 34 Sup. Ct. Rep. 333; Western U. Teleg. Co. v. Frear, 216 Fed. 199; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463.

The renewal of a policy of insurance is a transaction of new business.

Mutual L. Ins. Co. v. Girard L. Ins. Annuity & T. Co. 100 Pa. 180.

Mr. **William M. Hargest** argued the cause, and, with Mr. Francis Shunk Brown, Attorney General of Pennsylvania, filed a brief for defendant in error:

The only question in this case was what was "doing business" under the Pennsylvania statute; and the state of Pennsylvania, having the right to determine the conditions upon which the plaintiff in error might do business in Pennsylvania, had also the right to define what "doing business" meant. The plaintiff in error must abide by that decision, and come in the state or stay out of the state, upon the terms prescribed.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The business of insurance is not interstate commerce.

New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Hooper v. California, supra.

What possible denial of due process of law can there be in this case?

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Gilman v. Tucker, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040;

24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On taxation of corporate franchises in the United States—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The place of making the contract and the place for its performance cannot determine where business is done within the meaning of this statute.

Commercial Mut. Acci. Co. v. Davis, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. Rep. 445; Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483.

This company's business is insuring lives in Pennsylvania.

Wayland v. Western Life Indemnity Co. 166 Mo. App. 221, 148 S. W. 626; Reed v. Provident Sav. Life Assur. Soc. 190 N. Y. 111, 82 N. E. 734.

Where the subject-matter of insurance is in the state, it is a doing of business in the state.

Swing v. Munson, 191 Pa. 582, 58 L.R.A. 223, 71 Am. St. Rep. 772, 43 Atl. 342; Com. Mut. F. Ins. Co. v. Sharpless, 12 Pa. Super. Ct. 333; Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707.

If the Equitable Assurance Society withdrew from Pennsylvania and had no insurance except the policies concerning which this dispute arises it would be doing business as to them in Pennsylvania.

Johnson v. Mutual Reserve L. Ins. Co. 43 Misc. 254, 87 N. Y. Supp. 438.

[145] Mr. Justice Holmes delivered the opinion of the court:

The Equitable Life Assurance Society of the United States, the plaintiff in error, does business in Pennsylvania. By an act of June 28, 1895, that state levies an annual tax of 2 per cent upon the gross premiums of every character received from business done within the state during the preceding year. The company paid large taxes under this act, but appealed to the state courts from charges made by the state accounting officer in respect of premiums for the years 1906, 1907, 1908, 1909, and 1910, paid to the company outside the state by residents of Pennsylvania. The supreme court sustained the charge. 239 Pa. 288, 86 Atl. 787. The whole discussion there was whether these items fell within the statute. On that point, of course, the decision of the state court is final, and as the company is a foreign corporation and this is held to be a tax for the privilege of doing business in the state, it is obvious that the scope of the question before us is narrow, being only whether the statute as construed deprives the company of its property without due process of law, contrary to the 14th Amendment, as alleged. It is true that the plaintiff in error suggests a further infraction of that Amendment in an assumption by the supreme court of an unproved fact: that the beneficiaries of the policies lived in Pennsylvania. But it is enough to answer that we understand the decision, when it uses the word "beneficiaries," to mean parties to the contracts, the insured, and that the assumption was warranted by the record as to them.

The grounds for the only argument open are that a state cannot tax property beyond its jurisdiction (Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493); that it cannot effect that result indirectly by making the payment a condition of the right to do local business (Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. [146] Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280); and that as it could not prohibit the contracts it cannot impose the tax (Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427). In aid of the effort to make the foregoing decisions applicable it is argued that this is a property tax. But, as we have said, the supreme court of Pennsylvania speaks of it as a tax for the privilege of doing business within the commonwealth; and whether the statement is a construction of the act or not, we agree with it so far, at least, as to assume, that if that characterization is necessary to sustain the tax, the legislature meant to avail itself of any power appropriate to that end.

Without going into any preliminary matters that might be debated it is enough for us to say that we agree with the supreme court of the state in its line of reasoning, applying it to the claim of constitutional rights which that court did not discuss. The question is not what is doing business within a state in such a sense as to lay a foundation for service of process there. It being established that the relation of the foreign company to domestic policy holders constituted doing business within the meaning of the statute, the question is whether the company may be taxed in respect of it, in this way, whatever it may be called. We are dealing with a corporation that has subjected itself to the jurisdiction of the state; there is no question that the state has a right to tax it, and the only doubt is whether it may take

this item into account in fixing the figure of the tax. Obviously the limit in that regard is a different matter from the inquiry whether the residence of a policy holder would of itself give jurisdiction over the company. The argument of the state court is that the company is protecting its insured in Pennsylvania equally whether they pay their premiums to the company's agent in Philadelphia or by mail or in person to another in New York.

These are policies of life insurance, and, according to the [147] statement of the plaintiff in error, are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the state could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the state profits the company equally by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. Flint v. Stone Tracy Co. 220 U. S. 107, 162, 163, 55 L. ed. 389, 417, 418, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the state in case of dispute, or making proof of death. See Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 611, 43 L. ed. 569, 572, 19 Sup. Ct. Rep. 308; Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 415, 49 L. ed. 810, 814, 25 Sup. Ct. Rep. 483. It is not unnatural to take the policy holders residing in the state as a measure without going into nicer, if not impracticable, details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows.

Judgment affirmed.

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[148] PATSY PERRYMAN, Clory Cross, Isaac Saunders, et al., Plffs. in Err.,
v.
PEGGY WOODWARD.

(See S. C. Reporter's ed. 148-152.)

Indians — town site lot — patent to deceased grantee.

1. The intent and meaning of the provision of the act of June 25, 1910 (36 Stat. at L. 855, chap. 431), § 32, that where deeds to tribal lands in the Five Civilized Tribes have been or may be issued to a person who had died or who thereafter dies before the approval of such deed the title to the land designated therein shall inure to, and become vested in, the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to him during life, was to make the patented land part of the estate of the nominal patentee, and not to exclude other provisions of law otherwise applicable, and give a title at all events to the heir or other party named in the act as purchaser.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Error to state court — scope of review — Federal question — effect of Arkansas laws in Indian Territory.

2. The question whether a certain section of the Arkansas laws adopted and extended over the Indian Territory by the act of May 2, 1890 (26 Stat. at L. 81, chap. 182), if "in force at the close of the session of the general assembly of that state of 1883, as published in 1884 in the volume known as Mansfield's Digest," was so in force in Arkansas, is open for review in the Federal Supreme Court on writ of error to a state court, it being in effect a question as to whether that section was adopted by the Federal statute.

[For other cases, see Appeal and Error, 2227-2256, in Digest Sup. Ct. 1908.]

Descent and distribution — right of widow — effect of Arkansas laws in Indian Territory.

3. The unconstitutionality under Ark. Const. 1874, art. 9, § 6, so far as it affects homesteads, of the provisions of Mansf. Ark. Dig. chap. 1, § 3, by which, if the estate of the deceased does not exceed $300, the probate court is to make an order that the estate vest absolutely in the widow or children, as the case may be, does not render that section inapplicable in a suit to quiet title to land in the Indian Territory in which the displacement of such section as to homesteads is not material, since such section was still in force at the close of the session of the general assembly of Arkansas of 1883, within the meaning of the act of May 2, 1890, § 31, adopting and extending over the Indian Territory certain general laws of Arkansas which did not include

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Note.—On the general subjects of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On questions of local practice and procedure on writ of error from the Federal Supreme Court to a state court—see note to Texas & N. O. R. Co. v. Miller, 55 L. ed. U. S. 789.

either the Arkansas Constitution or the chapter of Mansfield's Digest dealing with the devolution of homesteads.

[For other cases, see Descent and Distribution, I. c, in Digest Sup. Ct. 1908.]

Error to state court — review — local practice.

4. Matters of local practice are not open for review in the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2209-2226, in Digest Sup. Ct. 1908.]

[No. 277.]

Argued and submitted May 12 and 13, 1915
Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Muskogee County, in that state, in favor of defendant in a suit to quiet title. Affirmed.

See same case below, 37 Okla. 792, 133 Pac. 244.

The facts are stated in the opinion.

Mr. B. B. Blakeney argued the cause, and, with Mr. James H. Maxey, filed a brief for plaintiffs in error.

As to the construction of the treaties of the Creek Nation with reference to the patenting of town property, and the acts of Congress in connection therewith, see Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401, 48 L. ed. 1039, 24 Sup. Ct. Rep. 676; McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; Bond v. United States, 181 Fed. 613; Parr v. United States, 153 Fed. 462; De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; Iowa Land & T. Co. v. United States, 133 C. C. A. 121, 217 Fed. 11.

As to the proper construction of § 31 of an act of Congress approved May 2d, 1890, chap. 182 (26 Stat. at L. 81), see Winters v. Davis, 51 Ark. 335, 11 S. W. 420; McAndrew v. Hollingsworth, 72 Ark. 446, 81 S. W. 610; Griffin v. Dunn, 79 Ark. 408, 96 S. W. 190; Cherokee Constr. Co. v. Harris, 92 Ark. 260, 135 Am. St. Rep. 177, 122 S. W. 485; State v. Ellis, 22 Wash. 129, 60 Pac. 136; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; Smythe v. Smythe, 28 Okla. 266, 114 Pac. 257; Frick Co. v. Oats, 20 Okla. 473, 94 Pac. 682; De Graff v. State, 2 Okla. Crim. Rep. 519, 103 Pac. 538; Sanger v. Flow, 1 C. C. A. 56, 4 U. S. App. 32, 48 Fed. 152; Zufall v. United States, 1 Ind. Terr. 639, 43 S. W. 760; Appolos v. Brady, 1 C. C. A. 299, 4 U. S. App. 209, 49 Fed. 401; National Live Stock Commission Co. v. Taliaferro, 20 Okla. 177, 93 Pac. 983; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Inland & S. Coasting Co. v. Hall, 124 U. S. 121, 31 L. ed. 369, 8 Sup. Ct. Rep. 397.

When the trial court reverses the order of the master in excluding evidence, it should order the cause re-referred, or open the case for admitting such evidence, and affording the adverse party the opportunity of introducing explaining or rebuttal evidence.

Re Friend, 23 Misc. 300, 50 N. Y. Supp. 954; 17 Enc. Pl. & Pr. 1057; Central Trust Co. v. Georgia P. R. Co. 83 Fed. 386; Brueggestradt v. Ludwig, 184 Ill. 24, 56 N. E. 419; Wall v. Stapleton, 177 Ill. 357, 52 N. E. 477; Severance v. Hilton, 32 N. H. 289; Bellows v. Ingham, 2 Vt. 575; American Hoist & Derrick Co. v. Hall, 208 Ill. 597, 70 N. E. 581; Guarantee Gold Bond, Loan & Sav. Co. v. Edwards, 7 Ind. Terr. 297, 104 S. W. 624.

Mr. Joseph C. Stone submitted the cause for defendant in error:

As to whether or not the award was properly made under the Arkansas law extended in force in the Indian Territory, and as to whether or not the lower court erred in matters of practice at the trial of this case,—all these things are matters of local law, and the decision of the state court thereon is not subject to review by this court.

Chever v. Horner, 142 U. S. 122, 35 L. ed. 959, 12 Sup. Ct. Rep. 184; Kennedy v. Hunt, 7 How. 586, 590, 12 L. ed. 829, 831; John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; McDonogh v. Millaudon, 3 How. 693, 11 L. ed. 787; Carpenter v. Williams, 9 Wall. 785, 19 L. ed. 827.

Section 3, chapter 1, Mansfield's Digest of the Statutes of Arkansas, was in force in the Indian Territory, and applicable to the estate here involved.

Chapple v. Gidney, 38 Okla. 596, 134 Pac. 859.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to quiet title to a parcel of land in Oklahoma, brought by the children and heirs of Squire Saunders against a purchaser of the land from his widow. The defendant had a decree in her favor in the state court. 37 Okla. 792, 799, 133 Pac. 244. The title of the defendant depends upon the effect of a decree of the probate court, made on November 16, 1900, finding that the estate of Squire Saunders did not exceed $300, and ordering and adjudging that the same do vest absolutely in his widow. If valid, it is decided that this decree embraces the land in controversy. Squire Saunders having the possessory right to the lot, which lay in the town of Muskogee, Creek Nation, Indian Territory, it was awarded to him by the townsite commission. On October 22, 1900, he

died intestate. On January 26, 1904, a deed was made by the principal chief of the Muskogee (Creek) Nation, approved by the Secretary of the Interior, purporting to convey the same to him.

The act of June 25, 1910, chap. 431, § 32, 36 Stat. at L. 855, 863, provided that "where deeds to tribal lands in the Five Civilized Tribes have been or may be issued . . . to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life." The intent and meaning of this statute, in our opinion, was to make the patented land part of the estate of the nominal patentee *quoad hoc*—the most important words being "as if the deed had issued to the deceased grantee during life." The section was not intended to exclude other provisions of law otherwise applicable, and to give a title at all events [151] to the heir or other party named in the act as purchaser. For other illustrations of heirs not taking as purchasers under statutes see McDougal v. McKay, April 26, 1915, [237 U. S. 372, ante, 1001, 35 Sup. Ct. Rep. 605]; Pigeon v. Buck, April 26, 1915 [237 U. S. 386, ante 1007, 35 Sup. Ct. Rep. 608]; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494. If the statute under which the above-mentioned probate decree was made was in force when the decree was passed, the later act does not attempt to deprive it of effect, but only establishes the validity of the Saunders title beyond a doubt. Therefore we pass to the consideration of the earlier laws.

The act of Congress of May 2, 1890, chap. 182, § 31, 26 Stat. at L. 81, 94, adopted and extended over the Indian Territory certain general laws of Arkansas "in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three, as published in 1884 in the volume known as Mansfield's Digest." etc. One of these was chapter 1, the provisions relating to administration, by § 3 of which, if the estate of the deceased does not exceed $300, the probate court is to make an order that the estate vest absolutely in the widow or children, as the case may be. The state court held that this section was extended over the Indian Territory, whether it was in force in Arkansas or not,—an erroneous principle, as decided in Adkins v. Arnold, 235 U. S. 417, ante, 294, 35 Sup. Ct. Rep. 118; but if the section was in force in Arkansas the decision may be right in its result. Whether the section was in force is the main question in the case; and as this is, in effect, a question whether the act of Congress adopted it, it may, without much stretching, be regarded as open to review in this court, although if it were one degree more remote, and concerned the construction of an Arkansas act admitted to be in force, it would be treated as involving only a local law. See Shulthis v. McDougal, 225 U. S. 561, 571, 56 L. ed. 1205, 1211, 32 Sup. Ct. Rep. 704; United States v. Pridgeon, 153 U. S. 48, 53, 54, 38 L. ed. 631, 633, 634, 14 Sup. Ct. Rep. 746.

The Constitution of 1874 (art. 9, § 6) gives the occupation of the homestead of the deceased to his widow for [152] life. The minor children take half during minority, but there were no minor children in this case. This section was held to be paramount, so far as it goes, in Winters v Davis, 51 Ark. 335, 11 S. W. 420. But neither the Constitution of Arkansas nor the chapter of Mansfield's Digest (75) dealing with the devolution of homesteads was put in force in the Indian Territory, so we are concerned only with § 3 of chapter 1 of the adopted laws. So far as it bears upon the present case we see no reason to doubt that it was in force, its displacement as to homesteads not being material here. If it was in force, it does not matter that the defendant purchased from the widow in 1900, before the decree of the probate court was made. There was nothing in the acts of Congress to prevent it, and no reason appears why the widow's title may not have inured to her grantee, as held by the Supreme Court Commission; but that does not concern the plaintiffs if the widow got a good title as against them.

The master to whom the case was referred to take the proof and report his findings of fact and conclusions of law was of opinion that the widow's interest "was purely that of dower," and excluded the decree of the probate court. But he attached it to his report and the decree was considered by the courts, as we have indicated. The plaintiffs contend that thereby they have been prevented from introducing evidence to control the effect of the alleged decree. This is a matter of local practice that does not concern us. It was disposed of by the courts of the state.

Decree affirmed.

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[153] DES MOINES GAS COMPANY, Appt., v. CITY OF DES MOINES et al.

(See S. C. Reporter's ed. 153-173.)

Gas rates — reasonableness — valuation — going value.

1. The "going value" of a long established and successful gas company was suf-

ficiently taken into account in determining the value of the company's property for the purpose of testing the reasonableness of gas rates fixed by municipal ordinance, where the valuation was based upon a plant in actual and successful operation, and overhead charges were allowed for promotion, organization, and development expenses.

[For other cases, see Gas, in Digest Sup. Ct. 1913 Supp.]

Gas rates — reasonableness — valuation —reproduction — cost — taking up and replacing pavement.

2. The expenses of taking up and replacing pavements on streets which were unpaved when the gas mains were laid need not be included when valuing the property of a gas company on the basis of reproduction new, less depreciation, for the purpose of testing the reasonableness of rates fixed by municipal ordinance.

[For other cases, see Gas, in Digest Sup. Ct. 1913 Supp.]

Appeal — following decision below — enjoining gas rate.

3. The refusal of a court to enjoin the enforcement of gas rates fixed by municipal ordinance upon the conclusion reached that a return of 6 per cent per annum on the valuation of the gas company's property would not be confiscatory will not be disturbed on appeal,—especially where the ordinance was attacked before an opportunity was afforded to test its results by actual experience.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Judgment — dismissal without prejudice.

4. The dismissal of a bill which seeks to enjoin the enforcement of a municipal ordinance fixing gas rates as confiscatory should be without prejudice where the actual effect of such rates has not had the test of experience.

[For other cases, see Judgment, 70-74, in Digest Sup. Ct. 1908.]

[No. 75.]

Argued November 10 and 11, 1914. Decided June 14, 1915.

APPEAL from the District Court of the United States for the Southern District of Iowa to review a decree dismissing a bill which seeks to enjoin the enforcement of a municipal ordinance fixing gas rates as confiscatory. Modified by directing that the bill be dismissed without prejudice, and as modified, affirmed.

See same case below, 199 Fed. 204.

The facts are stated in the opinion.

Mr. Nathaniel T. Guernsey argued the cause, and, with Mr. George H. Carr, filed a brief for appellant:

The depreciated cost of reproduction should have included the cost of removing and replacing pavements in streets which were unpaved when the mains were laid.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Consolidated Gas Co. v. New York, 157 Fed. 849; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 80 Minn. 191, 89 Am. St. Rep. 514, 83 N. W. 60; Cotting v. Kansas City Stock-Yards, 82 Fed. 850; People ex rel. Kings County Lighting Co. v. Willcox, 156 App. Div. 603, 141 N. Y. Supp. 677.

Going value is an element in the value of such a property.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A. (N.S.) 1084, 30 Sup. Ct. Rep. 615; Public Service Gas Co. v. Public Utility Comrs. 84 N. J. L. 463, 87 Atl. 651; People ex rel. Kings County Lighting Co. v. Willcox, 156 App. Div. 603, 141 N. Y. Supp. 677, 210 N. Y. 479, 51 L.R.A.(N.S.) 1, 104 N. E. 911; Monongahela Water Co.'s Case, 223 Pa. 323, 72 Atl. 625; Appleton Water Works Co. v. Railroad Commission, 154 Wis. 121, 47 L.R.A.(N.S.) 770, 142 N. W. 476, Ann. Cas. 1915B, 1160; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977; Norwich Gas & Electric Co. v. Norwich, 76 Conn. 565, 57 Atl. 746; Spring Valley Waterworks v. San Francisco, 124 Fed. 574, 165 Fed. 657; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; Galena Water Co. v. Galena, 74 Kan. 644, 87 Pac. 735; Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974; Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533; C. H. Venner Co. v. Urbana Waterworks, 174 Fed. 348; Spring Valley Waterworks v. San Francisco, 192 Fed. 137; Bonbright v. Geary, 210 Fed. 44.

The rule is the same in rate cases and condemnation cases. Omaha v. Omaha Water Co. 218 U. S. 203, 54 L. ed. 1001, 48 L.R.A. (N.S.) 1084, 30 Sup. Ct. Rep. 615; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Reagan v. Farmers' Loan & T. Co. 154 U. S. 410, 38

NOTE.—On the treatment of going concern value in public service property valuations—see note to Omaha v. Omaha Water Co. 48 L.R.A.(N.S.) 1092.

On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On special problems in respect to the treatment of appropriations in public service property valuations—see note to People ex rel. Kings County Light Co. v. Willcox, 51 L.R.A.(N.S.) 7.

L. ed. 1027, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ames v. Union P. R. Co. 64 Fed. 176; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

An 8 per cent return was justified by the evidence.

Public Service Gas Co. v. Public Utility Comrs. 84 N. J. L. 463, 87 Atl. 651; Willcox v. Consolidated Gas Co. 212 U. S. 19, 48, 53 L. ed. 382, 398, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 448, 48 L.R.A.(N.S.)1025, 138 Am. St. Rep. 299, 120 N. W. 966.

The clear and satisfactory evidence rule relates to the testimony necessary to establish the ultimate facts. Where facts have been established by testimony of this character, the rule may not be invoked to discredit sound and legitimate inferences from them.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Lincoln Gas & E. L. Co. v. Lincoln, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. Rep. 271.

The court erred in dismissing the bill upon the merits, and then in attempting to provide for a reopening of the case after three years.

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797.

If the appellant is not entitled to a decree in its favor upon the merits, it is entitled to an opportunity to try the rates and to definitely establish the facts upon which the rights of the parties depend.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Re Louisville, 231 U. S. 639, 58 L. ed. 413, 34 Sup. Ct. Rep. 255; Louisville v. Cumberland Teleph. & Teleg. Co. 231 U. S. 652, 58 L. ed. 419, 34 Sup. Ct. Rep. 260; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

The facts as found by the master must be accepted, and cannot be questioned by the appellees.

Chittenden v. Brewster, 2 Wall. 191, 17 L. ed. 839; New Orleans Mail Co. v. Flanders (New Orleans & B. S. Mail Co. v. Fernandez) 12 Wall. 130, 20 L. ed. 249; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

Mr. H. W. Byers argued the cause, and, with Messrs. R. O. Brennan and Eskil C. Carlson, filed a brief for appellees:

The rate or price fixed by the city council that may be charged for public service is presumed to be reasonable, and the court is limited in its inquiry in passing upon a rate thus fixed to the question as to whether or not the rate is confiscatory.

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 260, 91 N. W. 1081; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 968; San Diego Land & Town Co. v. Jasper, 189 U. S. 441, 47 L. ed. 894, 23 Sup. Ct. Rep. 571; Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 641; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 216, 48 L. ed. 406, 414, 24 Sup. Ct. Rep. 241; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 297, 50 Pac. 633; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.)1134, 29 Sup. Ct. Rep. 192. 15 Ann. Cas. 1034; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357; Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed. 926; Des Moines Water Co. v. Des Moines, 192 Fed. 193; Shepard v. Northern P. R. Co. 184 Fed. 765.

The burden being upon the appellant to establish every fact necessary to a finding that the rate fixed, if put in operation, would result in confiscation, before the court would be justified in holding the ordinance in question invalid because confiscatory and in violation of the Constitution, the proof, as in cases of fraud or mistake in the execution of instruments, must be clear, convincing, and satisfactory.

Bouvier's Law Dict. "clear," "satisfactory evidence;" Thayer v. Boyle, 30 Me. 475; West v. West, 90 Iowa, 41, 57 N. W. 639; White v. Chicago, M. & St. P. R. Co. 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146; Richmond & D. R. Co. v. Trammel, 53 Fed. 196; 2 Starkie, Ev. 512; United States v. Lee Huen, 118 Fed. 442; Cadman v. Peter, 118 U. S. 73,

30 L. ed. 78, 6 Sup. Ct. Rep. 957; Lalone v. United States, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 74; Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027; United States v. American Bell Teleph. Co. 167 U. S. 223, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Langer v. Meservey, 80 Iowa, 158, 45 N. W. 732; Gardner v. Weston, 18 Iowa, 535; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; McMillan v. Bissell, 63 Mich. 66, 29 N. W. 737; Sloan v. Becker, 34 Minn. 491, 26 N. W. 730; Miner v. Hess, 47 Ill. 170; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Kent v. Lasley, 24 Wis. 654; Henley v. Hotaling, 41 Cal. 22; Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700; Betts v. Betts, 132 Iowa, 72, 106 N. W. 928; Bradford v. Helsell, 150 Iowa, 732, 130 N. W. 908; 1 Greenl. Ev. § 2.

Even if it should be found that the ordinance in question fixes the rate so low that it will return to the appellant company only the lowest current rate of interest, the rate should not be held to be unreasonable.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; People v. Budd, 117 N. Y. 125, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 591–595, 41 L. ed. 560, 564–566, 17 Sup. Ct. Rep. 198; Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74; Shepard v. Northern P. R. Co. 184 Fed. 765; St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220; Louisville & N. R. Co. v. Siler, 186 Fed. 176.

In finding the value of appellant's plant upon which it is entitled to earn a fair return, the going value, franchise, or good will is not to be considered.

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 260, 91 N. W. 1081; Lincoln Gas & E. L. Co. v. Lincoln, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. Rep. 271; Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 637, 231 U. S. 652, 58 L. ed. 419, 34 Sup. Ct. Rep. 260; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 968; Re Advances in Rates by Carriers in Western Trunk Line, 20 Inters. Com. Rep. 347; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Knoxville v. Knoxville Water Co. 212 U. S. 9, 10, 53 L. ed. 378, 379, 29 Sup. Ct. Rep. 148.

Increased earnings because of the reduced rate are properly considered in determining whether the rate complained of is reasonable or unreasonable.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 343, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; Chicago Union Traction Co. v. Chicago, 199 Ill. 579, 65 N. E. 470; Reagan v. Farmers' Loan & T. Co. 154 U. S. 400, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Railroad Commission v. Central of Georgia R. Co. 95 C. C. A. 117, 170 Fed. 225; Southern P. Co. v. Interstate Commerce Commission, 177 Fed. 963; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed. 926.

In determining whether the rate in question constitutes a fair compensation for the use of appellant's property, the reasonable value of appellant's property necessarily used in its gas business at the time of the inquiry is to be taken as the foundation of the calculation.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 216, 48 L. ed. 406, 414, 24 Sup. Ct. Rep. 241; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Freeport Water Co. v. Freeport, 180 U. S. 600, 45 L. ed. 689, 21 Sup. Ct. Rep. 493; Spring Valley Waterworks v. San Francisco, 124 Fed. 586; Chicago Union Traction R. Co. v. Chicago, 199 Ill. 579, 65 N. E. 470; Souther v. Gloucester, 187 Mass. 555, 69 L.R.A. 309, 73 N. E. 558; Kennebec Water Dist. v. Waterville, 97 Me. 203, 60 L.R.A. 856, 54 Atl. 6; Knoxville v. Knoxville Water Co. 212 U. S. 9, 10, 53 L. ed. 378, 379, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed. 926; Des Moines Water Co. v. Des Moines, 192 Fed. 193; San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, 191 Fed. 875.

Where a gas company supplying gas to the inhabitants of a city laid its mains and pipes in unpaved streets, the value of the mains and pipes in estimating the value of the property, in fixing rates, could not be estimated on the basis that it would cost more to place the pipes because the streets had been paved.

Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 968.

Donations and gifts by managing officers of public service corporations, even when approved by the board of directors, are illegal, and the courts will not permit such donations and gifts to swell the operating expenses, and especially not when the effect would be to make a rate fixed by law confiscatory.

McCrory v. Chambers, 48 Ill. App. 445; Holt v. Winfield Bank, 25 Fed. 812; Davis v. Old Colony R. Co. 131 Mass. 258, 41 Am. Rep. 221.

Large and unusual expenditures should be spread over a period of years, and not charged up to a single year.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

As to exorbitant salaries, see Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 343, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400.

As to depreciation, see Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Cedar Rapids Gaslight Co. v. Cedar Rapids, 120 N. W. 968; Lincoln Gas & Electric Light Co. v. Lincoln, 182 Fed. 926; Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 641.

Mr. Justice Day delivered the opinion of the court:

This suit was begun in the district court of the United States for the southern district of Iowa, by the present appellant, hereinafter called the Gas Company, against the city of Des Moines and others, to enjoin the enforcement of the provisions of a certain ordinance of the city, passed December 27th, 1910, whereby, from and after the 1st day of January, 1911, the rate to be charged and collected for gas in the city of Des Moines was fixed at 90 cents for each thousand cubic feet. The allegations of the bill were that to enforce the ordinance would amount [158] to the taking of the Gas Company's property without just compensation and operate as confiscation of its property, and thereby deprive it of the same without due process of law, and would deny the equal protection of the laws; further, that it would impair the existing contract between the Gas Company and the city, and between the Gas Company and the state of Iowa, growing out of its incorporation under the statutes of the state and of the ordinances of the city, giving rights to the Gas Company to lay its mains and supply gas to the residents of the city. A temporary injunction was allowed, and after issue made, the case was referred to Robert Sloan, Esquire, as special master in chancery to report his findings of fact and conclusions of law. The master afterwards filed his report, and the same coming on before the district court for hearing, upon exceptions, the report of the master was confirmed, and the bill dismissed "with prejudice" (199 Fed. 204). From that decree the present appeal is taken.

The master's report, as court and counsel agree, gives evidence of very thorough consideration of the subject, and the facts found are accepted by the appellant. From the report we learn that the plant belonging to the Gas Company dates back to the year 1864; that it was owned and operated by the Capital City Gas Light Company until March 1st, 1906, when the present company was organized and the property, real and personal, of the Capital City Company conveyed to it; that the United Gas Improvement Company, of Philadelphia, became the owner of the entire stock of the Capital City Company on June 1st, 1886; that the capital stock then consisted of 3,000 shares of the par value of $100 each, and that subsequently the capital stock was increased to 6,000 shares of the same value each; that the growth of the city of Des Moines increased the demand for gas, and many extensions were added. In making these improvements [159] and extensions, the Capital City Gas Light Company became indebted to the United Gas Improvement Company for cash advanced, and otherwise to the amount of $105,526.49, and also for gas holder $103,958, and the United Gas Improvement Company also owned $400,000 of bonds secured by mortgage on the plant of the Capital City Company. On March 1st, 1906, the Capital City Company transferred and conveyed its property to the present Gas Company, the authorized capital stock of the new company being 22,500 shares of the par value of $100 each. At the time of this transfer, the new company executed to the United Gas Improvement Company $800,000 stock contracts bearing 6 per cent interest until paid, and also authorized and executed to the Commercial Trust Company, of Philadelphia, Pennsylvania, a deed of trust to all property of the Des Moines Gas Company, transferred to it as aforesaid to secure the payment of $1,500,000 5 per cent gold bonds payable semiannually, which were to be issued as provided by said mortgage. The sum of $240,000 bonds were issued at the date of execution of the mortgage, one half thereof used in payment of the debt due the United Gas Improvement Company for the gas holder, and the other half to pay the amount due on account to that company. On January 1st, 1907, there were also issued $400,000 of these bonds to pay the bonds then due of the Capital City Company. When the transfer was made $45,000 was issued to pay for the Valley Junction property. This is a town adjacent to Des

Moines, and something like 6 miles from the gas works of the Gas Company, to which the gas is transmitted by high pressure mains through the city, by a distribution system therein. There is nothing in the record to show the value of the Valley Junction property, except that of a high pressure main, which is also used in distributing gas in the city. Extensions and improvements have been made to the works and distribution system since the date of [160] transfer up to the 1st day of January, 1911, to the amount of $412,704.51, and, as provided by the mortgage, bonds have been issued by the trustee to the amount of $1,097,000, and these bonds have all been purchased by the United Gas Improvement Company. The total discount on these bonds is $33,950; $267,000, discounted at 10 per cent, and the balance, $145,000, at 5 per cent. No dividends have been declared by the present company upon its stock, but the interest upon the stock contracts and bonds has been regularly paid, and $389,000 has been paid on the principal of the stock contracts, leaving January 1st, 1911, only $411,000 unpaid. These payments have been made out of the profits derived from the operation of the plant. The officers of the Gas Company are elected by the United Gas Improvement Company, who own and control all the stock, and these officers are also, in the main, the officers of the United Gas Improvement Company, and the latter controls the Gas Company and its business.

Various ordinances have been passed, regulating the price of gas, from which the master finds as follows:

"1. That for the years 1896 and 7 the price of gas should be $1.30 per M. C. F. net; for the years 1898 and 9, $1.25 net; for the years 1900 and 1, $1.20 net; for the years 1902, 3, and 4, $1.15 net; and for the year 1905, $1.10 net; and for the years 1906 to 1910, $1 net with the proviso that it may add 10 cents per M. C. F. to each of these prices, but shall be required to discount that sum for the payment by or before the 15th day of the month following that in which the gas was consumed.

"2. That the city pay for the term of fifteen years for each street lamp, $18 per year, until they should reach 500, when it should be reduced to $17 for each lamp.

"3. That its gas should not be less than 22 candle power."

There is no question of the authority of the city of [161] Des Moines, under the laws of the state, to regulate the rates at which gas shall be furnished to the city of Des Moines and its inhabitants. After valuing the real estate and various items of personal property as hereinafter stated, the master adopted as the only practical way in his judgment of determining the reasonable value of the buildings, their contents, the yard structures and the mains, house and street lamp services and meters, the process of estimating the cost of reproducing them new, and then estimating the depreciation which should be deducted, in order to obtain their present value. Under this method, the master summed up the value of the property of the Gas Company as follows:

"The new ordinance deprives the complainant of the right to add 10 cents per M. C. F. to the price of gas, unless paid on or before the 15th day of the month following that in which the gas was consumed, and the evidence shows that the average working capital for the past five years was $120,000, and that when the ordinance went into effect, that they were then using $142,000 as working capital.

"Without the means of enforcing prompt payment, and without any inducement so to do, on the part of their customers, in my judgment the working capital should not be diminished, and the amount allowed is .....$ 140,000

To this add real estate.....	150,000
To organization expenses.....	6,923
To meters in stock	6,603
Present value of physical property aside from above items....	1,937,402
"Total physical value.....$2,240,928"	

What is called in this summary "the present value of physical property" the report shows was arrived at by the master in the manner following: He first found what he thought was the base value of the property, *i. e.*, "what [162] it would cost to produce it at the present time new, without adding thereto any overhead charges." This figure he fixed at $1,975,026. To this he added overhead charges, 15 per cent,—$296,254. From this he deducted depreciation, $333,878, leaving as the value of the property thus ascertained, $1,937,402.

As appears from the opinion of the court and the arguments of counsel in this case, exceptions to the master's report so far as the Gas Company is concerned pertain principally to two questions: One as to his manner of dealing with what is termed the "going value" of the concern, and the other as to the addition of the sum of $140,000 to the valuation, because appellant insists, upon the plan of valuation by cost of reproduction less depreciation, it would cost that sum to take up and replace pavements not laid when the mains were put in, but necessary to be removed and replaced in the reproduction thereof.

Before considering the correctness of the rulings of the master and their confirmation

by the district court, it is proper to notice that there is considerable difference between counsel as to what the master actually found, as to whether he included the sum of $300,000 which he was disposed to allow for going value in the $2,240,000 valuation found by him, or whether it was added to the estimate of the value of the property already made by him.

We think the master intended to value the property at $2,240,000 exclusive of the $300,000 which, as we have said, he was at first disposed to allow for going value, and also that he deducted, in reaching the $2,100,000, the $140,000 claimed by the Gas Company as a proper allowance because of the cost of removing and replacing pavements, as above stated. We think, too, that it was the master's conclusion that, if the $300,000, which he was at first disposed to allow, as stated, or the $140,000 for paving, were included, the valuation of the plant would be such that a fair return could not be made upon the value [163] of the property, and therefore the company would be entitled to a decree in its favor. It therefore follows that the determination of the correctness of the decree below, confirming the master's report, depends upon and requires a consideration of these two items.

We may premise that the public authority is presumed to have acted fairly, and that the burden of proof is upon the Gas Company to show that the regulating ordinance has the effect to deprive it of an income equivalent to a fair return upon its property dedicated to public use. Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

As we have said, the master was at first disposed to allow $300,000 as a separate item covering the going value of the concern. After stating that he fixed the going value at the sum of $300,000 he says:

"It may be asked upon what basis this amount is determined. The evidence, followed strictly, might require me to make it higher, could my mind rest satisfied that the 'going value' of this concern is worth more, but I cannot feel satisfied that such is the case, and regard $300,000 as every dollar it is worth over and above its physical value, and in my judgment, it is worth that much more than a plant would be that had to develop its business. But that would be much more rapid, in my judgment, than is estimated. I think a purchaser would be willing to add this amount for its developed business, and that a seller would not be willing to sell unless he got that much more than its physical value, but I could not give the mental process by which this conclusion is reached any more than a jury could do so, under like circumstances, but it is nevertheless my judgment under all the evidence in the case.

"The element of 'good will' as applied to the ordinary merchant or manufacturer dealing with the public generally is not considered in estimating the 'going value' of complainant's plant. It cannot be considered in a [164] public utility like the one in question in this case, because the complainant has a monopoly of the business in which it is engaged in the city of Des Moines, and those who desire to use its product must buy of it. They have no choice in the matter. But there is a great difference even in a monopoly which has a business already developed and one that must develop it. The plant of complainant has all its parts working in harmony, performing their several functions in producing and conveying the gas to its customers. These several parts are not only in place, but have been brought to a harmonious operation throughout. Even the employees of the concern are familiar with their duties and experienced in performing them. But without business, no matter how perfect it may be, it would be unprofitable. It is ready, however, for business, and has the business to transact. It was a small concern at the start in 1864, but its books show that it has had a steady growth for many years in the past, and everything indicates that it will continue in the future. There is great difference between such a plant and one whose business must be developed. All a purchaser of such a plant would have to do would be to take charge of the plant, 'touch the button,' and he is making money from the start. There is no element of uncertainty connected with it.

"He can retain its experienced employees as a rule, should he so desire, at the same wages. There is no question that such a plant has a 'going value,' because it is a money maker from the start.

"The only difficulty is to determine how much its 'going value' is worth. No interest during its construction is allowed, nor anything that is included in the 'overhead charges,' which are part of the physical value. But simply the fact that it has a developed business that will make money for its owner, with reasonable rates allowed for the product which it manufactures and sells."

That "good will," in the sense in which that term is [165] generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business, has no place in the fixing of valuation for the purpose of rate-making of public service

corporations of this character, was established in Willcox v. Consolidated Gas Co. 212 U. S. 19, 52, 53 L. ed. 382, 399, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034. "Going value," or "going concern value," *i. e.*, the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business, has been the subject of much discussion in rate-making cases before the courts and commissions. Many of those cases are collected in Whitten on "Valuation of Public Service Corporations," §§ 550–569, and the supplement to the same work, §§ 1350–1385. That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. Each case must be controlled by its own circumstances, and the actual question here is: In view of the facts found, and the method of valuation used by him, did the master sufficiently include this element in determining the value of the property of this company for rate-making purposes?

Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had long carried on business in the city of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. **[166]** For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business.

These items of expense in development are often called overhead charges, for which, as we have already seen, the master allowed 15 per cent upon the base value (exclusive of real estate) or $296,254, in addition to his allowance of $6,923 for organization expenses. Of these charges the master said:

"In reaching the physical value of the plant in question by the process of reproduction, it is necessary to bear in mind that the present value thereof represents much more than the machinery therein, the labor of installing and constructing them, and putting them in place to perform their various functions, ready for the manufacture and distribution of gas to its customers. Were the city of Des Moines without such a plant, and such a one as the complainant now owns was proposed, it would be found that much more than the mere cost of labor and material would be expended. Such expenditures are termed overhead charges, and are as follows:

"1. Time and money expended in the promotion of the enterprise, in the organization of the company and interesting capital therein, including, also, legal expenses, obtaining the necessary franchise, as well as the costs of incorporating the company.

"2. Then a competent engineer must be employed to prepare the plans and specifications for the plant, and make the necessary surveys, and when the work began, to superintend the construction thereof, and see that it is done properly and according to plans and specifications. **[167]** The successful operation of the plant depends largely upon its proper construction.

"3. Then losses arising from accidents and injuries to workmen as well as the material during its construction, which is such an amount as the cost of insuring against such losses, which is between 1 and 2 per cent.

"4. Contingencies are such expenditures as arise from the lack of foresight and care preparing the plans and specifications. No matter how careful the engineer may prepare them, such expenditures invariably arise. Mr. Alvord testified that his allowance therefor would depend very much upon his knowledge of the engineer who prepared them, but that no matter who prepared them, they would invariably occur, and an allowance should be made therefor. The careful and thorough inventory in this case reduces very greatly the allowance therefor.

"5. The cost of administration, which includes the time and money expended by the parties who are engaged in the enterprise, purchasing the material, procuring the money for their payment as needed, and generally superintending the entire enterprise during the construction of the plant.

"6. It is estimated that it would take three years to complete the plant in question, and that at least one half the time and money invested therein would give no return, and that a loss of interest would result therefrom, and that such loss would be included in the overhead charges.

"7. Taxes during the construction.

"The latter is regarded by me as very questionable. It is in a certain sense mak-

ing taxes an asset rather than a liability, and the amount is so vague and uncertain that it has been given very little consideration and weight in fixing the overhead charges. Either the money or the property should pay taxes.

"It must be borne in mind that these expenditures are all made during the promotion and construction of the [168] plant, and are necessarily a part of the cost thereof. No overhead charges that do not inhere in and add to the cost thereof should be allowed as a part of its physical value. It is not a question of what was actually expended therefor in the plant in question, but what would it cost to reproduce a similar plant at the present time. It is through this method we reach the present value of this plant new, and then when it is properly depreciated, according to the condition, life, and age of its various parts, we reach the present value of the plant in its present condition. It is not a perfect method, but it is the best method therefor, and results as nearly as possible in giving the present value of the plant. No other method known has proved so satisfactory."

The matter of going value was alluded to in Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148. In that case, $10,000 was allowed for organization, promotion, etc., and $60,000 for "going concern." Of the latter item this court said (page 9): "The latter sum we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return. We express no opinion as to the propriety of including these two items in the valuation of the plant, for the purpose for which it is valued in this case, but leave that question to be considered when it necessarily arises. We assume, without deciding, that these items were properly added in this case."

The question was presented in Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389. That case was a writ of error to a judgment of the supreme court of Iowa, holding valid a certain ordinance regulating the price of gas in Cedar Rapids (144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966), and the judgment of the Iowa court was affirmed. Dealing with the question of "going value," the Iowa supreme court said:

"Also the sum of $100,000 was included by these witnesses [169] as enhancement of value by reason of being a 'going concern.' As previously intimated, the value of the plant is to be estimated in its entirety, rather than by the addition of estimates on its component parts, though the latter course will materially aid in determining the value. Advantages have accrued through the sagacity of its management as contended by appellant. So, too, there are the inevitable mistakes which would not be likely in the construction of a new plant; but to put a new plant in profitable operation time would be required, and, aside from the intangible element of good will, the fact that the plant is in successful operation constitutes an element of value.

"As said, the value of the system as completed, earning a present income, is the criterion. In so far as influenced by income, however, the computation necessarily must be made on the basis of reasonable charges, for whatever is exacted for a public service in excess of this is to be regarded as unlawful.

"Save as above indicated, the element of value designated a 'going concern' is but another name for 'good will,' which is not to be taken into account in a case like this, where the company is granted a monopoly. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034. The witnesses for plaintiff took into account 'good will' in giving their opinion of the enhancement in value because of being a going concern, and we have no means of separating these so as to ascertain their estimate of the separate advantage of completion so as to earn a present income."

Dealing with the assignment of error which attacked the correctness of the ruling of the Iowa court upon this point, this court said (page 669):

"Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. What [170] it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. Willcox v. Consolidated Gas Co. 212 U. S. 19, 52, 53 L. ed. 382, 399, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034. An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side, if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the 14th Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This is not a matter of economic

theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit."

As we have already said, the master, while at first disposed to allow the additional sum of $300,000 for "going value" as a separate item, after the decision of this court in the Cedar Rapids Case seems to have reached a different conclusion, for he said of that case:

" . . . it also renders it extremely doubtful that 'going value' will be included in the valuation of such a plant as the basis of return, beyond the fact that it is in 'successful operation.' That would exclude the sum of $300,000 estimated in this case, on the grounds that when the ordinance was enacted, it already possessed a well-developed and paying business.

"In my judgment, after considering the able and thorough arguments of counsel, that it is decisive of the question, and holds that 'going value' should not be considered in determining the basis upon which the complainant is entitled to have its return reckoned, and feel that it is my duty to so state.

"The physical value as hereinbefore determined is reckoned upon the fact that the plant was in 'successful operation' when the ordinance was enacted, otherwise its [171] value would be much less. The 'going value' is that enhancement which results from a well-developed and paying business. This would result in reducing the estimated deficit for each year $24,000, and yield a return to the complainant of at least 6 per cent on $2,100,000.

"While this case is close to the border line, I cannot say on the whole case that the evidence beyond any just and fair doubt satisfies me that the rates will prove confiscatory, should the ordinance be put into effect and an actual test thereof be made."

While there is a difference between court and counsel as to what the master meant by this, we think it is apparent that he meant to say that, applying the rule of the Cedar Rapids Case, he had already valued the property in the estimate of what he called its physical value, upon the basis of a plant in actual and successful operation; for he said that otherwise its value would be much less.

As pointed out in the Cedar Rapids Case, if return is to be regarded beyond that compensation which a public service corporation is entitled to earn upon the fair value of its property, the right to regulate is of no moment, and income to which the corporation is not entitled would become the basis of valuation in determining the rights of the public. When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the master certifies upon the basis of a plant in successful operation, and overhead charges have been allowed for the items and in the sums already stated, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves, and the appellant's contention in this behalf is not sustained.

As to the item of $140,000, which, it is contended, should be added to the valuation, because of the fact that the master valued the property on the basis of the cost of reproduction new, less depreciation, and it would be [172] necessary in such reproduction to take up and replace pavements on streets which were unpaved when the gas mains were laid, in order to replace the mains, we are of opinion that the court below correctly disposed of this question. These pavements were already in place. It may be conceded that they would require removal at the time when it became necessary to reproduce the plant in this respect. The master reached the conclusion that the life of the mains would not be enhanced by the necessity of removing the pavements, and that the company had no right of property in the pavements thus dealt with, and that there was neither justice nor equity in requiring the people who had been at the expense of paving the streets to pay an additional sum for gas because the plant, when put in, would have to be at the expense of taking up and replacing the pavements in building the same. He held that such added value was wholly theoretical, when no benefit was derived therefrom. We find no error in this disposition of the question.

Nor do we think there was error in refusing an injunction upon the conclusion reached that a return of 6 per cent per annum on the valuation would not be confiscatory. This is especially true in view of the fact that the ordinance was attacked before there was opportunity to test its results by actual experience. It is true the master reported that in his opinion the company ought to earn 8 per cent, but he also found that in his judgment gas could be produced for 60 cents per thousand, and the actual effect of the 90-cent rate on an economically managed plant had not had the test of experience.

The decree of the court below is peculiar in that it directs the dismissal of the bill "with prejudice," and adds: "At any time on and after three years from this date complainant, its successor or assigns, may on motion reinstate this case with all the

pleadings and evidence now on file, with the same and like effect as though filed for such subsequent [173] hearing. And each party may then file such additional pleadings and take and file such additional evidence as to each party may be deemed advisable."

While we agree with the court below that it was right to confirm the master's report and dismiss the bill, we think, in view of the fact that the attack upon the rates was made before the ordinance went into effect, and before actual application of the rates could demonstrate whether they were remunerative or not, that the court should have followed the recommendation of the master and dismissed the bill without prejudice. We think this is particularly so, in view of the fact that ordinarily time alone can satisfactorily demonstrate in a case like this whether or not the rates established will prove so unremunerative as to be confiscatory in the sense in which that term has been defined in rate-making cases. The master's suggestion has the support of the judgment of this court in Knoxville v. Knoxville Water Co. and Willcox v. Consolidated Gas Co. supra.

With the modification that the bill be dismissed without prejudice, instead of, as the court below directed, with prejudice, the decree is affirmed, with costs.

Affirmed.

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[174] MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plff. in Err.,
v.
RAILROAD COMMISSION OF WISCONSIN.

(See S. C. Reporter's ed. 174-185.)

Federal courts — following state decision — construction of statute entering into impaired contract.

1. The construction given by the highest court of the state to the provisions of Wis. Rev. Stat. 1898, § 1862, empowering municipalities to grant the use of the streets to street railway companies "upon such terms as the proper authorities shall determine," as not authorizing a municipality to make a contract which will prevent the future exercise of the authority of the state to fix rates by legislative action, will be followed by the Federal Supreme Court.

[For other cases, see Courts, VII. c, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — regulation.

2. The exercise by a state of its lawful power to fix street railway rates, notwithstanding a municipal rate ordinance, does not deprive the street railway company of its property without due process of law.

[For other cases, see Constitutional Law, 608-628, in Digest Sup. Ct. 1908.]

[No. 233.]

Argued April 20 and 21, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Wisconsin to review a decree which affirmed a decree of the Circuit Court of Dane County, in that state, dismissing the bill in a suit to restrain the enforcement of an order of the State Railroad Commission reducing street railway rates. Affirmed.

See same case below, 153 Wis. 592, L.R.A. —, —, 142 N. W. 491, Ann. Cas. 1915A, 911.

The facts are stated in the opinion.

Messrs. Henry H. Pierce and Edwin S. Mack argued the cause, and, with Messrs. George P. Miller, Arthur W. Fairchild, and William J. Curtis, filed a brief for plaintiff in error:

The Supreme Court of the United States will determine for itself the question of the existence or nonexistence of a contract in cases of this character, and whether the state law complained of impairs its obligation.

Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 170, 59 L. ed. 175, 180, 35 Sup. Ct. Rep. 62; Russell v. Sebastian, 233 U. S. 195, 202, 58 L. ed. 912, 920, L.R.A.—, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 551, 57 L. ed. 633, 638, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Stearns v. Minnesota, 179 U. S. 223, 233, 45 L. ed. 162, 170, 21 Sup. Ct. Rep. 73; Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199.

When a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations will be

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NOTE.—On administration of Federal laws in state courts—see note to Loughin v. McCaulley, 48 L.R.A. 33.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On legislative regulation of tolls, rates, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On the power of municipality apart from contract to regulate the rates to be charged by public service corporations—see notes to St. Marys v. Hope Natural Gas Co. 43 L.R.A. (N.S.) 994, and Bluefield Waterworks & Improv. Co. v. Bluefield, 33 L.R.A.(N.S.) 759.

determined by the law as it existed at the time the rights accrued.

Douglass v. Pike County, 101 U. S. 677, 686, 687, 25 L. ed. 968, 971, 972; Rowan v. Runnels, 5 How. 134, 139, 12 L. ed. 85, 87; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 431, 14 L. ed. 997, 1003; Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Louisiana v. Pilsbury, 105 U. S. 278, 294, 295, 26 L. ed. 1090, 1095, 1096; Loeb v. Columbia Twp. 179 U. S. 472, 492, 45 L. ed. 280, 290, 21 Sup. Ct. Rep. 174; Muhlker v. New York & H. R. Co. 197 U. S. 544, 561, 49 L. ed. 872, 874, 25 Sup. Ct. Rep. 522; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 625, 58 L. ed. 1503, 1505, 34 Sup. Ct. Rep. 941.

The provision of the Federal Constitution, that no state shall pass a law impairing the obligation of a contract, applies to a contract to which the state is a party, as well as to contracts wholly between individuals.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Woodruff v. Trapnall, 10 How. 190, 207, 13 L. ed. 383, 390.

The grant of a right to a street railway company to use the public streets of a municipality and to operate its railroad thereon is not a mere license, but is a grant of a valuable property right which is assignable and taxable, and has all the other incidents of property.

New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 191–193, 59 L. ed. 184, 191, 192, 35 Sup. Ct. Rep. 72; Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 59 L. ed. 175, 35 Sup. Ct. Rep. 62; Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.—, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 9114C, 1282; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 90, 57 L. ed. 1400, 1406, 33 Sup. Ct. Rep. 997; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 65, 57 L. ed. 1389, 1393, 33 Sup. Ct. Rep. 988; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 552, 57 L. ed. 633, 639, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 56 L. ed. 934, 939, 32 Sup. Ct. Rep. 572; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 29, 36 L.R.A. 47, 60 Am. St. Rep. 74, 69 N. W. 791; Milwaukee Electric R. & Light Co. v. Milwaukee, 95 Wis. 39, 36 L.R.A. 45, 60 Am. St. Rep. 81, 69 N. W. 794; State ex rel. Atty. Gen. v. Portage City Water Co. 107 Wis. 441, 83 N. W. 697; State ex rel. Northern P. R. Co. v. Railroad Commission, 140 Wis. 157, 121 N. W. 919; Water Power Cases, 148 Wis. 136, 38 L.R.A.(N.S.) 526, 134 N. W. 330; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513.

The state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in point of time, and the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating rates.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 382, 46 L. ed. 592, 605, 22 Sup. Ct. Rep. 410; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 533, 48 L. ed. 1102, 1107, 24 Sup. Ct. Rep. 756; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 508, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 273, 274, 53 L. ed. 176, 182, 183, 29 Sup. Ct. Rep. 50.

The ordinance of 1900 and its acceptance constitute and were intended to constitute a contract between the state and the company, definitely fixing the rate of fare to be charged by the company during the term of the franchise.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 493, 83 N. W. 851; Re Southern Wisconsin Power Co. 140 Wis. 258, 122 N. W. 801; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

The state had conferred upon the city power to enter into the contract which it made with the plaintiff, fixing the rates of fare to be charged by the company during the term of its franchise.

Ashland v. Wheeler, 88 Wis. 607, 60 N. W. 818; Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 493, 83 N. W. 851; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Detroit v. Ft. Wayne & B. I. R. Co. 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; People ex rel. West Side Street R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354; Clinton v. Worcester Consol. Street R. Co. 199 Mass. 279, 85 N. E. 507;

Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253, 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

The order of the Commission violates the due process clause of the Constitution, even if there were no question of contract in this case.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Cator v. Southern P. Co. 6 Inters. Com. Rep. 113; Chicago, R. I. & P. R. Co. v. Ketchum, 212 Fed. 993; Southern P. Co. v. Railroad Commission, 208 Fed. 933; Portland R. Light & P. Co. v. Portland, 201 Fed. 119; Re Arkansas R. Rates, 168 Fed. 720; Louisville & N. R. Co. v. Interstate Commerce Commission, 195 Fed. 558; Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 831; Western R. Co. v. Railroad Commission, 197 Fed. 972; Sprigg v. Baltimore & O. R. Co. 8 Inters. Com. Rep. 452; Field v. Southern R. Co. 13 Inters. Com. Rep. 298; Weber Club & I. Fair Asso. v. Oregon Short Line R. Co. 17 Inters. Com. Rep. 212; Eschner v. Pennsylvania R. Co. 18 Inters. Com. Rep. 60; Re Commutation Rate Case, 21 Inters. Com. Rep. 428; Re Mileage, Excursion, & Commutation Tickets, 23 Inters. Com. Rep. 96; Carnegie Board of Trade v. Pennsylvania Co. 28 Inters. Com. Rep. 122; Re Mileage Books, 28 Inters. Com. Rep. 323; Beardsley v. New York, L. E. & W. R. Co. 162 N. Y. 230, 56 N. E. 488; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 7 L.R.A. (N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 Ann. Cas. 1124; State ex rel. McCue v. Great Northern R. Co. 17 N. D. 370, 116 N. W. 89; State ex rel. Bump v. Omaha & C. B. R. & Bridge Co. 113 Iowa, 30, 52 L.R.A. 315, 86 Am. St. Rep. 357, 84 N. W. 983.

Mr. **Walter Drew** argued the cause, and, with Mr. Lester C. Manson and Mr. W. C. Owen, Attorney General of Wisconsin, filed a brief for defendant in error:

The decision of the highest court of the state, denying the existence of the contract alleged, being in harmony with the Constitution and laws of the state, as expounded by the decisions of the highest court of the state, both before and after the creation of the alleged contract, will be followed by this court.

United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Jacobson v. Massachusetts, 197 U. S. 11, 24, 49 L. ed. 643, 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Fairfield v. Gallatin County, 100 U. S. 47, 52, 25 L. ed. 544, 546; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 218, 219, 58 L. ed. 924, 928, 34 Sup. Ct. Rep. 522; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 509, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762; Freeport Water Co. v. Freeport, 180 U. S. 587, 595, 596, 45 L. ed. 679, 687, 688, 21 Sup. Ct. Rep. 493; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 243, 244, 50 L. ed. 170, 173, 174, 26 Sup. Ct. Rep. 23; Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 220, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513; Burgess v. Seligman, 107 U. S. 20, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Wilson v. Standefer, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384; Chicago Theological Seminary v. Illinois, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386.

The law of the state had been settled long prior to the decision in Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 493, 83 N. W. 851, and has never since been changed, to the effect that under the Wisconsin Constitution the legislature can neither directly nor indirectly grant to a corporation by contract or otherwise an irrevocable exemption from legislative regulation of rates and tolls.

Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; Ashland v. Wheeler, 88 Wis. 616, 60 N. W. 818; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; La Crosse v. La Crosse Gas. & Electric Co. 145 Wis. 408, 130 N. W. 530.

The power to regulate in the public interest the tolls or rates of charge of one engaged in a public service is a police power inherent in the sovereignty of the state.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago, B. & Q. R. Co. v. Iowa (Chicago,

B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Ruggles v. Illinois, 108 U. S. 526, 531, 27 L. ed. 812, 815, 2 Sup. Ct. Rep. 832; Railroad Commission Cases, 116 U. S. 307, 325, 29 L. ed. 636, 642, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 84, 85, 46 L. ed. 92, 99, 22 Sup. Ct. Rep. 30; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 515, 517, 46 L. ed. 298, 305, 306, 22 Sup. Ct. Rep. 95; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; Madison, W. & M. Pl. Road Co. v. Reynolds, 3 Wis. 287; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 38, 86 N. W. 657; Madison v. Madison Gas & Electric Co. 129 Wis. 264, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 108 N. W. 65, 9 Ann. Cas. 819; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 157, 17 L.R.A.(N.S.) 821, 116 N. W. 905; State ex rel. Kenosha Gas & Electric Co. v. Kenosha Electric R. Co. 145 Wis. 346, 129 N. W. 600; La Crosse v. La Crosse Gas & Electric Co. 145 Wis. 426, 130 N. W. 530; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 19, 140 Am. St. Rep. 1056, 129 N. W. 925; Chicago, B. & Q. R. Co. v. Railroad Commission, 152 Wis. 654, 140 N. W. 296; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 547, 548, 9 L. ed. 773, 824; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 415, 416, 58 L. ed. 1011, 1023, 1024, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94.

This sovereign power of regulation is one which belongs exclusively to, and can be exercised only by, the legislature.

Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Express Cases, 117 U. S. 1, 29, 29 L. ed. 791, 803, 6 Sup. Ct. Rep. 542, 628; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 505, 42 L. ed. 243, 255, 17 Sup. Ct. Rep. 896; Madison v. Madison Gas & Electric Co. 129 Wis. 267, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 108 N. W. 65, 9 Ann. Cas. 819; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 874; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; State ex rel. Kenosha Gas & Electric Co. v. Kenosha Electric R. Co. 145 Wis. 346, 129 N. W. 600.

The general power of a municipal corporation to contract is limited to its contracts made in its business or proprietary capacity.

La Crosse v. La Crosse Gas & Electric Co. 145 Wis. 418, 130 N. W. 530; Kaukauna Electric Light Co. v. Kaukauna, 114 Wis. 333, 89 N. W. 542.

The city of Milwaukee was not authorized to abrogate by ordinance or contract the sovereign power of the state to regulate plaintiff in error's rates.

Madison v. Madison Gas & Electric Co. 129 Wis. 249, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 108 N. W. 65, 9 Ann. Cas. 819; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 38, 86 N. W. 657; Ruggles v. Illinois, 108 U. S. 526, 531, 27 L. ed. 812, 815, 2 Sup. Ct. Rep. 832; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 547, 9 L. ed. 773, 824; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Perrine v. Chesapeake & D. Canal Co. 9 How. 172, 13 L. ed. 92; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 435, 14 L. ed. 997, 1005; Detroit United R. Co. v. Detroit, 229 U. S. 39, 44, 57 L. ed. 1056, 1059, 33 Sup. Ct. Rep. 697; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 129, 51 L. ed. 399, 405, 27 Sup. Ct. Rep. 202; Holyoke Water Power Co. v. Lyman, 15 Wall. 500, 512, 21 L. ed. 133, 137; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Union Pass. R. Co. v. Philadelphia, 101 U. S. 528, 25 L. ed. 912; The Binghamton Bridge, 3 Wall. 51, 75, 18 L. ed. 137, 143; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Freeport Water Co. v. Freeport, 180 U. S. 587, 599, 45 L.

ed. 679, 688, 21 Sup. Ct. Rep. 493; Mills v. St. Clair County, 8 How. 569, 12 L. ed. 1201; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666, 24 L. ed. 1036, 1038; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 208, 48 L. ed. 406, 410, 24 Sup. Ct. Rep. 241; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Hoge v. Richmond & D. R. Co. 99 U. S. 348, 25 L. ed. 303; Tucker v. Ferguson, 22 Wall. 527, 22 L. ed. 805; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 182, 32 L. ed. 377, 381, 9 Sup. Ct. Rep. 47; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

In granting such a privilege of street user, the municipality acts as agent of the state. It is a franchise grant by the state, acting through the municipality.

State ex rel. Atty. Gen. v. Madison Street R. Co. 72 Wis. 619, 1 L.R.A. 771, 40 N. W. 487; Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 36, 36 L.R.A. 47, 60 Am. St. Rep. 74, 69 N. W. 791; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 27, 140 Am. St. Rep. 1056, 129 N. W. 925.

Any ambiguity or doubt as to the existence of a power is to be resolved against the corporation and the power denied.

Allen v. Clausen, 114 Wis. 250, 90 N. W. 181.

The act of a municipal council in passing a franchise ordinance conferring upon a street railway company the right of street user is legislative in character, and such ordinances only cover and could only cover such rights as the common council had power to grant.

Lange v. La Crosse & E. R. Co. 118 Wis. 562, 95 N. W. 952; State ex rel. Kenosha Gas & Electric Co. v. Kenosha Electric R. Co. 145 Wis. 337, 129 N. W. 600; State ex rel. Rose v. Superior Ct. 105 Wis. 673, 48 L.R.A. 819, 81 N. W. 1046.

This court, in the decisions on which plaintiff in error relies in this case, and where the municipality was held to have been clearly empowered and to have made a binding contract by the enactment of a franchise ordinance, has uniformly followed the decisions of the state court so holding. This is in accordance with the rule repeatedly stated by this court that, in determining upon the *existence* of a contract claimed to be entitled to protection against legislative impairment under provisions of the Federal Constitution, it will defer to the Constitution and laws of the state, as expounded by its judicial tribunals.

Fairfield v. Gallatin County, 100 U. S. 47, 52, 25 L. ed. 544, 546, 9 Rose's Notes, 784; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 508, 46 L. ed. 298, 302, 22 Sup. Ct. Rep. 95.

Mr. Daniel W. Hoan filed a brief as *amicus curiæ*.

[176] Mr. Justice Day delivered the opinion of the court:

This suit originated in the circuit court of Dane county, Wisconsin, and was brought by the Milwaukee Electric Railway & Light Company against the Railroad Commission of Wisconsin. The plaintiff, a street railway company, organized under the laws of Wisconsin, and authorized to conduct a street railway business in the city of Milwaukee, sought to enjoin the Railroad Commission, organized under the laws of that state of 1905, from enforcing a certain order against the company, whereby the right of the railway company to charge fares upon its railway system had been reduced below what it was contended had been previously fixed by an ordinance of the city of Milwaukee, which, it was alleged, upon acceptance, constituted an irrevocable contract between the company and the city. In the allegations of the complaint it appears that on January 2, 1900, there was granted to the plaintiff the right to operate over certain streets, and in the ordinances of that date all franchises expiring prior to December 31, 1934, were extended to that date, and all franchises which would otherwise expire subsequently to that date were made to terminate at that time.

Section 6 of the ordinance provides:

"After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed 5 cents for a single fare, except for children under ten years of age the rate of fare shall be 3 cents for one child and 5 cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which [177] fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at estab-

lished points of transfer to any connecting or cross line of said railway company for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

"Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for $1 or six for 25 cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8 o'clock in the morning and between the hours of 5 o'clock and 7 o'clock central standard time, in the afternoon of each day, until January 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of 5 cents; and the said railway company shall, from and after January 1, 1905, continue the sale of tickets in packages at the price aforesaid until December 31, 1934, each to be good at all hours of the day, with the same privileges as are or may be accorded to passengers paying a single cash fare of 5 cents."

The bill sets out the acceptance of this ordinance, and thereby it is claimed the company obtained the right to [178] charge, until December 31, 1934, a cash fare of 5 cents, and to sell tickets in packages of twenty-five for $1, or six for 25 cents, each of which tickets should entitle the holder to use the same upon the cars between the hours mentioned in the ordinance, and to have the privileges accorded to passengers paying 5 cents fare. In November, 1906, the city of Milwaukee filed a complaint with the defendant Railroad Commission for a reduction of rates of fare, and filed a similar complaint May 13th, 1908. This proceeding resulted in the order complained of, which did not interfere with the cash fare prescribed, but provided that the company should discontinue its rate of twenty-five tickets for $1, and should sell tickets in packages of thirteen for 50 cents, which tickets were ordered to be accepted in payment of fare. It is alleged that this action of the Railroad Commission impairs the obligation of the contract between the city and the company, and takes the plaintiff's property without due process of law, in violation of § 10 of article 1 of the Constitution of the United States and of the 14th Amendment thereto.

On the hearing in the court of first instance, it was held that there was no contract made by the passage and acceptance of the ordinance which we have quoted, and the complaint was accordingly dismissed. Upon appeal to the supreme court of Wisconsin that judgment was affirmed (153 Wis. 592, L.R.A.—, —, 142 N. W. 491, Ann. Cas. 1915A, 911). The case was heard before six judges of that court. Three held that the statute upon which the plaintiff relied as conferring authority upon a municipal corporation to make the contract in question did not authorize the making of a contract which would prevent the future exercise of the authority of the state to regulate the rates of fare by legislative action. A fourth judge expressed no view upon this phase of the case, specifically holding that under the Wisconsin Constitution there was no power to delegate to municipal corporations an authority [179] to make irrepealable contracts respecting rates. Two of the judges dissented upon the ground that there was an irrepealable contract, valid and binding between the company and the city, which was violated by the subsequent legislation creating and empowering the Railroad Commission, and because of the action of that body in reducing the rate of fare.

In the view we take of the case it is unnecessary to pass upon the question whether the ordinance had the effect to make a contract binding between the city and the company until subsequent legislative action by the state, or to decide whether the grant of the rights and privileges as to fares was, under the Wisconsin Constitution, revocable at the will of the legislature.

Section 1862 of the Revised Statutes of 1898 provides:

"Section 1862. Corporations for constructing, maintaining and operating street railways may be formed under chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways the use, upon such terms as the proper authorities shall determine, of any streets, parkways, or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and

passengers, to be propelled by animals or such other power as shall be agreed on, with all necessary curves, turnouts, switches and other conveniences. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway [180] corporation or person to take the same; but in such respects are hereby confirmed."

The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of any other political subdivision of the state, are not sufficient. Specific authority for that purpose is required."

The chief justice of Wisconsin, who delivered the opinion in which two other judges concurred, did not call in question the right of the city to make a contract with a public utility corporation, fixing the rates to be charged for a definite period, which would bind the city itself, but placed his decision upon the ground that the section in question gave no distinct authority to the city to contract away the legislative authority of the state to fix tolls [181] and fares by lowering them if found to be excessive; that while the term "grant" was used, he held the grant was to be upon terms such as the municipal authorities might determine, and that this language was more appropriate to the exercise of power by the municipality than to the making of a contract between parties. The language of the section certainly lends itself to this construction, and there is nothing in specific terms conferring the right to contract by agreement between parties, much less to make such contract during its existence exclusive of any further right of the state to act upon the subject in the exercise of its legislative authority. It authorizes the grant of the use of the streets upon such terms as the proper authorities shall determine, not upon such terms as the parties in interest shall agree to.

Among cases in this court specially relied upon by the plaintiff in error is Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410. It was therein held, quoting constructions of the supreme court of Michigan, that the legislation involved authorized the making of a contract between the city and the street railway company, which the city undertook to abrogate by subsequent ordinances; and the fact that the legislature had not attempted to interfere with the rights of the street railway company in Detroit was stated, and the extent of its power to interfere with the rights of the street railway company expressly held not to be involved in the case. In another case relied upon by plaintiff in error, Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, it was specifically stated (p. 534) that the courts of Ohio had held that the acceptance of ordinances of the character in question constituted a binding contract, and the Ohio statute was set forth and held to expressly authorize a binding contract for the period covered by the statute. In the case of Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118, the ordinance which was held to constitute a binding contract for the rates of fare prescribed [182] therein was specifically validated by an act of the legislature of Minnesota subsequently passed.

It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligation of a contract requires this court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the states. While this is so, it has been frequently held that where a statute of a

state is alleged to create or authorize a contract inviolable by subsequent legislation of the state, in determining its meaning much consideration is given to the decisions of the highest court of the state. Among other cases which have asserted this principle are Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, and Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 509, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762.

Both sides contend that the decisions of the supreme court of the state have decided this controversy. The plaintiff in error insists that it is governed by Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 493, 83 N. W. 851. In that case an injunction was sought by a taxpayer and owner of property abutting upon the street, to enjoin the company from accepting the franchise and the state officers from receiving the acceptance of the ordinance of 1900. The Linden Land Company and another, as taxpayers and owners of land abutting upon the street, were afterwards brought in as plaintiffs, and the court, speaking of § 1862, said the city was empowered to grant the use of streets and franchises to street railway companies upon such terms as the proper authorities should determine, and that that was a broad grant of discretionary powers, and also said that in the character of suit then before it, the right to maintain it depended upon whether there had been shown any wrongful squandering or surrender of the [183] moneys, property, or property rights of the city, or unlawful increase of the burdens of taxation threatened by the proposed ordinance, and held that the claim that parties had offered large sums of money for the franchise privileges granted to the company, and that the company itself had offered to pay large sums of money in case the city would grant the right to charge 5 cents fare until the year 1935, did not sustain the allegation that there was a squandering of the money and rights of the city, in rejecting the offers and enacting the ordinance. We do not find in this case any decision of the question here involved, as to whether the alleged contract between the city and the company would have the effect to deny, because of the provisions granting authority to the city in § 1862, the subsequent right of the legislature to fix rates binding upon the company.

The chief justice in the opinion in the present case regarded the construction of § 1862 as controlled by the previous case of Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925. In that case, the supreme court of Wisconsin used the following language, which is quoted with approval by the chief justice in this case:

"No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting § 1862, Stat. (1898), or § 1863, Stat. (Supp. 1906: Laws of 1901, chap. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act."

The chief justice further pointed out that § 1863, which [184] was in question in the Manitowoc Case, was substantially the same as § 1862, involved in the present case; for while § 1863 authorized consent by municipal authorities to the use of streets upon such terms and subject to such rules and regulations and the payment of such license fees as the council or board may from time to time prescribe, it was the same in effect as § 1862, authorizing municipal authorities to grant the use of streets upon such terms as they shall determine, and concluded:

"We are of the opinion, therefore, that the holding in the Manitowoc Case, to the effect that neither section indicated any legislative intention of surrendering the sovereign power of the state to regulate fares, was entirely correct and was advisedly made."

While it is true that the opinion of the chief justice in this case was concurred in by only two other judges of the six who sat on this appeal, in view of the decision of the same court in the Manitowoc Case, we can have no doubt that the judicial interpretation of § 1862 by the highest court of the state of Wisconsin denies authority to municipal corporations to make contracts concluding the state from the future exercise of its power to fix the rates which may be charged by such public service corporations as are here involved.

In view of the weight which this court gives in deciding questions involving the construction of legislative acts to decisions of the highest courts of the states in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme

Court of Wisconsin in this case should be affirmed.

We may observe that the contention of deprivation of property without due process of law is practically disposed [185] of in what we have said. For if the state might still exercise its authority to fix rates notwithstanding the so-called contracting ordinance, the exercise of such lawful power could not deprive the plaintiff of property without due process.

Affirmed.

WASHINGTON-VIRGINIA RAILWAY COMPANY, Plff. in Err.,
v.
REAL ESTATE TRUST COMPANY OF PHILADELPHIA.

(See S. C. Reporter's ed. 185–190.)

Writ and process — service on foreign corporation — doing business.

A foreign electric railway company is doing business in the eastern district of Pennsylvania, so far as the question of its amenability to service there is concerned, where it maintains in Philadelphia, the residence of its president and treasurer, an office at which the president transacts such business of the company as requires his attention there, and the treasurer keeps his regular books, and from which is conducted a general correspondence in relation to the business of the company, and where it keeps four bank accounts in separate banks in that city, depositing money therein and checking it out in payment of mortgages, dividends, and the larger bills of the company, and where checks for the payment of the company's bills at its Washington office, through which the business of conducting the physical operation of the road is carried on, are drawn in Philadelphia and afterwards forwarded to Washington.

[For other cases, see Writ and Process, III. c, 2, b, in Digest Sup. Ct. 1908.]

[No. 212.]

Argued April 29 and 30, 1915. Decided June 14, 1915.

NOTE.—On service of process on foreign corporation—see note to Reeves v. Southern R. Co. 70 L.R.A. 532.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

On service of process upon foreign corporation not doing business within the state as basis of a judgment *in personam*—see note to Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 538.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of plaintiff in an action against a foreign corporation in which the amenability of the corporation to service of process was questioned. Affirmed.

See same case below, 204 Fed. 678.

The facts are stated in the opinion.

Mr. **William A. Glasgow, Jr.**, argued the cause, and, with Messrs. Norman Grey and John S. Barbour, filed a brief for plaintiff in error:

The original rule as to service of process upon corporations was that a corporation exists only where it is chartered, and cannot "migrate" elsewhere; and that it can therefore be served with process only in the state where it is chartered.

Bank of Augusta v. Earle, 13 Pet. 519, 586, 10 L. ed. 274, 306.

The above rule has been qualified by the principle that a state has authority to prescribe the terms under which a foreign corporation may do business within its limits, and therefore has the right to require that such corporation, before being allowed to do business within its limits, shall consent to be found therein for service of process by the designation of an agent there upon whom process may be served, or by such other proper means as the state, through its statutes, may require.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451.

A further extension of the rule arose where certain corporations were actually doing business within a state other than that of their origin, but had not designated an agent therein or otherwise provided for service of process there, although the state's statutes provided for service of process upon foreign corporations doing business in the state. In such cases, it was held that the corporation, by doing business within the state, subjected itself to service of process upon officers or agents of the corporation sent into the state by the corporation for the purpose of there doing a substantial amount of its business.

St. Clair v. Cox, 106 U. S. 350, 355, 27 L. ed. 222, 224, 1 Sup. Ct. Rep. 354; Ex parte Schollenberger, 96 U. S. 369, 377, 24 L. ed. 853, 854; Swann v. Mutual Reserve Fund Life Asso. 100 Fed. 922; Doe v. Springfield Boiler & Mfg. Co. 44 C. C. A. 128, 104 Fed. 684; Central Grain & Stock Exch. v. Chicago Bd. of Trade, 60 C. C A. 299, 125 Fed. 463; Carpenter v. Westinghouse Air-Brake Co. 32 Fed. 434; United States v. American Bell Teleph. Co. 29 Fed. 17.

The whole question to be decided is whether the Washington-Virginia Railway Company was doing business in the state of Penn-

sylvania at the time when process was served upon its president.

Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 227, 57 L ed. 486, 489, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77; International Harvester Co. v. Kentucky, 234 U. S. 579, 583, 58 L. ed. 1479, 1481, 34 Sup. Ct. Rep. 944.

In the course of the many decisions upon this question certain principles have been laid down which may be briefly stated:

(a) The business done must be the business for which the corporation is chartered.

Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 533, 51 L. ed. 916, 917, 27 Sup. Ct. Rep. 595; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 734, 735, 28 L. ed. 1137, 1139, 5 Sup. Ct. Rep. 739; Earle v. Chesapeake & O. R. Co. 127 Fed. 235; Doe v. Springfield Boiler & Mfg. Co. 44 C. C. A. 128, 104 Fed. 684; Carpenter v. Westinghouse Air-Brake Co. 32 Fed. 434.

(b) Some substantial business must be done; mere isolated instances are insufficient.

Hunter v. Mutual Reserve L. Ins. Co. 218 U. S. 573, 583, 54 L. ed. 1155, 1159, 30 L.R.A. (N.S.) 686, 31 Sup. Ct. Rep. 127; St. Louis Southwestern L. R. Co. v. Alexander, 227 U. S. 218, 227, 57 L. ed. 486, 489, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77; St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co. 32 Fed. 802; Good Hope Co. v. Railway Barb Fencing Co. 23 Blatchf. 43, 22 Fed. 635; Reifsnider v. American Imp. Pub. Co. 45 Fed. 433; Craig v. Welch Motor Car Co. 165 Fed. 554; Doe v. Springfield Boiler & Mfg. Co. 44 C. C. A. 128, 104 Fed. 684; Case v. Smith, L. & Co. 152 Fed. 730; Eirich v. Donnelly Contracting Co. 104 Fed. 1; Clews v. Woodstock Iron Co. 44 Fed. 31; United States Graphite Co. v. Pacific Graphite Co. 68 Fed. 442; Hoyt v. Ogden Portland Cement Co. 185 Fed. 889; Ladd Metal Co. v. American Min. Co. 152 Fed. 1008; Louden Machinery Co. v. American Malleable Iron Co. 127 Fed. 1008.

(c) The business must be more than mere solicitation of business, or advertising in the interest of the company's business.

Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 533, 51 L. ed. 916, 917, 27 Sup. Ct. Rep. 595; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; Goepfert v. Compagnie Generale Transatlantique, 156 Fed. 196; Carpenter v. Westinghouse Air-Brake Co. 32 Fed. 434; Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286; Union Associated Press v. Times-Star Co. 84 Fed. 419; Boardman v. S. S. McClure Co. 123 Fed. 614; Buffalo Glass Co. v. Manufacturers' Glass Co. 142 Fed. 273; Case v. Smith, L. & Co. 152 Fed. 730; International Harvester Co. v. Kentucky, 234 U. S. 579, 584–589, 58 L. ed. 1479, 1481–1483, 34 Sup. Ct. Rep. 944.

(d) It should be more than such small incidental matters as would ordinarily be conducted by casual correspondence.

Good Hope Co. v. Railway Barb Fencing Co. 23 Blatchf. 43, 22 Fed. 635; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Boardman v. S. S. McClure Co. 123 Fed. 614.

(e) It must be something more than the negotiations of loans or placing of securities.

Gilchrist v. Helena, H. S. & S. R. Co. 47 Fed. 593; Honeyman v. Colorado Fuel & Iron Co. 133 Fed. 96; Clews v. Woodstock Iron Co. 44 Fed. 31; Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864; Cæsar v. Capell, 83 Fed. 403.

(f) The keeping of a bank account in another state is not a doing of business in such state so as to make the corporation liable to service there.

Swann v. Mutual Reserve Fund Life Asso. 100 Fed. 922; Honeyman v. Colordao Fuel & Iron Co. 133 Fed. 96.

(g) The mere residence of an officer or director for his own pleasure or convenience does not carry with it the residence of the corporation, so as to make the corporation liable to service at his residence.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 411, 47 L. ed. 1113, 1115, 23 Sup. Ct. Rep. 728; Honeyman v. Colorado Fuel & Iron Co. supra.

(h) The officer or other person served must have been sent into the state on the corporation's business, and not have been merely visiting or traveling there.

St. Clair v. Cox, 106 U. S. 350, 357, 27 L. ed. 222, 225, 1 Sup. Ct. Rep. 354; Caledonian Coal Co. v. Baker, 196 U. S. 432, 49 L. ed. 540, 25 Sup. Ct. Rep. 375; Earle v. Chesapeake & O. R. Co. 127 Fed. 235; Swann v. Mutual Reserve Fund Life Asso. 100 Fed. 922; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co. 32 Fed. 802; Carpenter v. Westinghouse Air-Brake Co. 32 Fed. 434; Case v. Smith, L. & Co. 152 Fed. 730.

(i) Even where an officer comes into the state and there negotiates some matter for the company, it has been held that service is not valid, if the transaction was a casual one, or an isolated matter which would have been taken up by correspondence in the ordinary course of business.

Louden Machinery Co. v. American Malleable Iron Co. 127 Fed. 1008; Wilkins v. Queen City Sav. Bank & T. Co. 154 Fed. 173; Case v. Smith, L. & Co. 152 Fed. 730;

Good Hope Co. v. Railway Barb Fencing Co. 23 Blatchf. 43, 22 Fed. 635; United States Graphite Co. v. Pacific Graphite Co. 68 Fed. 442; Hoyt v. Ogden Portland Cement Co. 185 Fed. 889; Ladd Metal Co. v. American Min. Co. 152 Fed. 1008; Craig v. Welch Motor Car Co. 165 Fed. 534; Eirich v. Donnelly Contracting Co. 104 Fed. 1; Noel Constr. Co. v. George W. Smith & Co. 193 Fed. 492; Houston v. Filer & S. Co. 85 Fed. 757; Brush Creek Coal & Min. Co. v. Morgan-Gardner Electric Co. 136 Fed. 505.

(j) And where the corporation has actually done considerable of its ordinary business in the state, an officer or agent coming into the state to transact or settle a particular piece of such business may be served with process in a suit arising out of that very piece of business.

Commercial Mut. Acci. Co. v. Davis, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. Rep. 445; New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138, 28 L. ed. 379, 4 Sup. Ct. Rep. 364; St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 228, 57 L. ed. 486, 489, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77; Van Dresser v. Oregon R. & Nav. Co. 48 Fed. 202.

(k) So, also, a foreign manufacturing corporation which has made many sales and deliveries in a state, and is present there through an agent sent into the state in connection with the corporation's business, with power to receive moneys for sales or to adjust controversies arising out of sales, has been held servable with process through such agent in a suit arising out of such business.

International Harvester Co. v. Kentucky, 234 U. S. 579, 58 L. ed. 1479, 34 Sup. Ct. Rep. 944; Herndon-Carter Co. v. James N. Norris, Son & Co. 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550; New Haven Pulp & Board Co. v. Downington Mfg. Co. 130 Fed. 605; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740.

(l) The mere maintaining an office within the state does not establish a doing of business there so as to subject the corporation to service of process.

Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 532, 51 L. ed. 916, 917, 27 Sup. Ct. Rep. 595; Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286; Case v. Smith, L. & Co. 152 Fed. 730; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; Goepfert v. Compagnie Generale Transatlantique, 156 Fed. 196; McGuire v. Great Northern R. Co. 155 Fed. 230; Union Associated Press v. Times-Star Co. 84 Fed. 419; Honeyman v. Colorado Fuel & Iron Co. 133 Fed. 96; People v. Horn Silver Min. Co. 105 N. Y. 76, 11 N. E. 155; Clews v. Woodstock Iron Co. 44 Fed. 31; Galena Min. & Smelting Co. v. Frazier, 20 Pa. Super. Ct. 394.

(m) The fact that stationery is printed or the corporation's name is placed on the door for a resident agent's convenience is not a determining factor, the real question being whether the office is maintained for the actual doing of the business of the corporation.

Doe v. Springfield Boiler & Mfg. Co. 44 C. C. A. 128, 104 Fed. 684; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740.

The pleadings and return of the marshal did not show sufficient facts upon which to maintain even prima facie the court's jurisdiction.

Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Earle v. Chesapeake & O. R. Co. 127 Fed. 235.

The depositions and exhibits do not establish that the defendant, a foreign corporation, was doing business in Pennsylvania, and that Frederick H. Treat was authorized to conduct its business in that state.

Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419.

The facts brought out by the depositions and exhibits filed in connection with the rule to vacate service affirmatively show that the defendant company was not doing business in Pennsylvania so as to render it subject to service of process in this case.

Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; International Harvester Co. v. Kentucky, 234 U. S. 579, 585, 58 L. ed. 1479, 1482, 34 Sup. Ct. Rep. 944; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; People v. Horn Silver Min. Co. 105 N. Y. 83, 11 N. E. 155.

Mr. John G. Johnson argued the cause, and, with Mr. Joseph de F. Junkin, filed a brief for defendant in error:

Findings of fact by the court below are final and conclusive unless they are so unsupported by evidence as to be, in the opinion of this court, substantially perverse or entirely without foundation.

Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; Sena v. United States, 189 U. S. 233, 47 L. ed. 787, 23 Sup. Ct. Rep. 596; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 329; Howard v. Perrin, 200 U. S. 71, 50 L. ed. 374, 26 Sup. Ct. Rep. 195; Earle v. Myers, 207 U.

S. 244, 52 L. ed. 191, 28 Sup. Ct. Rep. 86; Schwartz v. Duss, 187 U. S. 8, 47 L. ed. 53, 23 Sup. Ct. Rep. 4.

The service was made upon the highest officer of the corporation present in his official capacity in the state, while engaged in the transaction of the corporate business.

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; DeBeers Consolidated Mines v. Howe [1905] 2 K. B. 612; Haggin v. Comptoir d' Escompte de Paris, L. R. 23 Q. B. Div. 519, 58 L. J. Q. B. N. S. 508, 61 L. T. N. S. 748, 37 Week. Rep. 703.

The defendant corporation was "doing business" in the state, not only at the time when the service was made, but also the transaction itself, out of which the suit grew, was a transaction consummated in the state where the suit was brought.

International Harvester Co. v. Kentucky, 234 U. S. 579, 58 L. ed. 1479, 34 Sup. Ct. Rep. 944; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 57 L. ed. 486, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77; Interstate Commerce Commission v. Texas & P. R. Co. 4 Inters. Com. Rep. 408, 6 C. C. A. 653, 20 U. S. App. 1, 57 Fed. 948, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft [1902] 1 K. B. 342, 71 L. J. K. B. N. S. 284, 50 Week. Rep. 226, 86 L. T. N. S. 472, 18 Times L. R. 229, 19 R. P. C. 46; La Compagnie Générale Transatlantique v. Law [1899] A. C. 433, 68 L. J. Prob. N. S. 104, 80 L. T. N. S. 845, 15 Times L. R. 424, 8 Asp. Mar. L. Cas. 550; Goertz v. Bell [1904] 2 K. B. 147, 73 L. J. K. B. N. S. 448, 53 Week. Rep. 64, 90 L. T. N. S. 675, 20 Times L. R. 348; San Paulo R. Co. v. Carter [1896] A. C. 31, 65 L. J. Q. B. N. S. 161, 73 L. T. N. S. 538, 44 Week. Rep. 336, 60 J. P. 84, 452.

Mr. Justice Day delivered the opinion of the court:

This case is here upon the single question of the jurisdiction of the United States district court for the eastern district of Pennsylvania to entertain the action. The suit was begun by the Real Estate Trust Company of Philadelphia, against the Washington-Virginia Railway Company, a corporation of the state of Virginia, to recover a judgment on certain bonds made by the Washington, Alexandria, & Mt. Vernon Railway Company, also a Virginia corporation, payment of which, it was alleged, had been assumed by the Washington-Virginia Railway Company. The summons in the action was served upon the president of the defendant railway company, at its office in Philadelphia, by handing a true and attested copy of the summons to the president, at such office.

There is no question that the president was the proper officer to serve, and that he was duly served with process. The contention of the plaintiff in error is that the service is void and the court without jurisdiction because at the time of the service of process the defendant corporation was not doing business in the eastern district of Pennsylvania, wherein service was made. As this court has had frequent occasion to say, each case of this kind must depend upon its own facts, and the question is whether the defendant corporation had submitted itself to the local jurisdiction and was present therein so as to warrant service of process upon it. See St. Louis Southwestern R. Co. v. Alexandria, 227 U. S. 218, and previous cases in this court cited on page 226, 57 L. ed. 486, 488, 33 Sup. Ct. Rep. 245.

The district court found certain facts, from which it appears: The defendant is the successor to two electric railway companies, one of which was the Washington, [187] Alexandria, & Mount Vernon Railway Company, which issued the bonds upon which the present suit was brought. The defendant company operates electric railway lines from Mount Vernon to Alexandria, in the state of Virginia, and from that city to Washington, in the District of Columbia. Under the laws of Virginia, the defendant company might have offices outside the state. The Virginia office of the company, under the laws of Virginia, must be kept in that state, and was at Mount Vernon, where there was a ticket agent, and where the annual meetings of the stockholders were held. The company maintained a general office at Washington, District of Columbia, where the business of conducting the physical operation of the road was carried on through its manager. At the Washington office the cash books of the company were kept, showing daily receipts, collection of accounts due, operating record, pay roll, time record, and statement of claims accruing and their payment as made. No books of the company concerning its business were kept at the Mount Vernon office. The commercial account of the company was kept at the Commercial National Bank, of Washington, District of Columbia, where the receipts from the operation of the road were deposited, and where checks for operating expenses were drawn on that bank. The company also kept three smaller accounts in Alexandria, Virginia.

For some time prior to the merger, the Washington, Alexandria, & Mount Vernon

Railway Company maintained an office in the Real Estate Trust Building, at Philadelphia, which office was leased by the president of that company, one Clarence P. King, who subsequently became president of the merged company, and who was succeeded by Frederick H. Treat, president of the defendant company at the time of the service of this writ. The defendant company paid rental to Mr. King at the rate of $50 per month, which covered the right of desk room for its president, treasurer, and bookkeeper, and the [188] use of the furniture, fixtures, and telephone in the office. No formal authority from the directors appears for maintaining any office except that at Mount Vernon, Virginia, but the by-laws of the company provide that its stock shall be transferred only on the books of the company at the office of its treasurer. Upon application for listing its stock on the Washington Stock Exchange, the Washington, Alexandria, & Mount Vernon Railway Company, through its president, declared that the principal office of the company was located at Mount Vernon, Virginia, with branch offices at Washington and Philadelphia.

After the merger, the defendant applied to the Philadelphia Stock Exchange for the listing of its securities, and declared in its application, "Stock is transferred at the Company's General Office, 1307 Real Estate Trust Building, Philadelphia, and registered by the Girard Trust Company, Philadelphia, Registrar," and declared its offices to be as follows:

"Offices:

"Principal, Mt. Vernon, Virginia.

"General and Transfer, 1307 Real Estate Trust Building, Philadelphia.

"Washington: 1202 Pennsylvania avenue."

At the office in Philadelphia, the corporation kept its regular business ledgers, its stock transfer books and stock ledgers. The bookkeeper of the company had his desk in the office at Philadelphia, made his entries in the corporation books kept there, and conducted general correspondence in relation to the company's business at that office. The treasurer of the company maintained the only treasurer's office of the company there, and had there his desk, papers, and books. The company had four bank accounts in Philadelphia, into which accounts from time to time was deposited the surplus of cash not needed in the active operation of the company. Out of these accounts [189] were paid interest on mortgages, dividends, and the larger bills, by checks drawn at the Philadelphia office by the treasurer, and the deposit and check books on such banks were kept at the Philadelphia office. The president kept the official seal of the company in Philadelphia. The president and treasurer lived in Philadelphia. The president had his desk at the office in the Real Estate Trust Building, where he was present two days in each week and went to Washington twice a week. While in Philadelphia, the president transacted such business of the company as came to his attention, and conducted the correspondence of the company upon official stationery, upon which appeared the address at the Real Estate Trust Building, and the words, "Office of F. H. Treat, President, Philadelphia," or, "Office of the President, Philadelphia." The bills of the company, after approval in Washington by the manager of the railway, were sent to Philadelphia for examination and approval, and the checks for payment were drawn at the Philadelphia office and forwarded to Washington. No one at the Washington office had authority to draw checks. No money was paid out at the Washington office except petty cash for daily expenses.

With this finding of facts counsel for the plaintiff in error finds little fault. The objection is rather to the inference drawn by the court below from such facts. It is urged that the keeping of the books in Philadelphia was for the convenience of the president and treasurer, but it also appears that such books were required to be kept by the by-laws of the company. Among the uncontroverted facts it appears that the defendant company had an office in the city of Philadelphia, where the president of the company lived, upon whom service was made, and that at this office the treasurer of the company, who also lived in Philadelphia, kept its regular books, and from this office was conducted a general correspondence in relation to the business of the company. The company kept [190] four bank accounts in separate banks in the city of Philadelphia, where money was deposited and checked out in payment of mortgages, dividends, and the larger bills of the company. Such business of the company as required his attention at the Philadelphia office was there transacted by the president. Checks for payment of bills of the company at Washington were drawn at Philadelphia and forwarded to Washington.

We think the mere recital of these facts makes it evident that the corporation was properly served. It had submitted itself to the local jurisdiction, and there enjoyed the protection of the laws. In that jurisdiction by duly authorized agents it was, at the time of service, transacting an essential and material part of its business.

It follows that the judgment of the District Court, maintaining its jurisdiction, must be affirmed.

ADAMS EXPRESS COMPANY, Plff in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 190–202.)

Commerce — state regulation — transporting intoxicating liquors — Webb-Kenyon act.

Shipments into a state of intoxicating liquors, which, because intended solely for the personal use of the consignees, were not to be used in violation of the laws of the state as construed by its highest court, were not subjected to the operation of a law of such state forbidding carriers to bring intoxicating liquors into, or deliver them in, any dry territory, by the provisions of the Webb-Kenyon act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739), prohibiting the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.

[For other cases, see Commerce, III. b, in Digest Sup. Ct. 1908.]

[No. 271.]

Argued May 10 and 11, 1915. Decided June 14, 1915.

IN ERROR to the Circuit Court of Whitley County in the State of Kentucky to review a conviction of an express company for bringing into and delivering in that county an interstate shipment of intoxicating liquors. Reversed.

The facts are stated in the opinion.

Messrs. **Joseph S. Graydon** and **Lawrence Maxwell** argued the cause and filed a brief for plaintiff in error:

The transactions disclosed in evidence constituted interstate commerce to which the Kentucky statute could have no application prior to the taking effect of the Webb-Kenyon law.

Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

A citizen of Kentucky has the constitutional right to use intoxicating liquors and to receive and possess them for that purpose.

Adams Exp. Co. v. Com. 154 Ky. 471, 48 L.R.A.(N.S.) 342, 157 S. W. 908; Calhoun v. Com. 154 Ky. 70, 156 S. W. 1077; Martin v. Com. 153 Ky. 784, 45 L.R.A.(N.S.) 957, 156 S. W. 870; State v. Williams, 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; Eidge v. Bessemer, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; State v. Gilman, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; Com. v. Smith, 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340; Freund, Pol. Power, §§ 453, 454; Vance v. W. A. Vandercook Co. 170 U. S. 439, 455, 42 L. ed. 1101, 1106, 18 Sup. Ct. Rep. 674.

The Webb-Kenyon law does not authorize the application of a state statute to an interstate shipment for lawful, personal use.

Van Winkle v. State, — Del. —, 91 Atl. 385; Adams Exp. Co. v. Com. 154 Ky. 462, 48 L.R.A.(N.S.) 343, 157 S. W. 908; Palmer v. Southern Exp. Co. 129 Tenn. 116, 165 S. W. 236; Theo. Hamm Brewing Co. v. Chicago, R. I. & P. R. Co. 215 Fed. 672; Ex parte Peede, — Tex. Crim. Rep. —, 170 S. W. 749; Southern Exp. Co. v. State, — Ala. —, 66 So. 115; Southern Exp. Co. v. High Point, 167 N. C. 103, 83 S. E. 254; Bristol Distributing Co. v. Southern Exp. Co. (1915) — Va. —; West Virginia ex rel. Blue v. Adams Exp. Co. 219 Fed. 331; Adams Exp. Co. v. Com. 160 Ky. 66, 169 S. W. 603.

If there is any doubt as to the construction or application of a statute, contemporary history, which shows the evils intended to be remedied, may be referred to by the courts.

Johnson v. Southern P. Co. 196 U. S. 19, 49 L. ed. 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Dunlap v. United States, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319; Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

Mr. **James Garnett**, Attorney General of Kentucky, argued the cause, and, with Mr. Robert T. Caldwell, filed a brief for defendant in error:

The Webb-Kenyon act contemplates other interests than those of the consignee.

Adams Exp. Co. v. Com. 154 Ky. 462, 48 L.R.A.(N.S.) 342, 157 S. W. 908; Adams Exp. Co. v. Com. 160 Ky. 66, 169 S. W. 603; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; Theo. Hamm Brewing Co. v. Chicago, R. I. & P. R. Co. 215 Fed. 672; Van

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power to prohibit or restrict one's using intoxicating liquor, or having the same in his possession for his own use—see note to Com. v. Campbell, 24 L.R.A.(N.S.) 172.

On the right of prohibition as limited by the Federal Constitution and its Amendments—see note to State v. Durein, 15 L.R.A. (N.S.) 923.

Winkle v. State, — Del. —, 91 Atl. 385; State v. Grier, — Del. —, 88 Atl. 579; Dewey v. United States, 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981; American Exp. Co. v. Beer, — Miss. —, 65 So. 575; Hough v. City F. Ins. Co. 29 Conn. 10, 76 Am. Dec. 581.

It is competent for the legislature to make the place of delivery the place of sale.

State v. Patterson, 134 N. C. 612, 47 S. E. 808; State v. Herring, 145 N. C. 418, 122 Am. St. Rep. 461, 58 S. E. 1007; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; West Virginia v. Adams Exp. Co. — C. C. A. —, L.R.A. —, —, 219 Fed. 794; Com. v. Campbell, 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; Com. v. Smith, 163 Ky. 227, L.R.A. 1915D, 172, 173 S. W. 340; Calhoun v. Com. 154 Ky. 70, 156 S. W. 1077.

Messrs. J. B. Snyder and W. B. Wheeler filed a brief as *amici curiæ:*

The agreed statement of facts constitutes a violation of the law.

West Virginia v. Adams Exp. Co. — C. C. A. —, L.R.A.—, —, 219 Fed. 794.

The Kentucky statute prohibiting the shipment of intoxicating liquor for beverage purposes into dry territory, and making the place of delivery the place of sale, is a valid and constitutional enactment:

Adams Exp. Co. v. Com. 129 Ky. 420, 18 L.R.A.(N.S.) 1182, 112 S. W. 577; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; State v. Herring, 122 Am. St. Rep. 461, note; Hart v. State, 112 Am. St. Rep. 437, note; United States ex rel. F. Zimmerman & Co. v. Oregon-Washington R. & Nav. Co. 210 Fed. 379; Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; State v. Greer, — Del. —, 88 Atl. 579; State v. Van Winkle, — Del. —, 88 Atl. 807; American Exp. Co. v. Beer, — Miss. —, 65 So. 115; Atkinson v. Southern Exp. Co. 94 S. C. 444, 48 L.R.A.(N.S.) 349, 78 S. E. 516; State v. Cardwell, 166 N. C. 309, 81 S. E. 630; Com. v. Burgett, 136 Mass. 450; Com. v. Hugo, 164 Mass. 157, 41 N. E. 123; West Virginia v. Adams Exp. Co. — C. C. A. —, L.R.A.—, —, 219 Fed. 794.

A citizen of Kentucky has no constitutional right to receive and possess intoxicating liquors for his own use except as provided by law.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The purpose of all legislation limiting and prohibiting the sale of liquor is to discourage and prevent its use.

West Virginia v. Adams Exp. Co. — C. C. A. —, L.R.A.—, —, 219 Fed. 794.

Mr. Justice Day delivered the opinion of the court:

The Adams Express Company was indicted for violation of § 2569a of the statutes of the state of Kentucky, which, omitting the portions not essential to the consideration of this case, provides:

"It shall be unlawful for any . . . public or private carrier to bring into, . . . deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited, . . . any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken. . . . Any . . . public or private carrier violating the provisions of this act shall be deemed guilty of violating the local option law and shall be fined not less than fifty nor more than one hundred dollars for each offense. . . . And the place of delivery of such liquors shall be held to be the place of sale; . . . "

The charge of the indictment was that the Adams Express Company, doing the business of a common carrier in Kentucky, did knowingly bring into and deliver in Whitley county of that state certain intoxicating liquors to one John Horshaw, contrary to law. This case, with [194] eighteen others, was heard in the circuit court of Whitley county, upon an agreed statement of facts, which stipulated that the Adams Express Company was engaged in the business of a common carrier and did such business in Whitley county, Kentucky, and between that county and the cities of Jellico and High Cliff, in the state of Tennessee. That on the dates named in the indictment the Adams Express Company knowingly brought into, transferred, delivered, and distributed certain spirituous liquors, to wit: whisky, in local option territory and where the local option law was in force, as charged in the indictment. That before bringing such liquors into such territory the consignees of said liquors, being the persons named in the indictment, sent orders by mail for such liquors to dealers at Jellico and High Cliff, in the state of Tennessee, and paid the purchase price of said liquors to said dealers at the places named in Tennessee. That upon receipt of the orders, the dealers, at their respective places of business at Jellico and High Cliff, Tennessee, for the purpose of filling such orders delivered to the Adams Express Company the several packages of liquor, directing the Express Company to carry and deliver the same to such persons; that the Adams Express Company did thereupon carry said packages of liquor from Jellico and High

Cliff, in Tennessee, into Whitley county, Kentucky, and there delivered the same to the consignees thereof, who were the persons who had made the orders and to whom the indictment charged the defendant with delivering and distributing the liquors mentioned. That the liquors were intended by said consignees for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them. That the transactions and all of them described occurred since the enactment and going into effect of the act of Congress known as the Webb-Kenyon law [37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739].

The Express Company requested a peremptory instruction [195] for a verdict of not guilty because the shipments of liquor were interstate shipments and constituted interstate commerce within the meaning of the commerce clause of the Federal Constitution. That the liquors being for the personal use of the consignees respectively § 2659a is repugnant to the Constitution of Kentucky, and if the indictment was authorized by the act of Congress known as the Webb-Kenyon law, that law is in contravention of the interstate commerce clause of the Constitution of the United States and of the 5th and 14th Amendments to the Constitution. This request for a peremptory instruction for the defendant was refused. The court instructed the jury that if it believed from the evidence that the Adams Express Company, as a common carrier, brought any spirituous, vinous, or malt liquors into Whitley county, being local option territory in the state of Kentucky, and there delivered the same to the persons named in the indictment, then the defendant was guilty and its punishment should be fixed at not less than $50 nor more than $100; and that upon the whole case, if they had any reasonable doubt of the guilt of the company, they should find a verdict of not guilty. The defendant duly excepted to the giving of these instructions and to the refusal to grant its prayer for a peremptory instruction. The company was convicted, and fined in the sum of $50. That amount not being sufficient to give the court of appeals of the state jurisdiction, a writ of error was taken from this court to the circuit court of Whitley county.

The Kentucky statute now under consideration was before this court in the case of Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189. In that case it was held that, as applied to interstate shipments, the statute was void as an attempt by the state to regulate commerce among the states. Such must still be the fate of the statute unless it is the effect of the act of Congress of March 1, 1913, 37 Stat. at L. 699, [196] chap. 90, Comp. Stat. 1913, § 8739, known as the Webb-Kenyon act, to require a different result. That act provides:

An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Before entering upon a consideration of the meaning of this act, it is well to have in mind certain principles of constitutional law, and, as well, certain legislation of Congress upon this subject in force at the time when the Webb-Kenyon act was passed. The Constitution of the United States grants to Congress authority to regulate commerce among the states, to the exclusion of state control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the Constitution itself. This general principle runs through all the cases decided in this court considering the matter, and has never been questioned since Chief Justice Marshall, for the court, delivered the judgment in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23. Applying this general principle, [197] it was held by this court in Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, that the state of Iowa, in the absence of congressional permission, had no authority to prohibit the sale of liquor in original packages in the hands of importers from other states in that state, and the court there declared that, whatever the individual views of its members might be

concerning the deleterious qualities of certain articles of commerce, when such articles were recognized by Congress as legitimate subjects of interstate commerce such interstate traffic could not be controlled by the laws of the state amounting to regulations thereof. In the course of the consideration of this case, this court said:

"The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

After the decision of Leisy v. Hardin, Congress passed the Wilson act of 1890, 26 Stat. at L. 313, chap. 728, Comp. Stat. 1913, § 8738. That act made intoxicating liquors transported in interstate commerce subject to the exercise of the police power of the states upon arrival in the state, in the same manner as though such liquors had been produced in the state or territory into which the same were shipped. The constitutionality of that act was attacked and came under consideration in this court in Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865, where the law was upheld. In affirming the right of Congress to pass the statute, this court said:

"In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to [198] these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. . . .

"Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, it was held that the Wilson act did not have the effect to permit interstate shipments of liquor to come under the operation of the liquor laws of the state until after their delivery to the consignee, and that one receiving liquor shipped in interstate commerce obtained the right to use the same, although he no longer had the right to sell it free from the restrictions imposed by the laws of the state. And see Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

From what we have said, it follows that, before the passage of the Webb-Kenyon act, while the state, in the exercise of its police power, might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson act to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the state. The history of the Webb-Kenyon act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook, in the passage of that act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the states by means of interstate commerce. That the act did not assume to deal with all interstate commerce shipments of intoxicating liquors into prohibitory territory in the states [199] is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the act to develop.

It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction, and the statute is to be taken to mean what it says.

Extraneous words omitted, this statute reads: "The shipment or transportation . . . of . . . intoxicating liquor . . . from one state . . . into any other state . . . which . . . intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state . . . is hereby prohibited." It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the state wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wil-

son act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon act, which prohibits the transportation of liquors into the state, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution.

It becomes necessary, therefore, to inquire whether a [200] shipment of the character here in question comes within the terms of the Webb-Kenyon act, because of the purpose to use the liquor in violation of the law of the state of Kentucky. The stipulation upon which the case was tried shows that the liquor was bought and paid for in Tennessee, and was shipped from that state into the state of Kentucky for the personal use of the consignee, without any intention on his part to dispose of it contrary to the law of the state.

The case under review was one of nineteen tried under the same stipulation. In one of them the fine imposed was large enough to give jurisdiction to the court of appeals of Kentucky, and the case before that court is found in 154 Ky. 462, 48 L.R.A.(N.S.) 342, 157 S. W. 908. Considering whether such shipment was in violation of the law of the state, that court, after commenting upon the fact that the stipulation showed that the liquors were intended by the consignees for their personal use, and were not intended by them to be sold and were not sold, contrary to law, further said:

"This being the purpose for which the liquor was intended to be received, possessed, and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. Calhoun v. Com. 154 Ky. 70, 156 S. W. 1077; Martin v. Com. 153 Ky. 784, 45 L.R.A.(N.S.) 957, 156 S. W. 870. As said in Com. v. Campbell, 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159:

"'The history of our state from its beginning shows that there was never even the claim of a right on the part of the legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; [201] and we are of opinion that it never has been within the competency of the legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution. The Bill of Rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority, —would be but an empty sound if the legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. . . . Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.'"

And further:

"It, therefore, appears that the issue in this case really comes down to this: was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the Constitution and laws of the state, and the opinions of this court, that it was not."

In the subsequent case of Adams Exp. Co. v. Com. 160 Ky. 66, 169 S. W. 603, it appeared that the liquor was intended by the consignee to be sold in violation of the law of the state, and was so sold, and the court held that in such case the carrier was bound before the delivery of the whisky, to be circumspect and to use [202] ordinary care to learn the purpose for which it was to be used; and if, acting in good faith upon reasonable grounds, the carrier was misled, it was not liable; otherwise it was; and that the question was one of fact for the jury. The court, however, expressly adhered to its ruling in Adams Exp. Co. v. Com. 154 Ky. supra, under facts such as were there presented, and such as appear in the case now under consideration.

It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the state of Kentucky, as such laws are construed by the highest court of that state, the Webb-Kenyon law has no application and no effect to change the general rule that the states may not regulate commerce wholly interstate. As it appears that the conviction in this case was for an inter-

state transportation, not prohibited by the Webb-Kenyon act, the rights under the interstate commerce clause of the Constitution expressly set up by the Express Company were denied by the judgment of conviction in the Circuit Court of Whitley County, and that judgment must accordingly be reversed.

Reversed.

COMMONWEALTH OF VIRGINIA, Complainant,
v.
STATE OF WEST VIRGINIA, Defendant.

(See S. C. Reporter's ed. 202-242.)

States — compacts — apportioning public debt — crediting assets.

1. Moneys and securities which had previously been specifically dedicated to the payment of the public debt of Virginia must be taken into account in determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — assets — date of valuation.

2. The value of the assets specifically dedicated to the payment of the Virginia public debt, which must be taken into account when determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, should be ascertained as of January 1, 1861, rather than as of June 20, 1863 (the date of separation), in view of the provision of W. Va. Const. art. 8, § 8, conditioning her admission to the Union, which unmistakably fixed January 1, 1861, as the date as of which the amount of the debt to be apportioned should be ascertained.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt— valuation of assets.

3. The ultimate realization by Virginia of securities which had been specifically dedicated to the payment of the public debt is not the criterion of their value as assets, when determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state, which was assumed by West Virginia at the time of its creation as a state.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

Evidence — documentary — stock quotations.

4. Accredited price current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence on the question of market value of railway stock.

[For other cases, see Evidence, IV. a, in Digest Sup. Ct. 1908.]

Evidence — weight — valuation of railway stock.

5. The master may disregard published quotations and base his findings as to the value of railway stock upon book value and earnings, where the quotations show very infrequent transactions in the stock, and those shown are of unknown significance.

[For other cases, see Evidence, XII. l, in Digest Sup. Ct. 1908.]

Evidence — relevancy — value.

6. The value of railway stock may be proved by evidence tending to show its intrinsic value, as well as by proof of market value.

[For other cases, see Evidence, XI. f, in Digest Sup. Ct. 1908.]

Evidence — documentary — carrier's reports — value of railway shares.

7. Annual reports of a railway company's affairs, which the state requires to be made on oath for the benefit of the public, and which the state publishes as true as a part of its public records for public inspection, are admissible in evidence against the state on the question of the value of the railway company's shares.

[For other cases, see Evidence, IV. r, in Digest Sup. Ct. 1908.]

Evidence — weight — value of stock — book values.

8. Book values need not necessarily control the master's finding as to the value of railway shares, but earning capacity should also be taken into consideration.

[For other cases, see Evidence, XII. l, in Digest Sup. Ct. 1908.]

Evidence — presumption — value of railway stock.

9. No presumption exists, in the absence of all supporting evidence, that corporate stock is worth par.

[For other cases, see Evidence, II. k, l, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — valuation of assets.

10. A mortgage loan made by Virginia to a railway company could not be valued as an asset by the master, when determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia on January 1, 1861, which was assumed by West Virginia at the time of its creation as a state, at a greater sum than the gold equivalent, computed as of that

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NOTE.—On newspaper quotations as evidence of value—see note to Mt. Vernon Brewing Co. v. Teschner, 16 L.R.A.(N.S.) 758.

On methods of proving market price—see note to Fenerstein v. United States, 18 L. ed. U. S. 121.

On claims against a state for interest—see note to Northwestern & P. H. Bank v. State, 42 L.R.A. 62.

date, of the payments subsequently made thereon in Confederate moneys, where there is no other evidence that the loan had any value.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — valuation of assets.

11. The master would not be justified in valuing a loan made by Virginia to a railway company at more than the moneys realized therefrom, when determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, where there is no other evidence to support a valuation.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — valuation of assets.

12. West Virginia should be credited, when determining its equitable proportion of the Virginia public debt which West Virginia assumed at the time of its creation as a state, with its proportion of the face value of Virginia bonds forming a part of the public debt to be divided, which, being held by the United States, were subsequently set off, under a settlement with the United States, against a claim on the part of Virginia for interest upon advances made to the United States.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — valuation of assets.

13. A railway bond owned by Virginia should be credited at its face value as an asset when determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia on January 1, 1861, which was assumed by West Virginia at the time of its creation as a state, where it was a good asset at its face value on that date, although it may later have been paid in Confederate currency.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — valuation of assets.

14. A deduction for expenses of realization may be made from the book value of bank shares owned by Virginia when fixing their value as assets in the determination of the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — valuation of assets.

15. Ultimate realization, discounted as of January 1, 1861, is all that can be allowed—in the absence of any evidence showing actual worth—when valuing as an asset securities sold by Virginia to a railway company, for the purpose of determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia on that date, which was assumed by West Virginia at the time of its creation as a state.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — valuation of assets.

16. The average net earnings of a canal company for twenty-five years may be capitalized at 6 per cent as a basis for arriving at the value as an asset of its preferred capital stock held by the state of Virginia, when determining the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia on January 1, 1861, which was assumed by West Virginia at the time of its creation as a state, where there is no other satisfactory basis for a computation of value; and this valuation, because of the absence of any allowance for depreciation, need not be increased, even should the net earnings for a shorter period immediately preceding the separation of the two states be slightly larger.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — crediting taxes and fines.

17. Taxes, fines, etc., paid to Virginia by certain counties in West Virginia after the organization of the latter state, may not be credited to West Virginia when determining the amount due the former state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia, at the time of its creation as a state, where the expenses of the actual government of the counties in question for the maintenance of which the sums paid were raised is unascertained.

[For other cases, see States, VII. b; VIII. a, in Digest Sup. Ct. 1908.]

States — compacts — apportioning public debt — credits.

18. Crediting West Virginia with her proportionate share of the assets specifically dedicated by Virginia to the payment of the public debt, when determining the amount due Virginia by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state, requires that West Virginia should be charged with the moneys and securities which it received from the restored government of Virginia.

[For other cases, see States, VII. a; VIII. b, in Digest Sup. Ct. 1908.]

Interest — against state — compact between states — apportioning public debt.

19. The contract assumption by West Virginia at the time of its creation as a state of its equitable proportion of the public debt of the original state of Virginia must be deemed to embrace interest as well as principal,—especially in view of the lan-

guage of W. Va. Const. art. 8, § 8, which, after defining the state's engagement, declares that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

[For other cases, see Interest, I. b, 2, in Digest Sup. Ct. 1908.]

Interest —against state — rate.

20. West Virginia should not be held to the interest rate reserved in the Virginia bonded indebtedness, when determining the amount due the latter state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, where Virginia, as to her estimated share, has made arrangements with the creditors for a lower rate.

[For other cases, see Interest, II., in Digest Sup. Ct. 1908.]

Interest — against state — rate.

21. Interest at 4 per cent from January 1, 1861, to July 1, 1891, and at 3 per cent from the latter date to the date of entry of the decree, will be allowed to the state of Virginia in the determination of the amount due that state by the state of West Virginia as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, and the decree will provide for interest at 5 per cent upon the amount awarded until paid.

[For other cases, see Interest, II., in Digest Sup. Ct. 1908.]

[No. 2, Original.]

Argued April 27, 28, and 29, 1915. Decided June 14, 1915.

ORIGINAL BILL in Equity filed by the Commonwealth of Virginia against the State of West Virginia, which seeks an adjudication of the amount due to the former state as the equitable proportion of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state. Final decree ordered.

The facts are stated in the opinion.

Messrs. **Randolph Harrison** and **William A. Anderson** argued the cause, and, with Mr. John Garland Pollard, Attorney General of Virginia, filed a brief for complainant:

The defense of "laches," in equity, is only permitted to defeat an acknowledged right on one or both of the following grounds:

(1) That it raises the presumption that the claim has been abandoned or satisfied.

(2) That the party pleading it has been seriously prejudiced by the culpable failure of the plaintiff to assert his claim.

Demuth v. Old Town Bank, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 268; Coles v. Ballard, 78 Va. 147; Wissler v. Craig, 80 Va. 30; Cottrell v. Watkins, 89 Va. 801, 19 L.R.A 754, 37 Am. St. Rep. 897, 17 S. E. 328; Johnson v. Atlantic, G. & W. I. Transit Co. 156 U. S. 618, 648, 39 L. ed. 556, 566, 15 Sup. Ct. Rep. 520; Sebag v. Abitbol, 4 Maule & S. 462, 1 Starkie, 79; Morse v. Seibold, 147 Ill. 318, 35 N. E. 371; Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907.

Moreover, the defense of laches cannot be interposed against a state.

Armstrong v. Morrill, 14 Wall. 144, 145, 20 L. ed. 771, 772; Stoughton v. Baker, 4 Mass. 526, 3 Am. Dec. 236; Metropolitan R. Co. v. District of Columbia, 132 U. S. 11, 33 L. ed. 235, 10 Sup. Ct. Rep. 9; Weber v. State Harbor Comrs. 18 Wall. 70, 21 L. ed. 803; Gibson v. Chouteau, 13 Wall. 99, 20 L. ed. 536; Lindsey v. Miller, 6 Pet. 673, 8 L. ed. 541; United States v. Knight, 14 Pet. 315, 10 L. ed. 472; United States v. Thompson, 98 U. S. 489, 25 L. ed. 195; Gaussen v. United States, 97 U. S. 584, 24 L. ed. 1009; United States v. Nashville, C. & St. L. R. Co. 118 U. S. 125, 30 L. ed. 83, 6 Sup. Ct. Rep. 1006.

Market values and market quotations of securities constitute competent and important evidence as to their true value.

1 Greenl. Ev. 16th ed. § 162-L, p. 270; Sisson v. Cleveland & T. R. Co. 14 Mich. 489, 90 Am. Dec. 252; Cliquot's Champagne, 3 Wall. 114, 18 L. ed. 116; Fennerstein's Champagne (Fennerstein v. United States) 3 Wall. 145–149, 18 L. ed. 121–125; Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908; State ex rel. Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922, 929; Ferebee v. Berry, 168 N. C. 281, 84 S. E. 262.

The four requirements which are prescribed as conditions for admitting ancient writings, without proof of handwriting, are all satisfied as to the ancient books of Davenport & Company.

1 Greenl. Ev. 16th ed. § 575-B. pp. 720, 721.

The rule dispensing with proof of handwriting, as to ancient writings, other than deeds or other instruments, applies to "entries and writings" such as those in these old books.

1 Greenl. Ev. 16th ed. §§ 154, 570, 578, and the cases cited in footnote to § 154.

Mr. **A. A. Lilly**, Attorney General of West Virginia, and Mr. **John H. Holt** argued the cause, and, with Mr. **Charles E. Hogg**, filed a brief for defendant:

The books and balance sheets of the Richmond, Fredericksburg, & Potomac Railroad Company are prima facie correct.

Louisville & N. R. Co. v. Hart County, 116 Ky. 186, 75 S. W. 289, 77 S. W. 361; Wilson

v. Potter, 19 Ky. L. Rep. 988, 42 S. W. 836; Lambert v. Griffith, 44 Mich. 65, 6 N. W. 106; Budeke v. Ratterman, 2 Tenn. Ch. 459; Stuart v. McKichan, 74 Ill. 122.

The actual value of stocks may be shown by a comparison of the assets and liabilities of the company issuing them.

Crichfield v. Julia, 77 C. C. A. 297, 147 Fed. 65; Nelson v. First Nat. Bank, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. 798; Henry v. North American R. Constr. Co. 85 C. C. A. 409, 158 Fed. 79; Butler v. Wright, 103 App. Div. 463, 93 N. Y. Supp. 113; Cabble v. Cabble, 111 App. Div. 426, 97 N. Y. Supp. 773; Von Au v. Magenheimer, 126 App. Div. 257, 110 N. Y. Supp. 629, 196 N. Y. 510, 89 N. E. 1114; Leurey v. Bank of Baton Rouge, 131 La. 30, 58 So. 1022, Ann. Cas. 1913E. 1168; Beaty v. Johnson, 66 Ark. 529, 52 S. W. 129; McDonald v. Danahy, 196 Ill. 133, 63 N. E. 648; Greer v. Lafayette County Bank, 128 Mo. 559, 30 S. W. 319; State ex rel. Bross v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; White v. Jouett, 147 Ky. 197, 144 S. W. 55; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252; Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co. 118 Mo. 461, 24 S. W. 129; Tevis v. Ryan, 13 Ariz. 120, 108 Pac. 461; Felker v. Hyman, — Tex. Civ. App. —, 135 S. W. 1128; Milwaukee Trust Co. v. Milwaukee, 151 Wis. 224, 138 N. W. 707.

The alleged market quotations were properly ignored by the master.

Whelan v. Lynch, 60 N. Y. 474, 19 Am. Rep. 202; Norfolk & W. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606; 3 Wigmore, Ev. § 1704; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522; Jones v. Ortel, 114 Md. 205, 78 Atl. 1030; Mt. Vernon Brewing Co. v. Teschner, 108 Md. 158, 16 L.R.A.(N.S.) 758, 69 Atl. 702; St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 118 Am. St. Rep. 75, 101 S. W. 760, 12 Ann. Cas. 125, 101 S. W. 760; Bullard v. Stewart, 46 Tex. Civ. App. 49, 102 S. W. 174; Meriwether v. Quincy, O. & K. C. R. Co. 128 Mo. App. 647, 107 S. W. 434; Wilbur v. Buckingham, 153 Iowa, 194, 132 N. W. 960, Ann. Cas. 1913E, 210.

The presumption is that a bond, whatever the rule may be with respect to stock, is worth par.

Henry v. North American R. Constr. Co. 85 C. C. A. 409, 158 Fed. 79; Harris's Appeal, 9 Sadler (Pa.) 233, 12 Atl. 743; Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co. 118 Mo. 447, 24 S. W. 129; 2 Clark & M. Priv. Corp. p. 1170, 3 Sutherland, Damages, 3d ed. p. 1921.

If the division of the old commonwealth of Virginia into two states had taken place without any agreement upon the part of the state of West Virginia to assume an equitable proportion of the pre-existing debt, out of analogy to the rule that obtains in the division of municipalities, Virginia would have taken all the property originally owned by the old commonwealth, excepting the physical property actually situated within the new state, and would have become responsible for the entire debt.

1 Dill. Mun. Corp. 3d ed. §§ 188, 189, p. 216; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552.

The assets in question here were devoted by the legislature of Virginia to the payment of her public debt, and the same have, in consequence, become trust funds.

The Supreme Court having held that West Virginia is compelled to pay 23½ per cent of the debt, West Virginia should receive 23½ per cent of the value of the assets.

Virginia v. West Virginia, 220 U. S. 1, 27, 55 L. ed. 353, 358, 31 Sup. Ct. Rep. 330.

Unliquidated amounts do not bear interest, and it cannot be said that interest follows the principal as the shadow does the substance; for, until the amount is ascertained, there is no principal, and there is no substance.

Redfield v. Ystalyfera Iron Co. 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570; Stephens v. Phœnix Bridge Co. 71 C. C. A. 374, 139 Fed. 248; 1 Sedgw. Damages, 9th ed. 614; Barrow v. Reab, 9 How. 371, 13 L. ed. 179; Wittenberg v. Mollyneaux, 59 Neb. 203, 80 N. W. 824; Swanson v. Andrus, 83 Minn. 505, 86 N. W. 465; Dady v. Condit, 209 Ill. 488, 70 N. E. 1089; Brownell Improv. Co. v. Critchfield, 197 Ill. 61, 64 N. E. 332; Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494; Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312; Bright v. James, 35 R. I. 492, 87 Atl. 316, Ann. Cas. 1915B, 1099; Bennett v. Federal Coal & Coke Co. 70 W. Va. 456, 40 L.R.A.(N.S.) 588, 74 S. E. 418, Ann. Cas. 1913E, 578; Courteney v. Standard Box Co. 16 Cal. App. 600, 117 Pac. 778; 16 Am. & Eng. Enc. Law, 2d ed. 1016; Auditor of Public Accounts v. Dugger, 3 Leigh, 241; Philips v. Williams, 5 Gratt. 259; M'Connico v. Curzen, 2 Call (Va.) 358, 1 Am. Dec. 540; Skipwith v. Clinch, 2 Call (Va.) 253; Waggoner v. Gray, 2 Hen. & M. 603; Stearns v. Mason, 24 Gratt. 484; Lynchburg v. Amherst County, 115 Va. 608, 80 S. E. 117.

To hold a state to the payment of interest upon an obligation which she has contracted, there must be an express promise to pay interest. In the absence of such express promise there is no liability for interest.

United States v. North Carolina, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 Sup. Ct. Rep. 920; South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct.

Rep. 269; Molineux v. State, 109 Cal. 378, 50 Am. St. Rep. 49, 42 Pac. 34; Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; Seton v. Hoyt, 34 Or. 266, 43 L.R.A. 634, 75 Am. St. Rep. 641, 55 Pac. 967; Jackson County v. Kaul, 77 Kan. 717, 17 L.R.A.(N.S.) 552, 96 Pac. 45.

West Virginia is not chargeable with interest as damages.

16 Am. & Eng. Enc. Law, 2d ed. 1014; Bright v. James, 35 R. I. 492, 87 Atl. 316, Ann. Cas. 1915B, 1099.

Unearned interest is no part of the public debt of Virginia existing prior to January 1, 1861.

Illinois Steel Co. v. O'Connell, 156 Ill. 624, 31 L.R.A. 265, 47 Am. St. Rep. 245, 41 N. E. 185; 1 Abbott, Mun. Corp. pp. 354, 355, § 160; Epping v. Columbus, 117 Ga. 263, 43 S. E. 803; Herman v. Oconto, 110 Wis. 660, 86 N. W. 681; Jones v. Hurlburt, 13 Neb. 125, 13 N. W. 5; Finlayson v. Vaughn, 54 Minn. 331, 56 N. W. 49; Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441; Kelly v. Cole, 63 Kan. 385, 65 Pac. 672; Gibbons v. Mobile & G. N. R. Co. 36 Ala. 410.

Messrs. **Holmes Conrad** and **Sanford Robinson** argued the cause and filed a brief for the bondholding creditors:

The master should have taken judicial notice that the expenses and shrinkage due to liquidation would be much nearer 50 per cent than 5 per cent.

Thayer, Ev. pp. 278, 301, 302.

West Virginia is liable for interest.

United States v. North Carolina, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920; South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269; Jones v. Williams, 2 Call (Va.) 106; Baker v. Morris, 10 Leigh, 284; McVeigh v. Howard, 87 Va. 599, 13 S. E. 31; Stuart v. Hurt, 88 Va. 343, 13 S. E. 438; Hatcher v. Lewis, 4 Rand. (Va.) 157; Chapman v. Shepherd, 24 Gratt. 384; Roberts v. Cocke, 28 Gratt. 207; Tidball v. Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Tazewell v. Saunders, 13 Gratt. 370; Shipman v. Bailey, 20 W. Va. 146; Pickens v. McCoy, 24 W. Va. 352; Higginbotham v. Com. 25 Gratt. 627.

Mr. Justice **Hughes** delivered the opinion of the court:

Upon the hearing in 1911, it was determined that the public debt of Virginia, as of January 1, 1861,—of which West Virginia agreed to assume "an equitable proportion,"—amounted to $33,897,073.82; that, in view of a reduction secured by Virginia and with the consent of her creditors, the amount to be apportioned was $30,563,861.56; that the apportionment should be made according to the estimated value of the property of the [205] two states at the time of their separation, June 20, 1863; and that upon this basis the proportion of West Virginia was 23.5 per cent, making her share of the principal of the debt $7,182,507.46. While the fundamental issues were thus decided, the controversy was not completely determined. In view of the consideration due to the character of the parties, and of the fact that the cause was "a quasi international difference referred to this court in reliance upon the honor and constitutional obligations of the states concerned,", it was deemed advisable to go no farther at that stage, but to afford opportunity for conference and adjustment. Accordingly, the question of interest was left open. Virginia v. West Virginia, 220 U. S. 1, 35, 36, 55 L. ed. 353, 360, 361, 31 Sup. Ct. Rep. 330.

At the following term, a motion on the part of Virginia that the court should proceed at once to final decree was denied in the light of the public reasons urged for the granting of further time. 222 U. S. 17, 56 L. ed. 71, 32 Sup. Ct. Rep. 4. Another application of this sort was made by Virginia in November, 1913, and was again refused, and the cause was assigned for final hearing in April, 1914. 231 U. S. 89, 58 L. ed. 135, 34 Sup. Ct. Rep. 29.

At that time, West Virginia, as a result of her investigations, asked permission to file a supplemental answer asserting the existence of credits, which she claimed as against the portion of the principal debt assumed, and also alleging grounds why she should not be charged with interest. Without expressing an opinion as to the propriety of allowing any of the described items of credit, and refraining from applying the ordinary and more restricted rules of procedure which would govern in cases between private litigants, the court granted the application to the end that this public controversy should be determined only after the amplest opportunity for hearing and with full recognition of every equity that might be found to exist. The subject-matter of the supplemental answer, considered as traversed by Virginia, was at once referred to Charles E. Littlefield, Esq., the master before [206] whom the former proceedings had been had, with directions to hear and consider such pertinent evidence as West Virginia might offer, and such counter-showing as Virginia might make, and to report the evidence with his conclusions deduced therefrom, together with a statement of his views "concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous decree of this court,"—that decree mean-

while to remain wholly unaffected. 234 U. S. 117, 58 L. ed. 1243, 34 Sup. Ct. Rep. 889.

The master's report has been filed, all the questions remaining to be determined have been fully argued, and the case is before us for final decree.

At the outset, the master states that the extensive investigation involved in the later reference, with respect to the existence and the value of the various assets claimed as credits, was then prosecuted for the first time; and that so far as these items had been referred to in the earlier proceeding, it was for an entirely different purpose in the main. The master reports that, in his view, the assets as detailed by him were applicable according to their value as of January 1, 1861, to the public debt of Virginia, which was to be apportioned as of that date; that the value of these assets then amounted to $14,511,945.74, of which West Virginia's share—23½ per cent—would be $3,410,307.25. That if this amount were to be credited to her in reduction of her liability there should be offset certain moneys and stocks received by her from the Restored Government of Virginia aggregating $541,467.76, leaving a net credit to West Virginia of $2,868,839.49. This would reduce West Virginia's liability for principal from $7,182,507.46 to $4,313,667.97. The master also concluded that West Virginia, by virtue of her contract with Virginia, is liable for interest from January 1, 1861, the date as of which her share of the principal is determined.

[207] The ground for the allowance of the credits is that the moneys and securities in question had been specifically dedicated to the payment of the public debt. The moneys embraced cash in the sinking fund on January 1, 1861, and the securities had been purchased with proceeds of the debt. In 1838, the general assembly of Virginia, in authorizing the negotiation of loans, provided that the stock of any joint stock company purchased with the money so borrowed, together with the dividends and other net income which might accrue therefrom to the commonwealth, should be, and were, "appropriated and pledged" for the payment of the interest and for the final redemption of the principal borrowed. Act of April 9, 1838, § 3. The Constitution of 1851 directed the creation of a sinking fund which was to be applied to the debt (art. 4, § 29), and, with respect to the state's stocks, thus provided: "The general assembly may, at any time, direct a sale of the stocks held by the commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund, and be applied in like manner." Id. § 30. In 1853, the legislature in establishing the sinking fund enacted a corresponding provision. Act of March 26, 1853, § 3. The question then is not one of the division of public property, merely because of its character as such. In the light of the origin and nature of the investments which the master has reviewed and valued, and of the provisions of the Constitution and statutes of the state, it is clear that these particular assets must be regarded as a fund specially devoted to the payment of the debt to be apportioned. In this view, West Virginia is entitled to have these assets taken into account in fixing the amount of her liability. It cannot be conceived that, being held for the undivided debt, it was intended that they should be applied exclusively to Virginia's share. As West Virginia is to bear 23½ per [208] cent of the debt as it existed on January 1, 1861, she should be credited with a similar part of the fund, fairly valued, which had been pledged for its discharge. This equity is inherent in the obligation.

Both parties have filed exceptions to the report of the master. The first two exceptions on the part of Virginia, and of her committee of bondholding creditors, raise the same point,—that is, that the master erred in selecting January 1, 1861, instead of June 20, 1863 (the date of separation), as the time as of which the value of the assets should be ascertained.

The question must be determined by reference to the terms of the contract between the two states (220 U. S. p. 28) upon which the liability is based. The undertaking is found in the provision of the Constitution of West Virginia, which conditioned her admission to the Union. It is as follows (art. 8, § 8):

"An equitable proportion of the public debt of the commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this state; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

It is not to be doubted that this fixed January 1, 1861, as the date of cleavage with respect to the amount of the debt to be apportioned. It is not important that this date was prior to the separation of the two states. It was competent for the parties to fix a date, and they did so. The explanation of the selection may readily be found in the course of events, but it is sufficient to note that the selection was

made. The ascertainment of the ratio of division must not be confused with the fixing of the amount to be divided. With regard to the former, we decided that we must look to the time when West Virginia became [209] a state, that is, in determining the general resources of the two states when the separation was effected. 220 U. S. p. 34. But we did not refer to that time for the purpose of ascertaining the indebtedness which was to be apportioned. That, it was definitely stipulated by the agreement, was the debt as it stood on January 1, 1861. Id. p. 27. It follows that credits then existing were to be applied as of that date. Otherwise, the net amount which equitably was to be divided would not be determined. For example, it is not disputed that on January 1, 1861, there were over $800,000 in cash in the sinking fund. If the amount of the debt was to be ascertained as of that date for the purpose of equitable division, the sinking fund would have to be credited as of the same date, either in reduction of the debt, or by crediting to each state her proper share according to her proportion of the debt. We know of no method of accounting which would settle and finally divide the debt as of January 1, 1861, and credit the sinking fund as of 1863. The same is true of the assets which had been specifically appropriated for the payment of the debt. The very ground of the credit of their value implies that it should be allowed as of the time fixed for the taking of the account of the indebtedness to be apportioned. The exceptions referred to cannot be sustained.

There is the further exception presented by the bondholding creditors (not by Virginia) to the refusal of the master to hold that Virginia should not be charged with a value in excess of the price or amount that she actually received. The argument treats the ultimate realization by Virginia as the criterion. We must again refer to the contract. It was not intended to create and it did not create for the two states a partnership or community of interest in these assets, or provide that they should be held in trust by Virginia for West Virginia. It contemplated that each state should assume a fixed amount of [210] the debt,—not that there should be equitable co-ownership of a sinking fund to be liquidated for joint account. It did not look to a future accounting for moneys realized after the vicissitudes of civil war. There was to be a complete and final determination of West Virginia's "equitable proportion" of the debt existing on January 1, 1861, and the account with Virginia was to be closed. As to this share of West Virginia, she was to establish her own sinking fund. There was, however, the equity arising from the fact that moneys and securities had been specially set apart for the payment of the debt. The facts as to this were well known, and, as we have said, it cannot be supposed that West Virginia's fair and just proportion was to be fixed on a basis which denied her an appropriate share in the fund thus constituted, applying that which was meant for the whole only to Virginia's part. In view of the situation of the parties, and of the equitable adjustment which was contemplated, the question necessarily becomes one of valuation as of the selected date, and not solely of the amount realized in the later years.

It is argued that we should take the ultimate proceeds whenever they were received, and by discounting these upon a 6 per cent basis find their value as of January 1, 1861 (assuming that to be the proper date), and credit the amount thus ascertained as the then value of the securities. This contention cannot be maintained. It would seem to be clear that such a method could only be justified in exceptional instances, in the absence of other and better evidence. The amount of the ultimate proceeds may have probative force in particular cases, according to the approved circumstances, but it is not the criterion of the value to be determined.

We are thus brought to the findings as to value. The various items, and the amounts allowed, are classified by the master (following the arrangement of the supplemental answer) as follows:

[211] Class A, Cash in sinking fund	$819,250.03
Class B, Stock of Richmond, Fredericksburg, & Potomac Railroad Company	323,167.36
Class C, Various other stocks, loans, etc. (19 items)	7,352,594.65
Class D, Interest and dividends accruing prior to January 1, 1861, and subsequently received (20 items)	345,554.80
Class E, Bank stocks	3,802,357.48
Class F, Stocks sold to Atlantic, Mississippi, & Ohio Railroad Company	204,688.42
Class G, Stock of James River & Kanawha Company	1,664,333.00
Total	$14,511,945.74

Virginia and the bondholding creditors do not except to these findings on the basis of January 1, 1861, with respect to Class A, Class C (items 5 to 18, inclusive), and Classes D, E, and F. They except to the findings as to the value of the securities in Class B, Class C (items 1 to 4, inclusive, and item 19), and Class G. West Virginia

has filed exceptions to the findings as to the same items (save item 19 in Class C) and also excepts to the findings of value in ten other instances. There are no exceptions on either side with respect to Class A and Class D.

To avoid repetition, the exceptions of both parties will be considered in connection with each item in dispute.

1. *Class B. Stock of the Richmond, Fredericksburg, & Potomac Railroad Company.* Virginia held 2,752 shares, of the par value of $275,200, out of a total stock issue of $1,116,100. This stock she still owns.

In connection with this item and the other valuations to which they except, Virginia and the bondholding creditors complain that the master disregarded published [212] quotations and based his findings upon book value and earnings. The quotations referred to appeared in the "Richmond Dispatch," a newspaper of high reputation, and embraced reports of sales by brokers of good standing. It is unquestioned that, in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence. Cliquot's Champagne, 3 Wall. 114, 141, 18 L. ed. 116, 120; Fennerstein's Champagne (Fennerstein v. United States) 3 Wall. 145, 18 L. ed. 121; Chaffee v. United States, 18 Wall. 516, 542, 21 L. ed. 908, 912; Sisson v. Cleveland & T. R. Co. 14 Mich. 489, 90 Am. Dec. 252; Cleveland & T. R. Co. v. Perkins, 17 Mich. 296; Whitney v. Thacher, 117 Mass. 523; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522; State ex rel. Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922, 929; Nash v. Classen, 163 Ill. 409, 45 N. E. 276; Washington Ice Co. v. Webster, 68 Me. 449; Harrison v. Glover, 72 N. Y. 451. We need not stop to review the decisions that are cited with respect to the extent of the preliminary showing of authenticity that is required (Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Norfolk & W. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522) inasmuch as all the quotations asserted to have any bearing were received in evidence by the master. We are now simply concerned with the question of their importance or weight, and whether they can be deemed to have the controlling effect that is sought to be ascribed to them.

Thus with respect to the stock of the Richmond, Fredericksburg, & Potomac Railroad Company, the published quotations were extremely meager. There was no stock exchange at Richmond and the transactions shown are very few. There is mention of two sales at 80 in November, 1860, but the number of shares sold is not stated or whether the sales were public or private. There are no reports of earlier sales or of any between that time and April, 1863. During this period, no quotations appear under the head of "Bid" or "Asked." In December, 1860, [213] and also in the early part of 1861, under the head of "Quoted" there is mention of 76½ and 77 "Last sales," but nothing appears at these times under the head of "Sales," and the time and amount of the "last sales" referred to are not given. In short, we have very infrequent transactions, of unknown significance, which fall short of furnishing a satisfactory indication of the value of the large block of stock held by the state.

The fact, however, that there was no sufficient proof of market value, was not an insuperable obstacle to the making of a fair valuation. It was clearly proper to introduce evidence tending to show the intrinsic value of the shares. Nelson v. First Nat. Bank, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. 798, 803; Crichfield v. Julia, 77 C. C. A. 297, 147 Fed. 65, 73; Henry v. North American R. Constr. Co. 85 C. C. A. 409, 158 Fed. 79, 81; Murray v. Stanton, 99 Mass. 345; Industrial & General Trust v. Tod, 180 N. Y. 215, 232, 73 N. E. 7; State ex rel. Bross v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; Redding v. Godwin, 44 Minn. 355, 46 N. W. 563; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252. For this purpose, resort was had to corporate accounts and reports of the company's affairs. With respect to the competency of the proof (in the case both of this company and of others, the value of whose shares was in question) in the absence of supporting testimony as to the facts recited, the master refers in his report to the provisions of the statutes of Virginia. By the act of March 15, 1856, it was provided that every railroad corporation in which the commonwealth was interested as a stockholder or creditor should annually make report to the board of public works, showing the condition of the property, and containing full information with respect to capital stock, indebtedness, details of cost, physical characteristics, equipment, statistics of transportation, and a detailed statement, with an appropriate classification of earnings and expenses. By the same act reports were required from canal and navigation companies. The master says: "The state was a stockholder in all of these [214] corporations. By her statute she required the returns to be made on oath for the information of the public. She published them for public information as true, and the publications are now a part

of her public records." As such they were deemed to be admissible against her in this litigation. They were, of course, not regarded as conclusive, and the question of their weight was reserved.

In the case of the road now under consideration, the book value, based on the cost of the railroad and net current assets, was practically 150 as of January 1, 1861. It had increased from 144.2 on March 31, 1859, to 150.4 on March 31, 1861. This book value was deduced from the annual trial balances as of March 31 in each year, purporting to show assets and liabilities. The greater part of the surplus was invested in construction. There was evidence that the cost was carried forward carefully from year to year, generally under classified headings, and it did not appear to contain items that were not legitimate. The annual reports indicated the making of repairs and renewals to keep the road in good condition. Between 1848 and 1861, there were outlays amounting to $132,841.93, largely for added equipment and improvements, which had been charged to operating expenses. As to earnings, it appeared that the road had been built about 1837. There had been paid in dividends to March 31, 1861, $1,099,280.64. There were no dividends in 1856, 1857, and 1858. One half of the dividends in 1854, and the dividends of 1855, 1859, and 1860, were paid in bonds; they were deducted in arriving at book value. The dividends for the eleven years ending with 1860 averaged 5.09 per cent. The master found that capitalizing these on a 6 per cent basis would give a value of $84.83 per share. He concluded that a fair estimate was to take the average of the book value and this "earning value" as indicated by the dividends, or 117.43 per share. This gave [215] for the total holding of the state a value of $323,167.36, which the master allowed.

West Virginia excepts to the finding upon the ground that the book value of 150 per share should have been taken. This would make a difference in the total value of the stock of $89,632.64, or in the amount of West Virginia's credit of $21,063.68.

The exception is not well taken. It is urged that the book value represents actual value where books are correctly kept. This is not necessarily true, as books may be said to be correctly kept, in a sense, when they truly state the items set forth. But cost carried forward may not be the same as present value. Despite repairs and renewals, a suitable allowance for depreciation may not have been made. It would be too much to say that there is any controlling presumption, and it clearly would not have been just to value the shares on a statement of book cost and surplus without taking into consideration the earning capacity. It is also complained that if the dividends for fifteen years (from 1850 to 1864) had been taken, the average would have been higher; but this included dividends after 1861, paid in Confederate currency. It may be said that in this instance (as distinguished from others to which we shall presently refer) the master arrived at his "earning value" by taking the dividends declared instead of the actual net receipts, and that the latter exceeded the former. But the statement introduced gave the dividends; there was no separate computation of earnings, and these are not shown except as they may be computed from the trial balances which we have only for three years prior to March 30, 1861.

The master sought to give proper weight to all considerations. His estimate upon this record could be only an approximation, but aside from any question as to the propriety of the precise method of calculation employed, there can be no doubt that the result has support in the [216] evidence and does full justice to West Virginia. The exceptions are overruled.

2. *Class C. Items 1 to 4, inclusive.* These are railroad stocks and loans. In view of what has already been said, the exceptions may be disposed of briefly. The exception of Virginia and the bondholding creditors is substantially the same as that taken with respect to the item in Class B, and West Virginia insists that the full book value of the securities should have been allowed.

Item 1. —17,490 shares (par value $50) of the stock of the Orange & Alexandria Railroad Company. There was, in addition, a loan of $398,670.60 to this company, for which the master allowed the face value.

There are no market quotations of this stock in 1860 or 1861. The company was incorporated about the year 1848. The book value was 50.27 in 1856, and 53.32 in 1860. This was deduced from the trial balance of 1856 and from the subsequent profits set forth by the reports to the state. There was no showing of allowance for depreciation. Dividends had been paid on preferred stock in 1857-59. It does not appear that any dividends were declared in 1860 or 1861, although apparently dividends to the amount of $31,604.09 had accrued prior to January 1, 1861, for which the state received dividend bonds; the time of the declaration of these is not given. The road was operated at a profit. Capitalizing the profits for five years ending with 1860 at 6 per cent, the master found a value of 12.28, and taking the average of this value and the book value (53.32), he estimated

the shares at 32.80, or at a total value of $573,672.

Item 2. —12,000 shares (par value $100) of the stock of the Richmond & Danville Railroad Company. Loan of $565,803.34 was allowed at face value.

There were published quotations of two sales, one in November, 1860, at 60, and another in January, 1861, at 57. The report does not give the number of shares sold [217] or whether the sale was public or private. There is reference at various dates under "Quoted" to "Last sales," but actual sales are not stated prior to 1863, except as mentioned above. The company was incorporated in 1847. The book value of the stock in 1860 (derived from the trial balance of 1856 and the later profits) was 137.37. The total stock was $1,981,197.50. Apparently, only one dividend had been declared,—in 1859, at four per cent. But the profits were large. For six years they had been about 9 per cent, and in 1860 they rose to about 11 per cent. The average for five years, ending with 1860, was $179,782.12, which capitalized on a 6 per cent basis would give a stock value of $2,996,368.67. In view of this showing of profit the master allowed the book value, with a deduction of 5 per cent, or 132.37 per share, making for the 12,000 shares held by the state an allowance of $1,588,440.

The exception of West Virginia in this instance merely relates to the deduction of 5 per cent. The master treated the book value as virtually a "liquidation value," and held that to arrive at a fair estimate of the actual value there should be some deduction for the expense of realization, and this, upon the testimony of the expert for West Virginia, he fixed at 5 per cent.

Item 3.—3,856 shares (par value $100) of the Richmond & Petersburg Railroad Company. Dividend bonds amounting to $33,408 were allowed at face value.

There are no quotations under the head of "Sales," but simply references under "Quoted" to "Last sales" (from 64 to 57½), without particulars. The road had been incorporated in 1836, and its outstanding stock in 1860 amounted to $835,750. The book value at that time was 121.86. The dividends for four years had averaged nearly 6 per cent. The yearly profits averaged more, or $53,627.66, which, capitalized, gave a share value of 106.95. The master took the average of the book value and so-called [218] earning value, allowing per share 114.40, or for the total of the state's stock, $441,126.40.

Item 4.—Stock of the Virginia Central Railroad Company. The state held on September 30, 1860, $1,891,670.68, in par value, of this stock, out of the then total stock of $3,152,854.23. By December 30, 1860, through additional payments on her subscription, the holdings of the state were increased to $1,927,382.57. There were also a loan of $90,032.82 and dividend bonds amounting to $143,508 for which face value was allowed.

There are quotations of two sales in November, 1860, at 50, but without details as to amount sold or character of sale. There are no other quotations of actual sales down to 1863, but simply references to "Last sales," as in the other cases above noted. The book value per share in 1860 was 131.16. Dividends were paid apparently to the amount of a little more than 4 per cent in 1859, and nearly 5 per cent in 1860. Profits for four years, ending with 1860, averaged $221,234.06, which, capitalized at 6 per cent, gave a share value of 116.95. Taking the average of this and the book value, or 124.05, the master allowed for the shares owned by the state, $2,390,918.08

It must be concluded that, with respect to these four securities (as in the case of the item in Class B), the quotations did not afford sufficient proof of market value to sustain the contentions of Virginia. On the other hand, in the absence of a more complete showing with respect to the physical property and its condition, the expenditures for maintenance and the extent of depreciation, it is wholly impossible to say that the book cost represented the actual value at the time to which the inquiry was addressed. Book cost, as we have said, would be a more or less doubtful criterion. After the lapse of so many years, an appraisal of this sort is obviously a matter of the greatest difficulty, and while the master's valuation of these stocks may be regarded as a liberal one, it is [219] probably as fair an estimate as could be made upon the facts presented.

3. *Class C. Items 6, 8, 10, and 17.* The exceptions in these instances are solely by West Virginia.

Item 6. Stock of the Alexandria, Loudon, & Hampshire Railroad Company. It appeared that between the time of incorporation (1853) and January 1, 1861, Virginia had invested in this stock $993,248. There were further investments, making the total in April, 1862, $1,017,248. All this stock was sold by Virginia on November 25, 1867, at $5 a share, that is, for $50,862.40. The proportion of this price applicable to the stock held on January 1, 1861, was $49,662.-05. This was the amount first stated as its value in West Virginia's exhibit of the values of items in Class C; but, subsequently, in the course of the proceedings the claim that the stock should be valued at par was advanced. The master estimated

the value at $35,096.85, that is, taking the amount as of January 1, 1861, which would produce the above stated sum of $49,062.05 at the date of sale.

The evidence, as West Virginia concedes, is meager. There are no market quotations. It does not appear that any dividends had ever been paid or that any profits had ever been earned. There is no statement of assets and liabilities, of traffic conditions, or of the results of operation. There is little knowledge of the physical condition of the road. West Virginia's contention is that the stock should be valued at par upon the ground that this is presumed to be the value and that Virginia had paid for it at that rate.

Statements may be found to the effect that par value is prima facie actual value (Harris's Appeal, 9 Sadler (Pa.) 233, 21 W. N. C. 189, 12 Atl. 743; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252), but if such statements can be deemed to announce a comprehensive rule, to be applied in the absence of evidence as to the property and business [220] of the corporation, we cannot regard it as well founded. There is no such presumption of law, and common experience negatives rather than raises such an inference of fact. We took this view in Fogg v. Blair, 139 U. S. 118, 127, 35 L. ed. 104, 107, 11 Sup. Ct. Rep. 476, when we criticized the supposition "that the court, in the absence of averment or proof to the contrary, would assume that it [stock] was worth par, or had substantial value." See also Griggs v. Day, 158 N. Y. 1, 23, 53 N. E. 692; Warren v. Stikeman, 84 App. Div. 610, 82 N. Y. Supp. 1003; Beaty v. Johnston, 66 Ark. 529, 52 S. W. 129. Shares represent the proportionate interest of the shareholders in the corporate enterprise, and a rule that this interest, in the absence of all supporting evidence, should be taken as actually worth the par of the shares, would be wholly artificial. There is no exigency in the administration of justice which requires or justifies such an extreme assumption.

In the present case, upon this record, it would be wholly improper to say that this stock was worth $993,248. Nor is there any evidence upon which we can ascribe value to it apart from the fact of the subsequent sale. West Virginia, in claiming the credit, had the burden of proving value, and it was not sustained save as value could be deduced from the amount of the proceeds. The exception must be overruled.

Item 8. Loan to Virginia & Tennessee Railroad Company.

In 1853 Virginia made loan to this company of $1,000,000, which was secured by mortgage. The loan was outstanding on January 1, 1861. In 1863, payments were made in Confederate money amounting to $886,685,—equal on a gold basis to $97,601.46. These payments the board of public works of Virginia attempted to repudiate by its resolution of February 4, 1868, upon the ground that the second auditor of Virginia had no authority to receive them. That the moneys were returned is not clearly established. The master, finding no evidence of [221] the value of the loan aside from the fact that these payments had been made, took their value (in gold), computed as of January 1, 1861, and allowed the sum of $84,799.90. West Virginia excepts upon the ground that the loan should have been taken at her valuation of $886,685.

The company was incorporated in 1836 under the name of the Lynchburg & Tennessee Railroad Company. In 1860 Virginia held stock of the par value of $2,270,525, and her holdings were subsequently increased to $2,300,000. It is urged that the book value of the shares on June 30, 1860, was 99.90, but we have no statement of assets and liabilities or of net earnings. The only year for which the result of operation is given (the one preceding June 30, 1860) showed a loss. It does not appear that any dividends were paid prior to 1864, and then Virginia received $138,000, which the master figures as being equivalent in gold to ½ of 1 per cent.

In 1861 interest had accumulated upon the loan above mentioned to the amount of $280,000. Between 1861 and 1863 payments were made aggregating this amount in Confederate currency, the gold equivalent being $91,986.33. This accrued interest was made the subject of separate claim by West Virginia and was allowed in Class D at the value (in gold) of the payments, as of January 1, 1861, that is, $86,133.63. And to this finding there is no exception.

In 1870 Virginia transferred her stock in this road and whatever interest she had in the loan, together with her interest in other stocks and loans, to the Atlantic, Mississippi, & Ohio Railroad Company for $4,000,000, secured by a second mortgage for that amount, subject to a first mortgage of not more than $15,000,000, which was to provide for existing liens, new construction, and repairs and improvements. The payment of the $4,000,000 was to be in instalments of $500,000 each, the first of which was to [222] be made fifteen years later, in 1885. In addition to the stock and loan of the Virginia & Tennessee Railroad Company, there were embraced in this sale by Virginia 12,000 shares of the stock of the Norfolk & Petersburg Railroad Company, together with her claim for the unpaid balance ($163,000), and interest, of a loan of $300,-

000 to that company; 1,034 shares of the stock of the Virginia & Kentucky Railroad Company; and 8,035 shares of the stock of the South Side Railroad Company, with the claim of the state upon an outstanding loan to the latter of $800,000. This last-mentioned loan (to the South Side Railroad Company) constitutes item 9, in Class C, and was found by the master to be of no value; and to this ruling there is no exception. Both that loan and the one, now in question, to the Virginia & Tennessee Railroad Company, were included in the tabulation of the securities transferred, but no value was assigned to them. The terms of the sale as the master well says "are strongly indicative of an abortive, profitless enterprise." He adds that, "after the lapse of ten years, and the expenditure of approximately $5,000,000 of new money," it "again met with shipwreck, and the state was able to save as salvage from the wreckage, and that apparently through the grace of the first mortgagees, only the sum of $500,000 in 1882." In the absence of any satisfactory evidence of value with respect to the stocks thus transferred, the master, in connection with another item of claim to which we shall presently refer, gave credit for this realization, discounted as of January 1, 1861; that is, for the sum of $204,688.42.

Upon this record, it certainly cannot be assumed that the loan to the Virginia & Tennessee Railroad Company was worth par, and in fact West Virginia has claimed on this item not par, but $886,685, the amount which was subsequently paid in Confederate currency. Apart from this payment, we find no basis whatever for an estimate of value as of January 1, 1861. The payment itself cannot [223] be taken for more than it was worth in gold, and the master, in making his allowance on that basis, went as far as the proof justified.

Item 10. Loan to Norfolk & Petersburg Railroad Company.

This is the loan which we have mentioned in connection with the sale in 1870 to the Atlantic, Mississippi, & Ohio Railroad Company. At that time it appeared that the unpaid balance was $163,000. On January 1, 1861, the loan amounted to $300,000, and West Virginia contends that the face value should be allowed. The doubtful character of the claim is indicated by the fact that in one of West Virginia's exhibits the loan is scheduled with the statement under the head of "Value," January 1, 1861,—"No claim—too indeterminate."

As already stated, Virginia held 12,000 shares of the stock of this company; but we have no facts with respect to its condition, property, or operation, which would enable us to assign a value to the stock as of January 1, 1861. No net earnings are shown, and for the year preceding March 31, 1861, it appears that the road was operated at a large loss.

On this showing we cannot say that the loan was worth its face. There is, in fact, nothing to support a valuation, save the moneys realized. The sum of $137,000 was paid in two instalments in 1867 and 1868, and the remainder of $163,000, with certain accrued interest, entered into the realization of 1882. The value of the total amount thus obtained, calculated as of January 1, 1861, or $108,415.45, was allowed. We find no ground for any larger credit.

Item 17. Claim against the United States.

Virginia made advances to the government in aid of the War of 1812. These apparently were refunded but there remained a question as to interest. Virginia insisted that there was a balance of interest due on July 1, 1814, amounting to $298,369.74 which she claimed with [224] interest from that date. On the other hand, the United States held bonds of Virginia (which had been purchased by the government as trustee for certain Indian tribes) amounting to $581,800, and also held $13,000 of bonds of the Chesapeake & Ohio Canal Company, guaranteed by Virginia. A settlement was effected under the act of May 27, 1902 (32 Stat. at L. 235, chap. 887), by which February 11, 1894, was selected as the date of adjustment and the interest was calculated to that date on each side at 6 per cent. In the case of Virginia's bonds, the interest ran from January 1, 1861. The total claim of Virginia amounted to $1,723,582.53, and that of the government (after certain credits of interest received and with the addition of $16,923.70, which had been paid to the Restored State of Virginia) amounted to a total of $1,723,577.03. The difference on this adjustment was only $5.50, which was paid to Virginia in cash.

West Virginia asked that there should be allowed, as an asset of the undivided state, the amount of this claim of Virginia against the government to the extent of the principal with interest to January 1, 1861, that is, $1,130,821.31,—to the end that West Virginia should receive in the final adjustment of its liability a credit of 23½ per cent of this amount.

The master noted that the mutual claims of Virginia and the United States had been adjusted as of a selected date (long past) when with interest they practically balanced each other. He concluded that this convenient method of ending the controversy did not necessarily involve a determination of the cash values of the claims upon either side. He decided not to allow West Vir-

ginia's claim by virtue of this settlement so far as it involved interest. He found, however, that the bonds of Virginia ($581,800) which entered into the settlement were embraced in the indebtedness which was to be apportioned. The master thought, therefore, that as their full face value [225] was included in the aggregate of the debt with respect to which West Virginia was to be charged, an appropriate credit on their account should be made. For this purpose, he took the face of the bonds with the cash item of $5.50, or $581,805.50 in all, as received in 1903, and calculated the value of that sum as of January 1, 1861. This amount, to wit, $164,584.30, he allowed.

West Virginia excepts, insisting that the sum allowed should have been $1,130,821.31.

The proper disposition of this item, it would seem, is to treat the common asset as applied to the redemption of a portion of the common debt. That is, the claim of Virginia against the United States was devoted to the payment of the bonds of Virginia amounting to $581,800, which formed a part of the debt to be divided. It is equitable that West Virginia, being charged with her established share of the whole debt, should be credited with the same share of the reduction thus accomplished. This will properly be effected by including the amount of the face value of these bonds in the total sum, on account of which, as equitably applicable to the debt, West Virginia is to receive credit. We find no warrant for the diminution of this allowance through such a calculation as that made by the master. Virginia's bonds, as has been said, constituted the principal of the government's claim as it existed on January 1, 1861, and were discharged accordingly. What remained of Virginia's claim against the government—that is, of the common asset—was exhausted in the payment of the interest subsequently accruing upon the common debt, and if any equity exists with respect thereto, it is one to be adjusted in the disposition of the question of interest.

It follows that upon the item now under consideration there should have been allowed the sum of $581,800 instead of $164,584.30, making a difference of $417,215.70.

4. *Class C. Item 19. Dividend bond, $149,984, of the* [226] *Richmond, Fredericksburg, & Potomac Railroad Company.* The master allowed this item at the face value.

The exception is taken by Virginia and the bondholding creditors upon the ground that the bond was paid in 1863 in Confederate money.

This, however, is not a case where there is resort to the subsequent realization as evidence of value. On the contrary, the railroad company, as the master found, was operating at a profit. Its stock (Class B, supra) was valued at 117.43. The bond, upon the evidence, was a good asset at its face on January 1, 1861, and was properly valued as such in the same manner as the loans included in Class C, items 1 to 4.

5. *Class E. Items 1 to 4, inclusive. Bank stocks.*

The shares embraced in these items and the values fixed by the master are as follows:

Farmers' Bank of Virginia, 9,626 shares at 102.89	$990,419.14
Bank of Virginia, 13,766 shares at 71.49	984,131.34
Bank of the Valley, 4,839 shares at 102.6	496,481.40
Exchange Bank, 8,755 shares at 102.2	894,761.00

In each case the master took the book value with a deduction of 5 per cent. The sole exception is by West Virginia, who contends that the full book value should have been allowed.

It is urged that Virginia continued to own the shares and that no process of liquidation was necessary. But the deduction did not proceed upon the view that an actual liquidation was required. The master's conclusion was based upon the unassailable ground that the book value only represented the amount which, according to the books, could be obtained from the assets upon a liquidation; that hence the book value did not represent the actual net value of the shares; and that this actual value could not be estimated without a proper allowance for the expense of realization. He made this allowance upon a [227] basis sustained by the evidence, and there is no reason for disturbing his finding.

6. *Class F. Securities sold to the Atlantic, Mississippi, & Ohio Railroad Company.*

These embraced the stocks to which reference has been made in the discussion of items 8 and 10 of Class C, supra. The master, as stated, allowed for these—$204,688.42. West Virginia excepts because the master did not allow either the book value of $4,276,044.39 or the sum of $4,000,000 for which the second mortgage, already mentioned, was given at the time of the sale in 1870. We have commented upon the lack of evidence with respect to the value of the shares of the Virginia & Tennessee Railroad Company and the Norfolk & Petersburg Railroad Company, two of the four companies in question; and also upon the fact that in the case of the third company, the South Side Railroad Company, a loan of $800,000 outstanding on January 1, 1861, was found by the master to be of no value and no exception has been taken to the finding. With respect to both the

company last mentioned and the remaining company, the Virginia & Kentucky Railroad Company, as well as in the case of the two others, the record discloses no facts with respect to condition, assets, and liabilities, and results of operation, which can be deemed to furnish any adequate ground for a conclusion as to actual worth. The schedule of 1870, at the time of the transfer of these stocks to the Atlantic, Mississippi, & Ohio Railroad Company simply gives par values, and, as has been said, the purchaser of these stocks, and other items, executed therefor a second mortgage for $4,000,000, payable in annual instalments of $500,000 each, the first payment being postponed until 1885. We find in this transaction no proper basis for a valuation as of 1861. Notwithstanding the expenditure of large amounts upon the properties, the second mortgage proved to be worthless except for the sum of $500,000 paid in 1882 [228] on the foreclosure of the first mortgage, and this payment, it would seem, was not based upon the actual value of the property, but was rather in the nature of a concession to assure a complete title without controversy. There is no warrant in the evidence for any greater allowance than that which the master gave.

7. *Class G. Stock of the James River & Kanawha Company.*

The state held $10,400,000, in par value, of this stock, or 91.77 per cent of the entire capital stock, at a total cost of $9,547,582.21. The master allowed as its value $1,664,333. The exception is by Virginia and the bondholding creditors, it being insisted that the stock had no value.

The record contains voluminous reports, statistics, and testimony, with respect to this historic enterprise, showing the facts as to its development, the property which the company owned, and the course of its business. It would be almost impossible briefly to review these facts, and their recital at length would serve no useful purpose. The capital, as has been said, was mainly supplied by the state, and by January 1, 1861, there had been completed approximately 195 miles of the canal, from Richmond to Buchanan, with a branch of 22 miles to Lexington. There had been no dividends, save one of $10,092 in 1836. In addition to the original investment in the stock, there had been an increasing indebtedness to the state which amounted in the year 1860 to $7,560,214.44. As the company was unable to earn sufficient to pay the interest upon this indebtedness, the state under the act of March 23, 1860, provided for an increase of capital stock, and took in satisfaction of its debt (and to make specified provision for floating debt) 74,000 shares in 6 per cent preferred stock. Upon the assumption that this exchange had been effected and that the debt of the state had been converted into capital, [229] eliminating the interest charge, it appeared that the net operating revenue in 1860 amounted to $151,000.14. If computed on the same basis, it appeared that the average annual net operating revenue for seven years, including 1860, would have been $115,554.21, and for twenty-five years, $111,800. It seems, however, that there were certain outstanding bonds amounting to $199,000 upon which the company was liable, and that to get the net earnings, exclusive of any return to the state, it would be necessary to deduct the annual interest upon this sum; that is, $11,940. The master concluded that upon the evidence the only basis for computation of value was to take the average net returns for twenty-five years ($111,800), deducting this interest ($11,940), or $99,860. Capitalizing these earnings at 6 per cent, the value of the property was fixed at the sum above stated, to wit, $1,664,333. The master thought that this estimate was a liberal one in view of the fact that the computation did not make allowance for depreciation, and of the diminished returns of the succeeding years. But the basis chosen seemed to be the only one upon which he could reach a reasonable conclusion. In view of the property shown to have been owned by the company, and the evidence as to the results of operation, we think that the exception of Virginia and the bondholding creditors cannot be sustained, and that the master's appraisal should be accepted.

That West Virginia, after this painstaking investigation, was not dissatisfied with the result, is apparently shown by the fact that in filing its exceptions to the master's report, it took no exception to his finding as to this item. In its brief, however, in discussing Virginia's exception, West Virginia states that it "now excepts" to the master's finding because of his failure to allow $2,516,666 instead of $1,664,333. While this might not be regarded as a formal exception which should receive consideration, we should [230] not be disposed to ignore it if it had merit, but should consider the objection in the same untechnical spirit in which the controversy has been dealt with from the beginning. But we do not think that the exception is well taken. The suggested value is reached by capitalizing the net operating revenue of a single year; that is, by taking the return for 1860 at the amount above stated, $151,000.14, which on a 6 per cent basis would give a value of $2,516,666. This, however, makes no allowance for the interest charge

of $11,940; and, further, we think it would be wholly unjustifiable in the light of the history of this company to capitalize upon the return of one year. It is objected, however, that the master reached his result by taking the average net returns for a period of twenty-five years, which included the early years of the undertaking; but if we take the net returns of seven years preceding September 30, 1860, as shown by the exhibit prepared by West Virginia's accountant, or $115,554.21, and deduct the interest charge of $11,940, there remains $103,614.21 as the annual net profit, exclusive of any return to the state. This sum capitalized at 6 per cent would show a value of $1,726,903,—a sum very slightly in excess of the master's estimate. Having regard to the absence of allowance for depreciation, it cannot be said that West Virginia is entitled to have the estimate increased.

8. *Class G. Stock of the Manassas Gap Railroad Company.*

Virginia owned $2,105,000 of this stock in par value, out of a total of $3,322,164.67. The master found no evidence upon which he could assign a value to this stock, and West Virginia excepts, insisting that it should have been estimated to be worth par.

In the supplemental answer, a value was placed upon the stock at 25 per cent of the par value in view of the lapse of time and the lack of clear evidence as to actual [231] value. Even this, however, cannot be regarded as more than a conjecture. It was shown before the master that the road had been operated as far as Mt. Jackson and was in course of construction to Harrisonburg, but no satisfactory data were furnished as to the condition of property, liabilities, earnings, etc., upon which any finding of value could properly be made. It is, therefore, suggested that in the absence of proof to the contrary the stock should be presumed to be worth par, but, as already stated, no such assumption is justified. There was a failure of proof as to this item and the master properly disallowed it.

9. Under her general exception, West Virginia raises two further objections which affect the credits to be allowed.

(1) It appeared that certain counties in West Virginia, after the organization of the state, paid taxes, fines, etc., to Virginia amounting to $180,264.45. Credit for this was asked by West Virginia, but was refused by the master. He found that the circumstances under which this amount was assessed were "involved in a great deal of doubt and uncertainty." It appeared that a balance could not fairly be struck with respect to the sums thus paid without taking into consideration the expenses of the actual government of the counties in question for the maintenance of which it was raised. As the master says: "The amount" (of these expenses) "however was not known. It may have been more, it may have been less, than the amount paid in taxes." The record does not furnish any ground for the allowance of this item.

(2) The master concluded that if West Virginia were credited with her proportionate share of the assets which have been valued, she should be charged with the moneys and securities which she received from the Restored Government of Virginia, to wit, $170,771.46 in money, and $370,696.30 in securities, making a total of $541,467.76. West Virginia makes no objection to the charge of the [232] securities, but excepts to the ruling as to the money. There seems to be no doubt that the money was in fact received from the Restored Government of Virginia, and that it was money belonging to Virginia which was turned over to the new state. It would seem to be clearly equitable that, if the credits in question are allowed, this charge should be made.

10. The further exception is taken by the bondholding creditors (not by Virginia) to the failure of the master to hold that Virginia was entitled to apply the assets, thus valued, to various obligations not embraced in the principal debt, which, as heretofore determined, is to be apportioned. The contention thus urged is but a repetition in another form of the arguments which have already been considered in reaching the conclusion that these assets should be regarded as specifically dedicated to the discharge of the indebtedness to be apportioned, and that West Virginia, in assuming an equitable proportion of that indebtedness, was entitled to a credit accordingly. The exception cannot be sustained.

All the exceptions relating to the credits in question have now been considered. The values as thus ascertained are:

Class A		$ 819,250.03
Class B		323,167.36
Class C		
Allowed by master	$7,352,594.65	
Increase in item 17	417,215.70	7,769,810.35
Class D		345,554.80
Class E		3,802,357.48
Class F		204,688.42
Class G		1,664,333.00
Total		$14,929,161.44
[233] Credit to West Virginia of 23½ per cent of $14,929,161.44		$ 3,508,352.94

Less money and securities received by West Virginia from Restored Government of Virginia as found by master	541,467.76
Net credit to West Virginia	$ 2,966,885.18

This would give as West Virginia's equitable proportion of the principal debt the sum of $4,215,622.28, as follows:

23½ per cent of principal debt ($30,563,861.56) to be apportioned	$7,182,507.46
Deduct credit to West Virginia, as above	2,966,885.18
West Virginia's share of principal debt	$4,215,622.28

Interest. There remains the question of West Virginia's liability for interest.

This liability is contested upon the grounds that the claim of Virginia has been unliquidated and indefinite, that interest is not recoverable as damages save on default in the payment of an amount which is certain or susceptible of ascertainment, that there was no promise on the part of West Virginia to pay interest, that unearned interest was not a part of the debt of which she agreed to assume an equitable proportion, and that in the absence of an express promise interest is not to be charged against a sovereign state.

All the questions thus raised may be resolved by the determination of the fair intendment of the contract itself. If liability for interest is within the scope of the agreement no objection can lie on the ground of uncertainty in amount, as the promise attaches to the amount found to be payable. In this view, also, no question would be involved as to an award of interest by way of damages as distinguished from a recovery by virtue of the terms of the [234] undertaking. Nor can it be deemed in derogation of the sovereignty of the state that she should be charged with interest if her agreement, properly construed, so provides. The fundamental question is, What does the contract mean?

This subject has been discussed elaborately—from every possible point of view—in the comprehensive arguments which have been presented, but the considerations which must be deemed to be controlling are clearly defined and may be succinctly stated.

The subject-matter of the contract was a "public debt." That debt consisted of outstanding bonds. Some of these were redeemable at pleasure; but for the most part they were unmatured and had many years to run. These bonds provided for the payment of interest as well as principal; they were interest-bearing obligations. It is true that on January 1, 1861, there was interest due and unpaid, and apparently there were also some matured bonds; but these amounted to but a small fraction of the "public debt." The debt to which the parties referred—as it existed prior to and on January 1, 1861—was not a debt in the sense of a specific sum then due and payable, but manifestly was the liability evidenced by the outstanding obligations of which the promised interest was an integral part.

This being the subject-matter of the agreement, its express words have a clear significance. It was provided that West Virginia should "*assume*" her equitable proportion of the public debt. This was not an undertaking simply to pay a percentage of principal. West Virginia was to take upon herself a just share of the public burden represented by the bonds, and we cannot regard this provision as subject to an unexpressed limitation that interest should be excluded. A contract to assume an interest-bearing debt means the taking over of the liability for interest as well as principal. And the same is true *pro* [235] *tanto* of the assumption of an "equitable proportion" of the debt. Both parties unquestionably contemplated that interest would accrue upon these bonds. They were making provision for payment, and not looking to default. Certainly, Virginia was not expected to bear the burden of the interest accruing on the share to be taken by West Virginia. The very purpose of the contract was to secure—as between these parties—Virginia's exoneration with respect to that share. As it was plainly not the intention either that the bondholders should go without interest as to the proportion assumed by West Virginia, or that there should be left with Virginia the entire burden of meeting the interest on the outstanding bonds while the principal was apportioned, it must follow that the assumption of an equitable share by West Virginia related to the liability for both principal and interest. We cannot read the contract otherwise.

Nor do we think that in the construction of the provision of the Constitution of West Virginia (art. 8, § 8), which defines her engagement, the second clause can be ignored. After stating that an "equitable proportion" of the public debt shall be assumed by West Virginia, it is provided that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." If there could otherwise be any doubt as to what was embraced

in the contract of assumption, this provision would dissipate it. It is true, as we have said, that this direction to the legislature did not undo the contract by making "the representative and mouthpiece of one of the parties the sole tribunal for its enforcement." But it throws a clear light upon what the parties had in mind. The "accruing interest" had not escaped their attention. And it was because the payment of accruing interest was an essential part of the obligation to be assumed [236] in the division of the "public debt" that the legislature was enjoined to establish an adequate fund by which the assumed liability in its full scope would be discharged.

The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfilment. It is urged that there are equities to be considered, but we can find none which go so far as to destroy the claim. On the contrary, there is no escape from the conclusion that there was a contract duty on the part of West Virginia to provide for accruing interest as a part of the equitable proportion assumed, and that it would be highly inequitable as between the two states that Virginia, as to her share, should bear interest charges for these fifty years while West Virginia, on her part, should simply pay a percentage of principal reduced by the credits which have been allowed.

While liability for interest exists, there is still the question as to the rate at which interest should be allowed. Virginia, it appears, has not paid upon her estimated share the rate which was reserved in the bonds. This fact, we think, raises an equity demanding recognition. In fixing West Virginia's share of the principal, we took into account the fact that Virginia, by the consent of the creditors, had reduced her own share below the amount which it would have been upon the basis we found to be correct, and we gave appropriate credit to West Virginia on account of this difference. 220 U. S. p. 35. And it would not be proper to hold West Virginia to the rate of interest specified in the bonds when Virginia as to her share has made arrangement with the creditors for a lower rate. The provision that the share of West Virginia shall be an equitable proportion is the dominating principle of the [237] award, and while Virginia, as we have held, is entitled to enforce the contract, in the due performance of which *her honor* and credit are concerned, her action with respect to her own estimated share must be taken into consideration.

In 1866, the general assembly of Virginia provided for the funding of unpaid interest, on bonds issued prior to April 17, 1861, in bonds bearing the same rate of interest. It appears in the evidence that the bonds issued under this act for unpaid interest amounted to $6,576,913.60. It is also stated on behalf of Virginia that there was paid in cash from January 1, 1861, to December 31, 1871, on account of interest, the aggregate sum of $7,094,103.61, making a total of $13,671,017.21. Of these cash payments, $4,519,065.04 were paid on Confederate currency between January 1, 1861, and April 1, 1865, the equivalent of which in gold is stated to be $2,261,358.91, making the total money payments for interest during this period on a gold basis equal to $4,836,397.48.

By the act of March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one third, made provision for the issue of new bonds which, as the bill in the present case sets forth, were to be "for two thirds of the principal, and for two thirds of the past-due interest, and also for two thirds of the interest on that accrued interest," which accrued interest to the extent above mentioned had been funded in bonds issued after the War. The new bonds were to bear interest at the same rate as the old bonds,—for the most part, 6 per cent. For the remaining one third, there was to be issued upon the surrender of the old bond, a certificate of even date with the new bond setting forth the amount which was not funded, that payment with interest would be provided for in accordance with such settlement as should be made between Virginia and West Virginia, and that the old bonds so far as unfunded were held "in trust for the holder or his assignees." Under this act, as was said [238] in Hartman v. Greenhow, 102 U. S. 672, 679, 26 L. ed. 271, 274, "a large number of the creditors of the state, holding bonds amounting, including interest thereon, to about thirty millions of dollars, surrendered them and took new bonds with interest coupons annexed for two thirds of their amount and certificates for the balance." It should be added that it appears that there were certain bonds aggregating $864,842.03 in principal, which were held by educational institutions in Virginia, for which Virginia issued new bonds in full without deducting one third for West Virginia's share. It is testified that upon these last-mentioned bonds 6 per cent interest has been paid continuously.

As it appeared that even under the measure of 1871 Virginia had assumed a heavier

burden than she felt able to bear, other plans were attempted for the settlement of the state debt. By the act of March 28, 1879, the effort was made to accomplish a refunding upon the basis of 50 per cent of accrued interest and 100 per cent of principal (of Virginia's estimated share) in new bonds payable in forty years (and redeemable after ten years) with interest at 3 per cent for ten years, 4 per cent for twenty years, and 5 per cent for ten years. Under this statute, the two-thirds basis was maintained, and those making the exchange, in cases where certificates for the remaining one third had not already been issued, were to receive certificates like those authorized by the act of 1871.

While there was a refunding to some extent upon this basis, the legislation of 1879 very largely failed to accomplish its purpose, and another attempt was made under the act of February 14, 1882. By this, the outstanding bonds were divided into classes. For those which had been issued under the act of 1871, new bonds were authorized on the basis of 53 per cent of principal and 100 per cent of accrued interest. The act recited that the net revenues of the state did not warrant [239] the assumption of a larger rate of interest than 3 per cent upon the full amount of Virginia's equitable share of the old debt as the same was ascertained and formally declared by an account set forth in the preamble,—an account stated on the two-thirds basis. The new bonds were for fifty years (redeemable after July 1, 1900) with interest at 3 per cent until paid.

As shown by the account contained in this act, the payments in money from January 1, 1861, to July 1, 1871, for interest, amounted to $7,256,723.66.[1] In this account, the entire amount thus paid was credited against the two thirds of the accrued interest (or interest on two thirds of the principal) which Virginia had estimated to be her equitable share. The interest on this share exceeded these payments. It also appeared that between 1863 and 1871 bonds had been redeemed to the amount of $3,710,449.67, and this amount was credited against Virginia's two thirds of principal. The statement of account was made for the purpose of explaining and justifying the attempted readjustment.

The plan of 1882 proved abortive. New bonds to a considerable amount were issued under its provisions, but the bondholders for the most part refused to accede to its terms, and apparently there were outstanding on February 20, 1892 (unfunded under the act of 1882), about $28,000,000 of principal and interest (to July 1, 1891), that is, as representing Virginia's assumed proportion. On that date an act was passed by the general assembly which provided for the refunding of these bonds on the basis of nineteen twenty-eighths of the principal and accrued interest (as of July 1, 1891) in new bonds bearing 2 per cent interest for ten years and 3 per cent until paid. The bonds were to be for one hundred years, and were redeemable after July 1, 1906. The refunding was carefully limited [240] to the two-thirds basis and certificates were to be issued for the remaining one third similar to those above described. In 1894 provision was made for further time for an exchange on the stated basis, which, however, was not to be extended beyond the end of the year. There were additional bonds, said to amount to over $2,400,000, held by educational corporations, which were refunded under a statute passed February 23, 1892, in new obligations for their full amount of principal and interest.

Under this legislation the refunding was accomplished. Virginia alleges in her bill that "at length a final and satisfactory settlement of the portion of the debt of the original state which Virginia should assume and pay was definitely concluded by the act of February 20, 1892."

In the light of this financial history, we come to the consideration of Virginia's payments. It is stated on behalf of Virginia that the amount of interest paid by her from January 1, 1861, to September 30, 1913 (the latest date to which the calculation has been made), amounted to $41,071,219.02. Taking Virginia's share of principal at the amount assumed by her, as computed in our former decision (220 U. S. p. 35), that is, $22,598,049.21 (an amount somewhat less than her true proportion of the total debt of January 1, 1861), the total interest paid as above stated would be the equivalent of simple interest upon that principal at a rate somewhat less than 3½ per cent.

But these payments on account of interest did not include bonds that had been retired, and Virginia's exhibit shows that in addition to these payments she had "paid off and retired" (down to September 30, 1913) bonds amounting to $12,141,591.49; and that, further, her new bonds issued for the portion of the old debt, funded and assumed by her, and outstanding on September 30, 1913, amounted to $24,645,075.23. These items, including the item of interest first mentioned, make a total of $77,857,885.74. [241] We have in this aggregate

[1] Of this total the sum of $3,662,434.55 is stated as having been paid from January 1, 1861, to July 1, 1863, and the amount paid from July 1, 1863, to July 1, 1871, is given as $3,594,289.11.

the amounts paid by Virginia on account of the old debt to the date mentioned. If from this total we deduct the amount of Virginia's assumed share of principal, as above computed ($22,598,049.21), the remainder would be $55,259,836.53; or, if all payments of interest were put on a gold basis, $53,002,130.40. If we treat this entire sum as applicable to interest—and to interest upon Virginia's assumed share alone—it would be the equivalent of simple interest upon the principal stated, from January 1, 1861, to September 30, 1913, at a rate a little less than 4½ per cent.

It is manifestly impracticable, and it would not be equitable, to apply rates of interest in the present determination which would follow the details of Virginia's financial arrangements. The amounts included in the total of Virginia's payments represent large sums paid as interest upon interest. West Virginia's equitable proportion should not be increased by a rate based upon successive allowances of compound interest.

But in the light of the facts that have been recited a fair basis of adjustment may be fixed.

It will be observed that the amount of the new bonds shown by Virginia's statement to be outstanding on September 30, 1913, was slightly in excess of her assumed share of principal as computed. That is, Virginia, through the successful operation of the act of 1892 (which provided for a refunding as of July 1, 1891), taken with what had been effected under the act of 1882, placed an amount substantially equal to her assumed share of principal upon a permanent basis of 3 per cent. There appears to be an exception in the case of certain securities, but their amount is relatively small. Virginia's creditors may have been induced to accept this adjustment, and the low rate it involved, by reason of the inclusion of unpaid interest in fixing the principal of the new bonds. But, on the other hand, the total of the principal and interest [242] then outstanding was largely reduced in the refunding, and the rate of interest upon the new bonds under the act of 1892 for the first ten years was made 2 per cent. The reduction, and the ten years' rate, may well be regarded as offsetting the advantage derived from including in the face of the new obligations whatever excess there may have been over the assumed share of Virginia as computed.

Taking all the facts into consideration, we reach the conclusion that in fixing the equitable proportion of West Virginia, her part of the principal should be put on a 3 per cent basis, as of July 1, 1891; that is, *that interest* should run at that rate from that time. For the preceding period, from January 1, 1861, to July 1, 1891, there is greater difficulty. In recognition of the amounts paid by Virginia upon her share, but also having in mind the payments of compound interest attributable to her own exigency, the nearest approach to complete justice will be had by allowing interest at 4 per cent.

This, we are satisfied, will adequately recognize and enforce the equities of both states.

Upon this basis, West Virginia's share of the debt will be:

Principal, after allowing credits as stated		$4,215,622.28
Interest, January 1, 1861, to July 1, 1891, at 4 per cent.	$5,143,059.18	
July 1, 1891, to July 1, 1915, at 3 per cent..	3,035,248.04	8,178,307.22
		$12,393,929.50

For convenience the calculation of interest has been made to July 1, 1915. In the decree the calculation will be at 3 per cent per annum from July 1, 1891, to the date of entry. The decree will also provide for interest at the rate of 5 per cent per annum upon the amount awarded, until paid.

Costs to be equally divided between the states.

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[243] ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,
v.
FANNIE M. CONARTY, Administratrix, etc.

(See S. C. Reporter's ed. 243-251.)

Master and servant — safety appliance acts — breach.

A carrier's failure to have the end of a freight car equipped with the automatic coupler and drawbar prescribed by the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), April 1, 1896 (29 Stat. at L. 85, chap. 87, Comp. Stat. 1913, § 8610), March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), the purpose of which is to obviate the necessity for men to go between the ends of the cars, was not an actionable breach of duty toward an em-

Note.—On duty and liability under Federal and state railway safety appliance acts —see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

ployee who was injured in a collision between such car and the switch engine on which he was riding, although had these appliances been present there would have been room enough between the engine and the sill of the car to have prevented the injury, where there was no present intention or attempt to couple the car to the engine, or to handle it in any way.

[For other cases see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

[No. 166.]

Submitted March 3, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Crawford Circuit Court, in that state, in favor of plaintiff in an action based on the Federal employers' liability and safety appliance acts. Reversed.

See same case below, 106 Ark. 421, 155 S. W. 93.

The facts are stated in the opinion.

Mr. W. F. **Evans** submitted the cause for plaintiff in error. Mr. B. R. Davidson was on the brief:

The law requiring automatic couplers imposes on the employee the correlative duty of refraining from going between the ends of the cars when no duty requires it.

Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529.

Where a person goes between cars with defective drawbars, and stumbles and is injured, the stumbling is the proximate cause, and not the defective drawbar.

Cincinnati, N. O. & T. P. R. Co. v. Mealer, 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. 725; William v. Central R. Co. 43 Iowa, 396; Pryor v. Louisville & N. R. Co. 90 Ala. 32, 8 So. 55, 13 Am. Neg. Cas. 23; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 280, 282, 57 L. ed. 1179, 1187, 1188, 33 Sup. Ct. Rep. 858; Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949, 7 Am. Neg. Cas. 478; Berlin Mills Co. v. Croteau, 32 C. C. A. 126, 50 U. S. App. 419, 88 Fed. 860; Kreigh v. Westinghouse, C. K. & Co. 11 L.R.A. (N.S.) 684, 81 C. C. A. 338, 152 Fed. 120; American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Gill v. Louisville & N. R. Co. 160 Fed. 260; St. Louis, I. M. & S. R. Co. v. Ross, 56 Ark. 275, 19 S. W. 837; Ultima Thule, A. & M. R. Co. v. Benton, 86 Ark. 289, 110 S. W. 1037; St. Louis, K. & S. E. R. Co. v. Fultz, 91 Ark. 260, 120 S. W. 984.

The purpose of the act was to avoid the necessity of going between the cars. The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically.

Johnson v. Southern P. Co. 196 U. S. 15–19, 49 L. ed. 368–370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

The statute does not regard the strength of the coupling, but its safety in making couplings.

Pennell v. Philadelphia & R. R. Co. 231 U. S. 675–679, 58 L. ed. 430–433, 34 Sup. Ct. Rep. 220.

To constitute proximate cause the statute must have been violated, and from the act in violation of the statute the result should have been foreseen.

Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

The absence of the coupler was not the proximate cause.

Chicago, B. & Q. R. Co. v. Richardson, 121 C. C. A. 144, 202 Fed. 840; The Brinton, 50 Fed. 581; Lyddy v. Louisville & N. R. Co. 117 C. C. A. 20, 197 Fed. 527; Campbell v. Spokane & I. E. R. Co. 188 Fed. 518; Hohenleitner v. Southern P. Co. 177 Fed. 796.

The facts being undisputed, the question of proximate cause was for the court.

Pike v. Grand Trunk R. Co. 39 Fed. 255; Ultima Thule, A. & M. R. Co. v. Benton, 86 Ark. 289, 110 S. W. 1037; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529.

Neither the court nor jury could transfer a remote cause into the proximate cause, nor make the injury which was not the natural consequence of the alleged negligent act the natural consequence of such act.

Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676.

The death of Conarty was either the result of an accident pure and simple, for which no one was liable, or it was occasioned by his own negligence.

Ultima Thule, A. & M. R. Co. v. Benton, 86 Ark. 289, 110 S. W. 1037; St. Louis, K. & S. E. R. Co. v. Fulltz, 91 Ark. 260, 120 S. W. 984; United States v. Boyd, 45 Fed. 851; Midland Valley R. Co. v. Fulgham, L.R.A. —, —, 104 C. C. A. 151, 181 Fed. 91.

Mr. **Thomas P. Littlepage** also submitted the cause for plaintiff in error.

Messrs. Edward J. White and E. B. Kinsworthy filed a brief as *amici curiæ*.

Messrs. Samuel W. Moore, Frank H. Moore, and James B. McDonough also filed a brief as *amici curiæ*.

Mr. **Samuel R. Chew** submitted the cause for defendant in error:

The proof showing conclusively that the coal car was in a defective and unlawful condition, and that plaintiff in error had

knowledge of such defective and unlawful condition, and after having such knowledge used the car in interstate commerce, it did so at its sole risk and peril, and it is liable in damages for all injuries that it directly caused or contributed to cause to defendant in error's intestate, from which there is no legal escape.

Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

Evidence that if the cars were properly equipped with couplers there would be ample room between them and the footboard on the engine for a man to remain and stand in safety, and that in the absence of a coupler there would not be, was material and competent to show that the absence of the coupler on the coal car at least contributed to the injury of intestate.

Eastern Transp. Line v. Hope, 95 U. S. 297, 24 L. ed. 477; 1 Greenl. Ev. 14th ed. § 440; Western Coal & Min. Co. v. Berberich, 36 C. C. A. 368, 94 Fed. 329; The City of Washington, 92 U. S. 31, 23 L. ed. 600; Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. Rep. 534; Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 L. ed. 1057, 23 Sup. Ct. Rep. 681.

The defective condition of the car in question was the only and sole cause of intestate's injury and resulting death.

Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; McDonald v. Snelling, 14 Allen, 294, 92 Am. Dec. 768; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

[248] Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action for personal injuries ultimately resulting in death, the right of recovery being based upon the employers' liability act (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657; 36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), in connection with the safety appliance acts (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605; 29 Stat. at L. 85, chap. 87, Comp. Stat. 1913, § 8610; 32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613; 36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617). The injuries were received in a collision between a switch engine and a loaded freight car having no coupler or drawbar at one end, these having been pulled out while the car was in transit. The car was about to be placed on an isolated track for repair, and was left near the switch leading to that track while other cars were being moved out of the way,—a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued. It was dark and an electric headlight on another engine operated to obscure the car until the switch engine was within 40 or 50 feet of it. The deceased and two companions were standing on the footboard at the front of the switch engine, and when the car was observed, his companions stepped to the ground on either side of the track, while he remained on the footboard and was caught between the engine and the body of the car at the end from which the coupler and drawbar were missing. Had these appliances been in place they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car, with the result stated. The deceased and his companions, with the switch engine, were on their way to do some switching at a point some distance beyond the car, and were not [249] intending, and did not attempt, to couple it to the engine or to handle it in any way. Its movement was in the hands of others. The car was loaded with freight moving from one state to another, the railroad company was engaged in interstate commerce, and the deceased was employed therein at the time. He died from his injuries six days later, leaving a widow and three minor children. The only negligence charged in the complaint was a failure to have the car equipped, at the end struck by the engine, with an automatic coupler and a drawbar of standard height as required by the safety appliance acts, and there was no attempt to prove any other negligence. The plaintiff had a verdict and judgment for $10,000, and the supreme court of the state affirmed the judgment. 106 Ark. 421, 155 S. W. 93.

The principal question in the case is whether, at the time he was injured, the deceased was within the class of persons for whose benefit the safety appliance acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be, under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that, had they been complied with, it would not have resulted in injury to the deceased. It there-

fore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not, as to him, actionable. The Eugene F. Moran, 212 U. S. 466, 476, 53 L. ed. 600, 604, 29 Sup. Ct. Rep. 339; Gorris v. Scott, L. R. 9 Exch. 125, 43 L. J. Exch. N. S. 92, 30 L. T. N. S. 431, 22 Week. Rep. 575; Ward v. Hobbs, L. R. 4 App. Cas. 13, 23, 48 L. J. Q. B. N. S. 281, 40 L. T. N. S. 73, 27 Week. Rep. 114, 3 Eng. Rul. Cas. 125; Williams v. Chicago & A. R. Co. 135 Ill. 491, 498, 11 L.R.A. 352, 25 Am. St. Rep. 397, 26 N. E. 661; O'Donnell v. Providence & W. R. Co. 6 R. I. 211; [250] Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 280, 12 Am. Rep. 689; Favor v. Boston & L. R. Corp. 114 Mass. 350, 19 Am. Rep. 364; East Tennessee, V. & G. R. Co. v. Feathers, 10 Lea, 103; Pollock, Torts, 8th ed. 28, 198.

The safety appliance acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car can be coupled or uncoupled "without the necessity of men going between the ends of the cars," or that is not equipped with drawbars of standard height,—the height of the drawbar having, as explained in Southern R. Co. v. Crockett, 234 U. S. 725, 735, 58 L. ed. 1564, 1568, 34 Sup. Ct. Rep. 897, an important bearing on the safety of the processes of coupling and uncoupling and on the security of the coupling when made. It is very plain that the evils against which these provisions are directed are those which attended the old-fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars, when coupled into a train, sometimes separated by reason of the insecurity of the coupling. In Johnson v. Southern P. Co. 196 U. S. 1, 19, 49 L. ed. 363, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, this court said of the provision for automatic couplers that "the risk in coupling and uncoupling was the evil sought to be remedied;" and in Southern R. Co. v. Crockett, 234 U. S. 725, 737, 58 L. ed. 1564, 1569, 34 Sup. Ct. Rep. 897, it was said to be the plain purpose of the two provisions that "where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard." Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate "the necessity for men going between the ends of the cars."

We are of opinion that the deceased, who was not [251] endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the supreme court of the state erred in concluding that the safety appliance acts required it to hold otherwise.

Judgment reversed.

PENNSYLVANIA RAILROAD COMPANY, Plff. in Err.,
v.
MITCHELL COAL & COKE COMPANY.

(See S. C. Reporter's ed. 251-254.)

Error to state court — following decision below — intrastate character of shipments — rebates.

A judgment of a state court awarding a shipper of coal the damages sustained by him under the state laws through the secret allowance and payment of rebates to other shippers for whom the carrier was rendering a like and contemporaneous service will not be reversed by the Federal Supreme Court on the theory that some of the shipments were destined for points outside the state, where the record does not purport to contain all the evidence bearing upon this point, but does show that in some of the exhibits the shipments included in the record were all listed and designated as "Coal—Intrastate."

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

[No. 287.]

Argued May 14, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Philadelphia

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

County, in that state, in favor of a shipper for the damages sustained by reason of rebates to other shippers. Affirmed.

See same case below, 241 Pa. 536, 88 Atl. 743.

The facts are stated in the opinion.

Mr. **Francis I. Gowen** argued the cause, and, with Messrs. F. D. McKenney and John G. Johnson, filed a brief for plaintiff in error:

The ultimate destination of the coal is the determining factor, and as a consequence the transportation of these shipments must be regarded as interstate in character.

Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

That the service is performed wholly in one state can make no difference if it is a part of interstate carriage.

United States v. Union Stock Yards & Transit Co. 226 U. S. 304, 57 L. ed. 233, 33 Sup. Ct. Rep. 83; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

If the shipments to Greenwich which were ultimately transported to points beyond the Delaware Capes were interstate in character, the plaintiff's cause of action in respect thereto was not maintainable in a state court.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

Mr. **Joseph Gilfillan** argued the cause, and, with Mr. George S. Graham, filed a brief for defendant in error.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This writ of error brings under review a judgment recovered by a shipper of coal for damages sustained through unlawful discrimination consisting in the secret allowance and payment of rebates to other shippers for whom the carrier was rendering a like and contemporaneous service. 241 Pa. 536, 88 Atl. 743. The action was brought and the judgment rendered under the law of the state and the complaint now made is that damages were awarded in respect of several shipments which were not intrastate, but destined to points outside the state, and as to which no recovery could be had in this action consistently with the interstate commerce act. See Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916. The plaintiff's statement of claim described the shipments as intrastate, that is, as made from one point to another in the state, and up to the time that the referee came to compute the damages it does not appear to have been questioned that all the shipments were of that class. A stipulation was then entered into specifying the number of tons shipped by the plaintiff during each of several periods, and describing the shipments as made from the plaintiff's mines in Pennsylvania "to points within the state," but appended to the stipulation was a note wherein the defendant insisted that according to the evidence part of the shipments, those to Greenwich, Pennsylvania, "included coal [253] destined to points beyond the state," and that no recovery could be had in this action in respect of interstate shipments, and also a note on the part of the plaintiff controverting what was asserted in the defendant's note. The referee concluded that the shipments were all intrastate, and, while recognizing that some of the coal "might have been" re-shipped from Greenwich to places outside the state, said: "The plaintiff might have sold the coal at that place. To have moved the coal from Greenwich a new contract for carriage would have been necessary." The referee's conclusion was sustained by the trial court and by the supreme court of the state, the latter saying: "The shipments to Greenwich, Philadelphia, were intrastate, and hence were properly included in this action. They were consigned to plaintiff at Greenwich, and there the contract of carriage between the plaintiff and the defendant was fully performed and ended. What disposition the plaintiff made of the shipments at Greenwich, whether it sold them or sent them within or beyond the state, is immaterial as affecting the question whether, as between the plaintiff and the defendant, they were intrastate or interstate."

We find nothing in the record to sustain the contention that some of the shipments were interstate. While it appears that part of the coal was shipped from the mines to Greenwich, that the plaintiff there turned some of it over to other coal dealers, sold some of it outright and possibly re-shipped some to other places, it does not appear that any of it went out of the state, or, if it did, that the circumstances were such that its carriage from the mines to Greenwich was in fact but part of an intended and connected transportation beyond the state. See Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837. The rec-

ord [254] does not purport to contain all the evidence bearing upon this point, but it does show that in some of the exhibits the shipments included in the recovery were all listed and designated as "Coal—Intrastate." In this situation the conclusion reach by the state courts cannot be disturbed.

Judgment affirmed.

GENEVA FURNITURE MANUFACTURING COMPANY, Appt.,
v.
S. KARPEN & BROTHERS et al.

(See S. C. Reporter's ed. 254–260.)

Federal courts — jurisdiction — patent suit — proper district.

1. So much of a bill as charges defendants with contributing to the infringement of letters patent belonging to the plaintiff by wrongfully inducing and persuading designated licensees from the plaintiff to make, use, and sell devices embodying the inventions of the patents in circumstances not authorized or permitted by their licenses, and prays for an injunction and accounting in respect of the contributory infringement, presents a case arising under the patent laws of which a Federal district court has jurisdiction, under the Judicial Code, §§ 24, 48, and 256, where the defendants either reside in the district, or have committed the infringing acts in that district, and have a regular and established place of business therein.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — patent suit — proper district.

2. Only in the district of the residence of plaintiff or defendant can a Federal district court under the Judicial Code, § 51, take jurisdiction of so much of the bill in a patent infringement suit as charges defendants with wrongfully procuring plaintiff's licensees to violate their contractual obligations, and with refusing to perform their own agreement to assign to plaintiff certain other patents, and asks for an injunction and damages in respect to the procured breach of the licensee's contractual obligations, and for the specific performance of the agreement to assign the other patents, since the causes of action presented by these features of the bill do not arise under the patent laws.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — uniting jurisdictional and nonjurisdictional causes of action.

3. The jurisdiction of the Federal courts as limited and fixed by Congress cannot be enlarged by uniting in a single suit, under the rule governing the joinder of causes of action in suits in equity, causes of action of which the court is without jurisdiction with one of which it has jurisdiction.

[For other cases, see Courts, V. c, in Digest Sup. Ct. 1908.]

Appeal — from district court — jurisdiction below.

4. Whether those causes of action which must be eliminated from a suit in equity in a Federal district court as against a defendant which is not a resident of the district in which the suit is brought may be retained as against the other defendants is not a question of Federal jurisdiction, within the meaning of the Judicial Code, § 238, governing direct appeals to the Federal Supreme Court, but is one of general equity jurisdiction and practice applicable as well to state as to Federal courts.

[For other cases, see Appeal and Error, 895–914, in Digest Sup. Ct. 1908.]

[No. 496.]

Submitted December 17, 1914. Decided June 14, 1915.

APPEAL from the District Court of the United States for the Northern District of Illinois to review a decree dismissing, for want of jurisdiction, a suit based in part upon the patent laws. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **Thomas A. Banning** and **Samuel Walker Banning** submitted the cause for appellant:

In declaring upon infringement of patent rights the bill conferred jurisdiction.

The Fair v. Kohler Die & Specialty Co. 228 U. S. 24, 57 L. ed. 717, 33 Sup. Ct. Rep. 410.

The allegations of the bill, if confessed or proven, make out a case under the patent laws.

Consolidated Rubber Tire Co. v. Republic Rubber Co. 195 Fed. 770.

Messrs. **Levy Mayer**, **Isaac H. Mayer**, **John H. Lee**, and **Philip C. Dyrenforth** submitted the cause for appellees:

A bill for specific performance of a contract concerning an interest in a patent is not cognizable in a Federal court in the absence of the requisite diversity of citizenship.

Henry v. A. B. Dick Co. 224 U. S. 1, 15, 56 L. ed. 645, 651, 32 Sup. Ct. Rep. 364; Pratt v. Paris Gaslight & Coke Co. 168

NOTE.—As to the proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

U. S. 255, 256, 42 L. ed. 458, 459, 18 Sup. Ct. Rep. 62; New Marshall Engine Co. v. Marshall Engine Co. 223 U. S. 473, 56 L. ed. 513, 32 Sup. Ct. Rep. 238.

The defendants are charged as contributory infringers of plaintiff's patent merely because they induced licensees thereof to break provisions in the license agreements not to deal in devices which were "similar" to plaintiff's patented devices. Such a charge shows only a breach of contract, and not a suit under the patent laws, as the "similar" devices are not alleged to be infringing devices.

Henry v. A. B. Dick Co. 224 U. S. 1, 15, 16, 56 L. ed. 645, 651, 652, 32 Sup. Ct. Rep. 364; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Chadeloid Chemical Co. v. Johnson, 122 C. C. A. 293, 203 Fed. 993; Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722.

Where there is no invasion of the reserved patent domain, an existing license bars an infringement suit.

Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; Wilson v. Sandford, 10 How. 99, 13 L. ed. 344; Chadeloid Chemical Co. v. Johnson, 122 C. C. A. 293, 203 Fed. 993; Comptograph Co. v. Burroughs Adding Mach. Co. 175 Fed. 787, affirmed in 37 L.R.A.(N.S.) 821, 105 C. C. A. 533, 183 Fed. 321.

The allegation in the bill that the licensees are infringers, and that the defendants contributed to such infringement, is a mere conclusion of the pleader, and therefore is insufficient to sustain Federal jurisdiction.

Brown v. Keene, 8 Pet. 112, 115, 8 L. ed. 885, 886; Grace v. American Cent. Ins. Co. 109 U. S. 278, 283, 27 L. ed. 932, 934, 3 Sup. Ct. Rep. 207; Hanford v. Davies, 163 U. S. 273, 279, 280, 41 L. ed. 157, 159, 160, 16 Sup. Ct. Rep. 1051.

Where a bill is brought for specific performance of a contract, and there is joined thereto an alleged cause of action for infringement of patent, the district court cannot retain jurisdiction of the cause of action for specific performance, in the absence of the requisite diversity of citizenship—

(1) If the alleged cause of action for infringement fails.

A. Leschen & Sons Rope Co. v. Broderick & B. Rope Co. 201 U. S. 166, 50 L. ed. 710, 26 Sup. Ct. Rep. 425; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

(2) Or even if the alleged cause of action for infringement is sustained.

Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 460, 55 L. ed. 536, 543, 31 Sup. Ct. Rep. 456; St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co. 88 C. C. A. 585, 161 Fed. 725; National Casket Co. v. New York & B. Casket Co. 185 Fed. 533; Johnston v. Brass Goods Mfg. Co. 201 Fed. 368; King v. Inlander, 133 Fed. 416; Mecky v. Grabowski, 177 Fed. 591; Keasby & M. Co. v. Philip Cary Mfg. Co. 113 Fed. 432; Cushman v. Atlantis Fountain Pen Co. 164 Fed. 94; Woerheide v. H. W. Johns-Manville Co. 199 Fed. 535.

(3) Equity rule 26 does not and was not intended to affect this question.

Vose v. Rosebuck Weather Strip & Wire Screen Co. 210 Fed. 687, 216 Fed. 525; Marconi Wireless Teleg. Co. v. National Electric Signaling Co. 206 Fed. 300; Electric Boat Co. v. Lake Torpedo Boat Co. 215 Fed. 377.

[257] Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a direct appeal under Judicial Code, § 238 [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215], from a decree dismissing a suit in equity for want of jurisdiction, the question for decision being whether the bill presents a case arising under the patent laws; that is, a case asserting some right or privilege under those laws which will be sustained by one construction of them or defeated by another. Although not a model of good pleading, the bill plainly shows, when all of it is considered, that it is intended to charge the defendants (a) with contributing to the infringement of letters patent belonging to the plaintiff by wrongfully inducing and persuading designated licensees of the plaintiff to make, use, and sell devices embodying the inventions of the patents in circumstances not authorized or permitted by their licenses; (b) with wrongfully procuring such licensees to violate their license contracts in designated particulars, some of which have no bearing on the charge of infringement; and (c) with refusing to perform stipulations whereby the defendants agreed to assign to the plaintiff certain other letters patent. The prayer is for an injunction and accounting in respect of the contributory infringement, for an injunction and damages in respect of the procured breach of the licensees' contractual obligations, and for the specific performance of the stipulations to assign the other letters patent. The plaintiff is described as a New York corporation, one of the defendants as a West Virginia corporation, another as an Illinois corporation, and the third as an individual citizen of the latter state. The West Virginia company is alledged to have a regular and established place of business in the northern district of

Illinois, and the acts of infringement and contributory infringement are charged to have been committed in that district. Then there is an allegation that the suit is one "arising under the patent [258] laws of the United States, and also between citizens of different states," and that the amount in controversy exceeds $3,000, exclusive of interest and costs.

If the suit be one arising under the patent laws the district court undoubtedly had jurisdiction,—Judicial Code, § 24, ¶ 7 and §§ 48 and 256 [36 Stat. at L. 1092, 1100, 1160, chap. 231, Comp. Stat. 1913, §§ 991 (7), 1030, 1233]; but if it be not such a suit, that court was obviously without jurisdiction as respects the West Virginia company, unless it chose to waive its privilege of being sued only in the district of its residence or that of the plaintiff. § 51. Appearing specially, that company objected that the suit was not one arising under the patent laws, and insisted upon its personal privilege. The objection was sustained. The other defendants, likewise appearing specially, objected that the suit did not arise under the patent laws, and could not proceed without the presence of the West Virginia company because it was an indispensable party. This objection also was sustained, and the bill was then dismissed, the decree reciting that the dismissal was for want of jurisdiction.

We think the bill plainly rests the first branch of the suit, that relating to the alleged contributory infringement of the plaintiff's patents, upon the patent laws, and asserts in effect, if not in exact words, that the infringing acts charged against the defendants constitute an invasion of the plaintiff's exclusive rights under those laws and entitle it to relief thereunder by injunction and a recovery of profits and damages. And we think it cannot be said of this branch of the case that it is so unsubstantial or devoid of merit as to make it frivolous, or to bring it only nominally within the patent laws. On the contrary, we think it presents a real question under them. Whether it shall finally prevail or fail, it has enough of substance to entitle the plaintiff to an adjudication of it as presented. Thus it is within the ruling in The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 Sup. Ct. Rep. 410, that "if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction [259] whether the claim ultimately be held good or bad." Jurisdiction, as pointed out in that case, is the power to consider and decide one way or the other, as the law may require, and is not to be declined merely because it is not foreseen with certainty that the outcome will help the plaintiff. Of like import is Healy v. Sea Gull Specialty Co. 237 U. S. 479, ante, 1056, 35 Sup. Ct. Rep. 658.

We therefore hold that so much of the bill as charges the defendants with contributory infringement of the plaintiff's letters patent, and seeks relief on that ground, presents a case arising under the patent laws of which the district court should have taken jurisdiction.

But the other portions of the bill stand upon a different footing. The causes of action which they present—those not founded upon an unauthorized making, using, or selling of devices embodying the inventions of the plaintiff's patents, but resting only upon a breach of contractual obligations—do not arise under the patent laws. New Marshall Engine Co. v. Marshall Engine Co. 223 U. S. 473, 56 L. ed. 513, 32 Sup. Ct. Rep. 238; Henry v. A. B. Dick Co. 224 U. S. 1, 14, 15, 56 L. ed. 645, 650, 651, 32 Sup. Ct. Rep. 364, Ann. Cas. 1913D, 880. As to them no Federal court can take jurisdiction of a suit against the West Virginia company without its consent, save in the district of its residence or that of the plaintiff (Judicial Code, § 51); and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must, of course, yield to the jurisdictional statute. Thus, the West Virginia company's objection, while not good as to the entire bill, was good as to the causes of action not arising under the patent laws. Whether these causes of action can be retained as against the other defendants, after they are eliminated so far as the West Virginia company is concerned, is not open to consideration now. It [260] is not a question of Federal jurisdiction within the meaning of § 238, but only one of general equity jurisdiction and practice applicable as well to state as to Federal courts. Bogart v. Southern P. Co. 228 U. S. 137, 57 L. ed. 768, 33 Sup. Ct. Rep. 497, and cases cited.

The decree of dismissal is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Decree reversed.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plff. in Err.,
v.
BERNARD J. CARR.

(See S. C. Reporter's ed. 260–264.)

Master and servant — employer's liability — when servant engaged in interstate commerce.

A brakeman on a "pick-up" freight train running between points in the same state, but containing some cars loaded with interstate freight, who was injured while attempting, in the course of his employment, to set the brake on an intrastate car which had been cut out of the train and backed into a siding, was employed in interstate commerce, within the meaning of the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), where the setting of such brake was necessary in order that the engine to which the car was attached might, when uncoupled, return to the train and proceed on its journey.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

[No. 257.]

Argued May 4, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court, Appellate Division, Fourth Department, in the State of New York, to review a judgment which affirmed a judgment of the Trial Term of the Supreme Court in and for the County of Erie, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, 157 App. Div. 941, 142 N. Y. Supp. 1111.

The facts are stated in the opinion.

Messrs **Maurice C. Spratt** and **Lester F. Gilbert** argued the cause, and, with Mr. Charles C. Paulding, filed a brief for plaintiff in error:

If the injury occurred outside interstate commerce, the Federal act is without application, and the law of the state is controlling.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Wabash R. Co. v. Hayes, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

The burden is on the party relying upon the statute to prove that the work in which the employee was engaged at the time he received the injuries complained of was interstate; in other words, to prove that he is entitled to the benefit of the act.

Knowles v. New York, N. H. & H. R. Co. 164 App. Div. 711, 150 N. Y. Supp. 99; McAuliffe v. New York C. & H. R. R. Co. 164 App. Div. 846, 150 N. Y. Supp. 512.

Neither the plaintiff nor the defendant was, at the time and place of the accident, engaged in interstate commerce.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 52, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129

intrastate, they were engaged in an employment within the act.

Ibid.

While, therefore, any of the crew were employed on or in connection with the engine drawing the train and the two so-called intrastate cars in the cutting out process, they were still in interstate employment. Indeed, so far as the employment of the operatives of this train was concerned, there were no intrastate cars in it.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336; Pittsburgh, C. C. & St. L. R. Co. v. Glinn, — C. C. A. —, 219 Fed. 148; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

Mr. Justice Lamar delivered the opinion of the court:

Carr was a brakeman on a "pick-up" freight train running from Rochester to Lockport over the lines of the New York Central. On November 18, 1910, some of the cars in this train contained interstate freight. Among those engaged in purely intrastate business were the two [262] cars, at the head of the train and next to the engine, which were to be left at North Tonawanda, New York. On arriving at that point they were uncoupled from the train, pulled by the engine down the track, and then backed into a siding. It was the duty of one brakeman (O'Brien) to uncouple the air hose from the engine, and for the other (Carr) to set the hand brakes in order to prevent the two cars from rolling down upon the main track. O'Brien, having failed to open the gauge to the stopcock, suddenly and negligently "broke" the air hose. The result was that the sudden escape of air—applied only in cases of emergency—violently turned the wheel handle attached to the brake which Carr at the time was attempting to set. The wrench threw Carr to the ground, and for the injuries thus suffered he brought suit in a state court. If the case was to be governed by the law of New York he was not entitled to recover, since the injury was due to the negligence of O'Brien, a fellow servant. He did recover a verdict under the Federal employers' liability act, and, the judgment thereon having been affirmed (157 App. Div. 941, 142 N. Y. Supp. 1111, 158 App. Div. 891, 143 N. Y. Supp. 1109), the case is here on writ of error to review that ruling.

The railroad company insists that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr while working thereon was engaged in intrastate commerce and not entitled to recover under the Federal employers' liability act. The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from the interstate business. The present case is an instance of that kind; and many arguments have been advanced by the railway company [263] to support its contention that, as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159. This case is within the principle of those two decisions.

The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing, and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when

uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employees, on its interstate journey.

The case is entirely different from that of Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, for there the train of empty cars was running between two points in the same state. The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character. Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is [264] engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed.

D. J. McDONALD and United States Fidelity & Guaranty Company, Petitioners,
v.
J. W. PLESS and J. W. Winbourne, Partners, etc., as Pless & Winbourne.

(See S. C. Reporter's ed. 264–269.)

Federal courts — practice — conformity act.

1. The local practice with reference to the right of jurors to impeach their own verdict does not, because of the conformity provision of U. S. Rev. Stat. § 914, Comp. Stat. 1913, § 1537, control the Federal courts.

[For other cases, see Courts, V. e, 4, in Digest Sup. Ct. 1908.]

Trial — impeaching verdict — testimony of jurors.

2. Jurors may not, in the Federal courts, impeach their own verdict by testimony that it was rendered under an agreement to adopt as their verdict the quotient which would result from adding the sums which each juror thought should be the measure of plaintiffs' recovery, and dividing the aggregate by twelve.

[For other cases, see Trial, IX. c; New Trial, V. b, in Digest Sup. Ct. 1908.]

[No. 283.]

Argued May 13, 1915. Decided June 14, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of North Carolina in favor of plaintiff in an action for legal services. Affirmed.

See same case below, 124 C. C. A. 131, 206 Fed. 263.

The facts are stated in the opinion.

Mr. Julius C. Martin argued the cause, and, with Messrs. Thomas C. Rollins and George H. Wright, filed a brief for petitioners:

Where it can be lawfully proven that the jurors arrived at their verdict by what is sometimes called the quotient method, such verdict must be set aside by the court.

29 Cyc. 812, 813.

The testimony offered by the petitioners tending to show that the verdict had been so arrived at was competent and should have been received and considered by the court in this case.

Gottleib Bros. v. Jasper, 27 Kan. 770; Wright v. Illinois & M. Teleg. Co. 20 Iowa, 195; Perry v. Bailey, 12 Kan. 539; Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49; Ritchie v. Holbrooke, 7 Serg. & R. 458; Denn ex dem. Chews v. Driver, 1 N. J. L. 166; Nelms v. State, 13 Smedes & M. 500, 53 Am. Dec. 94; Hawkins v. New Orleans Printing & Pub. Co. 29 La. Ann. 134; Whitney v. Whitman, 5 Mass. 405; Hix v. Drury, 5 Pick. 296; Citizens' Bank v. Carey, 2 Ind. Terr. 84, 48 S. W. 1012; Johnson v. Husband, 22 Kan. 277; Atchison, T. & S. F. R. Co. v. Bayes, 42 Kan. 609, 22 Pac. 741.

The United States courts are not governed by the North Carolina decisions on this question in this kind of a case.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 368; Latchtimacker v. Jacksonville Towing & Wrecking Co. 181 Fed. 276; Southern P. Co. v. Kelley, 109 C. C. A. 659, 187 Fed. 937; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Union P. R. Co. v. Yates, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 584; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co. 66 C. C. A. 543, 133 Fed. 713; Nudd v. Burrows, 91 U. S. 426–442, 23 L. ed. 286–290; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898, 7 Am. Neg. Cas. 331; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; Manship v. New South

Bldg. & L. Asso. 110 Fed. 845; Union Bank v. Oxford, 90 Fed. 7; United States Sav. & L. Co. v. Harris, 113 Fed. 27; Swift v. Tyson, 16 Pet. 19, 10 L. ed. 871; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; Oates v. First Nat. Bank, 100 U. S. 239, 25 L. ed. 580; Boyce v. Tabb, 18 Wall. 546, 21 L. ed. 757; Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398; W. B. Grimes Dry Goods Co. v. Malcolm, 164 U. S. 490, 41 L. ed. 527, 17 Sup. Ct. Rep. 158; Lincoln v. Power, 151 U. S. 442, 38 L. ed. 227, 14 Sup. Ct. Rep. 387; United States Mut. Acci. Asso. v. Barry, 131 U. S. 119, 120, 33 L. ed. 66, 9 Sup. Ct. Rep. 755; Kennon v. Gilmer, 131 U. S. 24, 33 L. ed. 111, 9 Sup. Ct. Rep. 696; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 553, 30 L. ed. 258, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75; St. Louis, I. M. & S. R. Co. v. Vickers, 122 U. S. 363, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1216; 4 Fed. Stat. Anno. p. 575; Fed. Stat. Ann. Supp. 1914, p. 702.

Mr. **Joseph W. Bailey** argued the cause and filed a brief for respondents:

The trial court did not err in refusing to receive the testimony of jurors, offered in support of the motion for a new trial, to impeach their verdict.

Purcell v. Southern R. Co. 119 N. C. 739, 26 S. E. 161.

As this case was tried by a Federal court sitting in that state, the rule of the North Carolina court was properly applied.

M'Niel v. Holbrook, 12 Pet. 84, 88, 89, 9 L. ed. 1009, 1011; Stewart v. Morris, 32 C. C. A. 203, 60 U. S. App. 557, 89 Fed. 290; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Gormley v. Clark, 134 U. S. 338, 348, 33 L. ed. 909, 913, 10 Sup. Ct. Rep. 554; Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 189 U. S. 221, 228, 47 L. ed. 782, 23 Sup. Ct. Rep. 517; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

Even if a court of the United States sitting in North Carolina is not bound by the decision of the highest court in that state on that question, the testimony of the jurors to show that they had rendered a "quotient verdict" was inadmissible according to the overwhelming weight of authority, and such testimony was, therefore, properly excluded by the trial court.

5 Thomp. Trials, 2d ed. § 2603; 4 Wigmore, Ev. § 2354.

Mr. Justice **Lamar** delivered the opinion of the court:

Pless & Winbourne, attorneys at law, brought suit in the superior court of McDowell county, North Carolina, against McDonald to recover $4,000 alleged to be due them for legal services. The case was removed to the then circuit court of the United States for the western district of North Carolina. There was a trial in which the jury returned a verdict for $2,916 in favor of Pless & Winbourne. The defendant McDonald moved to set aside the verdict on the ground that when the jury retired the foreman suggested that each juror should write down what he thought the plaintiffs were entitled to recover, that the aggregate of these amounts should be divided by 12, and that the quotient should be the verdict to be returned to the court. To this suggestion all assented.

The motion further averred that when the figures were read out it was found that one juror was in favor of giving plaintiffs nothing, eight named sums ranging from $500 to $4,000, and three put down $5,000. A part of the jury objected to using $5,000 as one of the factors, inasmuch as the plaintiffs were only suing for $4,000. But the three insisted that they had as much right to name a sum above $4,000 as the others had to vote for an amount less than that set out in the declaration. The various amounts were then added up and divided by 12. But by reason of including the three items of $5,000, the quotient was so much larger than had been expected that much dissatisfaction with the result was expressed by some of the jury. Others, however, insisted on standing by the bargain, and [266] the protesting jurors finally yielded to the argument that they were bound by the previous agreement, and the quotient verdict was rendered accordingly.

The defendant further alleged in his motion that the jurors refused to file an affidavit, but stated that they were willing to testify to the facts alleged, provided the court thought it proper that they should do so. At the hearing of the motion one of the jurors was sworn as a witness, but the court refused to allow him to testify on the ground that a juror was incompetent to impeach his own verdict. That ruling was affirmed by the court of appeals. (124 C. C. A. 131, 206 Fed. 263.) The case was then brought here by writ of error.

On the argument here it was suggested that it was not necessary to consider the question involved as an original proposition, since the decision of the Federal court was in accordance with the rule in North Carolina (Purcell v. Southern R. Co. 119 N. C. 739, 26 S. E. 161), and therefore binding under Rev. Stat. § 914, Comp. Stat. 1913, § 1537, which requires that the practice, pleadings and forms and modes of procedure in the Federal courts shall conform as near

as may be to those existing in the state within which such Federal courts are held. But neither in letter nor in spirit does the conformity act apply to the power of the court to inquire into the conduct of jurors who had been summoned to perform a duty in the administration of justice, and who, for the time being, were officers of the court. The conduct of parties, witnesses and counsel in a case, as well the conduct of the jurors and officers of the court, may be of such a character as not only to defeat the rights of litigants, but it may directly affect the administration of public justice. In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules. Nudd v. Burrows, 91 U. S. 427 (4), 441, 23 L. ed. 286, 290; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 300, 23 L. ed. 898, 901, 7 Am. Neg. Cas. 331; W. B. Grimes Dry Goods Co. v Malcolm, 164 U. S. 483, 490, 41 L. ed. 524, 527, 17 Sup. Ct. Rep. 158; Lincoln v. Power, 151 U. S. 436, 442, 38 L. ed. 224, 227, 14 Sup. Ct. Rep. 387; [267] Burgess v. Seligman, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co. 66 C. C. A. 543, 133 Fed. 716.

But though Rev. Stat. § 914 does not make the North Carolina decisions controlling in the Federal court held in that state, we recognize the same public policy which has been declared by that court, by those in England, and most of the American states. For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended [268] to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

The rule on the subject has varied. Prior to 1785 a juror's testimony in such cases was sometimes received, though always with great caution. In that year Lord Mansfield, in Vaise v. Delaval, 1 T. R. 11, refused to receive the affidavit of jurors to prove that their verdict had been made by lot. That ruling soon came to be almost universally followed in England and in this country. Subsequently, by statute in some states, and by decisions in a few others, the juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissible. And, of course, the argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule "would open the door to the most pernicious arts and tampering with jurors." "The practice would be replete with dangerous consequences." "It would lead to the grossest fraud and abuse" and "no verdict would be safe." Cluggage v. Swan, 4 Binn. 155, 5 Am. Dec. 400; Straker v. Graham, 4 Mees. & W. 721, 7 Dowl. P. C. 223, 1 Horn & H. 449, 8 L. J. Exch. N. S. 86.

There are only three instances in which the subject has been before this court. In United States v. Reid, 12 How. 361, 366, 13 L. ed. 1023, 1025, the question, though raised, was not decided because not necessary for the determination of the case. In Mattox v. United States, 146 U. S. 140, 148, 36 L. ed. 917, 920, 13 Sup. Ct. Rep. 50, such evidence was received to show that newspaper comments on a pending capital case had been read by the jurors. Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there [269] might be instances in which such testimony of the juror could not be ex-

cluded without "violating the plainest principles of justice." This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict. The principle was recognized and applied in Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614, which, notwithstanding an alleged difference in the facts, is applicable here.

The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers, is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

Judgment affirmed.

NORFOLK SOUTHERN RAILROAD COMPANY, Plff. in Err.,
v.
WALTER G. FEREBEE.

(See S. C. Reporter's ed. 269–274.)

Master and servant — employers' liability — local practice.

1. A substantive right or defense arising under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), cannot be lessened or destroyed by a local rule of practice.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

Damages — diminution — comparative negligence — employers' liability — partial new trial.

2. The right of the carrier under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), to prove contributory negligence in mitigation of damages is not infringed by the action of the highest court of a state in granting a partial new trial, for the assessment of damages only, in an action under that statute, where the jury on the first trial specially found that the carrier was negligent and that the employee was free from contributory negligence, and where such new trial was granted at the instance of the carrier, and it did not ask for a rehearing or for a modification of the mandate, or for permission to introduce newly discovered evidence, and there was no offer of such newly discovered evidence on the second trial.

[No. 779.]

Argued April 23, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which, on a second appeal, affirmed a judgment of the Superior Court of Wake County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below on first appeal, 163 N. C. 351, 52 L.R.A.(N.S.) 1114, 79 S. E. 685; on second appeal, 167 N. C. 290, 83 S. E. 360.

The facts are stated in the opinion.

Mr. **Murray Allen** argued the cause, and, with Messrs. W. B. Rodman, John H. Small, and R. N. Sims, filed a brief for plaintiff in error:

Here we have the decision of a state court on a question of practice the result of which is to deny the plaintiff in error a fair trial under a Federal statute. If such result can be brought about by the application of rules of practice adopted by the state courts, then the state courts would have it within their power to do indirectly what this court has repeatedly said cannot be done directly by state legislation or judicial construction,—that is, they would have the power to control the application and effect of the Federal act.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

The measure of damages under the employers' liability act is determined by a comparison of the conduct of the carrier and that of the injured employee.

Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

The power to grant a new trial on the issue of damages alone ought to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which has crept into one ele-

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

ment of the verdict by no means can have affected its other element.

Simmons v. Fish, 210 Mass. 568, 97 N. E. 102, Ann. Cas. 1912D, 588. See also Watt v. Watt [1905] A. C. 115, 74 L. J. K. B. N. S. 438, 69 J. P. 249, 53 Week. Rep. 547, 92 L. T. N. S. 480, 21 Times L. R. 386, 2 Ann. Cas. 672; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696; Jarrett v. High Point Trunk & Bag Co. 144 N. C. 302, 56 S. E. 937.

The state courts should not be permitted to administer the employers' liability act in piecemeal, and the present case is an example of the great harm which will result from such practice. We think it manifest that the result in this case would have been different upon a proper application of the Federal act. That it might have been different is the test of jurisdiction and the right to a reversal.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

Messrs. W. B. Rodman, John H. Small, and R. N. Simms also filed a separate brief for plaintiff in error:

It would be difficult to conceive a clearer denial of a right arising under the Federal act than one in which the amount of damages assessed by the jury has been arrived at by the application of an erroneous rule, or by the failure to apply a correct rule when such rule is embodied in a prayer for instruction by the defendant.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; McGovern v. Philadelphia & R. R. Co. 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 896; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

Messrs. William C. Douglass and Clyde A. Douglass argued the cause and filed a brief for defendant in error:

It is true that this action was brought and tried under a Federal statute, but the state courts, under the act, have concurrent jurisdiction, and this court has no jurisdiction to review the judgment of the state court unless plaintiff in error has been denied some right, privilege, or immunity specially set up and claimed by it in the state courts under the Federal employers' liability act.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

It was within the discretion of the supreme court of North Carolina to grant a new trial upon the question of damages alone.

Key v. Allen, 7 N. C. (3 Murph.) 523; Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164; Sloan v. Hart, 153 N. C. 183, 69 S. E. 50; Benton v. Collins, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242; Strother v. Aberdeen & A. R. Co. 123 N. C. 197, 31 S. E. 386; Silver Valley Min. Co. v. North Carolina Smelting Co. 122 N. C. 542, 29 S. E. 940, 19 Mor. Min. Rep. 339; Rittenhouse v. Wilmington Street R. Co. 120 N. C. 544, 26 S. E. 922, 2 Am. Neg. Rep. 224; Pickett v. Wilmington & W. R. Co. 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; Jones v. Coffey, 109 N. C. 515, 14 S. E. 84; Boing v. Raleigh & G. R. Co. 91 N. C. 199; Price v. Deal, 90 N. C. 290; Jones v. Mial, 89 N. C. 89; Roberts v. Richmond & D. R. Co. 88 N. C. 560; Crawford v. Geiser Mfg. Co. 88 N. C. 554; Van Lindley v. Richmond & D. R. Co. 88 N. C. 547; Burton v. Wilmington & W. R. Co. 84 N. C. 194; Holmes v. Godwin, 71 N. C. 306; Stone v. Pentecost, 210 Mass. 223, 96 N. E. 335; Pratt v. Boston Heel & Leather Co. 134 Mass. 300; Thompson v. Pentecost, 206 Mass. 505, 92 N. E. 1021; Kleeb v. McInturff, 71 Wash. 419, 128 Pac. 1076; Austin v. Langlois, 83 Vt. 104, 74 Atl. 489; Radcliff v. Radford, 96 Ind. 482; McKay v. New England Dredging Co. 93 Me. 201, 44 Atl. 614; Iberville Parish v. Texas & P. R. Co. 129 La. 890, 57 So. 163; Evans v. Moseley, 87 Kan. 447, 124 Pac. 422.

This court has repeatedly held that matters within the discretion of the trial court will not be reviewed on appeal or writ of error.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Ludeling v. Chaffe, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; Tripp v. Santa Rosa Street R. Co. 144 U. S.

126, 36 L. ed. 371, 12 Sup. Ct. Rep. 655; Buena Vista County v. Iowa Falls & S. C. R. Co. 112 U. S. 165, 28 L. ed. 680, 5 Sup. Ct. Rep. 84; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

Mr. Justice **Lamar** delivered the opinion of the court:

Ferebee was employed by the Norfolk Southern Railroad Company as a train hand on a passenger train running from Raleigh, North Carolina, to Norfolk, Virginia. During the night, at some place on the journey, the steps to the platform of one of the cars were torn away by coming in contact with some unknown obstruction. The consequence was that when Ferebee attempted to alight at a station, he stepped from the platform to the ground, and received personal injuries for which he brought suit in the superior court of Wake county, North Carolina, under the Federal employers' liability act (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657). The company defended on the ground that the plaintiff had been guilty of contributory negligence in attempting to leave the car while it was in motion; in failing to hold on to the hand rail; in failing to use his lantern; and in failing to discover that the steps were missing. There was a trial in which, under the North Carolina practice, the jury returned a special verdict, finding, among other things, (1) that the railroad company was negligent, and (2) that the plaintiff was not guilty of contributory negligence. [272] The case was then taken to the supreme court of the state, which, because of an error in the charge on the subject of damages, granted a partial new trial and remanded the case for a hearing in which the only question to be considered was the amount to be awarded the plaintiff. 163 N. C. 351, 52 L.R.A. (N.S.) 1114, 79 S. E. 685.

At the second trial the plaintiff, on cross-examination, testified that when he left the car for the purpose of assisting passengers, he had in his hand a railroad lantern, and by holding it beneath the platform and "making an examination like a car inspector" he could have seen that the steps had been torn away. He testified that he made no such examination, and owing to the construction of the lantern—throwing light from the side instead of from the bottom—he did not see that they were missing. On motion of the plaintiff this evidence was excluded. Later the objection was withdrawn and the testimony admitted. On further cross-examination the plaintiff was asked if the rules did not require him to make such examinations. This evidence was excluded on the ground, among others, as stated in the argument here, that the rules themselves were the best evidence. The court refused to submit to the jury the question as to how much should be deducted from the damages sustained because of the plaintiff's contributory negligence, for the reason that the supreme court of North Carolina had granted a new trial to assess damages, and had thereby excluded the issue of contributory negligence from the case.

The jury found for the plaintiff—the amount being somewhat larger than that named in the first verdict. The judgment thereon was affirmed. 167 N. C. 290, 83 S. E. 360. The company then brought the case here by writ of error, in which it contends that it was error for the supreme court to grant a partial new trial in which the question of damages only could be considered, inasmuch as the employers' liability act entitles the defendant in all cases [273] to prove contributory negligence in mitigation of damages. On the other hand, the defendant in error contends that the question as to whether there should have been a partial new trial was a matter of procedure, to be governed by the practice of the state of North Carolina.

But a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury.

But this record, in connection with the special-finding first verdict, shows that in this case the two matters were in fact separable, so that the splitting up the issues and granting a partial new trial did not in this particular instance operate to deprive the defendant of a Federal right. For it appears that Ferebee had nothing to do with the loss of the steps and was not guilty of contributory negligence in failing to see that they were missing. His conduct at the time of his fall could not, therefore, affect the amount of the verdict, so that it was possible, on the second trial, to award damages without considering the conduct of the plaintiff, or retrying the question of contributory negligence.

The new trial was granted at the instance of the railway company. It did not ask the supreme court for a rehearing, or for a modification of the mandate, or for permission to introduce newly discovered evidence, nor was there any offer of such newly discovered evidence on the second trial. That offered

and excluded was not in the nature of newly discovered evidence, and the ruling of the trial court in reference to such evidence was in [274] accordance with the mandate of the supreme court. The other matters relied on here for a reversal involve no construction of the Federal act and are not of a nature to warrant this court in granting a new trial. Seaboard Air Line R. Co. v. Duvall, 225 U. S. 486, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

Under the facts, therefore, it cannot be said that the decision operated to deprive the railway company of a Federal right. But we recognize that the practice is not to be commended. Before granting partial new trials, in any case under the Federal employers' liability act, it should, as said by the supreme court of North Carolina, "clearly appear that the matter involved is entirely distinct and separable from the other matters involved in the other issues and . . . that no possible injustice can be done to either party. In cases of this character we do not know that the practice is generally to be commended." The North Carolina court further said in that case:—"An examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as of defendant's agents, might show that it is so interwoven with that relating to damage that to fairly ascertain what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries." Jarrett v. High Point Trunk & Bag Co. 144 N. C. 299, 302, 56 S. E. 937. See also Simmons v. Fish, 210 Mass. 568, 97 N. E. 102, Ann. Cas. 1912D, 588. Kennon v. Gilmer, 131 U. S. 22, 28, 33 L. ed. 110, 113, 9 Sup. Ct. Rep. 696, deals with the Federal practice in somewhat similar cases.

Judgment affirmed.

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[275] ILLINOIS CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

MULBERRY HILL COAL COMPANY.

(See S. C. Reporter's ed. 275-283.)

Commerce — state regulation — requiring railway company to furnish cars — congressional inaction.

1. Requiring an interstate railway company to furnish cars to shippers within a reasonable time after demand, as is done by Hurd's Rev. Stat. (Ill.) 1913, chap. 114, § 84, does not so directly burden interstate commerce as to render the statute invalid, irrespective of congressional legislation covering the subject, where the state courts hold that the question what is a reasonable time in any case depends upon all existing circumstances and conditions, including the requirements of interstate commerce.

[For other cases, see Commerce, III. j, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — Federal question not raised below.

2. A Federal question not raised in the trial court nor on appeal will not be considered by the Federal Supreme Court on writ of error to the highest state court.

[For other cases, see Appeal and Error, 2164-2174, in Digest Sup. Ct. 1908.]

Courts — jurisdiction of state court — suit by interstate carrier — previous action by Interstate Commerce Commission.

3. A state court has jurisdiction, without preliminary action by the Interstate Commerce Commission, under the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), §§ 8, 9, 22, giving shippers new rights, but preserving existing ones (which on this point are not affected by the act of June 29, 1906 [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563]), of a suit by a shipper against an interstate carrier to recover the damages caused by the latter's failure to discharge its duty under Hurd's Rev. Stat. (Ill.) 1913, chap. 114, § 84, to furnish the cars needed by a shipper within a reasonable time after demand, although the cars demanded were to be used in interstate commerce, and although the action may involve the carrier's duty to deliver cars during a time of car shortage, and when the plaintiff and other shippers were making the greater portion of their shipments in interstate commerce, since the carrier's

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Note.—As to the validity under the commerce clause of the statutory penalty for carrier's failure to furnish freight cars—see note to St. Louis Southwestern R. Co. v. Arkansas, 54 L. ed. U. S. 699.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

rule of car distribution not being attacked, there is no administrative question involved. [For other cases, see Courts, VI. a; Carriers, III. e, in Digest Sup. Ct. 1908.]

[No. 118.]

Argued and submitted January 14, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of St. Clair County, in that state, in favor of a shipper in an action to recover damages for the failure of a carrier to furnish cars. Affirmed.

See same case below, 257 Ill. 80, 100 N. E. 151.

The facts are stated in the opinion.

Mr. Blewett Lee argued the cause, and, with Messrs. Walter S. Horton, Edward C. Kramer, and John G. Drennan, filed a brief for plaintiff in error:

The furnishing of cars by railroads engaged in interstate commerce comes within the provisions of the act of Congress to regulate commerce.

Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174.

Where the reasonableness of the regulations and practices of an interstate carrier is involved, the Interstate Commerce Commission has original jurisdiction of such question, and the furnishing of coal cars by a railroad company engaged in interstate commerce to operators located on its lines, under the circumstances as shown by the evidence in this case, involves such regulation and practice of an interstate carrier of which the Interstate Commerce Commission has original jurisdiction, and until it has acted upon such question the courts are without jurisdiction.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315.

There is no question but what the Interstate Commerce Commission has original jurisdiction as to all questions involving discrimination in the charging of rates or the regulations and practices of interstate carriers.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 511, 56 L. ed. 288, 290, 32 Sup. Ct. Rep. 114; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443.

According to the Federal rule, railroad companies are not absolutely liable for failure to furnish cars in time of shortage.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 460, 54 L. ed. 280, 283, 30 Sup. Ct. Rep. 155; Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 451; Logan Coal Co. v. Pennsylvania R. Co. 154 Fed. 497; Montana, W. & S. R. Co. v. Morley, 198 Fed. 991.

The present case illustrates the tendency of some state courts to impose an absolute liability for the entire damage resulting from the shipper not having cars to move his coal when he demanded them.

Illinois C. R. Co. v. River & Rail Coal & Coke Co. 150 Ky. 489, 44 L.R.A.(N.S.) 643, 150 S. W. 641, Ann. Cas. 1914C, 1255.

The statute of the state of Illinois upon which this case is based, as applied in this case, is unconstitutional.

Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Southern R. Co. v. Reid, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213.

If a Federal question is fairly presented by the record and its decision is necessary to the determination of the case, such question is before this court for determination even though the state court avoided it.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 Sup. Ct. Rep. 627.

Mr. Frederick B. Merrills submitted the cause for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

This was an action brought by defendant in error against plaintiff in error to recover damages for the alleged failure [277] of the latter to furnish coal cars at plaintiff's mine, located upon the line of defendant's

railroad, pursuant to plaintiff's requirements and demands. It was founded upon § 22 of an act of March 31, 1874, in relation to fencing and operating railroads, as amended (Hurd's Rev. Stat. [Ill.] 1913, chap. 114, § 84, p. 1955). The declaration set forth that plaintiff was the owner of and engaged in operating a coal mine equipped with appliances necessary for the mining of coal, and was possessed of a large amount of coal at the mine; that defendant was the owner of the railroad upon which the mine was located, there being a switch at the mine, etc., and that on certain specified days in the year 1907 plaintiff notified defendant that it was ready and proposed to load certain specified quantities of coal, and needed defendant's cars in which to load it, and that defendant failed to furnish the cars, and by reason thereof plaintiff sustained damages. The plea was the general issue. There was a trial by jury, at which evidence was given tending to prove the averments of the declaration. Defendant's evidence showed that it was engaged in interstate commerce, having lines of railway extending to other states besides Illinois, with coal mines located upon its lines in three states, the greater part of them being in Illinois; that during the time covered by the action plaintiff shipped 95 per cent of its coal into states other than Illinois, and that if the cars demanded by it had been furnished 95 per cent of the coal shipped in them would have gone to points in other states and off the lines of defendant; and that the coal mines located along defendant's line were divided into divisions, and its equipment for hauling coal was first divided among the divisions and afterwards distributed among the coal operators. There was also evidence of a general shortage of coal cars upon the Illinois Central lines during the year 1907; but the reason for this was not clearly shown, and it did not appear that it was attributable to any sudden emergency or to other causes [278] beyond the control of the carrier. Defendant introduced in evidence its established rules governing the distribution of coal cars during the period covered by the suit, and there was evidence tending to show that these were followed. But it cannot be said that this was conclusive, and it was distinctly negatived by the finding of the jury.

A verdict was rendered in favor of plaintiff, which by remittitur was reduced to $716.92. The resulting judgment was affirmed by the supreme court of Illinois (257 Ill. 80, 100 N. E. 151), and the case comes here upon questions raised under the commerce clause of the Constitution of the United States and the act to regulate commerce.

1. The fundamental Federal question, and the only one with which the state supreme court dealt, is whether the Illinois statute is a direct burden upon interstate commerce and therefore repugnant to the commerce clause, irrespective of congressional action. This was raised by a motion to dismiss and a motion for the direction of a verdict in favor of defendant. The statute, so far as now pertinent, is as follows:

"Every railroad corporation in the state shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way-passengers and freights; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight, or fare legally authorized therefor, if payment shall be demanded, etc."

The Illinois supreme court construed it as follows: "The only requirement of the statute, as applied in this [279] case or any other case, is, that the railroad corporation shall furnish cars, within a reasonable time after they are required, to transport the property offered for transportation, and what would be a reasonable time in any case would depend upon all the circumstances and conditions existing, including the requirements of the interstate commerce carried on by the corporation."

In that court, Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 329, 50 L. ed. 772, 775, 26 Sup. Ct. Rep. 491, and St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 149, 54 L. ed. 698, 704, 29 L.R.A. (N.S.) 802, 30 Sup. Ct. Rep. 476, were cited. In the first of these, the state law absolutely required that a railroad should furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, making no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states or in other places within the same state, or any allowance for interference with traffic occasioned by wrecks or other accidents upon the same or other roads; and for any dereliction of the carrier, owing perhaps to circumstances be-

yond its control, it was made answerable not only to the extent of the damages incurred by the shipper, but, in addition, to an arbitrary penalty of $25 per car for each day of detention. In the Arkansas Case, the rule of the state railroad commission, as applied by the state court, penalized the carrier for delivering its cars to other roads for the movement of interstate commerce pursuant to the regulations of the American Railway Association, because, as the state court concluded, these regulations, although governing 90 per centum of the railroads in the United States, were inefficient and should be disregarded. This court held (p. 149) that the rule of the state court "involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such [280] commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition to the exercise of the right."

The statute now in question merely requires a railroad company to furnish cars within a reasonable time after demand made for them, and the question, What is a reasonable time? is to be determined in view of the requirements of interstate commerce. That the operation of the statute is thus limited in practice, and not merely in theory, is shown by the history of the case at bar. Upon a former trial there was a verdict for the plaintiff, and the resulting judgment came under the review of the appellate court (161 Ill. App. 272), which, while ruling in favor of the plaintiff upon the main questions, reversed the judgment and awarded a new trial (p. 282) because of the rejection of evidence offered by the defendant to show that there were times when it had not a sufficient amount of coal cars to supply the demand of all the operators along its lines, that this was the case during the year 1907, and that during this year plaintiff received its fair and just proportion of the cars.

We agree with the conclusion reached by the state court that the Illinois statute is not a direct burden upon interstate commerce, so as to be void in the absence of legislation by Congress.

2. It is here insisted that by reason of the provisions of the Federal act to regulate commerce and amendments (24 Stat. at L. 379, chap. 104, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563, etc.) the state law, however valid when originally enacted, has become an unconstitutional regulation when applied, as in the present case, to interstate transactions. Reference is made to § 1 of the act, as amended in 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), which provides: "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage . . .; and it shall be the duty of every carrier subject to the [281] provisions of this act to provide and furnish such transportation upon reasonable request therefor." Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 435, 57 L. ed. 284, 287, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213, and other cases of that class, are cited, to which may be added Charleston & W. C. R. Co. v. Varnville Furniture Co. decided June 1, 1915, 237 U. S. 597, ante, 1137, 35 Sup. Ct. Rep. 715.

As to this point, it is sufficient to say that no such question was raised in either of the state courts. Indeed, after the denial of the motion to dismiss and the motion to direct a verdict, defendant requested, and the trial court gave to the jury, an instruction setting forth almost *in hæc verba* the requirements of the state statute, and declaring "that no other or greater duty devolves upon railroad companies to receive and transport freight than mentioned in the statute."

3. The trial court overruled a motion, made by defendant at the close of the evidence, to dismiss the suit for want of jurisdiction: (a) because the cars demanded were to be used in interstate traffic; and (b) because the action involved defendant's duty to deliver cars during a period of time when there was a car shortage, and when plaintiff, and also the other coal operators, were shipping the greater portion of their coal in interstate commerce, and therefore the suit involved a question of the proper method of car distribution for interstate commerce at a time of shortage, authority over which question was vested in the Interstate Commerce Commission, and until that Commission had acted the court was without jurisdiction. The denial of this motion is insisted upon as error; but, under the facts of the case, the ruling is clearly sustained by our recent decision in Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, ante, 867, 35 Sup. Ct. Rep. 484. In that case, as in this, an interstate carrier was sued in a state court for damages caused by its failure to furnish a shipper with cars in which to load coal for shipment to [282] points within and without the state; the pleadings alleged that the carrier failed to perform its duty to furnish

cars, and also that, in violation of a state statute, it unjustly discriminated against the shipper by failing to distribute cars in accordance with the carrier's own rule applicable in time of shortage. A judgment having been rendered for damages caused by the unjust discrimination in the distribution of cars, the carrier brought the case here, insisting (1) that the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the administrative power of the Interstate Commerce Commission; (2) that no court had jurisdiction of an action for discriminatory allotment until after the Commission had determined that the established rule for distribution was improper; and (3) that no suit could be brought against an interstate carrier for damages occasioned by a failure to deliver cars, or for an unjust discrimination in distribution, except in a court of the United States. Upon a review of §§ 8 and 9 of the act to regulate commerce and of the proviso in § 22, which declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," we held (p. 130) that while the act gave shippers new rights, it at the same time preserved existing causes of action; that it did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; [283] but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or the Federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the state court had jurisdiction without previous application to the Interstate Commerce Commission.

It is true that the Puritan Case arose before the passage of the Hepburn act of 1906; but there is nothing in the amendments introduced by that act to affect the jurisdiction of the state court in an action such as the present.

In this case, plaintiff made no attack whatever upon defendant's rules for car distribution. The declaration, indeed, is based wholly upon the statute, and contains no averment of discrimination. It was defendant that endeavored to import the question of car distribution into the case by introducing the evidence above referred to, and by requesting an instruction (which the court accordingly gave) to the effect that if defendant had not and could not procure sufficient coal cars to furnish all of the operators on its lines with all the cars desired and demanded by them, and did fairly and equitably distribute its available cars among the operators, it discharged its whole duty to plaintiff. But the verdict of the jury in favor of plaintiff negatived the hypothesis of fact upon which this and another like instruction were based.

Judgment affirmed.

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[284] PEGGIE WOODWARD, Richard Woodward, Viola Woodward, et al., Plffs. in Err.,

v.

ROBERT P. DE GRAFFENRIED.

(See S. C. Reporter's ed. 284-320.)

Indians — Creek allotments — Curtis act.

1. Creek allotments made by the Dawes Commission after the passage of the Curtis act of June 28, 1898 (30 Stat. at L. 495, chap. 517), and prior to the Original Creek Agreement adopted by the act of March 1, 1901 (31 Stat. at L. 861, chap. 676), were none the less made under the Curtis act because the conditions precedent imposed by that act had not then been performed, since the only lawful authority to allot Creek lands possessed by the Dawes Commission prior to the adoption of the Original Creek Agreement was derived from the Curtis act, and all allotments made during the

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Note.—On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

intervening period were made under instructions issued by the Secretary of the Interior with express reference to that act.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — Creek allotments — interest acquired.

2. Only a personal right to the exclusive use and occupancy of the surface to be enjoyed by the persons identified by the Dawes Commission as properly entitled to a place upon the citizenship rolls of the Creek Nation was conferred by the Curtis act of June 28, 1898 (30 Stat. at L. 495, chap. 517), § 11, which requires the allotment by such Commission among the citizens of the tribe, without the latter's consent, of "the exclusive use and occupancy of the surface" of all tribal lands susceptible of allotment, reserving to the tribe all mineral lands and town sites, and provides that the lands allotted shall be nontransferable until after full title is acquired, and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held, and contains no provision for extinguishing the tribal title. The allottee took no assignable or inheritable interest in the land.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — Creek allotments — descent.

3. The conclusion that the Creek laws govern the descent of the allotted land of an enrolled Creek Indian who died after April 1, 1899, having previously received, under the Curtis act of June 28, 1898 (30 Stat. at L. 495, chap. 517), § 11, the exclusive use and occupancy of the surface of her provisional allotment, but before the ratification of the Original Creek Agreement by the act of March 1, 1901 (31 Stat. at L. 861, chap. 676), which, in § 6, confirmed all previous allotments, making them subject to the provisions of the agreement, is demanded either as the direct effect of the provisions of § 28, that if any citizen has died since April 1, 1899, before receiving his allotment and distributive share of the tribal funds, the lands and money to which he would have been entitled if living shall descend to his heirs according to the Creek laws of descent and distribution, or, if a narrower view of that section be adopted, as the necessary consequence of the provisions of § 7, which, after imposing restrictions on alienation first of "lands allotted to citizens hereunder," and next upon homestead allotments, ends by declaring that the homestead shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of the agreement, but, in the absence of such issue, "he may dispose of his homestead by will free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — Creek allotments — descent.

4. The equitable title vested under the Original Creek Agreement, adopted by the act of March 1, 1901 (31 Stat. at L. 861, chap. 676), in the heirs of a Creek allottee, to be determined according to the Creek laws of descent and distribution, was not devested by the subsequent adoption of the act of May 27, 1902 (32 Stat. at L. 258, chap. 888), or the Supplemental Creek Agreement of June 30, 1902 (32 Stat. at L. 501, chap. 1323), § 6, which substituted the Arkansas laws of descent and distribution.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Judgment — res judicata — partition — ejectment.

5. A decree in a partition suit in equity dismissing the petition because it showed that the land was held by defendants adversely to the plaintiff, and because the latter could not maintain an action for partition in equity without first establishing his title by an action in ejectment, is not a bar to an action in ejectment by the same plaintiff against the same defendants to establish the plaintiff's title to the land.

[For other cases, see Judgment, III. j, 4, b, in Digest Sup. Ct. 1908.]

[No. 164.]

Submitted February 25, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Muskogee County, in that state, in favor of plaintiff in an action of ejectment. Affirmed.

See same case below, 36 Okla. 81, 131 Pac. 162.

The facts are stated in the opinion.

Messrs. **William R. Lawrence, F. W. Clements, and George S. Ramsey** submitted the cause for plaintiffs in error:

Congress had plenary power to dissolve the tribal government and allot the lands among the individual members without the consent of the tribe.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74.

Agnes Hawes, the Curtis bill allottee, possessed an estate of inheritance, the minerals being reserved to the tribe, and upon her death her heirs inherited the allotment.

Welty v. Reed, — C. C. A. —, 219 Fed. 864; Goat v. United States, 224 U. S. 458–471, 56 L. ed. 841–847, 32 Sup. Ct. Rep. 541.

The allotment of the lands to the Indians

should not be considered as a mere donation upon the part of the Federal government, but the recognition of a great right, both moral and legal.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Johnson v. M'Intosh, 8 Wheat. 543, 603, 5 L. ed. 681, 695; United States v. Cook, 19 Wall. 591-593, 22 L. ed. 210, 211; Beecher v. Wetherby, 95 U. S. 517, 525, 24 L. ed. 440, 441; Spalding v. Chandler, 160 U. S. 394, 402, 40 L. ed. 469, 472, 16 Sup. Ct. Rep. 360; Parr v. United States, 132 Fed. 1004; Choate v. Trapp, 224 U. S. 671, 56 L. ed. 944, 32 Sup. Ct. Rep. 565.

Indian title by occupancy before allotment was sufficient title on which to base ejectment.

Hockett v. Alston, 3 Ind. Terr. 432, 58 S. W. 675, 49 C. C. A. 180, 110 Fed. 910; James v. Smith, 3 Ind. Terr. 447, 58 S. W. 715; Wilson v. Owens, 30 C. C. A. 257, 57 U. S. App. 500, 86 Fed. 572.

The right of occupancy descended.

Rush v. Thompson, 2 Ind. Terr. 557, 53 S. W. 333; Nivens v. Nivens, 4 Ind. Terr. 30, 64 S. W. 604.

For all practical purposes the status of the allotment should be treated and considered by the court as if the heirs obtained the same, technically, by inheritance, and not by purchase.

Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529; Pigeon v. Buck, 38 Okla. 101, 131 Pac. 1083.

A base, qualified, or determinable fee, as well as a fee tail, is an estate of inheritance. Any freehold estate for the life of another, or beyond the life of the holder, is an estate of inheritance.

16 Cyc. 602-604.

Seminole citizens obtained, upon the allotment, an estate of inheritance in the land, and under the act of April 21, 1904, they possessed full authority, prior to the issuance of patent (the Seminole government still being in existence) to alienate their equitable title.

Goat v. United States, 224 U. S. 458, 471, 56 L. ed. 841, 847, 32 Sup. Ct. Rep. 541.

The restrictions in the Curtis bill against alienation did not debase the quantity or quality of the estate granted.

Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045.

Allottees under the general allotment act of 1887 took an inheritable estate.

Beam v. United States, 89 C. C. A. 240, 162 Fed. 260; United States v. Park Land Co. 188 Fed. 383; Hallowell v. Commons, 127 C. C. A. 343, 210 Fed. 794.

A devise of the rents and profits, or the income of the land, is equivalent to a devise of the land itself.

Davis v. Williams, 85 Tenn. 646, 4 S. W. 8.

The right of exclusive occupancy acquired by possession was a descendible right, the title being in the United States.

Gillett v. Gaffney, 3 Colo. 361.

The possession of real estate, with the claim of ownership, is not only evidence of title, but is title itself in a low degree, and will descend to the heirs, and prior possession, with such a claim, will, even in ejectment, prevail over a subsequent possession acquired by mere entry without any lawful right.

Mooney v. Olsen, 21 Kan. 691.

The possessory right of the location of a mining claim on the public domain of the United States, although the locator had not applied for a patent, descends to the heirs by inheritance, and does not pass to the heirs by purchase as donees of the government.

O'Connell v. Pinnacle Gold Mines Co. 4 L.R.A.(N.S.) 919, 72 C. C. A. 645, 140 Fed. 854; Billings v. Aspen Min. & Smelting Co. 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338.

Where a party locates and surveys lands under an act of Congress providing for a donation of lands to officers and soldiers of the Virginia line, and dies before patent, and the patent afterwards issues to his heirs, the heirs take by descent, and not by purchase.

Bond v. Swearingen, 1 Ohio, 395.

When the heirs take anything which might have vested in the ancestor, the heir should be in by descent. Then, although it first vested in the heir, and never in the ancestor, yet the heir shall take it in the nature and course of descent.

Shelley's Case, 1 Coke, 98.

Land sold for taxes descends to the heir of the purchaser, although at his decease he had not received his deed, but only a certificate of the sale.

Rice v. White, 8 Ohio, 216.

Taking the provisions of the Curtis bill in connection with § 15 of the Indian appropriation of March 3, 1893, wherein the United States declared that "upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease," the allottee became vested, immediately upon the selection of the allotment, with an equitable estate of inheritance, and the issuance of a patent was unnecessary.

Shaw v. Kellogg, 170 U. S. 313, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632; Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; Best v. Polk, 18 Wall. 112, 21 L. ed. 805; Rutherford v.

Greene, 2 Wheat. 197, 4 L. ed. 218; Wray v. Doe, 10 Smedes & M. 452; Land v. Keirn, 52 Miss. 341; Godfrey v. Iowa Land & T. Co. 21 Okla. 293, 95 Pac. 792; Goat v. United States, 224 U. S. 470, 56 L. ed. 847, 32 Sup. Ct. Rep. 541; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Francis v. Francis, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129; Thomason v. Wellman, 124 C. C. A. 555, 206 Fed. 896.

Section 6 of the Original Creek Agreement ratified the action of the United States in providing for the allotment, and ratified the action of the Dawes Commission in allotting the particular land, and the confirmation of the title operated by relation so as to, in contemplation of law, vest the title to all minerals as of the date of the selection of the allotment on May 18, 1900, and the heirs obtained the title by descent, and not by purchase.

2 Words & Phrases, p. 1426; Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606; Landes v. Brant, 10 How. 372, 13 L. ed. 459; Goat v. United States, 224 U. S. 459, 56 L. ed. 843, 32 Sup. Ct. Rep. 541; French v. Spencer, 21 How. 228, 16 L. ed. 97; 5 Cruise, Real Prop. p. 510; Cornelius v. Kessel, 128 U. S. 456–463, 32 L. ed. 482–484, 9 Sup. Ct. Rep. 122; Morrison v. Faulkner, — Tex. Civ. App. —, 21 S. W. 984; Rozell v. Chicago Mill & Lumber Co. 76 Ark. 525, 89 S. W. 469; Frost v. Missionary Soc. 56 Mich. 62, 22 N. W. 203; Stoddard v. Chambers, 2 How. 284, 11 L. ed. 269; Bissell v. Penrose, 8 How. 317, 12 L. ed. 1095; Block v. Morrison, 112 Mo. 343, 20 S. W. 340; Spiess v. Neuberg, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; Shepley v. Cowan, 91 U. S. 330–340, 23 L. ed. 424–427; Jackson ex dem. De Forest v. Ramsay, 3 Cow. 76, 15 Am. Dec. 242; 3 Washb. Real Prop. 6th ed. § 2034; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Dibble v. Bellingham Bay Land Co. 163 U. S. 65, 68, 41 L. ed. 72, 73, 16 Sup. Ct. Rep. 939; Ozark Land & Lumber Co. v. Franks, 156 Mo. 673, 57 S. W. 540; United States v. Anderson, 194 U. S. 395, 48 L. ed. 1035, 24 Sup. Ct. Rep. 716; McAffee v. Lynch, 26 Miss. 257; Pickering v. Lomax, 145 U. S. 310, 36 L. ed. 717, 12 Sup. Ct. Rep. 860; Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933; Lykins v. McGrath, 184 U. S. 170, 46 L. ed. 485, 22 Sup. Ct. Rep. 450; Bonifer v. Smith, 92 C. C. A. 604, 166 Fed. 846; Story, Agency, § 244.

This whole scheme was but the recognition of the equity maxim that equity regards and treats that as done which in good conscience ought to be done.

Johnson v. Collins, 12 Ala. 322; Atwood v. Beck, 21 Ala. 590.

The Arkansas law of descent was the only law applicable to the devolution of the allotment at the time Agnes Hawes died on June 29, 1900.

Nivens v. Nivens, 4 Ind. Terr. 30, 64 S. W. 604; Labodie v. Smith, 41 Okla. 773, 140 Pac. 427; Bartlett v. Okla Oil Co. 218 Fed. 384.

Section 28 of the Original Creek Agreement only applies where the allotment is made to the heirs.

Skelton v. Dill, 235 U. S. 206, 59 L. ed. 198, 35 Sup. Ct. Rep. 60.

Agnes Hawes received her allotment during her lifetime, and whether she died seised and possessed of an estate of inheritance, or whether the allotment lapsed at her death and reverted to the tribe, is immaterial, because the allotment was not set apart to her heirs under § 28 of the Original Agreement, but was confirmed by § 6 of the Original Agreement, which operated as a ratification of all preceding allotments under the Curtis bill, whether the allottee was dead or living at the time the Original Agreement became effective.

Welty v. Reed, — C. C. A. —, 219 Fed. 864.

Homesteads were provided for the living, and not the dead, and the Commission had no authority to arbitrarily segregate any part of the allotment as a homestead for the heirs. No part of the land allotted to heirs could be impressed with homestead characteristics. For a period of time between the selection of the allotment under the Curtis bill and the actual designation of the homestead, the whole 160 acres stood in the status of surplus, and acquired none of the characteristics of the 40-acre homestead.

Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Hawkins v. Okla Oil Co. 195 Fed. 345.

The Original Agreement, § 7, does not put in force the Creek law of descent, except in a case of the actual inheritance of the 40-acre homestead; and where no homestead was ever selected or segregated, the Creek law had no field for operation. Of course, if a homestead was selected, it must follow that the allottee survived the Original Agreement, and the title to the minerals then united with the other title in one and the same person; and when the allottee died, he died seised and possessed of an equitable title in fee to both the minerals and the surface rights. That the heirs may take the land exclusive of the minerals by actual descent and obtain the minerals by purchase is neither wonderful nor anomalous. Such a

condition frequently occurs between individuals. One man may own the mineral rights and another the surface rights.

Hoilman v. Johnson, 164 N. C. 268, 80 S. E. 249.

It is immaterial as to the nature of the question presented to the court for determination, whether depending upon a Federal, general, or local law, if it be within the issues made, if it is adjudicated by a court having jurisdiction of the parties and subject, it binds the parties and their privies so long as the judgment remains unmodified and unreversed.

Mitchell v. First Nat. Bank, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Smith v. Kernochen, 7 How. 198, 12 L. ed. 666.

In general a judgment is a bar to a subsequent bill for the same purposes, but upon a different ground.

United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; United States v. Dalcour, 203 U. S. 423, 51 L. ed. 251, 27 Sup. Ct. Rep. 58; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; United States v. Morant, 123 U. S. 335, 31 L. ed. 171, 8 Sup. Ct. Rep. 189.

Where the issues having been made, defendant failed to appear when the case was called for trial, whereupon a default was entered, and the court, taking the case on the pleadings, adjudged, "The equities are with defendant, that the bill be dismissed and defendant to recover costs to be taxed," such decree was a bar to another action or suit for the same thing.

Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024. See also Durant v Essex Co. 7 Wall. 107, 110, 19 L. ed. 154, 156; Bigelow v. Winsor, 1 Gray, 299; Story, Eq. Pl. § 793.

It has been held, however, that a court of review may go so far as to reverse a decree, to allow an unsuccessful party in the lower court to have his suit there dismissed without prejudice, to prevent the bar, and allow him to try it upon the merits.

Miles v. Caldwell, 2 Wall. 45, 17 L. ed. 759.

One of the tests to determine whether the matter or cause of action is the same as in the former suit is whether the same evidence will sustain both actions.

Chapman v. Smith, 16 How. 133, 14 L. ed. 875.

Allotments made in the Creek Nation prior to the Original Creek Agreement were made under the Curtis bill of 1898.

Harris v. Hardridge, 7 Ind. Terr. 532, 104 S. W. 826; De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; Barnett v. Way, 29 Okla. 780, 119 Pac. 418.

Messrs. Joseph C. Stone and Thomas H. Owen submitted the cause for defendant in error. Mr. Charles A. Cook was on the brief:

The contention that the defendant in error is barred by a former adjudication does not present a Federal question, but one of local practice.

John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; Washington v. Miller, 235 U. S. 422, 59 L. ed. 295, 35 Sup. Ct. Rep. 119.

The defendant in error is not barred by former adjudication.

Gould, Pl. 1861 ed. p. 445, § 45; State use of McCreary v. Roth, 47 Ark. 226, 1 S. W. 98; Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416, 8 Rose's Notes, 719; 2 Black, Judgm. 2d ed. §§ 715, 716, pp. 1074, 1075; London v. Overby, 40 Ark. 155; Byers v. Danley, 27 Ark. 77; Bigelow, Estoppel, p. 61, § 6; Russell v. Place, 94 U. S. 606, 24 L. ed. 214.

Messrs. Thomas H. Owen and Joseph C. Stone also filed a separate brief for defendant in error:

The land involved, which was selected by Agnes Hawes, a Creek citizen who died June 29, 1900, was not allotted under § 11 of the Curtis act. The preliminary or tentative allotment was under the proposed Creek Agreements which failed to become laws. Final allotment was under the Original Creek Agreement.

De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; United States v. Jacobs, 115 C. C. A. 507, 195 Fed. 708; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302.

It did not lie with Congress, without the consent of the tribe, to dispose of their lands, and therefore had the allotment been made under § 11 of the Curtis act, it was not final or effectual as against the tribe or the United States.

Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565.

After the selection of allotments under § 11 of the Curtis act, Congress could have changed the plan.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716.

The Original Creek Agreement, at §§ 6 and 28, confirmed to the heirs of Agnes Hawes, as said heirs were determined by the Creek law and in the proportions provided for in that law, the temporary allotment selected by Agnes Hawes, and made the same a final allotment in the hands of the heirs. At final allotment the right to patent vested for the first time.

Washington v. Miller, 235 U. S. 422, 59 L. ed. 295, 35 Sup. Ct. Rep. 119.

Oklahoma cases holding that the Creek law governed in all cases where "Curtis bill allottees" died after the selection of their allotments, and prior to the Original Creek Agreement, constitute a rule of property.

Barnett v. Way, 29 Okla. 780, 119 Pac. 418; Divine v. Harmon, 30 Okla. 820, 121 Pac. 219.

The Creek law of descent was intended to govern the devolution of all Creek allotments, both surplus and homestead, whether allotted direct to citizens or for the benefit of their heirs after the death of the citizens entitled to receive allotment.

De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; Washington v. Miller, 235 U. S. 422, 59 L. ed. 295, 35 Sup. Ct. Rep. 119.

If the allotment involved was made under § 11 of the Curtis bill, the allottee took only the Indian title, "the exclusive use and occupancy," exclusive of the minerals, and nothing more, and the interest of the allottee therein, the same being a mere possessory right, was subject to further legislation and agreement; and even though it should be held that this right passed to the heirs by descent, it was not a vested right as against the government and the Creek Nation in the matter of final allotment and distribution of the lands.

Sizemore v. Brady, 235 U. S. 441, 59 L. ed. 308, 35 Sup. Ct. Rep. 135; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 74; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115.

Mr. Justice **Pitney** delivered the opinion of the court:

This was an ejectment suit, brought by defendant in error in the district court of Muskogee county, Oklahoma, to recover an undivided half interest in a tract of 160 acres of land situate in that county, formerly part of the domain of the Creek Nation in the Indian Territory. The tract was allotted to Agnes Hawes, A Creek freedwoman, [286] who, after receiving the allotment, died without issue, leaving surviving her husband, Ratus Hawes (under whom defendant in error claims), her mother, Peggie Woodward, one of the plaintiffs in error, and her father, Louis Woodward, since deceased, to whose rights the remaining plaintiffs in error have succeeded. From an agreed statement of facts it appears that Agnes Hawes was a recognized citizen of the Creek Nation, she being a negress of full blood and enrolled on the Freedmen Roll of that Nation; that she died June 29, 1900, having previously made selection of the tract in question as her allotment of land in that Nation before the Commission to the Five Civilized Tribes, and received from the Commission a certificate of allotment therefor; that after her death, and after the adoption of the Original Creek Agreement (act of March 1, 1901, 31 Stat. at L. 861, chap. 676; effective June 25, 1901, 32 Stat. at L. 1971), the Commission awarded the same land to her heirs, and thereafter, on April 1, 1904, a patent for it was duly issued to the "Heirs of Agnes Hawes," without naming them, which patent was in due form and approved by the Secretary of the Interior; that the patent, having been properly recorded, was accepted by her heirs; that at her death Agnes was the legal and acknowledged wife of Ratus Hawes, a noncitizen; that she left no children or grandchildren surviving her, had no children by her said husband, and was survived by him and by her parents already mentioned; and that on June 22, 1904, Ratus Hawes conveyed to plaintiff (defendant in error) an undivided half interest in the lands in question, by deed duly acknowledged and recorded in the records at Muskogee.

There was a judgment for the plaintiff, which was affirmed by the supreme court of Oklahoma (36 Okla. 81, 131 Pac. 162), and the present writ of error was allowed.

A brief additional recital should preface a statement of the questions in controversy. The date of the selection [287] by Agnes Hawes and of the allotment to her of the tract in question is not mentioned in the record; but it must have been on or after April 1, 1899, that being the date on which the allotment office for the Creek Nation was opened at Muskogee by the Commission to the Five Civilized Tribes, as appears from their Sixth Annual Report, p. 18, referred to in the marginal note, infra. Therefore, both the allotment and the death of the allottee occurred within the period during which § 11 of the Curtis act (act of June 28, 1898, chap. 517, 30 Stat. at L. 495, 497) was in force in the Creek Nation, by the terms of which the Commission was directed, upon the completion of the citizenship roll and the survey of the lands of the tribe, to "proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same," with reservations that need not at the moment be specified.

From the facts stated it is also evident that the allotment to Agnes Hawes was made under and by virtue of this section,

and therefore comes within the category of allotments confirmed by the Original Creek Agreement (act of March 1, 1901, chap. 676, § 6, 31 Stat. at L. 861, 863).

For we lay on one side, as quite untenable, the contention of defendant in error that the allotment was made not under the Curtis act, but under the Creek Agreement of February 1, 1899, which failed to become law. The principal ground of the contention is that conditions precedent to allotment, prescribed in terms or necessarily implied from § 11 of the Curtis act, had not been performed in the Creek Nation: the rolls of citizenship not having been completed, no appraisement or classification of the lands having been made for determining what lands were susceptible of allotment and for equalizing the value of allotments, [288] no selections having been approved by the Secretary of the Interior, etc. Not to mention other answers that might be made to this, it is sufficient for the present to say that the only lawful authority to allot Creek lands possessed by the Commission prior to the adoption of the Original Creek Agreement was derived from the Curtis act, and that all allotments made during the intervening period were made under instructions issued by the Secretary of the Interior with express reference to the latter act. This will be more particularly shown when we come to discuss, as we must, the proper construction of the two acts referred to, and their effect upon the title to the allotted tract. The fact that conditions precedent imposed by the Curtis act had not been performed when the Commission proceeded to make Creek allotments after its passage and prior to the Original Creek Agreement may have furnished one of the reasons for the express ratification of such allotments contained in § 6 of the Agreement; but this, of course, is far from saying that the allotments were not made under the Curtis act.

The case presented, therefore, is that of a Creek allotment selected by the citizen and made by the Dawes Commission under § 11 of that act, followed first by the death of the allottee after receiving the allotment and prior to the Original Creek Agreement, and then by action of the Commission, after ratification of that Agreement, awarding the lands to the "heirs" of the deceased allottee, and the ultimate issue of a patent to them.

The principal question is: By what law are the beneficiaries of the allotment and patent to be determined? Plaintiffs in error contend that, by the terms of § 11 of the Curtis act, Agnes Hawes took an estate of inheritance, subject to the reservation of the minerals; that at her death this interest descended to her heirs, according to the Arkansas laws of descent, under which the husband was not an heir, and acquired no interest in the land by the [289] curtesy, there being no child born of the marriage; and that § 6 of the Original Creek Agreement in ratifying the allotment vested an absolute title in her heirs, which related back to the date of the allotment or else to the date of her death, and carried the minerals with it. It is the contention of defendant in error, sustained by the Oklahoma courts, that the allotment to Agnes Hawes under the Curtis act did not vest in her the fee or any heritable interest; that the (equitable) fee was first vested in her "heirs" by the provisions of the Original Creek Agreement, they taking by purchase, and not by descent; and that who should take as her "heirs" must be determined according to the Creek laws of descent, under which the surviving husband took an undivided half interest, which passed by his deed to defendant in error.

It is not open to question that at the death of Agnes Hawes (June 29, 1900) the Arkansas law of descent was in force in the Creek Nation. This court, in a recent decision, pointed out the successive acts of legislation; culminating in §§ 26 and 28 of the Curtis act itself, by which Congress had displaced the tribal laws of descent and distribution, and substituted the Arkansas law as expressed in chapter 49 of Mansfield's Digest. Washington v. Miller, 235 U. S 422, 424, ante, 295, 297, 35 Sup. Ct. Rep. 119. But, as shown in that case (p. 425), the Original Creek Agreement contained provisions which reinstated the Creek laws of descent and distribution for certain purposes affecting the allotments in that Nation. Whether they apply to the present case is a subordinate question, to be discussed in its order.

In order to determine the questions thus presented it is necessary first to ascertain the true meaning of § 11 of the Curtis act, and then to consider the pertinent provisions of the Original Creek Agreement.

In Barnett v. Way (1911) 29 Okla. 780, 119 Pac. 418, a case precisely in point with the present,—the allotment having been made under § 11 of the Curtis act and the allottee [290] having died thereafter and before the ratification of the Original Creek Agreement,—the supreme court of Oklahoma held the rule of descent and distribution obtaining at the death of the allottee to be immaterial because she had no title in fee, legal or equitable, that could descend; and further held that by § 6 of the Original Agreement her allotment was ratified, and by § 28 was vested in her heirs, to be as-

certained as to the date of her death, according to the rule of descent and distribution then in force in the Creek Nation governing the devolution of property owned by any of its deceased members at the time of the member's death. To the same effect is Divine v. Harmon, 30 Okla. 820, 121 Pac. 219. These decisions are invoked by defendant in error as establishing a rule of property. But, as the first of them was rendered only a little more than three years ago, after the present action was commenced, and less than a year before it was decided by the supreme court of Oklahoma, it seems proper that, while giving due weight to the state decisions, we should re-examine the questions upon their merits.

Upon a first attentive reading of the Curtis act (30 Stat. at L. 495, chap. 517) it is seen to be divisible into three principal parts: (a) the first 28 sections, which contain obligatory provisions applicable (with minor exceptions not important in this discussion) generally throughout the Indian Territory, which at that time (act of May 2, 1890, chap. 182, § 29, 26 Stat. at L. 81, 93) included the country of the Five Civilized Tribes, and little besides; (b) § 29, which ratified an agreement made by the Dawes Commission with commissions representing the Choctaw and Chickasaw tribes on April 23, 1897 (the "Atoka Agreement"), as amended, the same to be of full force and effect if ratified before December 1, 1898, by a majority of the votes cast by the members of the tribes at an election held for that purpose; "and if said agreement as amended be so ratified, the provisions of this act shall [291] then only apply to said tribes where the same do not conflict with the provisions of said agreement;" and (c) § 30, ratifying and resubmitting, on similar terms and with like effect, an agreement made by the Dawes Commission with a commission representing the Creek tribe on September 27, 1897, as amended.

The first part of the Act required (§ 11) the allotment, *without the consent of the tribe*, of "the exclusive use and occupancy of the surface" of all tribal lands susceptible of allotment, reserving to the tribe all oil, coal, asphalt, and mineral deposits, and all town sites; the oil and other minerals to be leased (§ 13) by the Secretary of the Interior; the town lots to be sold (§ 15), with right of pre-emption to the owner of the substantial improvements, if any, and the purchase money to become the property of the tribe *upon the execution and delivery to the purchaser, by some person authorized by the tribe, of a deed* conveying to him the title to the lands. Each of the proposed agreements contains provisions for the allotment of lands to the members of the tribes, to be followed by the delivery of a *patent conveying all the right, title, and interest of the tribe*, excepting, in the case of the Atoka Agreement, the coal and asphalt under the land. With respect to allotments to be made under § 11, *no provision is made for extinguishing the tribal title*. But there is a proviso (p. 498): "That the lands allotted shall be nontransferable until after full title is acquired, and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held." By § 12, the allotments were to be reported to the Secretary of the Interior, "and *when he shall confirm such allotments* the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act."

Considering the language of § 11, and the absence of provision for extinguishing the tribal title to allotted lands, in contrast with the provisions respecting title [292] contained in § 15 as to town lots, and those contained in each of the proposed agreements as to both allotments and town lots, it seems sufficiently plain, upon the face of the act, that allottees under § 11 were to take only "the exclusive use and occupancy of the surface," with the right to remain in peaceable and undisturbed possession, but without right to transfer the allotment until full title should be acquired. For the acquisition of such title, no provision was made by this act, except as either or both of the proposed Agreements might be ratified by the tribes concerned. There was, however, in § 15 of an act of March 3, 1893, chap. 209 (27 Stat. at L. 612, 645), a grant of authority to each of the tribes to allot their lands in severalty, not exceeding 160 acres to any one person.

Having regard, therefore, merely to the language employed in § 11 of the Curtis act and the context, there is no foundation for the contention that allottees thereunder took any assignable or inheritable interest in the land, or anything more than an exclusive right to possess and enjoy the surface of the land during the lifetime of the occupant.

It is, however, insisted by plaintiffs in error that when the conditions existing at the time of the passage of this act, and the objects Congress sought to attain by it, are fully understood and considered, § 11 bears a different import, and by its true construction confers upon the allottee at least an equitable title of inheritance in the lands set apart to him, saving the minerals. It is said that to confer upon the allottee a mere right of occupancy for life, to revert to the tribe and become a part of the public

domain upon his decease, would have given to the Creek Indians less than they already had under their own laws, which conferred the right to inclose and cultivate lands of the tribe and to pass the improvements to their heirs at their death. It is insisted that at least the Curtis act allottee took an inheritable right of occupancy, [293] and that this, coupled with the confirmation arising from § 6 of the Original Agreement, vested the fee in the heirs of the allottee as of the time of his or her decease, even though that event occurred before the ratification of the Agreement.

It is very true that this act, passed as it was during a period of transition in the history of the Indian Territory, must be interpreted in the light of the situation then existing, and that we should have especial regard to the "old law" and the "mischief" in order to correctly appreciate the "remedy." And, in view of the great importance of the question before us,—for it appears that much the greater part of the Creek lands were allotted during the period intervening between April 1, 1899, and May 25, 1901,—we have resorted to all authentic sources of information within reach in order to realize and appreciate the situation that presented itself to Congress when the Curtis act was passed. The result is that the view above expressed respecting the true intent and meaning of § 11 is most fully confirmed.

The history of the removal of the Muskogee or Creek Nation from their original homes to lands purchased and set apart for them by the government of the United States in the territory west of the Mississippi river does not differ greatly from that of the others of the Five Civilized Tribes rehearsed in recent decisions of this court. Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Goat v. United States, 224 U. S. 458, 461, 56 L. ed. 841, 843, 32 Sup. Ct. Rep. 541. Pursuant to treaty provisions (treaty of 1826, art. 6, 7 Stat. at L. 286; treaty of 1832, arts. 12 and 14, 7 Stat. at L. 366; treaty of 1833, art. 3, 7 Stat. at L. 417), the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them. McKellop's Comp. 1893, p. 9. These treaties and the [294] treaty of 1856, 11 Stat. at L. 699, articles 4 and 15, conferred in ample terms the right of self government so far as compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes. The other four tribes held similar patents.

In the course of time, changing conditions and the great influx of white people into the territory pointed to the necessity of abolishing, if possible, the tribal organizations, and allotting the land in severalty. But because of the special rights that had been conferred upon these tribes, and the fact that they held patents for their respective lands, it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership. As early as the year 1866, shortly after the close of the Civil War, when new treaties were negotiated with the Five Civilized Tribes (14 Stat. at L. 755, 769, 785, 799), the treaty with the Choctaws and Chickasaws (pp. 774–778) contained provisions for a survey, division, and allotment of their lands, so as to change the tenure from a holding in common to a holding in severalty, in tracts of a quarter section each; but this plan was made contingent upon the consent of the Choctaw and Chickasaw people through their respective legislative councils. The Chickasaw Council, by an act approved November 9, 1866 (re-enacted October 17, 1876), not only confirmed the treaty, but gave assent to the adoption of the proposed plan of allotment. The Choctaw Council, by an act approved December 21, 1866, referred the proposition "to the people at large to be declared through their legal representatives in council at the October session, A. D. 1867;" but no affirmative action appears to have been taken upon it. And so the provisions of the treaty in this respect were not put into effect.

When Congress in the act of February 8, 1887, chap. 119 (24 [295] Stat at L. 388, Comp. Stat. 1913, § 4195), entered upon the general policy of allotting lands in severalty to the Indians upon the various reservations, the lands of the Creeks and other Indians in the Indian Territory were by § 8 excluded from the operation of the act.

By § 15 of the Indian appropriation act of March 3, 1893, chap. 209 (27 Stat. at L. 612, 645), Congress sought to encourage the Five Civilized Tribes to themselves enter upon the policy of allotting their lands in severalty, by giving the express consent of the United States to such allotments, not exceeding 160 acres to any one individual, declaring that the allottees should be deemed to be citizens of the United States, and that the reversionary interest of the United States in the allotted lands should cease, and appropriating money to pay for the survey of any lands so allotted. As a declaration of the policy of the United States this section has importance. But it

seems to have had no direct effect in the way of establishing that policy; at least, we have found nothing to show that any of the tribes allotted any of their land pursuant to it.

By § 16 of the same act provision was made for the appointment of a commission to enter into negotiations with the same tribes for the purpose of extinguishing the tribal titles, either by cession to the United States, or by allotment and division in severalty among the Indians, or by such other method as might be agreed upon between the several tribes and the United States, with a view to the ultimate creation of a state or states of the Union to embrace the lands within the territory. This was the origin of the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission. Its reports, issued annually thereafter, and communicated by the Secretary of the Interior to Congress for its information and guidance, give a complete and interesting history of the efforts made to further the policy of Congress,—efforts [296] beginning in discouragement, but finally crowned with success. So far as these reports antedate the legislation that is under inquiry, they may of course be resorted to as aids to interpretation, for the Commission was in a very real sense "the eyes and the ears" of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations. (See Church of the Holy Trinity v. United States, 143 U. S. 457, 465, 36 L. ed. 226, 230, 12 Sup. Ct. Rep. 511; Binns v. United States, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816.) We append in the margin a reference-list of these reports.[1]

The 1st Report contains a general explanation of conditions in the Territory, indicating (p. lxviii.) the complete [297] failure of the tribal governments, and showing that the principle of the treaties, which was that the lands of the several nations should be held in common for the equal benefit of the citizens, was so far departed from in practice that a few energetic men had been enabled to appropriate to their exclusive use almost the entire property of the territory that could be rendered profitable and available. "In one of these tribes, whose whole territory consists of but 3,040,000 acres of land, within the last few years laws have been enacted under the operation of which sixty-one citizens have appropriated to themselves and are now holding for pasturage and cultivation 1,237,000 acres. This comprises the arable and greater part of the valuable grazing lands belonging to that tribe. . . . In another of these tribes, under similar legislation, vast and rich deposits of coal of incalculable value have been appropriated by the few, to the exclusion of the rest of the tribe and to the great profit of those who operate them and appropriate their products to their individual use." It was further pointed out that towns of considerable importance, with permanent improvements of great value, had been built upon lands which could not be granted in severalty to the inhabitants. In the 2d Report, pp. lxxxvii., xciii., the substance of the above statements was reiterated with emphasis. And in the 4th Report, dated October 11, 1897, and submitted to Congress shortly before the consideration of the Curtis bill, reference was made to the pending agreements with the Choctaws and Chickasaws, and with the Creeks (these were rejected by the Indians before the Curtis bill was passed), and attention was again called (p. cxxi.) to "the condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment

[1]Reference List of Annual Reports of the Commission to the Five Civilized Tribes, transmitted to Congress in connection with the reports of the Secretary of the Interior, and printed as House Documents.

1st Report, Nov. 20, 1894, House Ex. Doc., Part 5, 53d Cong., 3d Sess., Vol. 14, pp. lix.-lxx.

2d Report, Nov. 14, 1895, House Doc. No. 5, 54th Cong., 1st Sess., Vol. 14, pp. lxxix.-xcvii.

3d Report, Nov. 28, 1896, House Doc. No. 5, 54th Cong., 2d Sess., Vol. 12, pp. cl.-clv.

4th Report, Oct. 11, 1897, House Doc. No. 5, 55th Cong., 2d Sess., Vol. 12, pp. cxvii.-cxl.

5th Report, Oct. 3, 1898, House Doc. No. 5, 55th Cong., 3d Sess., Vol. 15, pp. 1051-1090.

6th Report, Sept. 1, 1899, House Doc. No. 5, 56th Cong., 1st Sess., Vol. 19, pp. 3-178.

7th Report, Sept. 1, 1900, House Doc. No. 5, 56th Cong., 2d Sess., Vol. 28, pp. 5-79.

8th Report, Oct. 1, 1901, House Doc. No. 5, 57th Cong., 1st Sess., Vol. 24, pp. 5-221.

9th Report, July 20, 1902, House Doc. No. 5, 57th Cong., 2d Sess., Vol. 18, pp. 180-217.

10th Report, Sept. 30, 1903, House Doc. No. 5, 58th Cong., 2d Sess., Vol. 20, pp. 1-190.

11th Report, Oct. 15, 1904, House Doc. No. 5, 58th Cong., 3d Sess., Vol. 20, pp. 1-198.

12th Report, June 30, 1905, House Doc. No. 5, 59th Cong., 1st Sess., Vol. 19, pp. 579-640.

of all their people. . . . [298] Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, but, on the contrary, have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the government which created them." From these reports it also appears that while there was a strong sentiment among the Indian natives favorable to the subdivision of the tribal lands into individual holdings, the principal chiefs and most influential citizens were at first opposed to any concession threatening the permanence of the communal or tribal titles.

The first agreement negotiated with the Creeks was dated September 27, 1897, and in unamended form is found in the 4th Report, p. cxxix. It provided that every Creek citizen should have an allotment of 160 acres of the tribal lands, for which he should receive a patent conveying to him the tribal title; that land should be set apart for religious and educational institutions, for public buildings, and for cemetery purposes; that the town lots should be appraised—land and improvements separately—and that the owners of the improvements might buy the land; and that the balance of the tribal lands should be appraised and sold at auction, and the proceeds put into the Treasury of the United States and used for the purpose of equalizing the allotments with respect to value. The Commission say in their 5th Report, dated October 3, 1898 (p. 1052), that this agreement "was rejected by the [Creek] council, the chief, Isparhecher, some of his friends and other persons interested in leases obtained from the Nation, opposing the changes contemplated in it." This rejection was prior to the passage of the Curtis act.

Even before the first report of the Commission, the attention of the Senate of the United States was especially drawn to affairs in the Indian Territory, and a select committee was sent there to make an investigation. They [299] reported under date May 7, 1894, expressing views closely agreeing with those afterwards expressed by the Dawes Commission. And the House Committee report that accompanied the Curtis bill was to the same effect in substance.

We have set forth in the margin extracts from (a) the Senate Committee report just mentioned, (b) the House Committee report, and (c) the bill as enacted into law, the latter selected to show how its provisions were directed to the mischiefs pointed out in the reports. The italics are ours.[2]

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[2] Extracts from Senate Committee Report No. 377, May 7, 1894, 53d Cong., 2d Sess., vol 5:

"The theory of the government was when it made title to the lands in the Indian Territory to the Indian tribes as bodies politic that the title was held for all of the Indians of such tribe. *All were to be the equal participators in the benefits to be derived from such holding. But we find in practice such is not the case.* A few enterprising citizens of the tribe, frequently not Indians by blood, but by intermarriage, have in fact become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe—theoretically for all, yet in fact the great body of the tribe derives no more benefit from their title than the neighbors in Kansas, Arkansas, or Missouri. According to Indian law (doubtless the work of the most of the enterprising class we have named) an Indian citizen may appropriate any of the unoccupied public domain that he chooses to cultivate. In practice he does not cultivate it, but secures a white man to do so, who takes the land on lease of the Indian for one or more years according to the provision of the law of the tribe where taken. The white man breaks the ground, fences it, builds on it, and occupies it as the tenant of the Indian, and pays rental either in part of the crop or in cash, as he may agree with his landlord. Instances came to our notice of Indians who had as *high as* 100 tenants, and we heard of one case where it was said the Indian citizen, a citizen by marriage, had 400 holdings, amounting to about 20,000 acres of farm land. We believe that may be an exceptional case, but *that individual Indians have large numbers of tenants on land not subdued and put into cultivation by the Indian, but by his white tenant, and that these holdings are not for the benefit of the whole people but of the few enterprising ones, is admitted by all.* The monopoly is so great that in the most wealthy and progressive tribe your Committee were told that 100 persons had appropriated fully one-half of the best land. This class of citizens take the very best agricultural lands and leave the poorer land to the less enterprising citizens, who in many instances farm only a few acres in the districts farthest removed from the railroads and the civilized centers. As we have said, *the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians,* and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights. . . . We do not care to at this time suggest what, in our judgment, will be the proper step for Congress to take on this matter, for the Com-

[300] The Curtis bill, as introduced in the House, did not contain the provisions of the present §§ 29 and 30 (30 Stat. at L. 505, 514, chap. 517), ratifying, with amendments, and submitting [301] to the approval of the members of the respective tribes, the Atoka agreement and the Creek agreement of September 27, 1897, then recently rejected by the Indians. [302] These were added as a Senate amendment, perhaps at the suggestion of the Dawes Commission, for it appears from their 5th Report, p. 1053, that they were in Washington [303] co-operating with Congress respecting this legislation. Section 11, however, in substantially its final form, was a part of the original bill. Sections 16, 17, and 23, also, but in somewhat different form, were in the bill as introduced.

[304] It is evident that at the time this law was enacted, Congress entertained serious doubts as to its constitutional power to interfere with the tribal lands of the Five Civilized [305] Tribes or to overthrow the tribal governments without the consent of the Indians. Some of the doubts were afterwards resolved by the decisions rendered by this court in Stephens v. Cherokee Nation, 174 U. S. 445, 489, 491, 43 L. ed. 1041, 1057, 1058, 19 Sup. Ct. Rep. 722, and Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115. From what has been said and quoted, however, it very clearly appears that the purpose of Congress in the allotment provisions of § 11, and in those quoted from §§ 16, 17, and 23, which should be read in the same connection, was not to interfere at all with the tribal title to the allotted land unless with the consent of the tribe, manifested either by approval of the Agreement for that purpose submitted, or by tribal action under § 15 of the act of 1893; that the Curtis act had for its object the administration of the trusts imposed upon the several tribes by the early treaties, and which the tribes had failed to enforce; namely, that the beneficial use of the tribal domain should be enjoyed equally by all the members of the tribe, and that monopolization of it in any form or by any means should be prevented. Section 15, providing for the sale of town lots, improved or unimproved, went somewhat further, and permitted the purchaser to deposit the purchase price in the United States Treasury by way of tender to the tribe. A clause was included—permissive, but probably not obligatory upon the tribe—that "the person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such lands or town lots;

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mission created by an act of Congress, and commonly known as the Dawes Commission, is now in the Indian Territory with the purpose of submitting to the several tribes of that territory some proposition for the change in the present very unsatisfactory condition of that country. We prefer to wait and see whether this difficult and delicate subject may not be disposed of by an agreement with the several tribes of that territory. But if the Indians decline to treat with that Commission, and decline to consider any change in the present condition of their titles and government, the United States must, without their aid and without waiting for their approval, settle this question of the character and condition of their land tenures and establish a government over whites and Indians of that territory in accordance with the principles of our Constitution and laws."

Extracts from House Committee Report, March 1, 1898, accompanying the Curtis bill (House Rep. No. 593, 55th Cong., 2d Sess., Vol. 3):

"The Committee on Indian Affairs, to whom was referred the bill (H. R. 8581) for the protection of the citizens of the Indian Territory and for other purposes, respectfully report:

"On account of the importance of the questions involved and the many interests affected by the measure, the question was submitted to a subcommittee of five, who invited a subcommittee of three from the Committee on Indian Affairs in the Senate to join them. The subject was considered by that joint committee for several days and then by the full Committee on Indian Affairs in the House, and after the most careful investigation, your committee recommended the passage of the bill.

"Your committee believes that it has, by this bill, provided a way by which many of the evils existing in the Indian Territory may be corrected.

. . . . . .

"*It appears that the title to lands in the Indian Territory has been conveyed by patent to the tribes, and cannot be taken from them without their consent.* There are about 20,000,000 acres of land thus owned. It is rich in mineral deposits, and contains a large area of splendid farming and grazing land. . . .

"*For the last few years the Dawes Commission has been endeavoring to secure agreements with the various tribes, but so far there has been little accomplished.* Agreements were made with the commissioners of the several tribes—all, in fact, except the Cherokees—but the Creek agreement was rejected by the tribe when the vote was taken upon it. . . . *In view of the fact that it is now impossible to secure agreements with the tribes, and the fact that the title is in the tribe, your committee has provided for the allotment of the exclusive use and occupancy of the surface of the lands of each of the nations; but all valuable oil, coal, asphalt, mineral deposits, and town sites are reserved from allotments.*

"*Your committee found that while under*

and thereafter the purchase money shall become the property of the tribe," etc. This plan recognized the fact, referred to in the 1st Report of the Dawes Commission, that towns had been built up with the consent of the tribes, and valuable dwellings and other improvements constructed, without title and without means of acquiring title to the land. With the town lot question we have no present concern, except as § 15, by contrast, throws light upon § 11 and the [306] other compulsory provisions of the act respecting allottable lands. Section 11, we repeat, conferred only a personal right to the exclusive use and occupancy of the surface, to be enjoyed by persons identified by the Dawes Commission as properly entitled to a place upon the citizenship rolls.

The argument that this gave to the Creek Indians less than they were already entitled to under their own laws is wide of the mark. We must not be understood as conceding that the Creek laws conferred any inheritable right, except to the improvements upon the land; certainly, no ampler right could be conferred as against the United States, in view of the limitations imposed upon the tribal title by the terms of the patent held by the tribe. But, passing this question, the chief difficulty was not in the Creek laws, but in the mode of their administration or mal-administration. And the manifest purpose of the Curtis act was not to displace but to recognize the communal titles, and to administer the use of lands for the equal benefit of the members

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treaty provisions the lands of each tribe were to be held for the use and benefit of each of its members, yet the truth is that the lands are in the possession of a very few; and while some of the more powerful members have in their possession and under their control thousands of acres, the poorer class of Indians are unable to secure enough lands for houses and farms; and your committee has provided in this bill for a division of the use of the surface of the lands, so that each and every member of the tribes will be placed in possession of his share of the common lands. We believe this to have been the intent of all parties when the treaty was made.

"Your committee was convinced that there are many rich deposits of coal and other minerals in said territory, and that the tribes are not deriving the benefits therefrom that they should derive, but that individual members, and those holding leases from them, are deriving more than their share of the profit, so it has provided that all valuable mineral deposits be reserved to the tribes and be set apart as incapable of allotment, and that such mineral deposits be in the future leased under rules and regulations prescribed by the Secretary of the Interior. . . .

"Your committee fully appreciates the important problems involved, and it believes this measure, if enacted into law, will do much to settle those problems. *It will settle the intruder question, protect the so-called common Indians by allotting to them their right to use and occupy their part of the lands; it will break up the monopoly of lands, which has reached enormous proportions in the territory; it will secure to the tribes the income from the rich mineral deposits, and prevent that which rightfully belongs to them from being used by a few individuals;* it will assist in establishing schools and churches; it authorizes the laying out of cities and towns, and gives them power to enact and enforce ordinances; it will insure the people of that country the protection and relief to which they are entitled, and, at the same time, it protects the interests of the various *tribes.*"

Extracts from Curtis Act (30 Stat. at L. 495, chap. 517):

"Sec. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission,' *shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof,* considering the nature and fertility of the soil, location and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits; . . . When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval; . . . *provided further,* that whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires. . . . *Provided further, that the lands allotted shall be nontransferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held.*

"Sec. 12. That when report of allotments of lands of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, *and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act.*

"Sec. 13. That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said territory, and all such leases shall be made by the Secretary of the Interior; and any lease for

of the tribe according to the true intent and meaning of the early treaties; the effort being to do what the tribal governments ought to have done, but were failing to do. That this meaning was placed upon the act by the Secretary of the Interior will appear from the administrative regulations issued to the Dawes Commission, excerpts from which are set forth in the marginal note, infra.

Goat v. United States, 224 U. S. 458, 469, 56 L. ed. 841, 846, 32 Sup. Ct. Rep. 541, is not in conflict with the view above expressed. That case dealt with the right of Seminole freedmen to convey the lands allotted to them in severalty pursuant to the agreement confirmed by the act of July 1, 1898 (30 Stat. at L. 567, chap. 542), and turned upon the question whether the restriction upon alienation imposed by that agreement had been violated. It was argued that the interest of the allottee was not of such a character as to be susceptible of transfer; [307] and—notwithstanding the provision in the agreement that each allottee should have "the sole right of occupancy of the land so allotted to him"—the court rejected the argument on the ground that the allotments constituted the respective shares of the allottees in the tribal property, and were set apart to them as such, and that while the execution of the deeds was deferred, each had meanwhile a complete equitable interest in the land allotted to him. But this was because it was so agreed between the United States and the tribe, and has no

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any such minerals otherwise made shall be absolutely void. . . .

"Sec. 15. That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes. . . . Said commissions shall cause to be surveyed and laid out town sites where towns with a present population of two hundred or more are located, . . . *And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements thereon;* and no such appraisement shall be effective until approved by the Secretary of the Interior. . . . *The owner of the improvements* upon any town lot, other than fencing, tillage, or temporary buildings, *may deposit in the United States Treasury,* Saint Louis, Missouri, *one half of such appraised value; . . . and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.* If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; . . . *All town lots not improved as aforesaid shall belong to the tribe,* and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, *sold to the highest bidder* at public auction by said commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and *purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots. . . . The person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such lands or town lots;* and thereafter the purchase money shall become the property of the tribe; and all such moneys shall, when titles to all the lots in the towns belonging to any tribe have been thus perfected, be paid *per capita* to the members of the tribe. . . .

"Sec. 16. That it shall be *unlawful for any person, after the passage of this act,* except as hereinafter provided, *to claim, demand, or receive, for his own use* or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or *any rents on any lands or property belonging to any one of said tribes or nations in said territory,* or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; . . . *Provided,* That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him. . . .

"Sec. 17. *That it shall be unlawful for any citizen of any one of said tribes to inclose or in any manner, by himself or through another, directly or indirectly, to hold possession of any greater amount of lands or other property belonging to any such nation or tribe than that which would be his approximate share of the lands belonging to such nation or tribe and that of his wife and his minor children, as per allotment herein provided;* and any person found in such possession of lands or other property in excess of his share and that of his family, as aforesaid, or having the same in any manner inclosed, at the expiration of nine months after the passage of this act, shall be deemed guilty of a misdemeanor. . . .

"Sec. 23. *That all leases of agricultural or grazing land belonging to any tribe made after the first day of January, eighteen hundred and ninety-eight, by the tribe or any member thereof shall be absolutely void,* and all such grazing leases made prior to said date shall terminate on the first day of April, eighteen hundred and ninety-nine, and all such agricultural leases shall terminate on January first, nineteen hundred, *but this shall not prevent individuals from leasing their allotments when made to them as provided in this act, nor from occupying or renting their proportionate shares of the tribal lands until the allotments herein provided for are made.*"

10, 59. Still another agreement was negotiated under date of April 8, 1900 (7th Report, pp. 13, 47), which, with some amendments, was ratified by Congress in behalf of the United States by the act of March 1, 1901 (31 Stat. at L. 861, chap. 676). It was subsequently ratified by the Creek Nation on May 25, 1901 (8th Report, pp. 11, 47; 32 Stat. at L. 1971), and is known as the Original Creek Agreement. It provided for a general allotment of all the tribal lands, except town sites, etc., 160 acres being allotted to each citizen; town lots to be sold; deeds or patents to be made to allottees and purchasers, conveying the tribal title; the residue of lands and all funds arising under the agreement to be used for equalizing allotments; and any deficiency to be supplied out of other funds of the tribe, "so that the allotments of all citizens may be made equal in value, as nearly as may be."

The sections especially bearing upon the present inquiry are §§ 6, 7, and 28.[4] These and the other provisions of the [313] Agreement respecting the allotment of lands show that it was the intention of the parties to accept and confirm the allotment work already performed by the Dawes Commission, with the same effect as if it had been done after the ratification of the agreement. This was to adopt what had been done in dividing the lands so far as it had been done consistently with the provisions of the Agreement, and thus save not only the time and expense of the [314] allotment work, but the great confusion and hardship that would necessarily have resulted if the attempt had been made to vacate upwards of 10,000 allotment selections already made, involving the greater part of the improved lands of the Nation and a large majority of the citizens. At the same time the Curtis act allotments were brought under the provisions of the Agreement respecting the conveyance of the tribal title, etc. We see no evidence of a purpose to put allotments previously made upon a different basis, in any respect, from allotments thereafter to be made; on the contrary, the phrase used in § 6 is that the confirmed allotments "shall, as to appraisement and all things else, be governed by the provisions of this agreement." We construe the section to mean that allotments theretofore made, if not inconsistent with the provisions of the Agreement, were to be treated the same as if made after the ratification of the Agreement; and this includes the designation of the beneficiaries in case of the death of an allottee.

There were reasons for an express ratification of the allotment work previously done by the Commission. As already pointed out, the allotments had been tentatively and provisionally made in tracts of 160 acres, upon

[4] Extracts from Original Creek Agreement, act of March 1, 1901 (31 Stat. at L. 861, chap. 676).

"6. All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission.

"7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any encumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above. . . .

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

. . . . . .

"28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the [Curtis act] . . . shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly. . . ."

the order of the Secretary of the Interior, and without express authorization of acreage allotments in the Curtis act; they had been made before completion of the membership rolls and without appraisement of the lands; and, of course, they had been made without the consent of the tribe.

[315] But it is argued by plaintiffs in error that there is no provision of the Agreement that can be construed to apply the Creek law of descent to Curtis act allotments; that § 28 provides for an allotment to the heirs according to Creek law in two cases only: (a) where a citizen living on April 1, 1899, died *prior* to the ratification of the agreement "*before* receiving his allotment of lands and distributive share," etc.; and (b) where the citizen living April 1, 1899, died *after* the ratification of the agreement "*before* receiving his allotment," etc. It is insisted that Agnes Hawes did not fall within either of these classes, since she died *before* the ratification of the agreement, but *after* receiving her allotment. It is also insisted that § 7 put in force the Creek law of descent only with respect to the homestead 40 acres; and since the Curtis act had no provision for homesteads, the allotment, when made, was not impressed with homestead characteristics, and no part of the land allotted to heirs was impressed with such characteristics by the Agreement. The result of this argument, if sound, would be that all Curtis act allotments (over 10,000 in number, and covering more than 1,600,000 acres; 8th report, p. 32), and all allotments made after the ratification of the Original Agreement except homestead allotments under § 7 and a limited class of allotments under § 28, would descend according to the Arkansas laws of descent, while the exceptional allotments, comparatively of little importance, would descend according to the Creek laws.

Even if this construction accorded with the strict letter of the Agreement, it savors too much of refinement to be accepted as an exposition of the true intent and meaning of an engagement made between the government of the United States and an Indian tribe. Jones v. Meehan, 175 U. S. 1, 10, 44 L. ed. 49, 53, 20 Sup. Ct. Rep. 1; Choate v. Trapp, 224 U. S. 665, 675, 56 L. ed. 941, 945, 32 Sup. Ct. Rep. 565. The adoption of the Creek laws of descent was a concession to the Indians, who were, of course, more familiar with their [316] own laws than with chapter 49 of Mansfield's Digest, and were no doubt materially influenced in giving consent to the treaty by the fact that thereafter their lands would descend just as their personal property had descended in former times. To confine the operation of the Creek laws to the few and exceptional cases, and leave the Arkansas laws in effect respecting the greater part of the tribal domain, would be to keep the word of promise to the ear, while breaking it to the hope. At the same time, it would be inconsistent with the purpose expressed in § 6 to put Curtis act allotments on a parity with allotments afterwards made. The confusion that would result from applying two variant systems of law at one and the same time, with respect to lands lying side by side and otherwise indistinguishable, is, of course, apparent. The suggested construction must be rejected.

In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of § 28, which says: "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled . . . shall be placed upon the rolls . . . and if any such citizen has died since that time . . . before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled if living shall descend," etc. Although she had been placed in possession of an allotment, she had not in her lifetime "received" it, in the sense of the Agreement, for this contemplated ownership in fee, and she had received only a provisional surface right. Besides, while § 6 in confirming the allotment brought it under those provisions of the Agreement that contemplated a patent in fee, it was still only a partial dividend out of the property of the tribe. There remained something else contemplated by the Agreement and not received by Agnes Hawes in her lifetime, namely, her "distributive share of [317] all the funds of the tribe." Thus we have the precise situation contemplated by § 28, which in that case confers the lands and money, to which she would have been entitled if living, upon her heirs according to Creek law. This accords with the view adopted by the Oklahoma supreme court in Barnett v. Way, 29 Okla. 780, 785, 119 Pac. 418. And see Washington v. Miller, 235 U. S. 422, 425, ante, 295, 297, 35 Sup. Ct. Rep. 119.

Were there doubt of the correctness of this view, and were § 28 as restricted in its effect as is contended by plaintiff in error, the same result would follow from a fairly liberal reading of § 7, such as would have to be adopted in construing an agreement with Indians. That section begins by saying that "Lands allotted to citizens hereunder" shall not be encumbered or sold to secure or satisfy any debt contracted prior to the date of the deed to the allottee, and shall not be alienable within five years from the ratification of the agreement except with the approval of the Secretary of the In-

terior. Then follow clauses imposing restrictions solely upon the homestead 40 acres, and the section ends by declaring that the homestead shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of the Agreement, but in the absence of such issue "he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, *the land shall descend* to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation." It is reasonable to suppose that the Indians, when giving approval to this agreement, would understand that the land which was thus to descend free from limitation included as well the land to which the limitation had never applied as that to which it had applied, but respecting which it had expired. And they would understand the provisions of § 28 (if limited as is here contended), to apply the laws of descent and distribution of the Creek Nation to allotments made under the peculiar circumstances [318] there provided for, in order to bring those allotments into conformity, as to descent and otherwise, with allotments of the general class, including allotments made prior to the ratification of the agreement, which by § 6 were "as to appraisement and all things else" to be governed by the provisions of the agreement. Such was the view expressed by the supreme court of Oklahoma in De Graffenreid v. Iowa Land & T. Co. (1908) 20 Okla. 687, 709-711, 95 Pac. 624. In Bartlett v. Okla Oil Co. 218 Fed. 380, 385, the United States district court for the eastern district of Oklahoma passed upon the question of the descent of a Creek allotment held by a full-blood Indian of that tribe who died November 17, 1907, one day after the admission of Oklahoma as a state. It being in dispute whether the Creek law, the Arkansas law, or the Oklahoma law of descent and distribution applied, the court, in the course of a historical review of the legislation of Congress, said (p. 385) that under the Original Creek Agreement the descent of surplus lands was not especially provided for, and therefore was controlled by the laws of Arkansas, in force in the Indian Territory by virtue of the act of June 7, 1897 [30 Stat. at L. 62, chap. 3], and June 28, 1898 (the Curtis act); but this was clearly *obiter*.

Under either of the views that we have expressed, the Agnes Hawes allotment, if it was uncontested, if it did not include public property, and was not otherwise affected by the Original Creek Agreement, was confirmed by § 6. That it was not among the excepted classes is sufficiently evidenced by the subsequent action of the Dawes Commission in awarding it to the heirs of Agnes. That which had been tentative and provisional then became, by force of the provisions of the Agreement, final and conclusive. The result was to vest a complete equitable title in her "heirs," to be determined according to the Creek laws of descent and distribution; and, upon familiar principles, their interest, being vested, was not devested by the subsequent [319] adoption of the act of May 27, 1902, chap. 888, effective July 1, 1902 (32 Stat. at L. 258; Joint Res. No. 24, 32 Stat. at L. 742), or the Supplemental Creek Agreement (act of June 30, 1902, chap. 1323, § 6, 32 Stat. at L. 501; effective August 8, 1902, 32 Stat. at L. 2021), which substituted the Arkansas laws. See Ballinger v. United States, 216 U. S. 240, 249, 54 L. ed. 464, 468, 30 Sup. Ct. Rep. 338. Sizemore v. Brady, 235 U. S. 441, 448, ante, 308, 311, 35 Sup. Ct. Rep. 135, is distinguishable, because there the allotment in question was not selected or made until after the Supplemental Agreement went into effect.

It is undisputed that, according to Creek law, the husband was entitled to take a half interest in his wife's property if she died without will, at least, in case there were no children. And it is now settled that an intermarried noncitizen husband could inherit under the tribal laws the same as if he were a citizen. Reynolds v. Fewell, 236 U. S. 58, 63, ante, 465, 468, 35 Sup. Ct. Rep. 230; Shellenbarger v. Fewell, 236 U. S. 68, ante, 470, 35 Sup. Ct. Rep. 234.

It is perhaps unnecessary to say that the subsequent issue of a patent to the "Heirs of Agnes Hawes," without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement.

The restrictions upon alienation contained in the Original Agreement did not apply to allotments made on behalf of deceased members of the tribe. Skelton v. Dill, 235 U. S. 206, 210, ante, 198, 200, 35 Sup. Ct. Rep. 60. Indeed, all restrictions upon alienation as to allottees not of Indian blood (except minors and except as to homesteads) were removed by the act of April 21, 1904 (33 Stat. at L. 189, 204, chap. 1402).

Therefore, the conveyance on June 22, 1904, by Ratus Hawes to defendant in error passed to the latter the undivided half interest in the lands in question.

The further point is raised that defendant in error (plaintiff below) was barred from maintaining his present action by a decree dismissing a previous suit, brought by him prior to statehood in the United States court for [320] the western district of the Indian Territory, against Louis and Peggie Woodward, for a partition of the same land. This contention—equivalent to the plea of *res judicata*—was rejected by the state court

upon the ground that the partition suit was brought in equity, and was dismissed because the petition showed that the land was held by the defendants adversely to plaintiff, and because he could not maintain an action for partition in equity without first establishing his title by an action in ejectment. The decision was rested upon the authority of numerous cases cited from the supreme court of Arkansas, the practice of that state having been put in force in the Indian Territory by act of Congress. We concur in the result, and need add nothing to the reasoning of the state court.

One or two other questions were argued, but they are not within the assignments of error—indeed, were not raised in the court whose judgment is under review.

Judgment affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
M. J. MURPHY.

(See S. C. Reporter's ed. 320–324.)

Trial — instructions — negligence.

A railway company sued for damages for personal injuries sustained by a switchman as the result of a fall from the top of a refrigerator car, occasioned by the act of the messenger in charge of the car in leaving the door of the ice bunker wide open, has no valid ground of complaint because the trial court, instead of charging, as requested, that the rules of the carrier governing transportation of perishable freight in refrigerator cars were reasonable and binding upon the parties, and that if the car in question was handled in accordance with those rules, and if the messenger left the door open and this caused the plaintiff to fall, he could not recover, instructed the jury that the carrier could not escape liability because the messenger left the bunker opening uncovered, but that the jury might take into consideration the fact of the messenger's control of the car in determining the question of the carrier's negligence and the plaintiff's contributory negligence,—there being nothing to show that the plaintiff had notice of the carrier's rules, or that they entered into the contract of employment.

[For other cases, see Trial, VII., in Digest Sup. Ct. 1908.]

[No. 791.]

Argued April 23, 1915. Decided June 14, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Texas in favor of plaintiff in a personal injury action. Affirmed.

The facts are stated in the opinion.

Mr. F. H. Prendergast argued the cause and filed a brief for plaintiff in error:

Where a car loaded with bananas is in charge of a custodian, and has been placed on a bulk track to be unloaded, then the shipping rules of the railroad which permit the custodian to open or close the ventilators to the car are valid, and the railroad will not be liable for an injury caused by the custodian leaving the ventilators open on the top of the car.

Densmore Commission Co. v. Duluth, S. S. & A. R. Co. 101 Wis. 563, 77 N. W. 904; Gillett v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 68 S. W. 61; Houston & T. C. R. Co. v. Alexander, 103 Tex. 597, 132 S. W. 119; Schwartz & Co. v. Erie R. Co. 128 Ky. 22, 15 L.R.A.(N.S.) 801, 106 S. W. 1188; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; Texas C. R. Co. v. Dorsey, 30 Tex. Civ. App. 381, 70 S. W. 575.

If Marshall, the man in charge of the bananas, left the opening on top of the car uncovered, then the railroad company would not be liable, and the court erred in its charge to the jury.

Densmore Commission Co. v. Duluth, S. S. & A. R. Co. 101 Wis. 563, 77 N. W. 904; Gillett v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 68 S. W. 61; Schwartz & Co. v. Erie R. Co. 128 Ky. 22, 15 L.R.A.(N.S.) 801, 106 S. W. 1188; Texas C. R. Co. v. Dorsey, 30 Tex. Civ. App. 381, 70 S. W. 575.

Mr. S. P. Jones submitted the cause for defendant in error:

The duty of the master to provide for his servant a reasonably safe place in which to work and reasonably safe instrumentalities is an ever-present, non-delegable duty, and when the same is delegated to another, he thereby becomes the agent or representative of the master, for whose negligence the master is responsible.

Cooper v. Robischung Bros. — Tex. Civ. App. —, 155 S. W. 1050; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Baltimore & O. R. Co. v. Baugh, 149 U. S. 386, 37 L. ed. 780, 13 Sup. Ct. Rep. 914; Texas & N. O. R. Co. v. Conway, 44 Tex. Civ. App. 68, 98 S. W. 1070; Pennsylvania R. Co. v. La Rue, 27 C. C. A. 363, 55 U. S. App. 20, 81 Fed. 148; Southern P. Co. v. Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; Houston & T. C. R. Co. v. Milam, — Tex. Civ. App. —, 58 S. W. 735; Texas Traction Co. v. Morrow, — Tex. Civ. App. —, 145 S. W.

1069; Toledo Brewing & Malting Co. v. Bosch, 41 C. C. A. 482, 101 Fed. 530.

Mr. Justice Pitney delivered the opinion of the court:

Murphy, while in the employ of the railway company as a switchman in its yards at Marshall, Texas, fell from a [323] refrigerator car and received personal injuries, for which he recovered a judgment against the company in the United States district court, which was affirmed by the circuit court of appeals, without opinion. According to plaintiff's theory, supported by evidence sufficient to sustain the verdict, the car was standing upon one of the unloading tracks, but in such a position that it required to be occasionally moved in the course of switching operations. It was partially loaded with bananas, and it had at one end an ice bunker with an opening or scuttle in the roof of the car through which the bunker was filled. The opening was surrounded with a casing or coaming, rising somewhat above the surface of the roof, and there was a hinged door or cover fitted to the opening and furnished with a ratchet device for raising it and setting it at any desired angle. Plaintiff went upon the top of the car at night in the course of his duties in order to test the brake and if necessary to set it, so that the refrigerator car could not run down upon the main track. While walking upon the roof of the car and making ready to descend, it being dark, and the signal lantern that he carried furnishing scanty light upon his path, he stepped upon the casing or coaming of the ice bunker, his foot slipped or turned, and he fell to the ground, receiving serious injuries. The hatch cover, it appeared, was on this occasion left wide open, instead of being set at an angle by means of the ratchet, which, according to the evidence, was the proper mode of arranging it when it was desired to ventilate the ice bunker, and would have had the effect of preventing plaintiff from stepping upon the coaming.

Plaintiff's contention was that the railway company was negligent in leaving the door of the ice bunker wide open. Defendant insisted that the car was in the charge and control of one Marshall, who was selling bananas from it, and that under the rules prescribed by the company for governing the transportation of bananas Marshall had [324] a right to have the doors of the ice bunker open or closed, as he preferred. The trial court was requested to charge that the rules of the company governing the transportation of bananas in refrigerator cars were reasonable and binding upon the parties, and if the car in question was handled in accordance with those rules, and if the messenger in charge of the car left the ventilators open, and this caused the plaintiff to fall, he could not recover. This request was refused, and the court charged, on the contrary, that the railway company could not escape liability for injuring plaintiff by reason of Marshall's act in leaving the bunker opening uncovered; that the mere fact that Marshall, or somebody acting for him, left it uncovered, would not be sufficient to defeat a recovery by the plaintiff; but that the jury could take into consideration the fact of Marshall's control of the car in determining whether the defendant company, on the occasion in question, was guilty of negligence directly or proximately contributing to plaintiff's injury, and also in determining whether plaintiff was guilty of contributory negligence in walking along the car in the manner he did at the time of his injury. We think this was sufficiently favorable to defendant. So far as appears, there was nothing to show that plaintiff had notice of the company's rules respecting the care of perishable freight in refrigerator cars, or that they entered into the contract of employment. Assuming he was charged with notice of Marshall's control of the car and knew that this must interfere to some extent with the railway company's care for plaintiff's safety, this was no more than a circumstance in the case, and could not properly be treated as conclusively showing a want of responsibility on the part of defendant.

The other contentions of plaintiff in error are sufficiently answered by referring to Texas & P. R. Co. v. Rosborough, 235 U. S. 429, ante, 299, 35 Sup. Ct. Rep. 117, and cases cited.

Judgment affirmed.

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[325] PRODUCERS OIL COMPANY, Plff. in Err.,

v.

LYDIA HANZEN, Sam W. Mason, Dillard P. Eubank, Robert L. Stringfellow, and Earl H. Barnes.

(See S. C. Reporter's ed. 325-340.)

Boundaries — public lands — meander line.

A tract of not less than 40 acres of high ground lying between the platted traverse lines of a lot in a fractional section and the waters of a navigable stream will not be deemed to have been included in a

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NOTE.—On the effect of bounding grant on river or tide water—see note to Hanlon v. Hobson, 42 L.R.A. 502.

On the effect of meander line on boundary of Federal grant—see note to Security Land & Exploration Co. v. Burns, 48 L. ed. U. S. 662.

patent for such lot calling for 12.84 acres, issued to the occupant at whose request the survey was made, where the field notes of the survey show the existence of land outside the traverse lines, and the official plat delineating the surveyor's courses, and specifying acreage of the several subdivisions, cannot be said to indicate a water boundary beyond possible question, and where the owner and occupant for more than thirty years never occupied or exercised any act of corporeal possession outside the traverse lines.

[For other cases, see Boundaries, IV. b, in Digest Sup. Ct. 1908.]

[No. 165.]

Submitted March 3, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which reversed a judgment of the District Court of the Parish of Caddo, in that state, in favor of plaintiff in an action to establish a right to possession of land. Affirmed.

See same case below, 132 La. 691, 61 So. 754.

The facts are stated in the opinion.

Mr. Edgar H. Farrar submitted the cause for plaintiff in error:

The patent granted by the United States to plaintiff's vendor, being based on a plat showing that lot 1 of section 4 was bounded north, east, and west by a navigable stream, which plat shows a meander or traverse line all around the border of the bounding stream, drawn in accordance with the field notes, and shows also no surveyed land between the meander line and the water's edge, conveys to the grantee any spur or strip of land actually existing between the meander line and the water line.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; Mitchell v. Smale, 140 U. S. 414, 35 L. ed. 445, 11 Sup. Ct. Rep. 819, 840; Hardin v. Jordan, 140 U. S. 400, 35 L. ed. 439, 11 Sup. Ct. Rep. 808, 838; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Forsyth v. Smale, 7 Biss. 201, Fed. Cas. No. 4,950; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579.

Grants of the United States for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie. Hardin v. Jordan, 140 U. S. 400, 35 L. ed. 439, 11 Sup. Ct. Rep. 808, 838; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530. This means that the Federal grant must alone be looked to in order to determine whether it is a grant bounded on the stream or water. If the Federal grant is, by its terms, riparian, then the rights of the riparian grantee are determined by the local law.

Official patents and surveys of the United States cannot be attacked collaterally, or in litigations between private persons. Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822; Russell v. Maxwell Land Grant Co. 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530. In the absence of attack by the United States on the survey and patent to plaintiff, it is idle to say that to claim that a meander line, clearly shown to be such, and intended to be such by the United States, is a boundary line, and not a meander line, is not to attack collaterally the patent and the survey on which it is based.

Messrs. Eugene Mackey and D. T. Watson submitted the cause for defendants in error:

The rule for the construction of a patent is that it is to be construed strictly against the grantee,—that such public grants convey nothing by implication, but are construed strictly in favor of the government,—and unless the necessary and unavoidable construction of the patent shows a plain intent to convey the land in question, it will not be so construed.

Shively v. Bowlby, 152 U. S. 1, 10, 38 L. ed. 331, 335, 14 Sup. Ct. Rep. 548; United States v. Arredondo, 6 Pet. 738, 8 L. ed. 564.

The Bristol line is not a meander line.

Niles v. Cedar Point Club, 175 U. S. 308, 44 L. ed. 174, 20 Sup. Ct. Rep. 124; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 286, 19 L. ed. 74, 78; 2 Farnham, Waters, § 418; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Chapman & D. Lumber Co. v. St. Francis Levee Dist. 232 U. S. 186, 196, 197, 58 L. ed. 564, 567, 568, 34 Sup. Ct. Rep. 297; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. Rep. 425; Granger v. Swart, Woolw. 88, Fed. Cas. No. 5,685; Scott v. Lattig, 227 U. S. 242, 57 L. ed. 496, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242; Lammers v. Nissen, 4 Neb. 245; Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 303; Fuller v. Shedd, 161 Ill. 462, 33 L.R.A. 155, 52 Am. St. Rep. 380, 44 N. E. 286; Shoemaker v. Hatch, 13 Nev. 266; Glenn v. Jeffrey,

75 Iowa, 20, 39 N. W. 160; Grant v. Hemphill, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; Schlosser v. Hemphill, 118 Iowa, 455, 90 N. W. 842; Barringer v. Davis, 141 Iowa, 428, 120 N. W. 65; James v. Howell, 41 Ohio St. 696; Barnhart v. Ehrhart, 33 Or. 274, 54 Pac. 195; Little v. Pherson, 35 Or. 51, 56 Pac. 807; Fulton v. Frandolig, 63 Tex. 330; Tolleston Club v. Lindgren, 39 Ind. App. 452, 77 N. E. 818.

Extraneous proof is admissible to show what was in fact the true location of the lake or Jeems bayou. It is permissible to show that in fact the water line did not even roughly correspond with the Bristol traverse, but that between it and the bayou lay a tract many times larger than lot one (1) to which plaintiff would annex it.

Graham v. Gill, 223 U. S. 643, 56 L. ed. 586, 32 Sup. Ct. Rep. 396.

The findings of facts of the state court are conclusive and will not be reviewed by this court.

Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 44, 45, 51 L. ed. 953, 956, 27 Sup. Ct. Rep. 679.

Mr. Justice McReynolds delivered the opinion of the court:

Plaintiff in error—the Oil Company—instituted this action July 1, 1910, in the district court, Caddo parish, Louisiana, for the purpose of establishing its right to possession of part of lot No. 1, section 4, township 20, north, range 16, west, suddenly become very valuable through discovery of gas and oil. The petition alleges that the United States in 1874 sold to one Pitts lots 1 and 2, section 4, forming a projection known as "Wilson's Point," surrounded on three sides by waters of James bayou, a navigable stream; that he immediately entered, and, together with his successors, remained in peaceful, complete possession until April 2, 1910, when defendants in error, without knowledge of Noel, then owner, wrongfully entered upon part of lot No. 1, built a wire fence and placed a keeper thereon; that April 15, 1910, by notarial act duly recorded, the Oil Company purchased both lots from Noel and became subrogated to his rights; and when it came to subject the whole property to actual possession a portion was found occupied as above indicated.

A writ of sequestration, issued contemporaneously with filing of petition, was subsequently dissolved upon motion, a proper bond having been given, conditioned not to commit waste, and to make faithful restitution of fruits if so required.

Answering, defendants in error denied they were occupying any part of lot No. 1, section 4, but said they were and had been since April 2, 1910, in possession of 87.9 acres situated in sections 3 and 4, township 20, described by metes [330] and bounds, "which said property your respondents located under the laws of the United States relative to the location of mining lands and upon which they have made a discovery of oil and gas, and are, therefore, entitled to the full use and enjoyment and to a patent from the United States." They also denied the Oil Company or any of "its ancestors in title ever had or claimed possession of any part of the property so located by your respondents; but, that, on the contrary, your respondents aver that the said land was never in the possession of any person until the location by them." Further answering they averred that "Thomas H. Pitts purchased from the United States, among other property, lot 1 of section 4, township 20 north of range 16 west, containing 12.84 acres, and that he paid for the same with military land warrants, as containing that acreage; that the said lot 1 of section 4 is figured and described on the surveys of the United States by certain metes and bounds, shown on the said plat, the eastern boundary of said lot, as well as the other boundaries thereof, being shown on the said map; that the east line of said lot, which is the boundary between the land of respondents and that of plaintiff, did not and does not denote the banks of any body of water, but that, on the contrary, the said line was run through the hills as the line of boundary of the said lot; that the land of which your respondents are in possession, and which they located under their mineral filing aforesaid, is high land, not subject to overflow at any time, and which never constituted any part of any lake or bayou, and was left out of the surveys of the United States, and which remained the property of the government until said location had been made thereon by your respondents."

There were introduced in evidence patents from the government, field notes and attending documents, official plat, sundry conveyances, contour maps,—one prepared by Williams for plaintiff company, another by Barnes for [331] defendants,—Barbour's survey of sections 9, 10, 15, and 16, and photographs showing landscape and vegetation. Witnesses were examined in behalf of both sides chiefly in explanation of lines, maps, water levels, character of land and growth thereon. A draft of the official plat (⅛ original size) is in the margin [p. 1333]: on the following page is a copy of the combination map (much reduced) showing the Bristol, Williams, Barnes, and Barbour surveys especially referred to by Louisiana supreme court [p. 1334]. At the trial the following stipulation was made part of the record:

"It is admitted by both parties that J. S. Noel was in possession, as owner, from the date of his purchase in 1880 [1884], to the sale to the plaintiffs of the property known as the Wilson's Point place, his corporeal possession being limited on the east and north by the Bristol meander line, and said Noel never exercised any acts of corporeal possession, or was ever in occupancy of any land in section 4, east of or outside of the said meander line, or of any of the land in controversy. This is not intended to apply to any other land west of the land in controversy. That Noel's possession was vested by act of purchase and continued by occupancy in the plaintiffs.

"It is further admitted that defendants on the 2d day of April, 1910, took actual possession of, and posted and filed notices of location under the placer mining laws of the United States, of the tract of land on which they are now in possession, and concerning which this suit is brought, which tract of land is described by metes and bounds in defendants' answer.

"It is further admitted that when defendants took possession of said land, they located the western boundary line of their location, as the Bristol meander line, as properly located, and the defendant does not claim the ownership or possession of any land west of the true location of said Bristol meander line.

"It is admitted that since the institution of this suit [333] the defendants have actually discovered oil and gas and are now producing oil from said property.

"It is admitted by both parties that the land in controversy is high land and was high land at the date that Bristol made his survey in 1871.

[334] "There being a dispute between the plaintiffs and defendants as to the true location of the Bristol meander line referred to above, it is agreed that the said issue as to the true and exact location of said line is

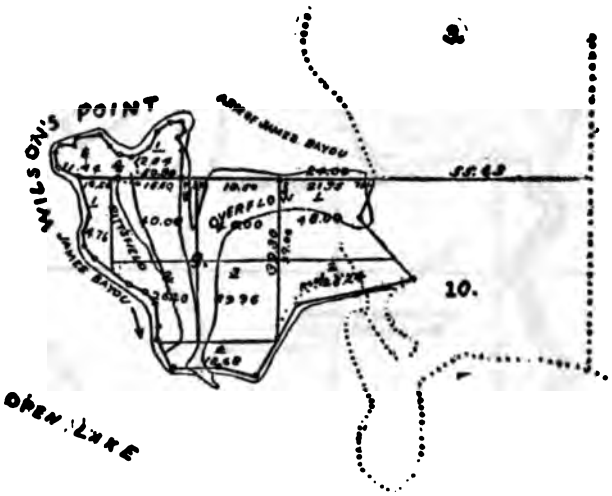


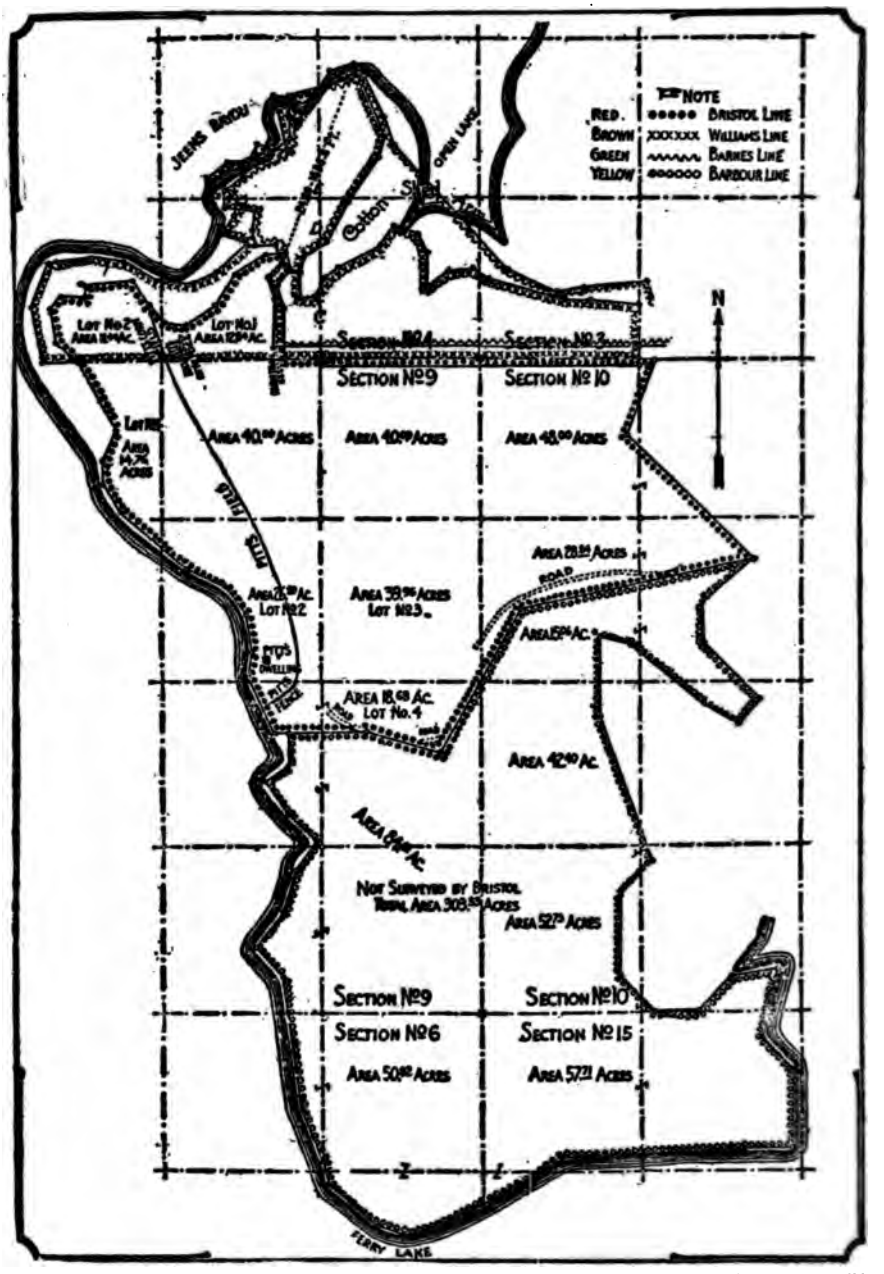
TABLE OF TRAVERSE.

In front of Sec. 4.		N. 39½ W.	3.00	S. 24° W.	4.00	S. 76° E.	10.00
N. 3° E.	6.00	N. 31½ W.	3.50	South	3.00	N. 80 E.	11.00
N. 15° W.	3.00	S. 24° W.	6.00	S. 21° E.	4.00	In front of Sec. 10	
W. 4½° E.	2.50	S. 15° W.	1.50	S. 51 E.	11.00	N. 30° E.	9.50
N. 16° W.	2.50	N. 83° W.	3.00	S. 65 E.	5.00	N. 78° E.	30.00
S. 86½ W.	2.50	S. 59 W.	3.00	S. 36 E.	4.00	N. 45° W.	30.00
S. 67° W.	4.00	S. 8° E.	4.50	S. 3° E.	5.00	N. 20° E.	10.00
S. 39½ W.	4.50	S. 50° E.	3.50	S. 11° W.	3.00		
S. 65° W.	4.50	In front of Sec. 9.		S. 24½ E.	9.00		
N. 81° W.	2.00	S. 22½ E.	10.00	N. 88 E.	11.00		

CONTENTS:

Sec. 4.... 24.28 Acl ; Sec. 9... 179.60 Acl ; Sec. 10... 76.24 Acl

* See field notes N. 47½ E



not to be passed upon in this case, said issue being relegated to a subsequent proceeding herein, should the court sustain the defendants' position that said line is the true boundary between the property, and the question of costs and damages are likewise relegated to further proceedings."

Prior to 1858 Alfred Wilson squatted on the point since known by his name, and during that year sold to Ann Pitts improvements upon "160 acres more or less" lying thereon. In April, 1871, Thomas H. Pitts applied to the United States for a survey of the land,—long improved and then occupied,—and shortly thereafter (July, 1871) this was made by Byron Bradley Bristol, duly certified and reported as "Field Notes of the Survey of Wilson's Point." From these notes, referring, among other things, to inclosure, corn field, fence, dwelling, and road, the official plat or diagram was made in office of the surveyor general

of Louisiana with actual traverse lines marked out. This plat shows fractional section 4, immediately north of section 9,—divided into two lots, No. 1 on the east, 12.84 acres, and No. 2 west, 11.44 acres,—on a point upon the left bank and surrounded on three sides by waters of James bayou. It is very small and does not indicate with certainty whether traverse lines or the stream constitute north and east boundaries. In respect of this fractional section 4 the surveyor's field notes in part recite: "July 27th, 1871. Meanders of the left Bank of James Bayou begin at the corner between fractional sections 9 and 4 [southeast corner of Lot No. 1, Section 4], a gum tree at 24.50 West of the corner of sections 3, 4, 9 and 10; run thence down stream in fractional sec. 4; N. 2 degrees E. 6.00; N. 15 degrees W. 3.00; N. 47½ degrees E. 2.50; N. 16 degrees W. 2.50; *S. 86½ degrees W. 2.50, spur of marsh* [335] *extends out North;* S. 57 degrees W. 4.50; S. 33¼ degrees W. 4.50; S. 63 degrees W. 4.50; N. 81 degrees W. 2.80 at 1.10, enter Pitts' enclosure; N. 39½ degrees W. 3.00, enter corn field;" thence according to seven designated calls bearing westerly and southerly around lot No. 2 "to the corner to fractional sect. 4 and 9, thence in sect. 9, etc. Under "General Description" this note appears: "The front land on James' Bayou is above the common average. The back land is thin and poor, post oak, flat. James' Bayou is navigable in ordinary seasons for large boats. The slough or water course near the original traverse in front of Sec. 10, is now dry and can only be traced by the rotten drift wood."

March 1, 1878, Thomas H. Pitts received from the United States a conveyance of "Northwest quarter of the Northeast quarter of Section Nine, . . . containing Forty Acres, according to the official plat." By patent dated February 18, 1892, which recites a soldier's warrant for 120 acres had been deposited, the United States conveyed to Thomas H. Pitts "Lots numbered one, two, three and four of Section Nine and the Lots numbered one and two of Section Four in Township Twenty North, of Range Sixteen West, of Louisiana, Meridian, in the District of Lands subject to sale at Natchitoches, Louisiana, containing One Hundred and Twenty-three acres and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of said Lands returned to the General Land Office by the Surveyor-General."

Pitts's title to 163.88 acres "with all buildings and improvements," described substantially as in his two patents,—one for 40 acres, the other 123.88 acres,—was conveyed November 23, 1880, to Walsch for $250; February 15, 1884, Walsch conveyed to Noel for $300; and on April 15, 1910, Noel conveyed the 163.88 acres "more or less" to plaintiff company for recited consideration of $50,000.

[336] It appears that north and northeast from the northernmost traverse line of lot No. 1, designated in filed notes "S. 86½ degrees W. 2.50, spur of marsh extends out North," and between it and James bayou, there is and was at time of Bristol survey a narrow ridge of high land 1,636.8 feet long and contiguous fast ground, amounting altogether to about 40 acres (87 according to defendants' estimate), upon which is much large growing timber, including cypress, hickory, gum, and oak—one oak 400 feet beyond the traverse lines being 14 feet in circumference. This is the land in dispute. To the south of the Bristol survey and outside its traverse lines lie 300 acres of fast land surveyed and platted by Barbour in 1896.

The Oil Company claimed traverse lines around lot No. 1 must be treated as true meanders; that being owner and in actual possession of the lot it had constructive possession of land lying beyond such lines east and north to the bayou—40 acres or more; and that this was being trespassed upon. Defendants in error maintained the traverse lines were not intended as true meanders; that the grant was limited by courses and distances specified; and lands north and east of these were left unsurveyed, with title remaining in the government.

The trial court sustained the Oil Company's contention and adjudged it entitled to be maintained in possession of lot No. 1, "and that the tongue of land on which defendants and their lessee have drilled an oil well, projecting north, and bounded north, east, and west by Jeems bayou, is a constituent and component part of lot number 1, the boundary of said lot number 1 being the water line of Jeems bayou; it being the purpose of this judgment to fix Jeems bayou as the boundary of said lot without regard to any arbitrary lines of survey."

Upon appeal the supreme court of Louisiana (132 La. 691, 698-700, 703, 707, 61 So. 754) reversed the judgment of the trial court. It declared:

"Plaintiff claims possession [337] of the land in this suit as owner; and it produces a title from the United States government, showing it to be the owner of lot No. 1, containing 12.84 acres, and it claims the additional 40 or 87 acres, as the case may be, as a part of lot No. 1, lying between the Bristol meander line and Jeems bayou, treating said meander line as a regular meander line, and not a boundary line. But we cannot so consider it, particularly in

view of the admission of plaintiff that 'it is admitted by both parties that the land in controversy is high land, and was high land at the date that Bristol made his survey in 1871.' . . . As plaintiff and its authors held no title to the land referred to it has had neither actual nor constructive possession of the same, and cannot therefore be heard to complain of the acts of these defendants. Its demand for possession must be denied. The meander line established by Bristol on the east and northeast of lot No. 1 does not meet any of the requirements set forth by the Supreme Court of the United States in defining a meander line in St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 286, 19 L. ed. 74, 78. . . . Tested by this definition, which is sustained by all authorities, the so-called meander line of Bristol fails in all respects. Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124. A glance at the annexed map, taken from the Williams and Barnes maps in the record (Bristol made no map or plat, and the one made by the draftsman in the land office is very small and apparently without reference to a scale), shows that the Bristol meander line does not purport to define the sinuosities of a stream; it is not represented as the border line of a stream; and it shows, to a demonstration, that the meander line, as actually run on the land on the east and northeast of lot No. 1, is the boundary, and that a water course is not the boundary. . . . The evidence in the record in this case, aside from the admissions of record, shows that there was and is a large quantity of swamp or marsh land on the east and north of the Bristol [338] meander line. . . . If the eastern and northern boundaries of lot No. 1 were taken out and other boundaries substituted, so as to reach Jeems bayou, plaintiff would get three to seven fold more land than was actually mentioned and described in the patent conveying this lot, or than its ancestor in title supposed he was purchasing, or than he actually paid for."

The cause is here by writ of error and the Oil Company maintains that it was obligatory upon the supreme court to accept the government survey, plat, and patent as correct; to treat traverses about lot No. 1 as true meanders of the bayou; and to hold, in consequence, that boundaries of the grant extended to the stream and include the *locus in quo*. The substantial Federal question presented—the only one for our determination—is whether, properly construed, the original patent conveyed to Pitts land lying between platted traverse lines and waters of the navigable stream. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220. The effect of riparian rights, if established, would depend upon the local law. Hardin v. Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685; Whitaker v. McBride, 197 U. S. 510, 512, 49 L. ed. 857, 860, 25 Sup. Ct. Rep. 530.

Many causes decided by this court involved construction of patents conveying public lands by reference to official surveys and plats indicating streams or other waters. St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 286, 19 L. ed. 74, 78; Cragin v. Powell, 128 U. S. 691, 696, 32 L. ed. 566, 567, 9 Sup. Ct. Rep. 203; Hardin v. Jordan, 140 U. S. 371, 380, 35 L. ed. 428, 432, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 412, 35 L. ed. 442, 444, 11 Sup. Ct. Rep. 819, 840; Horne v. Smith, 159 U. S. 40, 42, 40 L. ed. 68, 69, 15 Sup. Ct. Rep. 988; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 92, 40 L. ed. 85, 87, 15 Sup. Ct. Rep. 991; Ainsa v. United States, 161 U. S. 208, 229, 40 L. ed. 673, 680, 16 Sup. Ct. Rep. 544; Niles v. Cedar Point Club, 175 U. S. 300, 306, 44 L. ed. 171, 173, 20 Sup. Ct. Rep. 124; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 51, 46 L. ed. 800, 802, 22 Sup. Ct. Rep. 563; Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; Hardin v. Shedd, supra; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. Rep. 425; Whitaker v. McBride, supra; Graham v. Gill, 223 U. S. 643, 645, 56 L. ed. 586, 588, 32 Sup. Ct. Rep. 396; Scott v. Lattig, 227 U. S. 229, 244, 57 L. ed. 490, 497, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242; [339] Chapman & D. Lumber Co. v. St. Francis Levee Dist. 232 U. S. 186, 196, 58 L. ed. 564, 567, 34 Sup. Ct. Rep. 297; Gauthier v. Morrison, 232 U. S. 452, 459, 58 L. ed. 680, 684, 34 Sup. Ct. Rep. 384; Forsyth v. Smale, 7 Biss. 201, Fed. Cas. No. 4,950. A review and analysis of these cases would be tedious and unprofitable; thorough acquaintance with the varying and controlling facts is essential to a fair understanding of them. They unquestionably support the familiar rule relied on by counsel for the Oil Company that, in general, meanders are not to be treated as boundaries, and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river, the purchaser takes title up to the water line. But they no less certainly establish the principle that facts and circumstances may be examined, and if they affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section

borders a body of water, and that a patent thereto confers riparian rights.

In the instant case we find a survey of improved lands made at the express request of the occupant to whom they were subsequently patented; a grant from the United States specifying the exact number of acres conveyed; a positive declaration in field notes that land to the north lies outside the traverse lines; admission that excluded area contains not less than 40 acres of high ground, and evidence of large timber growing there; official plat delineating the surveyor's courses and specifying acreage of the several subdivisions, which cannot be said to indicate a water boundary beyond possible question. Outside the southern traverses of this plat, in space designated "Open Lake," lie 300 acres of fast land surveyed by Barbour in 1896. Although Noel, the Oil Company's immediate vendor, as owner, was in possession of property known as Wilson's Point place for some thirty years, and until after alleged unlawful entry by [340] defendants in error, his corporeal possession (as expressly stipulated) was limited east and north by the Bristol traverse lines, and he never occupied or exercised any act of corporeal possession over the above-indicated 40 acres or more without the same.

Considering all disclosures of the record we are unable to conclude the court below erred in holding original patent from the United States to Pitts conveyed no title to lands in controversy, and its judgment must be affirmed.

It seems proper to add that nothing in this opinion or the judgment to be entered thereon shall be taken to prejudice or impair any right which the United States may have in respect to the lands in controversy.

Affirmed.

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF MINNESOTA EX REL. RAILROAD & WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA.

(See S. C. Reporter's ed. 340–347.)

Constitutional law — due process of law — requiring railway company to install scales.

The enforcement of an order of a state railroad commission directing a railway company to erect in its stockyards in a specified village a scale of at least 6 tons capacity, without affording the railway company an opportunity to abate any existing discrimination against such village by discontinuing the use of similar scales already installed at some other stock-shipping stations on its line, takes the railway company's property without due process of law, contrary to U. S. Const., 14th Amend., where such scales have no direct part in transportation, nor in the business of selling at the terminal yards, but are merely a convenience which gives the station possessing one an advantage over a place where none exists.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 225.]

Argued April 16, 1915. Decided June 14, 1915.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Todd County, in that state, upholding an order of the state Railroad and Warehouse Commission directing a railway company to install a scale at a specified station on its line. Reversed and remanded for further proceedings.

See same case below, 122 Minn. 55, 141 N. W. 1102.

The facts are stated in the opinion.

Messrs. **E. C. Lindley** and **Sanford H. E. Freund** argued the cause and filed a brief for plaintiff in error:

The order of the Commission requiring the railway company to install the scales in question for the convenience of stockmen and farmers in connection with private transactions deprives the railway company of its property without due process of law.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 523, 56 L. ed. 863, 868, 32 Sup. Ct. Rep. 535; New Mexico Wool Growers' Asso. v. Atchison, T. & S. F. R. Co. — N. M. —, 145 Pac. 1077.

Conceding, for the sake of argument, the authority of the state to exact of the railway company nondiscriminatory service, the order in question contravenes the 14th Amendment of the Constitution in that it does not give the railway company the alternative of removing the alleged discrimination against Bertha, by withdrawing from the stockmen at Eagle Bend and Hewitt the privilege of the use of stock scales in the transaction of their private business.

Missouri, P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Missouri P. R. Co. v. Nebraska, 217 U. S.

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91.

Mr. Lyndon A. Smith, Attorney General of Minnesota, argued the cause, and, with Mr. Alonzo J. Edgerton, filed a brief for defendant in error:

The Railroad & Warehouse Commission has authority to require the installation of stock scales by railroad companies.

Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; State ex rel. Railroad & W. Comrs. v. Minneapolis & St. L. R. Co. 76 Minn. 469, 79 N. W. 510; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; North Carolina Corp. Commission v. Atlantic Coast Line R. Co. 139 N. C. 133, 51 S. E. 793.

It must be presumed that the circumstances justified the order of the Commission until it is shown affirmatively that furnishing the facilities required by such order will impose an unreasonable burden upon the company. The question as to what accommodations are reasonably necessary to afford proper transportation facilities to the public is legislative or administrative, and not judicial in its nature; and the courts can interfere with the action of the body intrusted with the power and duty to determine such question only when such action oversteps the limitations, constitutional or otherwise, placed upon the exercise of such power.

State ex rel. Railroad & W. Commission v. Great Northern R. Co. 123 Minn. 467, 144 N. W. 155; Railroad & W. Commission v. Great Northern R. Co. 124 Minn. 533, 144 N. W. 771.

An illegal discrimination was shown.

Farwell Farmers' Warehouse Asso. v. Minneapolis, St. P. & S. Ste. M. R. Co. 55 Minn. 13, 56 N. W. 248; North Carolina Corp. Commission v. Atlantic Coast Line R. Co. 139 N. C. 133, 51 S. E. 793; Riddle v. New York, L. E. & W. R. Co. 1 Inters. Com. Rep. 787; Ayers v. Chicago & N. W. R. Co. 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432.

The order of the Commission does not violate the Constitution of the United States.

Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 26, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585: State ex rel. Railroad & W. Commission v. Northern P. R. Co. 90 Minn. 281, 96 N. W. 81; Chicago, R. I. & P. R. Co. v. Nebraska State R. Commission, 85 Neb. 818, 26 L.R.A. (N.S.) 444, 124 N. W. 477.

Mr. Justice McReynolds delivered the opinion of the court:

An order of the Minnesota Railroad & Warehouse Commission (October 26, 1911) directing the Great Northern Railway Company to erect within forty-five days at least a 6-ton scale in its stockyard at the village Bertha, Todd county, was sustained by the supreme court of the state (122 Minn. 55, 57, 58, 141 N. W. 1102); the cause is here by writ of error; and it is contended that enforcement of order, as promulgated, would deprive the railway of its property without due process of law, contrary to the inhibition of the 14th Amendment. The supreme court said:

"At the trial the appellant offered no evidence, but rested upon the evidence presented by the respondent and the facts are undisputed. They are in substance as follows: That in the year 1910 stock was shipped in carload lots from 259 of appellant's stations in the state of Minnesota; that the number of carloads so shipped from the different stations varied from 1 at each of 32 stations to 414 at the station of Jasper; that appellant has installed stock scales, each of 6-ton capacity, at 54 of these stations; that these scales are located adjacent to the stockyards, but are not adjacent to nor connected with the railway track or buildings; that they are convenient for and are [344] used by dealers and stock raisers in buying and selling, but no obligation to ship over the railway is imposed by such use; that stock raisers who would otherwise market their stock at Bertha sometimes take it to Hewitt or Eagle Bend, a longer distance, in order to have the use of the scales installed at those places; that such scales tend to draw the stock business to and concentrate it at the places where they are located; that where these scales are available shippers are accustomed to weigh their stock, for their own convenience and information, immediately before loading for shipment, but these weights are not used as a basis for freight charges, nor in any transactions between the shipper and the railway company, nor in sales made at the terminal stockyards; that, after stock is loaded, the carload is weighed at some suitable point upon track scales which are under the supervision of the state, and the freight charges and all the transactions between the shipper and the company are based exclusively upon this weight; and

that these stock scales are not used in any manner in the business transacted between the railway company and its patrons.

"The witnesses testifying for respondent insisted that stock scales were a convenience, if not a necessity, in dealing in stock, and that a town having such scales possessed an advantage, as a stock market, over a town that did not, but frankly admitted that these scales had no direct part in the business of transportation, nor in the business of selling at the terminal yards.

"As scales are a convenience, and, probably, a necessity in dealing in stock, and tend to cause stock to be collected for shipment at the places where they are available, to the disadvantage of those places where they are not available, and are undoubtedly furnished for the purpose and with the view of securing the transportation of stock from points at which they are located, it is the opinion of a majority of the members of the court that the evidence [345] submitted, together with the fact that the company considered such scales of sufficient importance to its business to furnish them voluntarily at 54 of its stockyards in this state, is sufficient to support the finding that such scales pertain to the transportation facilities which the Commission may require of a railroad, and that the refusal to supply such scales to the station in question was a discrimination against it."

Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.

The applicable principles were announced in Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 524, 56 L. ed. 863, 868, 32 Sup. Ct. Rep. 535. A taking of railroad property under administrative regulation must "be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable, or was justified by the public necessities which the carrier could lawfully be compelled to meet." The facts being established, the question then presented is whether, as matter of law, they are adequate to support a finding of requisite public necessity,—the mere declaration of a commission is not conclusive. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Florida East Coast R. Co. v. United States, 234 U. S. 167, 185, 58 L. ed. 1267, 1271, 34 Sup. Ct. Rep. 867.

It appears from the supreme court's findings that 6-ton scales installed by the railway at 54 of its 259 stock-shipping stations in Minnesota were not used in transactions between carrier and shippers. All witnesses declared these instruments had no direct part in transportation or selling at terminal yards, but were convenient in stock dealings, and a station possessing one had an advantage over the place where none existed.

The business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty. The obvious purpose of the challenged order was to enforce installation at Bertha [346] of a scale like those at Eagle Bend and Hewitt, and dedicated to same use. Under admitted facts, unless justified by alleged unlawful discrimination, we think this was an arbitrary and unreasonable exercise of power. It is no answer to say, as counsel do, that the Commission has "general authority to require railroad companies to supply the necessary demands of the public along transportation lines; that it has a right to require the company to build and maintain such facilities as are necessary for the public needs." The demands upon a carrier which lawfully may be made are limited by its duty, and the present record conclusively shows the required structure had no direct relation thereto. See New Mexico Wool Growers' Asso. v. Atchison, T. & S. F. R. Co. — N. M. —, 145 Pac. 1077.

The railway company does not presently controvert the finding that scales at Eagle Bend and Hewitt brought about discrimination, but maintains the Commission acted arbitrarily and unreasonably in seeking to eliminate this by peremptorily requiring construction of another without giving opportunity to accomplish the same result through discontinuing the use of those already installed. This contention is sound and must be sustained. Conceding power to inhibit discrimination, the Commission could not exercise it unreasonably by needlessly taking property, or, what comes to the same thing, obliging incurrence of expense wholly unnecessary. It by no means follows, simply because a railroad voluntarily supplies a convenience at some stations which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty; but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order precluded [347] use of this method to bring about lawful conditions, and therein, we think, was plainly arbitrary and unreasonable. Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17

Sup. Ct. Rep. 130; Donovan v. Pennsylvania Co. 199 U. S. 279, 293, 50 L. ed. 192, 199, 26 Sup. Ct. Rep. 91; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 206, 54 L. ed. 727, 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

FRANK GUINN and J. J. Beal
v.
UNITED STATES.

(See S. C. Reporter's ed. 347-368.)

Civil rights — negro suffrage — grandfather clause.

1. The exemption from the literacy test prescribed by the 1910 amendment of Okla. Const. art. 3, as a condition to voting, which that amendment makes in favor of persons who, on January 1, 1866, or at any time prior thereto, were entitled to vote under any form of government, or who at that time resided in some foreign nation, and their lineal descendants, is a denial or abridgment of the right to vote on account of race, color, or previous condition of servitude, contrary to U. S. Const., 15th Amend., as it creates a standard which, as a necessary result, re-creates and perpetuates the very conditions which the 15th Amendment was intended to destroy.

[For other cases, see Civil Rights, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

2. Neither forms of classification nor methods of enumeration should be made the basis of striking down a voting standard prescribed by a state which was independently legal, and which was lawfully enacted, because of the invalidity under the Federal Constitution of another test with which the legal provisions may have been associated.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

3. The invalidity under U. S. Const., 15th Amend., of the exemption from the literacy test prescribed by the 1910 amendment of Okla. Const. art. 3, as a condition to voting, which that amendment makes in favor of persons who, on January 1, 1866, or at any time prior thereto, were entitled to vote under any form of government, or who at that time resided in some foreign nation, and their lineal descendants, renders invalid the literacy test itself.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Trial — instructions — unconstitutional statute as defense.

4. No error was committed in instructing the jury, in a prosecution of state election officials under U. S. Pen. Code, § 19, for conspiring to deprive negro citizens of their right to vote, that the 1910 Amendment of Okla. Const., art. 3, on which defendants relied, was repugnant to U. S. Const., 15th Amend., as denying the right to vote on account of race, color, or previous condition of servitude, where such state constitutional amendment, after prescribing a literacy test as a condition of voting, declares that no persons who, on January 1, 1866, or at any time prior thereto, were entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendants of such persons, shall be denied the right to vote because of their inability to meet such test.

[For other cases, see Trial, VII. c, in Digest Sup. Ct. 1908.]

Conspiracy — against civil rights — negro suffrage.

5. State election officials who conspire to deprive negro citizens of their right to vote secured by U. S. Const., 15th Amend., are indictable under U. S. Pen. Code, § 19, which makes it a criminal offense to "conspire to injure, oppress, threaten, or intimidate, any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

[For other cases, see Conspiracy, III., in Digest Sup. Ct. 1908.]

Statutes — repeal by implication.

6. The repeal by the act of February 8, 1894 (28 Stat. at L. 36, chap. 25, Comp. Stat. 1913, § 1015), of all the sections of U. S. Rev. Stat. tit. 70, chap. 7, which relate to offenses by persons or officers against the elective franchise, did not, by implication, withdraw offenses by election officers from the operation of § 5508 (now U. S. Penal Code, § 19), which makes it a criminal offense to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

[For other cases, see Statutes, III. b, in Digest Sup. Ct. 1908.]

[No. 96.]

Argued October 17, 1913. Decided June 21, 1915.

NOTE.—On the right to vote as a privilege or immunity of citizens of the United States —see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 580.

On repeal of statutes by implication, generally—see notes to State v. Massey, 4 L.R.A. 309, and United States v. Henderson, 20 L. ed. U. S. 235.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

On civil rights, generally—see note to United States v. Reese, 23 L. ed. U. S. 563.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit presenting questions as to the validity, under the 15th Amendment to the Federal Constitution, of an amendment to the Oklahoma Constitution fixing standards for suffrage. Answered by holding that the state standards were invalid.

The facts are stated in the opinion.

Mr. Joseph W. Bailey argued the cause and filed a brief for Frank Guinn and J. J. Beal:

The suffrage amendment to the Constitution of Oklahoma does not violate the 15th Amendment to the Constitution of the United States.

Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583.

No enactment which is valid on its face can be held invalid by this court on account of the unlawful motives or purposes which are supposed to have actuated those by whom it was enacted.

McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

It was a full and perfect defense against this indictment for these defendants to answer that what they did was done under the command of a law of their state which no court of competent jurisdiction, up to the time of the transaction for which these men were indicted, had ever declared unconstitutional.

State ex rel. Cruse v. Cease, 28 Okla. 271, 114 Pac. 251, Ann. Cas. 1912D, 151; Smith v. Indiana, 191 U. S. 148, 48 L. ed. 126, 24 Sup. Ct. Rep. 51.

Messrs. C. B. Stuart, A. C. Cruce, W. A. Ledbetter, Norman Haskell, and C. G. Hornor also field a brief for Frank Guinn and J. J. Beal:

The determination of the constitutionality of the grandfather clause in the Oklahoma Constitution, not being necessary to a full solution of this case, this court will not pass upon the constitutionality of such provision.

Atwater v. Hassett, 27 Okla. 292, L.R.A. —, —, 111 Pac. 802; Bishop, Statutory Crimes, §§ 805, 806; Braxton County Ct. v. West Virginia, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275; Byrne v. State, 12 Wis. 519; Bevard v. Hoffman, 18 Md. 479, 81 Am. Dec. 618; Liverpool, N. Y. & P. S. S. Co. v. Emigration Comrs. 113 U. S. 39, 28 L. ed. 901, 5 Sup. Ct. Rep. 352; Missouri, K. & T. R. Co. v. Ferris, 179 U. S. 606, 45 L. ed. 339, 21 Sup. Ct. Rep. 231; Smith v. Indiana, 191 U. S. 138, 139, 48 L. ed. 125, 126, 24 Sup. Ct. Rep. 51; State ex rel. Cruse v. Cease, 28 Okla. 271, 114 Pac. 251, Ann. Cas. 1912D, 151; State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 La. Ann. 1679, 47 L.R.A. 512, 18 So. 746.

Suffrage is purely a political right, granted by the sovereign to those who are thought to be worthy and competent to take a part in the management and functions of government. In the nature of things it can be neither a natural nor a fundamental right.

Jameson, Const. Convention, § 336.

The grandfather clause under consideration is not in violation of the 15th Amendment to the Constitution of the United States.

Atwater v. Hassett, 27 Okla. 292, L.R.A. —, —, 111 Pac. 802; Scott v. Sandford, 19 How. 393, 15 L. ed. 691; Dodge v. Woolsey, 18 How. 371, 15 L. ed. 417; Fairbank v. United States, 181 U. S. 286, 45 L. ed. 864, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Mills v. Green, 67 Fed. 818, 3 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852; Mitchell v. Lippincott, 2 Woods, 467; McClure v. Owen, 26 Iowa, 253; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Pope v. Williams, 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. Rep. 573; Southern P. R. Co. v. Orton, 6 Sawy. 157, 32 Fed. 478; State v. Grand Trunk R. Co. 3 Fed. 889; Stimson, Fed. & State Const. p. 224; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Anthony, 11 Blatchf. 205, Fed. Cas. No. 14,459; United States v. Des Moines Nav. & R. Co. 142 U. S. 545, 35 L. ed. 1109, 12 Sup. Ct. Rep. 308; Webster v. Cooper, 14 How. 488, 14 L. ed. 510; Williams v. Mississippi, 170 U. S. 214, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Even though the exemption privilege provided in the grandfather law may be invalid, yet the body of the law may be permitted to stand.

Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Little Rock & Ft. S. R. Co. v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469.

Solicitor General Davis argued the cause and filed a brief for the United States:

The so-called grandfather clause incorporates by reference the laws of those states which in terms excluded negroes from the franchise on Jaunary 1, 1866, because of

race, color, or condition of servitude, and so itself impliedly excludes them for the same reason.

Bank for Savings v. The Collector (Bank for Savings v. Field) 3 Wall. 495, 18 L. ed. 207; Donnelly v. United States, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; Re Heath, 144 U. S. 92, 36 L. ed. 358, 12 Sup. Ct. Rep. 615; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; United States v. Le Bris, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; Viterbo v. Friedlander, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962; Endlich, Interpretation of Statutes, § 492; Potter's Dwarr. Stat. & Const. pp. 190–192, 218; Sutherland, Stat. Constr. 2d ed. § 405.

What is implied in a statute is as much a part of it as what is expressed.

Gelpcke v. Dubuque, 1 Wall. 175, 220, 17 L. ed. 520, 530; United States v. Babbit, 1 Black, 55, 61, 17 L. ed. 94, 96; Wilson County v. Third Nat. Bank, 103 U. S. 770, 778, 26 L. ed. 488, 491.

While the 15th Amendment did not confer the right of suffrage upon anyone, it did confer upon citizens of the United States from and after the date of its ratification the right not to be discriminated against in the exercise of the elective franchise on account of race, color, or previous condition of servitude.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

In all cases where the former slaveholding states had not removed from their Constitutions the word "white" as a qualification for voting, the 15th Amendment did in effect confer upon the negro the right to vote, because, being paramount to the state law, it annulled the discriminating word "white," and thus left him in the enjoyment of the same right as white persons.

Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

The necessary effect and operation of a state statute or constitutional amendment may be considered in determining its validity under the Federal Constitution.

Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192.

The grandfather clause being in violation of the 15th Amendment and void, the amendment of 1910 to the Constitution of Oklahoma as a whole is likewise invalid. The unconstitutional portion of the amendment is not separable from the remainder.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Mr. Moorfield Storey filed a brief for the National Association for the Advancement of Colored People.

Messrs. John H. Burford and John Embry, by permission of the Attorney General, filed a brief in support of the government's position:

That the right of a qualified voter to vote for a candidate for Congress is fundamentally based upon and secured by the Constitution of the United States, and that § 19 of the new Penal Code protects the same and is constitutional, are well settled.

Felix v. United States, 108 C. C. A. 503, 186 Fed. 685; United States v. Stone, 188 Fed. 836; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; Logan v. United States, 144 U. S. 263, 33 L. ed. 429, 12 Sup. Ct. Rep. 617; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Lackey v. United States, 53 L.R.A. 660, 46 C. C. A. 189, 107 Fed. 114.

Such legislation is directed against individual action as such, whether it be the action of an official or of a private citizen, although not appropriate legislation for the enforcement of the 15th Amendment to the

Federal Constitution, which is directed against state action only.

Karem v. United States, 61 L.R.A. 437, 57 C. C. A. 486, 121 Fed. 250; James v. Bowman, 190 U. S. 127, 47 L. ed. 980, 23 Sup. Ct. Rep. 678.

The form of the amendment, exempting certain persons from the educational test by way of exceptions to a general provision imposing such test, is not determinative of its character, since it clearly divides the mass of those otherwise qualified to vote into two classes, one of which is subjected to, and the other exempted from, such test.

Kansas City v. Whipple, 136 Mo. 475, 35 L.R.A. 747, 58 Am. St. Rep. 657, 38 So. 295.

Though a law be fair on its face, if it confers arbitrary power not required to be exercised upon proper considerations, or if it necessitates, as does the Oklahoma amendment, or its administration actually accomplishes, as in the case at bar, unconstitutional results, the same will be held invalid.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The Oklahoma amendment refers to the election laws of the states on and prior to January 1, 1866, for the prior qualifications entitling the electors to the present privilege; and the laws, so referred to, are to be considered as incorporated into the Oklahoma amendment.

Endlich, Interpretation of Statutes, §§ 43, 492; Nunes v. Wellisch, 12 Bush, 363; Turney v. Wilton, 36 Ill. 385; Sutherland, Stat. Constr. 2d ed. § 443 (283); Black, Constr. & Interpretation of Laws, § 86; Moore's Case, 10 Ct. Cl. 375; Rexford v. Knight, 15 Barb. 627; Rogers v. Bradshaw, 20 Johns. 744; Louisville v. Com. 9 Dana, 75; United States v. Collier, 3 Blatchf. 325, Fed. Cas. No. 14,833; Territory v. Luna, 3 N. M. 218, 3 Pac. 244; Bank for Savings v. The Collector (Bank for Savings v. Field) 3 Wall. 495, 18 L. ed. 207; Viterbo v. Friedlander, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962; Shull v. Barton, 58 Neb. 741, 79 N. W. 732; Welty v. United States, 14 Okla. 7, 76 Pac. 121; United States v. Oregon & C. R. Co. 133 Fed. 956; United States v. Jessup, 15 Fed. 790; Chauncey v. Dyke Bros. 55 C. C. A. 579, 119 Fed. 10; Mosle v. Bidwell, 65 C. C. A. 533, 130 Fed. 334; Postal Teleg. Cable Co. v. Southern R. Co. 89 Fed. 190; United States v. Le Bris, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; Flanders v. Merrimack, 48 Wis. 567, 4 N. W. 741.

That which is implied in a law is as much a part thereof as that which is expressed.

United States v. Babbit, 1 Black, 61, 17 L. ed. 96; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Wilson County v. Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488.

When privileges are conferred upon a class to which negroes are ineligible because of race and color, such negroes are discriminated against in terms because of race and color.

Strauder v. West Virginia, 100 U. S. 305, 25 L. ed. 664, 3 Am. Crim. Rep. 515.

Previous status cannot be imputed to a negro as a basis of prejudicial legislation, and as separating him from and making him ineligible to, a right of suffrage enjoyed by a class of citizens otherwise similarly situated.

Jones v. Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366.

A requirement based upon the resultant of a prior state is on account of such prior state.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 578, 39 L. ed. 818, 15 Sup. Ct. Rep. 673; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; Almy v. California, 24 How. 169, 16 L. ed. 644; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015.

The substance, and not the shadow, determines the validity of the exercise of power.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Henderson v. New York (Henderson v. Wickham) 92 U. S. 268, 23 L. ed. 547.

The law may be fair on its face, yet if it accomplishes or necessitates the accomplishment of the things prohibited by the Amendments of the Constitution of the United States, it is unconstitutional.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Maxwell v. Dow,

176 U. S. 602, 44 L. ed. 605, 20 Sup. Ct. Rep. 448.

Mr. J. H. Adriaans filed a brief as *amicus curiæ*.

Mr. Chief Justice White delivered the opinion of the court:

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the state of Oklahoma (the plaintiffs in error) of the crime of having conspired unlawfully, wilfully, and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that state in 1910, they being entitled to vote under the state law, and which right was secured to them by the 15th Amendment to the Constitution of the United States. The prosecution was directly concerned with § 5508, Revised Statutes, now § 19 of the Penal Code [35 Stat. at L. 1092, chap. 321, Comp. Stat. 1913, § 10183], which is as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

[355] We concentrate and state from the certificate only matters which we deem essential to dispose of the questions asked.

Suffrage in Oklahoma was regulated by § 1, article 3, of the Constitution under which the state was admitted into the Union. Shortly after the admission there was submitted an amendment to the Constitution making a radical change in that article, which was adopted prior to November 8, 1910. At an election for members of Congress which followed the adoption of this amendment, certain election officers, in enforcing its provisions, refused to allow certain negro citizens to vote who were clearly entitled to vote under the provision of the Constitution under which the state was admitted; that is, before the amendment; and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed. The persons so excluded based their claim of right to vote upon the original Constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the 15th Amendment, and therefore afforded no basis for denying them the right guaranteed and protected by that Amendment. And upon the assumption that this claim was justified and that the election officers had violated the 15th Amendment in denying the right to vote, this prosecution, as we have said, was commenced. At the trial the court instructed that by the 15th Amendment the states were prohibited from discriminating as to suffrage because of race, color, or previous condition of servitude, and that Congress, in pursuance of the authority which was conferred upon it by the very terms of the Amendment, to enforce its provisions had enacted the following (Rev. Stat. § 2004, Comp. Stat. 1913, § 3966):

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, . . . municipality, or [356] other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, or usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding."

It then instructed as follows:

"The state amendment which imposes the test of reading and writing any section of the state Constitution as a condition to voting to persons not, on or prior to January 1, 1866, entitled to vote under some form of government, or then residents in some foreign nation, or a lineal descendant of such person, is not valid, but you may consider it in so far as it was in good faith relied and acted upon by the defendants in ascertaining their intent and motive. If you believe from the evidence that the defendants formed a common design and cooperated in denying the colored voters of Union township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters,—that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty,—then the criminal intent requisite to their guilt is wanting and they cannot be convicted. On the other hand, if they knew or believed these colored persons were entitled to vote, and their purpose was to

unfairly and fraudulently deny the right of suffrage to them, or any of them entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions."

The questions which the court below asks are these:

"1. Was the amendment to the Constitution of Oklahoma, heretofore set forth, valid?

"2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified [357] candidate for a member of Congress in Oklahoma unless they were able to read and write any section of the Constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a member of Congress in that state, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?'

As these questions obviously relate to the provisions concerning suffrage in the original Constitution and the amendment to those provisions which form the basis of the controversy, we state the text of both. The original clause, so far as material, was this:

"The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

And this is the amendment:

"No person shall be registered as an elector of this state or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the [358] precinct election officers when electors apply for ballots to vote."

Considering the questions in the light of the text of the suffrage amendment it is apparent that they are twofold because of the twofold character of the provisions as to suffrage which the amendment contains. The first question is concerned with that provision of the amendment which fixes a standard by which the right to vote is given upon conditions existing on January 1, 1866, and relieves those coming within that standard from the standard based on a literacy test which is established by the other provision of the amendment. The second question asks as to the validity of the literacy test and how far, if intrinsically valid, it would continue to exist and be operative in the event the standard based upon January 1, 1866, should be held to be illegal as violative of the 15th Amendment.

To avoid that which is unnecessary let us at once consider and sift the propositions of the United States on the one hand, and of the plaintiffs in error, on the other, in order to reach with precision the real and final question to be considered. The United States insists that the provision of the amendment which fixes a standard based upon January 1, 1866, is repugnant to the prohibitions of the 15th Amendment because in substance and effect that provision, if not an express, is certainly an open, repudiation of the 15th Amendment, and hence the provision in question was stricken with nullity in its inception by the self-operative force of the Amendment, and, as the result of the same power, was at all subsequent times devoid of any vitality whatever.

For the plaintiffs in error, on the other hand, it is said the states have the power to fix standards for suffrage, and that power was not taken away by the 15th Amendment, but only limited to the extent of the prohibitions which that Amendment established. This being true, as the [359] standard fixed does not in terms make any discrimination on account of race, color, or previous condition of servitude, since all, whether negro or white, who come within its requirements, enjoy the privilege of voting, there is no ground upon which to rest the contention that the provision violates the 15th Amendment. This, it is insisted, must be the case unless it is intended to expressly deny the state's right to provide a standard for suffrage, or what is equivalent thereto, to assert: (a) that the judgment of the state, exercised in the exertion of that power, is subject to Federal judicial review or supervision, or (b) that it may be questioned and be brought within the prohibitions of the Amendment by attributing to the legislative authority an occult motive to

violate the Amendment, or by assuming that an exercise of the otherwise lawful power may be invalidated because of conclusions concerning its operation in practical execution and resulting discrimination arising therefrom, albeit such discrimination was not expressed in the standard fixed, or fairly to be implied, but simply arose from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote.

On the other hand, the United States denies the relevancy of these contentions. It says state power to provide for suffrage is not disputed, although, of course, the authority of the 15th Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a state to exert judgment and discretion in fixing the qualification of suffrage is advanced, and no right to question the motive of the state in establishing a standard as to such subjects under such circumstances, or to review or supervise the same, is relied upon, and no power to destroy an otherwise valid exertion of authority upon the mere ultimate operation of the power exercised is asserted. And applying these principles to the very case in hand, the argument of the [360] government in substance says: No question is raised by the government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment, and therefore cannot be here assailed either by disregarding the state's power to judge on the subject, or by testing its motive in enacting the provision. The real question involved, so the argument of the government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1st, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the 15th Amendment, and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy. From this it is urged that no legitimate discretion could have entered into the fixing of such standard which involved only the determination to directly set at naught or by indirection avoid the commands of the Amendment. And it is insisted that nothing contrary to these propositions is involved in the contention of the government that if the standard which the suffrage amendment fixes, based upon the conditions existing on January 1, 1866, be found to be void for the reasons urged, the other and literacy test is also void, since that contention rests not upon any assertion on the part of the government of any abstract repugnancy of the literacy test to the prohibitions of the 15th Amendment, but upon the relation between that test and the other, as formulated in the suffrage amendment, and the inevitable result which it is deemed must follow from holding it to be void if the other is so declared to be.

Looking comprehensively at these contentions of the parties it plainly results that the conflict between them is [361] much narrower than it would seem to be because the premise which the arguments of the plaintiffs in error attribute to the propositions of the United States is by it denied. On the very face of things it is clear that the United States disclaims the gloss put upon its contentions by limiting them to the propositions which we have hitherto pointed out, since it rests the contentions which it makes as to the assailed provision of the suffrage amendment solely upon the ground that it involves an unmistakable, although it may be a somewhat disguised, refusal to give effect to the prohibitions of the 15th Amendment by creating a standard which, it is repeated, but calls to life the very conditions which that Amendment was adopted to destroy and which it had destroyed.

The questions then are: (1) Giving to the propositions of the government the interpretation which the government puts upon them, and assuming that the suffrage provision has the significance which the government assumes it to have, is that provision as a matter of law repugnant to the 15th Amendment? which leads us, of course, to consider the operation and effect of the 15th Amendment. (2) If yes, has the assailed amendment in so far as it fixes a standard for voting as of January 1, 1866, the meaning which the government attributes to it? which leads us to analyze and interpret that provision of the amendment. (3) If the investigation as to the two prior subjects establishes that the standard fixed as of January 1, 1866, is void, what, if any, effect does that conclusion have upon the literacy standard otherwise established by the amendment? which involves determining whether that standard, if legal, may survive the recognition of the fact that the other, or 1866, standard, has not and never had any legal existence. Let us consider these subjects under separate headings.

1. *The operation and effect of the 15th Amendment.* This is its text:

[362] "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.

"Section 2. The Congress shall have power

to enforce this article by appropriate legislation."

(a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard to the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify, or deprive the states of their full power as to suffrage except, of course, as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the states possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both.

(c) While in the true sense, therefore, the Amendment [363] gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that, as a consequence of the striking down of a discriminating clause, a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state Constitutions in which, at the time of the adoption of the Amendment, the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word "white" disappeared and therefore all male citizens, without discrimination on account of race, color, or previous condition of servitude, came under the generic grant of suffrage made by the state.

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the 15th Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the 15th Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment by creating a standard of [364] voting which, on its face, was in substance but a revitalization of conditions which, when they prevailed in the past, had been destroyed by the self-operative force of the Amendment.

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry, of course, here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the 15th Amendment as previously stated? This leads us, for the purpose of the analysis, to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all-inclusive, since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This, however, is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. The provision is this:

"But no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution."

We have difficulty in finding words to

more clearly demonstrate the conviction we entertain that this standard has the characteristics which the government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, prohibited by the 15th Amendment, but the standard itself inherently brings that result into existence since it is based [365] purely upon a period of time before the enactment of the 15th Amendment, and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the 15th Amendment was adopted and the continuance of which the 15th Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment, to make them the basis of the right to suffrage conferred in direct and positive disregard of the 15th Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the 15th Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the 15th Amendment was in view.

While these considerations establish that the standard fixed on the basis of the 1866 test is void, they do not enable us to reply even to the first question asked by the court below, since to do so we must consider the literacy standard established by the suffrage amendment and the possibility of its surviving the determination of the fact that the 1866 standard never took life, since it was void from the beginning because of the operation upon it of the prohibitions of the 15th Amendment. And this brings us to the last heading:

3. *The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866* [366] *standard with which it is associated in the suffrage amendment.*

No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former, is really a question of state law; but, in the absence of any decision on the subject by the supreme court of the state, we must determine it for ourselves. We are of opinion that neither forms of classification nor methods of enumeration should be made the basis of striking down a provision which was independently legal, and therefore was lawfully enacted, because of the removal of an illegal provision with which the legal provision or provisions may have been associated. We state what we hold to be the rule thus strongly because we are of opinion that on a subject like the one under consideration, involving the establishment of a right whose exercise lies at the very basis of government, a much more exacting standard is required than would ordinarily obtain where the influence of the declared unconstitutionality of one provision of a statute upon another and constitutional provision is required to be fixed. Of course, rigorous as is this rule and imperative as is the duty not to violate it, it does not mean that it applies in a case where it expressly appears that a contrary conclusion must be reached if the plain letter and necessary intendment of the provision under consideration so compels, or where such a result is rendered necessary because to follow the contrary course would give rise to such an extreme and anomalous situation as would cause it to be impossible to conclude that it could have been, upon any hypothesis whatever, within the mind of the law-making power.

[367] Does the general rule here govern, or is the case controlled by one or the other of the exceptional conditions which we have just stated, is, then, the remaining question to be decided. Coming to solve it we are of opinion that by a consideration of the text of the suffrage amendment in so far as it deals with the literacy test, and to the extent that it creates the standard based upon conditions existing on January 1, 1866, the case is taken out of the general rule and brought under the first of the exceptions stated. We say this because, in our opinion, the very language of the suffrage amendment expresses, not by implication nor by forms of classification nor by the order in which they are made, but by direct and positive language the command that the persons embraced in the 1866 standard should not be, under any conditions, subjected to the literacy test,—a com-

mand which would be virtually set at naught if, on the obliteration of the one standard by the force of the 15th Amendment, the other standard should be held to continue in force.

The reasons previously stated dispose of the case and make it plain that it is our duty to answer the first question, No, and the second, Yes; but before we direct the entry of an order to that effect, we come briefly to dispose of an issue the consideration of which we have hitherto postponed from a desire not to break the continuity of discussion as to the general and important subject before us.

In various forms of statement not challenging the instructions given by the trial court concretely considered, concerning the liability of the election officers for their official conduct, it is insisted that, as in connection with the instructions the jury was charged that the suffrage amendment was unconstitutional because of its repugnancy to the 15th Amendment, therefore, taken as a whole, the charge was erroneous. But we are of opinion that this contention is without merit, especially in view [368] of the doctrine long since settled concerning the self-executing power of the 15th Amendment, and of what we have held to be the nature and character of the suffrage amendment in question. The contention concerning the inapplicability of § 5508, Revised Statutes, now § 19 of the Penal Code, or of its repeal by implication, is fully answered by the ruling this day made in United States v. Mosley, No. 180, 238 U. S. 383, post, 1355, 35 Sup. Ct. Rep. 904.

We answer the first question, No, and the second question, Yes.

And it will be so certified.

Mr. Justice **McReynolds** took no part in the consideration and decision of this case

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CHARLES E. MYERS and A. Claude Kalmey, Plffs. in Err.,
v.
JOHN B. ANDERSON. (No. 8.)

CHARLES E. MYERS and A. Claude Kalmey, Plffs. in Err.,
v.
WILLIAM H. HOWARD. (No. 9.)

CHARLES E. MYERS and A. Claude Kalmey, Plffs. in Err.,
v.
ROBERT BROWN. (No. 10.)

(See S. C. Reporter's ed. 368-383.)

Election officers — liability — denying suffrage to negro citizens.

1. State election officials who, comformably to a state statute, deprive negro citizens of their right to vote secured by U. S. Const., 15th Amend., are made liable to such negro citizens for the resulting damages by U. S. Rev. Stat. § 1979, Comp. Stat. 1913, § 3932, which provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[For other cases, see Elections, IV. b, in Digest Sup. Ct. 1908.]

Civil rights — negro suffrage — municipal elections.

2. The right to vote, secured by U. S. Const., 15th Amend., against denial on account of race, color, or previous condition of servitude, extends to municipal elections.

[For other cases, see Civil Rights, in Digest Sup. Ct. 1908.]

Civil rights — negro suffrage — grandfather clause.

3. Conferring the right to register and vote at municipal elections in Annapolis, as is done by Md. Laws 1908, chap. 525, upon all citizens who, despite their lack of the qualifications otherwise prescribed by that statute, were, prior to January 1, 1868, entitled to vote in the state of Maryland or any other state of the United States at a state election, and upon the lawful male descendants of any person who, prior to that date, was so entitled to vote, denies and abridges the right to vote on account of race, color, or previous condition of servitude, contrary to U. S. Const., 15th Amend., as a standard is thus created which, by necessary result, re-creates and perpetuates the very condition which the 15th Amendment was intended to destroy.

[For other cases, see Civil Rights, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

4. The invalidity under U. S. Const., 15th Amend., of the provision of Md. Laws 1908, chap. 525, which confers the right to vote at municipal elections in Annapolis upon all citizens who, prior to January 1, 1868, were entitled to vote in the state of Maryland or any other state of the United States at a state election, and their lawful male descendants, despite their lack of the qualifications otherwise prescribed by that

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NOTE.—On the right to vote as a privilege or immunity of citizens of the United States —see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 580.

On construction of statutes, generally—see notes to Riggs v. Palmer, 5 L.R.A. 340; United States v. Saunders, 22 L. ed. U. S. 736; Maillard v. Lawrence, 14 L. ed. U. S. 925; and Blake v. National City Bank, 23 L. ed. U. S. 119.

On civil rights, generally—see note to United States v. Reese, 23 L. ed. U. S. 563.

statute, renders invalid also such other qualifications, *viz.*, that the prospective voter must either be a taxpayer assessed on the city books for at least $500, or a duly naturalized citizen, or a male child of naturalized citizens who has reached the age of twenty-one years.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Election officers — liability — denying suffrage to negro citizens.

5. The invalidity of the provisions of Md. Laws 1908, chap. 525, prescribing qualifications for voters at municipal elections in Annapolis, does not relieve the election officers appointed under that statute from liability under U. S. Rev. Stat. § 1979, Comp. Stat. 1913, § 3932, for denying the right to register and vote at such elections to negro citizens, contrary to U. S. Const., 15th Amend., on account of race, color, or previous condition of servitude, since the right of every male citizen to vote under the Maryland Constitution, as changed by the 15th Amendment, still existed, notwithstanding the invalidity of such qualifications, and a prior state statute which provided for registration and elections in Annapolis was unaffected by such invalidity.

[For other cases, see Elections, IV. b, in Digest Sup. Ct. 1908.]

[Nos. 8, 9, and 10.]

Argued November 11 and 12, 1913. Decided June 21, 1915.

THREE WRITS of Error to the Circuit Court of the United States for the District of Maryland to review judgments awarding damages against state election officials for denying the right of suffrage to negro citizens. Affirmed.

See same case below on demurrer, 182 Fed. 223.

The facts are stated in the opinion.

Messrs. **William L. Marbury** and **Ridgely P. Melvin** argued the cause, and, with Mr. William L. Rawls, filed a brief for plaintiffs in error:

Malice is an essential allegation in a suit of this kind against registration officers at common law.

Blake v. Brothers, 79 Conn. 676, 11 L.R.A.(N.S.) 501, 66 Atl. 501; Murphy v. Ramsey, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; Isaacs v. McNeil, 11 L.R.A. 254, 44 Fed. 32; Alden v. Hinton, 6 D. C. 217; Bernier v. Russell, 89 Ill. 60; Carter v. Harrison, 5 Blackf. 138; Caulfield v. Bullock, 18 B. Mon. 494; Morgan v. Dudley, 18 B. Mon. 693, 68 Am. Dec. 735; Chrisman v. Bruce, 1 Duv. 63, 85 Am. Dec. 603; Miller v. Rucker, 1 Bush, 135; Bridge v. Oakey, 12 Rob. (La.) 638, 2 La. Ann. 968; Dwight v. Rice, 5 La. Ann. 580; Patterson v. D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Bevard v. Hoffman, 18 Md. 479, 81 Am. Dec. 618; Anderson v. Baker, 23 Md. 531; Elbin v. Wilson, 33 Md. 135; Friend v. Hamill, 34 Md. 298; Gordon v. Farrar, 2 Dougl. (Mich.) 411; Curry v. Cabliss, 37 Mo. 330; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Pike v. Megoun, 44 Mo. 491; Wheeler v. Patterson, 1 N. H. 88, 8 Am. Dec. 41; Hanlon v. Partridge, 69 N. H. 88, 44 Atl. 807; Jenkins v. Waldron, 11 Johns, 114, 6 Am. Dec. 359; Peavey v. Robbins, 48 N. C. (3 Jones, L.) 339; Weckerly v. Geyer, 11 Serg. & R. 35; Moran v. Rennard, 3 Brewst. (Pa.) 601; Keenan v. Cook, 12 R. I. 52; Rail v. Potts, 8 Humph. 225; Ashby v. White, 1 Bro. P. C. 62, reversing 2 Ld. Raym. 938, 6 Mod. 45, 1 Salk. 19, 1 Smith, Lead. Cas. 9th ed. 472, 1 Eng. Rul. Cas. 521; Cullen v. Morris, 2 Starkie, 577, 20 Revised Rep. 742; Tozer v. Child, 7 El. & Bl. 377, 26 L. J. Q. B. N. S. 151, 3 Jur. N. S. 774, 5 Week. Rep. 287, 25 Eng. Rul. Cas. 78; Goetchens v. Matthewson, 5 Lans. 214; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; Swafford v. Templeton, 185 U. S. 491, 46 L. ed. 1007, 22 Sup. Ct. Rep. 783.

Section 1979 of U. S. Rev. Stat. Comp. Stat. 1913, § 3932, under which these suits are brought, gives no new or different right of action from that given by the common law, but only such right of action as would be a proper proceeding for redress at common law, and does not dispense with the necessity of alleging and proving malice.

Hemsley v. Myers, 45 Fed. 290; Aultman & T. Co. v. Brumfield, 102 Fed. 13; Giles v. Harris, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639.

Section 1979 of U. S. Rev. Stat. has no application to the cases at bar, because it was passed soley to protect the civil rights guaranteed or secured under the 14th Amendment.

Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; Wadleigh v. Newhall, 136 Fed. 946.

In any event, the acts complained of by plaintiffs do not constitute a deprivation of any right, privilege, or immunity secured by the Constitution and laws of the United States within the meaning of § 1979.

Carter v. Greenhow, 114 U. S. 317, 29 L. ed. 202, 5 Sup. Ct. Rep. 928, 962.

The inhibition of the 15th Amendment against the denial or abridgment of the right to vote on account of race, color, or previous condition of servitude is only directed against state action, and does not comprehend any acts of individuals whatsoever.

James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

The cases at bar are controlled by the case of Giles v. Harris, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639.

See also Giles v. Teasley, 193 U. S. 160, 48 L. ed. 658, 24 Sup. Ct. Rep. 359.

The distinction between national and state citizenship and their respective privileges, drawn in Slaughter House Cases, has come to be firmly established.

Twining v. New Jersey, 211 U. S. 96, 53 L. ed. 104, 29 Sup. Ct. Rep. 14; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; Re Kemmler, 136 U. S. 444, 34 L. ed. 523, 10 Sup. Ct. Rep. 930; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678.

The right to vote for members of Congress is a right possessed by a citizen of the United States as such, such right being derived primarily not from a state, but from the United States.

Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; Swafford v. Templeton, 185 U. S. 491, 46 L. ed. 1007, 22 Sup. Ct. Rep. 783.

The opinions expressed by members of Congress during the debate on the Amendment do not constitute any guide for its construction. The meaning of the act must be determined from the language used therein.

United States v. Trans-Missouri Freight Asso. 166 U. S. 318, 41 L. ed. 1019, 17 Sup. Ct. Rep. 540.

Beginning with the case of United States v. Reese, 92 U. S. 214, 23 L. ed. 563, and coming down to James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678, the courts have overruled the construction placed by Congress on the 15th Amendment by striking down as unconstitutional the statutes passed to enforce it.

The words "right to vote," as used in the statutes or Constitutions, generally mean the right to vote at elections of a public general character, and not at municipal elections.

State ex rel. Gibson v. Monahan, 72 Kan. 492, 115 Am. St. Rep. 224, 84 Pac. 130, 7 Ann. Cas. 661; Lefiore County v. State, 70 Miss. 769, 12 So. 904; Buckner v. Gordon, 81 Ky. 671; Hanna v. Young, 84 Md. 179, 34 L.R.A. 55, 57 Am. St. Rep. 396, 35 Atl. 674; State ex rel. Lamar v. Dillon, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383; Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; Belles v. Burr, 76 Mich. 1, 43 N. W. 24; Spitzer v. Fulton, 172 N. Y. 285, 92 Am. St. Rep. 736, 64 N. E. 957; Setterlun v. Keene, 48 Or. 520, 87 Pac. 763; Landis v. Ashworth, 57 N. J. L. 510, 31 Atl. 1017; Willis v. Kalmbach, 109 Va. 475, 21 L.R.A. (N.S.) 1009, 64 S. E. 342; Livesley v. Litchfield, 47 Or. 254, 114 Am. St. Rep. 920, 83 Pac. 142; Harris v. Burr, 32 Or. 348, 39 L.R.A. 768, 52 Pac. 17; Re Gage, 141 N. Y. 112, 25 L.R.A. 781, 35 N. E. 1094; Coffin v. Election Comrs. 97 Mich. 188, 21 L.R.A. 662, 56 N. W. 567; People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678.

If construed to have reference to voting at state or municipal elections, the 15th Amendment would be beyond the amending power conferred upon three fourths of the states by art. 5 of the Constitution, and therefore, the Amendment should not receive that construction, if it is fairly open to a more limited construction.

Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108.

Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 407, 53 L. ed. 848, 29 Sup. Ct. Rep. 527.

The right to determine for itself who shall constitute its electorate is one of the functions essential to the existence of a state, and any invasion of that right is beyond the power of amendment conferred upon three fourths of the states by the people in the adoption of the Constitution; otherwise there could be no indestructible states.

Texas v. White, 7 Wall. 700, 19 L. ed. 227; Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101.

If construed to be applicable to state or municipal elections, the 15th Amendment would fall within the express prohibition contained in art. 5 of the Constitution against any amendment which would deprive a state of its "equal representation in the Senate" without its consent.

Texas v. White, supra; Machen's article in 23 Harvard L. Rev. pp. 169–193.

The subjection of state officers charged with the duty of enforcing state laws to liabilities such as those which it is con-

tended by defendants in error are imposed by § 1979 of U. S. Rev. Stat. Comp. Stat. 1913, § 3932, would completely destroy the autonomy of the states, and would in effect deprive them of a republican form of government secured to them by the Constitution of the United States.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547.

Mr. **Edgar H. Gans** argued the cause, and, with Messrs. Morris A. Soper and Daniel R. Randall, filed a brief for defendant in error:

Can a Maryland official, exercising the power of the state, violate the Constitution of the United States and an act of Congress, and deprive the plaintiff of a right granted thereby, and when sued for the wrong, justify by setting up his ignorance of the law?

Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589.

Here is a distinct right given to citizens of the United States. It is true that the right to vote is, as a rule, given by the state, but in the special case of a colored man in a former slave-holding state, it is in effect given by the United States.

Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Gibson v. Mississippi, 162 U. S. 591, 40 L. ed. 1081, 16 Sup. Ct. Rep. 904; Shaeffer v. Gilbert, 73 Md. 66, 20 Atl. 434; Southerland v. Norris, 74 Md. 326, 28 Am. St. Rep. 255, 22 Atl. 137; Hanna v. Young, 84 Md. 179, 34 L.R.A. 55, 57 Am. St. Rep. 396, 35 Atl. 674; Pope v. Williams, 98 Md. 66, 66 L.R.A. 398, 103 Am. St. Rep. 379, 56 Atl. 543, affirmed in 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. Rep. 573.

The defendants acted under color of law.

State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; McCain v. Des Moines, 174 U. S. 175, 43 L. ed. 938, 19 Sup. Ct. Rep. 644.

The plaintiff was not required to allege that defendants acted maliciously.

Brickhouse v. Brooks, 165 Fed. 534; Monroe v. Collins, 17 Ohio St. 665.

This court has said that where the meaning of the words in a section of the Revised Statutes is clear, you cannot go back to the original law as a help to the meaning. You may get help to solve an ambiguity on the face of the section by going gack to the original law, but you cannot go back to the original law to create the ambiguity.

United States v. Bowen, 100 U. S. 508, 25 L. ed. 631; Vietor v. Arthur, 104 U. S. 498, 26 L. ed. 633; Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155; United States v. Oregon & C. R. Co. 164 U. S. 526, 41 L. ed. 541, 17 Sup. Ct. Rep. 165.

The title is no part of the statute, and does not prevail against the context.

Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821.

The 15th Amendment applies to municipal elections.

Karem v. United States, 61 L.R.A. 437, 57 C. C. A. 486, 121 Fed. 252; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; United States v. Lackey, 99 Fed. 956; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897; Matthews, 15th Amend. p. 38; Howell v. Pate, 119 Ga. 537, 46 S. E. 667; Wood v. Fitzgerald, 3 Or. 568.

Mr. Chief Justice **White** delivered the opinion of the court:

These cases involve some questions which were not in the Guinn Case, No. 96, just decided [238 U. S. 347, ante, 1340, 35 Sup. Ct. Rep. 926]. The [**376**] foundation question, however, is the same; that is, the operation and effect of the 15th Amendment.

Prior to the adoption of the 15th Amendment the privilege of suffrage was conferred by the Constitution of Maryland of 1867 upon "every white male citizen," but the 15th Amendment by its self-operative force obliterated the word "white," and caused the qualification therefore to be "every male citizen," and this came to be recognized by the court of appeals of the state of Maryland. Without recurring to the establishment of the city of Annapolis as a municipality in earlier days, or following the development of its government, it suffices to say that before 1877 the right to vote for the governing municipal body was vested in persons entitled to vote for members of the general assembly of Maryland, which standard, by the elimination of the word "white" from the Constitution by the 15th Amendment embraced "every male citizen." In 1896 a general election law comprising many sections was enacted in Maryland. Laws of 1896, chap. 202, p. 327. It is sufficient to say that it provided for a board of supervisors of elections in each county to be appointed by the governor, and that this board was given the power to appoint two persons as registering officers and two as judges of election for each election precinct or ward in the county. Under this law each ward or voting precinct in Annapolis became entitled to two registering officers. While the law made these changes

in the election machinery it did not change the qualification of voters.

In 1908 an act was passed "to fix the qualifications of voters at municipal elections in the city of Annapolis and to provide for the registration of said voters." Laws of 1908, chap. 525, p. 347. This law authorized the appointment of three persons as registers, instead of two, in each election ward or precinct in Annapolis, and provided for the mode in which they should perform their duties, and conferred the right of registration and consequently the [377] right to vote on all male citizens above the age of twenty-one years who had resided one year in the municipality and had not been convicted of crime, and who came within any one of the three following classes:

"1. All taxpayers of the city of Annapolis assessed on the city books for at least $500. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of twenty-one years. 3. All citizens who prior to January 1, 1868, were entitled to vote in the state of Maryland or any other state of the United States at a state election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this state or in any other state of the United States at a state election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the city of Annapolis or qualified to vote at the municipal elections held therein, and any person so duly registered shall, while so registered, be qualified to vote at any municipal election held in said city; said registration shall in all other respects conform to the laws of the state of Maryland relating to and providing for registration in the state of Maryland."

The three persons who are defendants in error in these cases applied in Annapolis to the board of registration to be registered as a prerequisite to the enjoyment of their right to vote at an election to be held in July, 1909, and they were denied the right by a vote of two out of the three members of the board. They consequently were unable to vote. Anderson, the defendant in error in No. 8, was a negro citizen who possessed all the qualifications required to vote exacted by the law in existence prior to the one we have just quoted, and who on January 1, 1868, the date fixed in the third class in the act in question, would have been entitled to vote in Maryland but for the fact that he was a negro, albeit he possessed none of the [378] particular qualifications enumerated by the statute in question. Howard, the defendant in error in No. 9, was a negro citizen possessing all the qualifications to vote required before the passage of the act in question, whose grandfather resided in Maryland and would have been entitled to vote on January 1, 1868, but for the fact that he was a negro. Brown, the defendant in error in No. 10, also had all the qualifications to vote under the law previously existing, and his father was a negro residing in Maryland who would have been able to vote on the date named but for the fact that he was a negro. The three parties thereupon began these separate suits to recover damages against the two registering officers who had refused to register them on the ground that thereby they had been deprived of a right to vote secured by the 15th Amendment, and that there was liability for damages under § 1979, Rev. Stat., Comp. Stat. 1913, § 3932, which is as follows:

"Every person who under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaints were demurred to and it would seem that every conceivable question of law susceptible of being raised was presented and considered, and the demurrers were overruled, the grounds for so doing being stated in one opinion common to the three cases (182 Fed. 223). The cases were then tried to the court without a jury, and to the judgments in favor of the plaintiffs which resulted these three separate writs of error were prosecuted.

The nonliability in any event of the election officers for their official conduct is seriously pressed in argument, and [379] it is also urged that in any event there could not be liability under the 15th Amendment for having deprived of the right to vote at a municipal election. But we do not undertake to review the considerations pressed on these subjects because we think they are fully disposed of by the ruling this day made in the Guinn Case and by the very terms of § 2004, Rev. Stat., Comp. Stat. 1913, § 3966, when considered in the light of the inherently operative force of the 15th Amendment as stated in the case referred to.

This brings us to consider the statute in order to determine whether its standards for registering and voting are repugnant to the 15th Amendment. There are three general criteria. We test them by beginning at the third, as it is obviously the most comprehensive, and, as we shall ultimately

see, the keystone of the arch upon which all the others rest. In coming to do so it is at once manifest that, barring some negligible changes in phraseology, that standard is in all respects identical with the one just decided in the Guinn Case to be repugnant to the 15th Amendment, and we pass from its consideration and approach the first and a subdivision numbered 2½. The first confers the right to register and vote free from any distinction on account of race or color upon all taxpayers assessed for at least $500. We put all question of the constitutionality of this standard out of view as it contains no express discrimination repugnant to the 15th Amendment, and it is not susceptible of being assailed on account of an alleged wrongful motive on the part of the lawmaker or the mere possibilities of its future operation in practice, and because, as there is a reason other than discrimination on account of race or color discernible upon which the standard may rest, there is no room for the conclusion that it must be assumed, because of the impossibility of finding any other reason for its enactment, to rest alone upon a purpose to violate the 15th Amendment. And as, in order to dispose of the case, as [380] we shall see, it is not necessary to examine the constitutionality of the other standards, that is, numbers 2 and 2½ relating to naturalized citizens and their descendants, merely for the sake of argument we assume those two standards, without so deciding, to be also free from constitutional objection, and come to consider the case under that hypothesis.

The result, then, is this: that the third standard is void because it amounts to a mere denial of the operative effect of the 15th Amendment, and, based upon that conception, proceeds to re-create and re-establish a condition which the Amendment prohibits and the existence of which had been previously stricken down in consequence of the self-operative force of its prohibitions; and the other standards separately considered are valid or are assumed to be such and therefore are not violative of the 15th Amendment. On its face, therefore, this situation would establish that the request made by all the plaintiffs for registration was rightfully refused since, even if the void standard be put wholly out of view, none of the parties had the qualifications necessary to entitle them to register and vote under any of the others. This requires us therefore to determine whether the two first standards which we have held were valid or have assumed to be so must nevertheless be treated as nonexisting as the necessary result of the elimination of the third standard because of its repugnancy to the prohibition of the 15th Amendment. And by this we are brought therefore to determine the interrelation of the provisions and the dependency of the two first, including the substandard under the second, upon the third; in other words, to decide whether or not such a unity existed between the standards that the destruction of one necessarily leaves no possible reason for recognizing the continued existence and operative force of the others.

In the Guinn Case this subject was also passed upon and [381] it was held that albeit the decision of the question was, in the very nature of things, a state one, nevertheless, in the absence of controlling state rulings, it was our duty to pass upon the subject, and that in doing so the overthrow of an illegal standard would not give rise to the destruction of a legal one unless such result was compelled by one or both of the following conditions: (a) Where the provision as a whole plainly and expressly established the dependency of the one standard upon the other, and therefore rendered it necessary to conclude that both must disappear as the result of the destruction of either; and (b) where, even although there was no express ground for reaching the conclusion just stated, nevertheless that view might result from an overwhelming implication consequent upon the condition which would be created by holding that the disappearance of the one did not prevent the survival of the other; that is, a condition which would be so unusual, so extreme, so incongruous as to leave no possible ground for the conclusion that the death of the one had not also carried with it the cessation of the life of the other.

That both of these exceptions here obtain we think is clear: First, because, looking at the context of the provision, we think that the obvious purpose was not to subject to the exactions of the first standard (the property qualification) any person who was included in the other standards; and second, because the result of holding that the other standards survived the striking down of the third would be to bring about such an abnormal result as would bring the case within the second exception, since it would come to pass that every American-born citizen would be deprived of his right to vote unless he was able to comply with the property qualification, and all naturalized citizens and their descendants would be entitled to vote without being submitted to any property qualification whatever. If the clauses as to naturalization were [382] assumed to be invalid, the incongruous result just stated would, of course, not arise, but the legal situation would be unchanged, since that view would not weaken the con-

clusion as to the unity of the provisions of the statute, but, on the contrary, would fortify it.

But it is argued even although this result be conceded, there nevertheless was no right to recover, and there must be a reversal since, if the whole statute fell, all the clauses providing for suffrage fell, and no right to suffrage remained, and hence no deprivation or abridgment of the right to vote resulted. But this, in a changed form of statement, advances propositions which we have held to be unsound in the Guinn Case. The qualification of voters under the Constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute which we are considering. The mere change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty, nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof. The conclusive effect of this view will become apparent when it is considered that if the argument were accepted, it would follow that although the 15th Amendment by its self-operative force, without any action of the state, changed the clause in the Constitution of the state of Maryland conferring suffrage upon "every white male citizen" so as to cause it to read "every male citizen," nevertheless the Amendment was so supine, so devoid of effect, as to leave it open for the legislature to write back by statute the discriminating provision by a mere changed form of expression into the laws of the state, and for the state officers to make the result of such action successfully operative.

There is a contention pressed concerning the application [383] of the statute upon which the suits were based to the acts in question. But we think, in view of the nature and character of the acts, of the self-operative force of the 15th Amendment, and of the legislation of Congress on the subject, that there is no ground for such contention.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of these cases.

UNITED STATES, Plff. in Err.,

v.

TOM MOSLEY and Dan Hogan.

(See S. C. Reporter's ed. 383-393.)

Civil rights — suffrage — right to have vote counted.

1. The right to have one's vote at an election for member of Congress counted is as open to protection by Congress as is the right to vote itself.

[For other cases, see Civil Rights, in Digest Sup. Ct. 1908.]

Conspiracy — against civil rights — counting vote.

2. A conspiracy of state election officials to omit the returns from certain precincts at an election for member of Congress from their count and from their return to the state election board is indictable under the Criminal Code of March 4, 1909 (35 Stat. at L. 1088, chap. 321, Comp. Stat. 1913, § 10165), § 19, which makes it a criminal offense to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

[For other cases, see Conspiracy, III., in Digest Sup. Ct. 1908.]

Statutes — repeal by implication.

3. The repeal by the act of February 8, 1894 (28 Stat. at L. 36, chap. 25, Comp. Stat. 1913, § 1015), of all the sections of U. S. Rev. Stat. tit. 70, chap. 7, which relate to offenses by persons or officers against the elective franchise, did not by implication withdraw offenses by election officers from the operation of § 5508 (now U. S. Penal Code, § 19), which makes it a criminal offense to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

[For other cases, see Statutes, III. b, in Digest Sup. Ct. 1908.]

[No. 180.]

Submitted October 17, 1913. Decided June 21, 1915.

IN ERROR to the District Court of the United States for the Western District of Oklahoma to review a judgment sustaining a demurrer to an indictment charging state election officials with a conspiracy to omit the returns from certain precincts at an election for member of Congress from their count and return to the state election board. Reversed.

The facts are stated in the opinion.

Solicitor General Davis submitted the cause for plaintiff in error:

Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon, the Constitution of the United States.

NOTE.—On the right to vote as a privilege or immunity of citizens of the United States —see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 580.

On repeal of statutes by implication, generally—see notes to State v. Massey, 4 L.R.A. 309, and United States v. Henderson, 20 L. ed. U. S. 235.

Ex parte Virginia, 100 U. S. 339, 345, 25 L. ed. 676, 679, 3 Am. Crim. Rep. 547; Ex parte Yarbrough, 110 U. S. 651, 663, 28 L. ed. 274, 278, 4 Sup. Ct. Rep. 152; Hodges v. United States, 203 U. S. 1, 24, 51 L. ed. 65, 72, 27 Sup. Ct. Rep. 6; Logan v. United States, 144 U. S. 263, 293, 36 L. ed. 429, 439, 12 Sup. Ct. Rep. 617; Strauder v. West Virginia, 100 U. S. 303, 310, 25 L. ed. 664, 666, 3 Am. Crim. Rep. 515; United States v. Reese, 92 U. S. 214, 217, 23 L. ed. 563, 564.

The right of suffrage in the election of members of Congress is such a right.

Ex parte Yarbrough, 110 U. S. 651, 663, 28 L. ed. 274, 278, 4 Sup. Ct. Rep. 152; Felix v. United States, 108 C. C. A. 503, 186 Fed. 688; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17.

This right, together with others thus created or secured, is protected by § 19 of the Criminal Code.

Ex parte Yarbrough, 110 U. S. 657, 28 L. ed. 275, 4 Sup. Ct. Rep. 152; Felix v. United States, 108 C. C. A. 503, 186 Fed. 688; Hodges v. United States, 203 U. S. 24, 51 L. ed. 72, 27 Sup. Ct. Rep. 6.

Consequently, § 19, both generally and in its application to the elective franchise, is constitutional.

Ex parte Yarbrough, supra; Logan v. United States, 144 U. S. 263, 293, 36 L. ed. 429, 439, 12 Sup. Ct. Rep. 617; Motes v. United States, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993; United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35.

The right of suffrage secured by the Constitution consists not merely of the right to cast a ballot, but likewise of the right to have that ballot counted.

(a) The right in question arises equally from the 2d and 4th sections of art. 1 of the Constitution.

Ex parte Yarbrough, 110 U. S. 660, 664, 28 L. ed. 277, 278, 4 Sup. Ct. Rep. 152.

(b) Upon whichever section it depends, it must include the right to have the vote counted.

Ex parte Clarke, 100 U. S. 399, 25 L. ed. 715; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Re Coy, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1.

Any conspiracy to interfere with or prevent the free exercise or enjoyment of the constitutional right of suffrage is in violation of § 19 of the Criminal Code.

When applied to the elective franchise, the inference is that the statute was designed to prevent any act whereby the complete exercise of that privilege might be prevented or impeded, and not merely attacks or threats directed against the voter's person.

United States v. Morris, 125 Fed. 322; United States v. Stone, 188 Fed. 836; United States v. Waddell, 112 U. S. 80, 28 L. ed. 674, 5 Sup. Ct. Rep. 35.

No appearance for defendants in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment under § 19 of the Criminal Code, act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1092, Comp. Stat. 1913, §§ 10165, 10183. It was demurred to and the demurrer was sustained by the district court on the ground that the section did not apply to the acts alleged. As the judgment on the face of it turned upon the construction of the statute, the United States brought the case to this court.

The indictment contains four counts. The first charges a conspiracy of the two defendants, who were officers and a majority of the county election board of Blaine county, Oklahoma, to injure and oppress certain legally qualified electors, citizens of the United States, being all the voters of eleven precincts in the county, in the free exercise and enjoyment of their right and privilege, under the Constitution and laws of the United States, of voting for a member of Congress for their district. To that end, it is alleged, the defendants agreed that, irrespective of the precinct returns being lawful and regular, they would omit them from their count and from their returns to the state election board. The second count charges the same conspiracy, a secret meeting of the defendants without the knowledge of the third member of their board, for the purpose of carrying it out, and the overt act of making a false return, as agreed, omitting the returns from the named precincts, although regular and entitled to be counted. The third count is like the first with the addition of some details of the plan, intended to deceive the third member of their board. The [386] fourth charges the same conspiracy, but states the object as being to injure and oppress the same citizens for and on account of their having exercised the right described.

The section is as follows: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with

intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution and laws of the United States." It is not open to question that this statute is constitutional, and constitutionally extends some protection, at least, to the right to vote for members of Congress. Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Logan v. United States, 144 U. S. 263, 293, 36 L. ed. 429, 439, 12 Sup. Ct. Rep. 617. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.

The only matter that needs argument is that upon which the district court expressed its view—whether, properly construed, the statute purports to deal with such conduct as that of the defendants, assuming that there is no lack of power if such be its intent. Manifestly the words are broad enough to cover the case, but the argument that they have a different scope is drawn from the fact that originally this section was part of the enforcement act of May 31, 1870, chap. 114, § 6, 16 Stat. at L. 141, Comp. Stat. 1913, § 10,183 (later, Rev. Stat. § 5508), and that by an earlier section of the same statute, § 4 (later, Rev. Stat. § 5506), every person who, by any unlawful means, hindered or combined with others to hinder any citizen from voting at any election [387] in any state, etc., was subjected to a much milder penalty than that under § 6. It may be thought that the act of 1870 cannot have meant to deal a second time and in a much severer way in § 6 with what it had disposed of a few sentences before. The other sections have been repealed, but § 19, it may be said, must mean what it meant in 1870 when the enforcement act was passed, and what it did mean will be seen more clearly from its original words.

In its original form the section began: "If two or more persons shall band or conspire together or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress," etc. The source of this section in the doings of the Ku Klux and the like is obvious, and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. But this section dealt with Federal rights, and with all Federal rights, and protected them in the lump, whereas § 4, Rev. Stat. § 5506, dealt only with elections, and although it dealt with them generally and might be held to cover elections of Federal officers, it extended to all elections. It referred to conspiracies only as incident to its main purpose of punishing any obstruction to voting at any election in any state. The power was doubtful and soon was held to have been exceeded. United States v. Reese, 92 U. S. 214, 23 L. ed. 563. See Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617. The subject was not one that called for the most striking exercise of such power as might exist. Any overlapping that there may have been well might have escaped attention, or, if noticed, have been approved, when we consider what must have been the respective emphasis in the mind to Congress when the two sections were passed.

But § 6 being devoted, as we have said, to the protection of all Federal rights from conspiracies against them, naturally did not confine itself to conspiracies contemplating [388] violence, although, under the influence of the conditions then existing, it put that class in the front. Just as the 14th Amendment, to use the happy analogy suggested by the Solicitor General, was adopted with a view to the protection of the colored race, but has been found to be equally important in its application to the rights of all, § 6 had a general scope and used general words that have become the most important now that the Ku Klux have passed away. The change of emphasis is shown by the wording already transposed in Rev. Stat. § 5508, and now in § 19. The clause as to going in disguise upon the highway has dropped into a subordinate place, and even there has a somewhat anomalous sound. The section now begins with sweeping general words. Those words always were in the act, and the present form gives them a congressional interpretation. Even if that interpretation would not have been held correct in an indictment under § 6, which we are far from intimating, and if we cannot interpret the past by the present, we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which, on its face, § 19 most reasonably affords.

Judgment reversed.

Mr. Justice McReynolds did not sit in this case.

Mr. Justice Lamar, dissenting:

I dissent from the judgment that the state election officers are subject to indictment in Federal courts for wrongfully refusing to receive and count election returns.

In this case the indictment charges a

violation of Rev. Stat. § 5508 (Penal Code, § 19 [35 Stat. at L. 1092, chap. 321, Comp. Stat. 1913, § 10183]), which makes it an offense to "conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of [389] the United States." And the indictment charges that these two defendants, *"being then and there members of the county election board of Blaine county, Oklahoma,"* did conspire to deprive certain unnamed voters of such right, and in pursuance of that conspiracy threw out the returns from several election precincts.

The section under which the indictment is brought was originally a part of the act of 1870, appearing as § 5508[1] in chapter 7 of the Revised Statutes, headed, "Crimes against the Elective Franchise and Civil Rights of Citizens." The act and the chapter contained many sections—ten of them (§§ 5506, 5511-5515, 5520-5523) related to offenses by persons or officers against the elective franchise,—to crimes by the voter, and against the voter, and specifically to offenses by registrars, deputy marshals, supervisors, and "every officer of an election." Taken together it is perfectly evident that in them Congress intended to legislate comprehensively and exhaustively on the subject of "crimes against the franchise." Under one or the other of them, these defendants would have been subject to indictment, but for the fact that all of those ten sections were explicitly and expressly repealed by the act of February 8, 1894 (28 Stat. at L. 36, chap. 25, Comp. Stat. 1913, § 1015).

Those ten election sections having been repealed, it is now sought to indict these officers under § 5508, which [390] was not repealed. This is said to be justified on the ground that, in the original act, there was such an overlapping and doubling of offenses that even when those relating to election officers were repealed, a right to prosecute them for conspiracy was retained in § 5508. But this assumes that there was an overlapping when, in fact, the subjects of *"crimes against the elective franchise"* and *"crimes against civil rights"* were treated as separate and distinct. The chapter heading (Rev. Stat. §§ 5506-5523) indicates the difference; and though the two subjects were dealt with in the same act, they were nevertheless treated as distinct. The sections of the original act ran parallel to each other, but were separated from each other; and when all those dealing with offenses by election officers were repealed, the legislative content of those sections was not poured into § 5508.

The act of 1870 imposing punishment upon election officers who were agents of the state was passed in pursuance of the provisions of the Amendment which related to state action, and thus authorized Congress to provide for the punishment of state officers by Federal courts, which, prior to that time, could not have been done. The Congressional will on that subject was fully and completely expressed in those parts of the statute which were afterwards repealed. Congress, having dealt so explicitly with offenses by state election officers in the ten repealed sections, cannot be supposed to have referred to them indirectly in § 5508, which does not mention voters, or elections, or election officers, but deals with the deprivation of civil rights of a different nature.

As will appear by the report of the committee (House Report No. 18, 53d Cong., 1st session) and debates in the House and Senate during the discussion of the repealing act of 1894, Congress took the view that as elections were held under state laws, by state officers who were subject to punishment by the state for a violation of the election [391] laws, they should not be subject to indictment in the United States courts. The express and avowed intent was to repeal all statutes which gave Federal courts jurisdiction over elections and over offenses committed by election officers. And to hold that while a single election officer is now immune from prosecution, two or more can be indicted under § 5508, gives an enlarged operation to the theory that an act, not in itself criminal, may be punished if committed by more than one. Such construction also injects § 5508 into a field from which it was excluded when passed in 1870, and into which it cannot now be forced by implication. For under Penal Code (§ 339 [35 Stat. at L. 1153, chap. 321, Comp. Stat. § 10513])

[1] "Sec. 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." 16 Stat. at L. 141, chap. 114, § 6, Comp. Stat. 1913, § 10183.

§ 5508 means now exactly what it did when it was originally enacted.

To reverse the judgment of the lower court quashing this indictment means, in effect, that Congress failed in its avowed purpose to repeal all statutes relating to crimes against the franchise. To hold that by virtue of § 5508 as a conspiracy statute all of these repealed election offenses are retained, when committed by two or more officers, will also lead to the conclusion that in 1870 Congress in the very same statute had included two sections both of which related to the same conspiracy and to the same overt act, but which might be punished differently. For, if the district attorney had indicted under § 5506 for *"combining and confederating to prevent a qualified citizen from voting,"* the two defendants might have been punished by a fine of $500 and imprisonment for twelve months; while if the indictment for the very same conduct had been based on § 5508, for *"conspiring to deprive the citizen of a right under the United States law,"* the punishment might be a fine of $5,000, imprisonment for ten years and the loss of the right to hold office under the laws of the United States. Congress certainly never intended in the same breath to make the same act punishable under two different sections in different ways at the option of the prosecuting attorney. [392] Similar anomalies could be pointed out if § 5508 is to be construed as so all-embracing as to include acts by two in violation of the ten election sections which have been repealed.

Rev. Stat. § 5508 is highly penal and is to be strictly construed. And that ordinary rule is especially applicable when a statute is sought to be enforced against election officers for the relation between the states and the Federal government is such that the power of the United States courts to punish state officers for wrongs committed by them as officers should be clearly and expressly defined by Congress, and not left to implication—especially so when Congress has given such an explicit expression of its intent that election officers should not be punished in the Federal courts.

The 15th Amendment is self-executing in striking the word "white" from all laws granting the right of suffrage. It was not so far self-executing as to define crimes against the franchise, or to impose punishments for wrongs against a voter. The Amendment provided that Congress should have power to enforce its provisions by appropriate legislation. Congress did so legislate in 1870. In 1894 it expressly repealed the legislation relating to elections. Since that time no subsequent Congress has restored that legislation or anything like it to the statute books. If this be a hiatus in the law (James v. Bowman, 190 U. S. 127, 139, 47 L. ed. 979, 982, 23 Sup. Ct. Rep. 678) it cannot be supplied through the operation of a conspiracy statute (§ 5508) which did not contemplate furtive and fraudulent conduct, or a wrong to the public, or to the voters of an entire precinct, or to wrongs like those here charged. It related to conspiracies to *injure, oppress, threaten, intimidate,*—to violence, oppression, injury, intimidation; to force on the premises, force on the highway. The nearest approach to a prosecution for an election offense under § 5508 is the Yarbrough Case (110 U. S. 656, 28 L. ed. 275, 4 Sup. Ct. Rep. 152). But he was not an election officer and [393] "the beating and wounding" there charged took place on the "highway" remote from the precinct. That form of intimidation and violence was in express terms dealt with in § 5508 and in none of the repealed sections.

Rev. Stat. § 5508 has been in force for forty-five years. During those forty-five years no prosecution has ever been instituted under it against a state election officer. That nonaction but confirms the correctness of the construction that it was never intended to apply to offenses by state election officers. On the general subject see: James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; Giles v. Teasley, 193 U. S. 149, 48 L. ed. 656, 24 Sup. Ct. Rep. 359; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; Green v. Mills, 30 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 863; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; United States v. Cruikshank, 92 U. S. 558, 23 L. ed. 593; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; Re Coy, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; Wiley v. Sinkler, 179 U. S. 58, 66, 67, 45 L. ed. 84, 89, 21 Sup. Ct. Rep. 17; Karem v. United States, 61 L.R.A. 437, 57 C. C. A. 487, 121 Fed. 250, 258 (2), 259; Seeley v. Koox, 2 Woods, 368, Fed. Cas. No. 12,630; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Holt v. Indiana Mfg. Co. 176 U. S. 68, 72, 73, 44 L. ed. 374, 376, 377, 20 Sup. Ct. Rep. 272; Baldwin v. Franks, 120 U. S. 690, 30 L. ed. 770, 17 Sup. Ct. Rep. 656, 763; United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35.

OREGON & CALIFORNIA RAILROAD COMPANY et al., Defendants and Appellants; John L. Snyder et al., Cross Complainants and Appellants; William F. Slaughter et al., Interveners and Appellants,

v.

UNITED STATES.

(See S. C. Reporter's ed. 393–439.)

Public lands — railway land grants — covenant or condition — sales to settlers.

1. The provisos in the railway land grant acts of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), § 4, that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to each purchaser, and at a price not exceeding $2.50 per acre, are not conditions subsequent, a breach of which incurs a forfeiture of the grant, nor are they restrictive and negative only and hence unenforceable covenants, but they constitute valid, continuing, and enforceable covenants.

[For other cases, see Public Lands, I. c, 2, h, in Digest Sup. Ct. 1908.]

Estoppel — laches — accepting benefit.

2. The contention that Congress was without lawful authority to annex a new condition, as it did by the amendatory act of April 10, 1869 (16 Stat. at L. 47, chap. 27), to the railway land grant made by the act of July 25, 1866 (14 Stat. at L. 239, chap. 242), as amended by the act of June 25, 1868 (15 Stat. at L. 80, chap. 80), comes too late where, instead of an immediate rejection of the provisions and obligations of such act of April 10, 1869, there was formal and repeated assent to the act of July 25, 1866, and the amendments thereto, on the part of the beneficiary railway companies, and they have obtained every advantage offered by the legislation in question, and have enjoyed the benefit of it.

[For other cases, see Estoppel, III. b, 6; III. b, 7, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — covenant — waiver — acquiescence — estoppel.

3. The United States is not precluded from enforcing the covenant in the provisos of the railway land grant acts of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), § 4, that the land granted shall be sold to actual settlers only, in quantities not greater than one quarter section to each purchaser, and for a price not exceeding $2.50 per acre, on any theory of waiver, acquiescence, or estoppel because of the government's silence in the face of repeated breaches of such covenant, and of its issuance of patents to the railway companies from time to time, with knowledge of such forbidden sales, where the government's position seems to have been that the enforcement of such covenant was a matter for the courts, and not one for executive or legislative action.

[For other cases, see Public Lands, I. c, 2, h; Estoppel, III. b, 5, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — covenants — sales to settlers.

4. The character of the lands as respects their fitness or unfitness for settlement furnishes no excuse for the violation by a railway company of the covenant in the land-grant acts of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), § 4, that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre.

[For other cases, see Public Lands, I. c, 2, h, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — covenant.

5. The grant by the act of August 20, 1912 (37 Stat. at L. 320, chap. 311), of authority to compromise with purchasers from the railway companies suits brought under the joint resolution of April 30, 1908 (35 Stat. at L. 571), to assert rights and remedies existing in favor of the United States, arising out of the railway land grant acts of July 25, 1866 (14 Stat. at L. 239, chap. 242), June 25, 1868 (15 Stat. at L. 80, chap. 80), and May 4, 1870 (16 Stat. at L. 94, chap. 69), cannot be regarded as a waiver of breaches by the railway companies of the covenants in the two latter acts requiring sales to actual settlers only, where the suit involves lands which are expressly excluded from the application of the act of August 20, 1912 (37 Stat. at L. 320, chap. 311), which further declares that such act shall create no rights or privileges whatever in favor of any of the defendants in such suit, and that nothing in such act shall condone any of the breaches of the conditions or provisions of the granting act, nor be a waiver of any cause of action or remedy of the United States on account of such breaches, or of any right or remedy existing in favor of the United States.

[For other cases, see Public Lands, I. c, 2, h, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — covenant — settlers' clause — abrogation.

6. The so-called settlers' clause in the railway land grant acts of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), § 4, was not abrogated as to the Oregon lands by any ratification in the sinking fund act of May 7, 1878 (20 Stat. at L. 56, chap. 96), of the transfer of the California & Oregon Railroad and its land in California to the Central Pacific Railroad Company, since the Oregon part of the grant was, by the grant itself, treated as substantially distinct from the California part, and the Oregon part has always been claimed, used, and enjoyed by the Oregon & California Railroad Com-

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

pany, or its predecessors in title, and never by the Central Pacific Railroad Company.

[For other cases, see Public Lands, I. c, 2, h, in Digest Sup. Ct. 1908.]

Trust — in railway land grant — actual or intending settlers.

7. No trust in favor of either actual settlers or those who should become such was created by the provisos of the railway land grants of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), § 4, that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre.

[For other cases, see Trusts, I. d, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — covenants — sales to settlers.

8. Any implied power of the railway companies to mortgage the lands embraced in their land grants did not carry with it a right to sell on foreclosure, divested of the obligations of the provisos in the acts of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre.

[For other cases, see Public Lands, I. c, 2, h, in Digest Sup. Ct. 1908.]

Judgment — form — without prejudice.

9. A decree enjoining future violations by the railway companies of the provisos in the land grant acts of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), § 4, that the lands granted shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and at a price not exceeding $2.50 per acre, should be without prejudice to any other suits, rights, or remedies which the government may have by law or under the joint resolution of April 30, 1908 (35 Stat. at L. 571), or the supplemental act of August 20, 1912 (37 Stat. at L. 320, chap. 311), where the government in its bill has distinguished between the sold and unsold lands, and between the respective rights and interests vested, contingent, or expectant in them, and, while asserting that all had become forfeited, includes in the suit only the unsold lands and the rights and interests in them.

[For other cases, see Judgment, II. a, in Digest Sup. Ct. 1908.]

Injunction — against violation of covenant — railway land grant — extent of relief.

10. Railway companies whose long disregard of the covenants in the provisos of the land grant acts of April 10, 1869 (16 Stat. at L. 47, chap. 27), and May 4, 1870 (16 Stat. at L. 94, chap. 69), § 4, that the lands granted shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre, may have made the lands more inviting for speculation than for settlement, should not only be enjoined from future sales in violation of the covenants, but should be enjoined from any disposition whatever of the lands or the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon until Congress shall have reasonable opportunity to provide by legislation for their disposition.

[For other cases, see Injunction, I. c, in Digest Sup. Ct. 1908.]

[No. 679.]

Argued April 23, 26, and 27, 1915. Decided June 21, 1915.

ON A CERTIFICATE from, and WRIT OF CERTIORARI to, the United States Circuit Court of Appeals for the Ninth Circuit, bringing up for review a decision of the District Court for the District of Oregon decreeing the forfeiture of the unsold portion of certain lands granted by Congress to certain railroad companies, and quieting the title of the United States to such lands. Reversed and remanded for further proceedings.

Statement by Mr. Justice McKenna:

This writ brings up for review a decision of the United States district court for the district of Oregon decreeing [395] the forfeiture of the unsold portion of certain lands granted by Congress to certain railroad companies, and quieting the title of the United States thereto.

In consequence of a memorial presented to it, Congress, on April 30, 1908 [35 Stat. at L. 571], adopted a joint resolution which authorized and directed the Attorney General of the United States to institute and prosecute any and all suits in equity, actions at law, or other proceedings, to enforce any rights or remedies of the United States arising and growing out of either of the following acts of Congress, to wit: "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866 [14 Stat. at L. 239, chap. 242], as amended by the acts approved June 25, 1868 [15 Stat. at L. 80, chap. 80], and April 10, 1869 [16 Stat. at L. 47, chap. 27], and "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinville, in the State of Oregon," approved May 4, 1870 [16 Stat. at L. 94, chap. 69].

The Attorney General was empowered to assert all rights and remedies existing in favor of the United States, including the claim on behalf of the United States that

the lands granted by such acts, or any part of the lands, have been or are forfeited to the United States by reason of any breaches or violations of the terms or conditions of either of such acts which may be alleged or established in such suits, actions, or proceedings.

The resolution declared that it was not intended to determine the right of the United States to any such forfeiture or forfeitures, but to fully authorize the Attorney General to assert on behalf of the United States, and the court or courts before which such suits, actions, or proceedings might be instituted or pending, to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and, if found, to enforce the same. 35 Stat. at L. 571.

[396] Being so authorized, the United States brought this suit as complainant against the Oregon & California Railroad Company, the Southern Pacific Company, Stephen T. Gage (individually and as trustee), the Union Trust Company (individually and as trustee), John L. Snyder, and certain others as defendants, to declare forfeited to the United States the lands of the Oregon & California Railroad Company aggregating 2,300,000 acres which inured to the predecessors in interest of the company under the acts of Congress referred to in the resolution.

The bill set forth the acts of Congress and alleged that it was expressed that neither the amendatory act of April 10, 1869, nor the act of 1866 should be construed to entitle more than one company to the grant of land, and that following such provision which was in the act of 1869 there was this proviso: "And provided further, That the lands granted by the act aforesaid [act of 1866] shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

That the act of May 4, 1870, also contained the provision (§ 4) that the lands granted thereby, excepting only such as were necessary for depots and other needful uses in operating the road, should "be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

The bill also detailed the organization of companies and the steps taken by them to avail themselves of the grants and accomplish the purpose for which they were made; the steps and proceedings in the construction of the roads contemplated; the issue of patents for the lands granted; the amount of land sold and unsold and wherein [397] and by what acts there had been breaches of provisions of the acts above set forth, which were alleged to have been conditions subsequent, and that by such breaches the grants had become forfeited. The bill likewise detailed the various steps and the proceedings whereby the Oregon & California Railroad Company became the owner of the grants, the connection of the defendants, Southern Pacific Company, Gage, and the Union Trust Company therewith, and the rights they asserted therein.

It was alleged that each of the other defendants (other than the railroad company, the Southern Pacific Company, Gage, and the Union Trust Company) asserted an interest in the lands, created, as they alleged, by actual settlement in good faith upon certain of the unsold lands, not exceeding one quarter section, with intention of making a permanent home thereof, and had applied to the railroad company to purchase the same; that the said defendants had instituted suits against the railroad company, Gage, and the Union Trust Company to compel a sale and conveyance of the lands to them; that unless enjoined they would prosecute their suits to final judgments, and that they were hence made parties to this suit in order that they might be so enjoined, and, if the court so order, be permitted to set forth their respective claims for adjudication.

The bill prayed a forfeiture of the unsold lands and that the title of the government thereto be quieted, or, if such relief be denied, that the lands be adjudged subject to purchase by actual settlers in quantities not exceeding 160 acres to any one purchaser and at a price not exceeding $2.50 per acre; that a receiver be appointed to sell the lands and account for the proceeds "as the court shall direct."

If such relief be denied, that a mandatory injunction issue requiring the railroad company to offer for sale and to sell the lands as required by the grants. And the [398] bill also prayed that all of the defendants be enjoined from asserting any right, title, or interest in and to the lands, or committing waste thereon, and for an accounting of all moneys received from the sale of lands or timber.

The persons who asserted interests acquired by actual settlement were made parties to this suit and the causes consolidated, and Snyder and others filed cross complaints herein setting up their alleged rights. And there were about 6,000 other persons who by the court was permitted as interveners to present their claims for consideration and adjudication. They are represented in the record by the peti-

tion and papers of B. W. Nunnally and others.

The cross complainants alleged that they were actual settlers upon the lands granted by the act of May 4, 1870, long prior to the institution of any suit or the assertion of any claim of forfeiture by the government; and the petitions in intervention averred that the petitioners were applicants to purchase lands granted by that act or the act of July 25, 1866; and both cross complaints and petitions respectively alleged in substance that the lands were granted in trust to the respective grantee companies for actual settlers or those who should become such, and alleged respectively tender of the purchase price, demand for conveyances, and the refusal of the railroad company to accept the tender or make the conveyances. And both cross complainants and interveners asserted a prior right to the extent of the land demanded by them, respectively; denied that the grants had become forfeited, and resisted the relief prayed by the government. They adopted in all other particulars the allegations of the bill, and relied upon them as the basis of their respective claims; prayed that the railroad company be decreed to hold in trust the legal title to the land respectively claimed by them, that their several rights be established and enforced, and that the railroad company [399] be directed to convey to each of them the tract of land applied for by each, and for general relief.

Demurrers were sustained to the cross complaints and to the petitions in intervention. Demurrers to the bill were overruled. 186 Fed. 861. Joint and several answers were then filed by the railroad company, the Southern Pacific Company, and Gage. The Union Trust Company answered separately. These companies when referred to collectively will be called defendants.

The answers admitted most of the allegations of the bill and denied others; alleged facts in resistance to the construction of the government of the acts of Congress and to the relief prayed, justified the alleged breaches of the conditions or covenants of the grants, and set up laches, waiver of the breaches, and statutes of limitation.

A great deal of testimony was taken, but the case was practically submitted and a decree entered upon a stipulation of facts made by the government and defendants. It of itself is quite voluminous, but we deem only certain of its facts material.

By the act of July 25, 1866, supra (14 Stat. at L. 239, chap. 242), Congress authorized and empowered the California & Oregon Railroad Company, which had been organized under a statute of the state of California, and such company, organized under the laws of Oregon, as the legislature of that state should designate, to construct and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad in California, as follows: The California & Oregon Company to construct that part of the railroad and telegraph line within the state of California, beginning at a point to be selected by the company on the Central Pacific Railroad in Sacramento Valley, and running thence northerly through the Sacramento and Shasta valleys to the northern boundary of the state. The Oregon company to construct the part in Oregon from Portland south [400] through certain designated valleys to the southern boundary of Oregon, to connect with the part constructed by the first-named company. Whichever company first completed its respective part of the road from the designated terminus to the boundary line between the states was authorized to continue construction until the parts should meet and connect, and the whole line of railroad and telegraph should be completed.

Section 2 of the act granted to the companies, their successors and assigns, "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line."

In case of deficiency in the original sections granted other lands might be selected in lieu thereof. Upon the filing of the survey of the railroad the lands granted were to be withdrawn from public sale so far as located within the limits designated. And it was provided that the lands granted should be applied to the building of the said road within the states respectively, wherein they were situated; and that the lands reserved by the government should not be sold except at double the minimum price of public lands, with provisions for sale to actual settlers under the pre-emption and the homestead laws.

Section 3 granted to the companies the right of way through the public lands "for the construction of said railroad and telegraph line" 100 feet in width on each side of the road, including grounds for stations, etc., and the right to take from the public lands materials for the construction of the road.

Section 4 provided that when 20 or more

consecutive [401] miles of any portion of the railroad and telegraph line should be ready for the service contemplated, commissioners should be appointed by the President to examine the same, and if it should appear that 20 miles had been completed and equipped in all respects as required by the act, and the commissioners should so report under oath to the President of the United States, patents should issue to the companies or either of them, as the case might be, to the extent of the completed section, and successively as 20 or more miles should be constructed, until the entire railroad and telegraph line authorized by the act should be constructed, and patents to the lands granted should be issued.

Section 5 expressed that the grants were made upon the condition that the companies should keep the railroad and telegraph in repair and use and transport the mails and despatches for the government when required to do so by any department thereof; that the government should have the preference in the use of the railroad and telegraph at reasonable rates not exceeding those paid by private parties, and that the road should remain a public highway for the use of the government, free of toll or other charges upon the transportation of the property or troops of the United States, and at the cost and charge of the corporation or companies.

Section 6 required assent to the act to be filed in the Department of the Interior within one year after the passage of the act, and that the first section of 20 miles should be completed within two years and 20 miles in each year thereafter, and the whole on or before July 1, 1875; and the road to be of the same gauge as the Central Pacific Railroad of California, and be connected therewith.

Section 7 required the roads to be operated and used as one connected and continuous line, and afford to the government and the public equal advantages and facilities as to rates, time, and transportation.

[402] Section 8 provided that for failure to file assent to the act or to complete the road as required the act should be null and void, "and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of such failure, shall revert to the United States." And it was provided if the road and telegraph should not be kept in repair and fit for use the United States might put the same in repair and use, and might devote the income of the road and telegraph line to repay all expenditure caused by the default of the companies or either of them, or might fix pecuniary responsibility not exceeding the value of the lands granted.

Section 9 provided that wherever the word "company" or "companies" was used in the act it should be construed to embrace the words "their associates, successors, and assigns" the same as if the words had been inserted or thereto annexed.

Sections 10 and 11 are not material to be quoted. And § 12 provided that Congress might, at any time, having due regard for the right of the companies, "add to, alter, amend, or repeal" the act.

To avail of the grant, the Oregon Central Railroad Company was incorporated October 6, 1866. It projected its road from Portland to Forest Grove, thence southerly on the westerly side of the Willamette river, and became known as the "West Side Company," and its railroad line as the "West Side Line."

The legislature of Oregon, by joint resolution adopted October 10, 1866, designated the Oregon Central as the road to receive the land grant. (There were certain steps in the organization of the company not important.)

The assent of the company to the act of 1866 was filed in the office of the Secretary of the Interior, and subsequently (August 20, 1868) a map of survey of its projected line.

April 22, 1867, certain persons, contending that the [403] West Side Company had not been lawfully incorporated or organized, and designing to secure the grants and other benefits under the act of 1866, caused proceedings to be taken, intending to organize under the general laws of Oregon the Oregon Central Railroad Company of Salem, and so named in its articles of incorporation. It projected its line of railroad on the easterly side of the Willamette river and became known as the "East Side Company" and its railroad line as the "East Side Line."

In furtherance of its design it procured from the legislature of Oregon on October 20, 1868, the adoption of a joint resolution which declared that the West Side Company was not properly incorporated and was incapable of receiving the grant, and designated the Oregon Central Railroad Company organized at Salem on April 22, 1867, "as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said act of Congress." Oregon Sess. Laws 1868.

Controversy arose between the companies as to which was entitled to the benefits of the act of 1866, which controversy continued until about January, 1870.

The controversy was carried to Congress, and on April 10, 1869, Congress passed an act which amended § 6 of the act of 1866 so as to allow any railroad company there-

tofore designated by the legislature of Oregon to file its assent to the act of 1866 within one year from the date of the amending act, and providing that nothing therein contained should impair any rights theretofore acquired by any railroad company; but declaring that neither the act of 1866 nor the amending act should be construed to entitle more than one company to a grant of land. "*And provided further, That the lands granted by the act aforesaid [act of 1866] shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.*"

[404] On June 8, 1869, the East Side Company adopted a resolution which recited the act of July, 1866, its designation by the legislature of Oregon as the company to receive the grant, the passage of the act of April 10, 1869, and concluded as follows: "This company, the Oregon Central Railroad of Salem, Oregon, . . . do hereby accept all the provisions, rights, privileges, and franchises of said act of July 25, 1866, . . . and of all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto."

A certified copy of the resolution was filed in the office of the Secretary of the Interior June 30, 1869, and in the following October a map of survey of location of the first 60 miles of the projected line. On December 24th, following, the company completed the first 20 miles within the prescribed time, and the same was examined and approved by commissioners appointed therefor pursuant to the provisions of § 4 of the act of 1866.

March 16, 1870, the Oregon & California Railroad Company was incorporated, and, on March 29, 1870, the East Side Company assigned to it all of its property, including the land grant, with present and future rights under the act of July, 1866, and acts amendatory thereof and supplemental thereto, and by virtue of any act or resolution of the legislature of Oregon, and by the action of its stockholders the East Side Company was dissolved and its stock canceled.

Resolutions were adopted by the Oregon & California Railroad Company accepting the transfer and also a resolution accepting the act of 1866 and amendments thereto, and "all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified," and authorizing its assent to be filed with the Secretary of the Interior and a copy of the deed of assignment from the Oregon Central Railroad Company. This [405] was done, and since the date of the transfer (March 29, 1870) the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company and of all its rights under the acts of Congress.

The West Side Company abandoned all claims under the act of 1866 and solicited and obtained from Congress, by the act of May 4, 1870, a grant of other lands. The act recited (§ 1) that for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill river, near McMinnville, in the state of Oregon, there is granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands, and the right to take materials from the public lands and necessary lands for depots, etc., not exceeding 40 acres at any one place; and also 20 alternate sections per mile of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers, not disposed of or reserved or held by valid pre-emption or homestead rights at the time of the passage of the act.

There was the usual provision for selecting other lands in case of deficiency; the survey of the lands along the line of the railroad; the segregation of lands upon the survey and location of 20 or more miles of road; and for the disposition of the lands reserved by the government within the limits of the grant only to actual settlers at double the minimum price for such lands.

The issuance of patents was provided (§ 3) upon the completion and equipment of 20-mile sections of the railroad.

By § 4 it was enacted: "That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, [406] side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

It was provided (§ 5) that the company should, by mortgage or deed of trust to two or more trustees, appropriate and set apart the net proceeds of the lands as a sinking fund, to be kept invested in United States bonds or other safe securities for the purchase from time to time of the first mortgage construction bonds on the road, depots, etc., and that no part of the funds should be applied to any other purpose

until all of the bonds should have been purchased or redeemed or canceled.

An assent to the act was required to be filed with the Secretary of the Interior (§ 6) and it was expressed that the grant was upon the condition that 20 miles or more of the road should be completed within two years, and the entire road and telegraph line within six years from the date of the act.

In this act Congress, by the words "Oregon Central Railroad Company," referred to the West Side Company.

On July 20, 1870, the West Side Company filed its assent to the act in the office of the Secretary of the Interior.

During the year 1870 the Oregon & California Railroad Company procured, by mortgage bonds, approximately $8,000,000, and during the year 1871 the West Side Company in the same way procured about $1,000,000. With the funds thus procured the lines of railroad contemplated by the act of 1866 and the act of May 4, 1870, respectively, were prosecuted continuously until about January, 1873.

As stated, the East Side Company completed the construction of the first 20 miles of its railroad, and the Oregon & California Railroad Company, after the assignment and transfer to it, as stated, continued construction [407] in 1870, 1871, and 1872 for a distance of approximately 197 miles; and the West Side Company, with the funds procured by it in 1871, constructed its line under the act of 1870 from Portland to McMinnville, a distance of approximately 47 miles. There was no other construction by the West Side Company, and the lands contiguous to the line of road from Forest Grove to Astoria were forfeited by act of Congress of January 31, 1885 [23 Stat. at L. 296, chap. 46].

Financial vicissitudes came to both companies and construction was suspended. It was never resumed by the West Side Company, and the East Side Company, under its new name of Oregon & California Railroad Company, finally became, by the assignment of the West Side Company, the owner of the grants under both acts.

The consideration of the conveyance was the payment of the debts of the West Side Company. Since the date of the conveyance the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all of the rights, franchises, and property granted or intended to be granted by the act of May 4, 1870.

Further financial difficulties impeded the construction of the road and these were met by the various processes detailed in the stipulation of facts, and which we omit except as referred to in the opinion. Among these were a cancelation of the stock of the company and a reissue secured by a trust deed, of which Stephen T. Gage became the only surviving trustee, an issue of bonds, the trust deed to the Union Trust Company, leases to the Southern Pacific Company, and the final control by that company through stock ownership of all of the properties and land grants. That company thereafter administered the land grants. These transactions were alleged as breaches of the conditions which, it is contended, were constituted by the provisos in the respective acts given above, providing for the sale of the granted lands to actual settlers.

[408] 163,430.28 acres of the granted lands were sold by the Oregon & California Railroad Company prior to May 12, 1887, nearly all of which were sold to actual settlers, in small quantities, although in a few instances the quantities exceeded 160 acres to one purchaser and the prices were slightly in excess of $2.50 an acre. A rapidly increasing demand for the lands in large quantities and at increased prices commenced about 1889 or 1890 and has continued ever since. From 1894 to 1903 some of the granted lands were sold to persons not actual settlers in quantities and at prices exceeding the maximum designated in the provisos, and in several instances in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5 to $40 an acre; and in one instance a sale of 45,000 acres at $7 an acre to a single purchaser. About 5,306 sales were made, aggregating 820,000 acres, of which sales about 4,930 were for quantities not exceeding 160 acres and 376 sales in quantities exceeding 160 acres to one purchaser, aggregating 524,000 acres. The latter sales were to persons other than actual settlers and for other purposes than settlement and at prices in excess of $2.50 an acre; and approximately 478,000 acres were sold since 1897 and approximately 370,000 of the 524,000 were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser. Approximately three fourths of all sales made since 1897 were made by contracts providing for the payment of the purchase price in from five to ten annual payments and execution of conveyance upon final payment, a considerable number of which contracts were pending when this suit was brought.

On January 1, 1903, the company withdrew from sale all of its lands and refused to accept offers for any of them, asserting that they were timber lands and unsuitable for settlement. At the time the answer was filed there remained unsold 2,360,492.81

acres, of which 2,075,616.45 acres were theretofore patented under the land grant [409] acts, and 284,876.36 at that time remained unpatented, all of which are claimed by the company under the land grants.

Since January, 1903, over 4,000 persons have applied to purchase certain of the unsold lands, claiming that they desire to do so for the purpose of settling and establishing homes thereon, and each applicant stated that he was willing and able to tender at the rate of $2.50 per acre therefor. Until about the year 1890 or 1891 there was substantially no demand for the granted lands except for the purpose of settlement, and nearly all of the sales prior to the year 1894 were made for settlement and to settlers.

Prior to 1894 the company maintained an immigration bureau to induce settlement upon the lands, and the greater part of the sales made after that year were to persons not settlers, and for prices exceeding $2.50 per acre.

It was testified that the gross amount of lands that inured to the Oregon & California Railroad Company under both the East Side and the West Side grants was 3,182,169.57, and it was stipulated that between the years 1871 and 1906 there were patented under the East Side grant 2,745,786 68 acres and between the years 1895 and 1903 there were patented under the West Side grant 128,618.13 acres, leaving unpatented 307,764.76 acres.

At the time the answer was filed there remained unsold of the granted lands 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented to the Oregon & California Railroad Company under the land grants and 284,876.36 thereof at that time remained unpatented, all of which unsold lands are claimed by the railroad company under and by virtue of the grants. The reasonable value of said unsold lands exceeds the sum of $30,000,000. There is a table attached to the answer showing the net amount received by the railroad company to be, after [410] all disbursements, $2,495,094.03. (The bill, as we have seen and shall presently more at length refer to, prays a forfeiture of the unsold lands only.)

Pursuant to the rules and regulations of the Interior Department, all of the patents were issued to and based upon applications in writing therefor from time to time filed in the appropriate land office of the United States by the Oregon & California Railroad Company as the "successor and assign" of the East Side Company and the West Side Company, respectively. Each application was accompanied by an affidavit which alleged, among other things, the following: "The said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands, and are of the character contemplated by the granting act" under which the patents were applied for.

The stipulation sets out the creation of an auditor of railroad accounts, and subsequently the creation of a commissioner of railroads and his duties by various acts of Congress until 1904, when the bureau was terminated and the duties, files, and records thereof were transferred to the Secretary of the Interior, and that from 1879 to and including 1903 reports were made of the transactions of the Land Department of the Oregon & California Railroad Company upon blanks furnished by such bureau. The details of the reports are given, which show many sales of the lands in excess of $2.50 per acre.

The bureau, it is stipulated, made annual reports to the Secretary of the Interior which were embodied in his annual reports to the President, and by the President forwarded to Congress, where they were referred to appropriate committees and printed as executive documents.

These reports show the administration of the grants by the company, the number of acres received under the grants, the number sold and at what prices, some of which exceeded $2.50 per acre, and that the price asked for lands not sold was in excess of that sum per acre.

Mr. P. F. Dunne argued the cause, and, with Messrs. William D. Fenton, William F. Herrin, and Frank C. Cleary, filed a brief for the Railroad Companies.

The act of Congress of July 25, 1866, was passed for the primary purpose, not of promoting the settlement of the public lands, but of aiding in the construction of a railroad from a point on the Central Pacific Railroad, in the state of California, to Portland, in the state of Oregon; and any provision in the later act of April 10, 1869, for the benefit of settlers, must be taken in subordination to this primary purpose.

United States v. Union P. R. Co. 91 U. S. 79, 23 L. ed. 228; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424.

October 20, 1868, was the point of time at which, as this court has held, the grant to the East Side Company must be deemed to have taken effect.

Hall v. Russell, 101 U. S. 509, 510, 25 L. ed. 831, 832.

When the title, therefore, vested in the East Side Company as of October 20, 1868, the condition subsequent of the filing of assent, possible of performance only within the year ending July 25, 1867, had become impossible of performance, and therefore

the grantee took the land discharged of the condition.

Hughes v. Edwards, 9 Wheat. 492, 6 L. ed. 143.

No formal acceptance of the grant in writing was now necessary. Its acceptance of the grant, as being a grant to a corporation in anticipation of its organization, would be presumed from the fact of the organization.

Rotch's Wharf Co. v. Judd, 108 Mass. 227.

The engagement by the company in construction work as early as April 16, 1868, established the fact of its acceptance.

Bank of United States v. Dandridge, 12 Wheat. 71, 6 L. ed. 555; St. Paul, M. & M. R. Co. v. Greenalgh, 139 U. S. 22, 35 L. ed. 73, 11 Sup. Ct. Rep. 395.

If the fee simple had vested in the company prior to the amendment of April 10, 1869, Congress had no power to attach to a vested estate this *ex post facto* proviso.

Morgan v. Rogers, 25 C. C. A. 97, 49 U. S. App. 126, 79 Fed. 577.

The circumstance that the East Side Company, whether inadvertently, or in error, or prudentially, did file an assent under the amendment of April 10, 1869, is not in derogation of its vested estate, and works no estoppel against it.

Bybee v. Oregon & C. R. Co. 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641, s. c. 26 Fed. 591.

The railroad company had the clear and necessary right to mortgage the grant for construction purposes.

Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424.

Any sales by way of redemption of the mortgage lien and in aid of the purpose of construction are not to be confused with primary and out-and-out sales, such as the settlers' proviso must be held to have contemplated, for such a confusion would simply mean the destruction of the grantee's right to mortgage, and the utter defeat of the policy of Congress to aid in the construction of the road.

The settlers' clause or proviso is not, in any view, a condition subsequent.

Post v. Weil, 115 N. Y. 366, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; Stanley v. Colt, 5 Wall. 119, 121, 18 L. ed. 502; Deseret Salt Co. v. Tarpey, 142 U. S. 248, 35 L. ed. 1001, 12 Sup. Ct. Rep. 158; Green County v. Quinlan, 211 U. S. 582, 594, 595, 53 L. ed. 335, 341, 342, 29 Sup. Ct. Rep. 162; Nichols v. Southern Oregon Co. 135 Fed. 233; Los Angeles Terminal Land Co. v. Muir, 136 Cal. 39, 68 Pac. 308; Stuart v. Easton, 170 U. S. 401, 42 L. ed. 1084, 18 Sup. Ct. Rep. 650; First M. E. Church v. Old Columbia Public Ground Co. 103 Pa. 608; Greene v. O'Connor, 18 R. I. 57, 19 L.R.A. 262, 25 Atl. 692; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Hastings & D. R. Co. v. Whitney, 132 U. S. 366, 33 L. ed. 367, 10 Sup. Ct. Rep. 112; Tiffany, Real Prop. § 64; 2 Blackstone, Estates upon Condition, p. 152; 4 Kent, Com. 122; Washb. Real Prop. § 935; Raley v. Umatilla County, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890; Coffin v. Portland, 16 Or. 77, 17 Pac. 580; Portland v. Terwilliger, 16 Or. 465, 19 Pac. 90.

The settlers' clause was put into the amendment of April 10, 1869, for the sake of the settlers; it inures peculiarly to their benefit.

United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 538, 539, 35 L. ed. 1099, 1106, 1107, 12 Sup. Ct. Rep. 308.

The grant in question was made upon a valuable consideration and must be construed accordingly, and therefore liberally.

United States v. Union P. R. Co. 98 U. S. 613, 614, 25 L. ed. 154, 155; United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 979, 14 Sup. Ct. Rep. 11; Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 625, 28 L. ed. 1109, 1111, 5 Sup. Ct. Rep. 606; 17 Am. & Eng. Enc. Law, 14; Langdon v. New York, 93 N. Y. 129; Charles River Bridge v. Warren Bridge, 7 Pick. 344, 11 Pet. 557, 9 L. ed. 828; 3 Washb. Real Prop. 3d ed. 172; Moon v. Salt Lake County, 27 Utah, 436, 76 Pac. 222.

After this grant has been ascertained by the rules of construction, whether liberal or illiberal, the question then comes up of forfeiting that grant, whatever it is and such as it has been found or made to be by construction. The benign, consistent, and settled rule then applies, that if, on any reasonable construction, the estate, such as it is, can be saved from forfeiture, such interpretation will be indulged.

Courtright v. Cedar Rapids & M. River R. Co. 35 Iowa, 397; New York Indians v. United States, 170 U. S. 25, 26, 42 L. ed. 935, 936, 18 Sup. Ct. Rep. 531; Jones, Real Prop. §§ 678, 679; Kiefer v. German American Seminary, 46 Mich. 640, 10 N. W. 50.

The practical interpretation of the Oregon land grant, what the parties have done under it, and for the better part of half a century, does not transform the proviso of the settlers' clause into a condition subsequent.

United States v. Des Moines Nav. & R. Co. 142 U. S. 540, 35 L. ed. 1107, 12 Sup. Ct. Rep. 308; United States v. Northern P. R. Co. 177 U. S. 441, 442, 44 L. ed. 838, 20 Sup. Ct. Rep. 706; Deseret Salt Co. v. Tarpey, 142 U. S. 253, 35 L. ed. 1003, 12 Sup. Ct. Rep. 158; United States v. Winona & St. P. R. Co. 165 U. S. 478, 41 L. ed. 796, 17 Sup. Ct. Rep. 368.

Debates are not the proper source from

which to discover the meaning of language employed in an act of Congress.

United States v. Trans-Missouri Freight Asso. 166 U. S. 318, 41 L. ed. 1019, 17 Sup. Ct. Rep. 540; Standard Oil Co. v. United States, 221 U. S. 50, 55 L. ed. 641, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Lapina v. Williams, 232 U. S. 90, 58 L. ed. 519, 34 Sup. Ct. Rep. 196.

If it was competent for Congress to pass the act of April 10, 1869, thereby placing upon the lands granted by the act of July 25, 1866, within the state of Oregon, the restrictions contained in the actual-settler clause, the enforcement thereof would in effect destroy the right of the California & Oregon Railroad Company to construct this continuous line to Portland and earn the grant under the original act, free from the restrictions of the actual-settler clause.

Dubuque R. Co. v. Richmond, 19 Wall. 584, 22 L. ed. 173; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 565, 589, 41 L. ed. 265, 274, 16 Sup. Ct. Rep. 1173; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

There is no presumption in favor of the United States that an estate granted in fee simple shall be destroyed by any act of the grantee which shall re-invest the United States with title. Estates granted by the United States wil not be enlarged by construction but when granted, there is no presumption that such estate will revert for any cause. The destruction of the estate will not be favored, whether the grant is public or private.

Schulenberg v. Harriman, 21 Wall. 44, 60, 22 L. ed. 551, 554; United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 979, 14 Sup. Ct. Rep. 11; Bradley v. New York & N. H. R. Co. 21 Conn. 294; Stuart v. Easton, 170 U. S. 383, 397, 42 L. ed. 1078, 1083, 18 Sup. Ct. Rep. 650; New York Indians v. United States, 170 U. S. 1, 24, 42 L. ed. 927, 935, 18 Sup. Ct. Rep. 531; Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 378, 17 L. ed. 147, 153; Wright v. Morgan, 191 U. S. 55, 58, 48 L. ed. 89, 93, 24 Sup. Ct. Rep. 6; Davis v. Gray, 16 Wall. 203, 232, 21 L. ed. 447, 457; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 340, 14 L. ed. 157, 171; Bybee v. Oregon & C. R. Co. 139 U. S. 663, 667, 35 L. ed. 305, 306, 11 Sup. Ct. Rep. 641, 26 Fed. 589.

Conditions subsequent are construed strictly.

Morrill v. Wabash, St. L. & P. R. Co. 96 Mo. 174, 9 S. W. 657; Roanoke Investment Co. v. Kansas City & S. E. R. Co. 108 Mo. 50, 17 S. W. 1000; Farnham v. Thompson, 34 Minn. 337, 57 Am. Rep. 59, 26 N. W. 9; Cross v. Carson, 44 Am. Dec. 759, note; Chapin v. School Dist. 35 N. H. 445; Emerson v. Simpson, 43 N. H. 477, 80 Am. Dec. 184, 82 Am. Dec. 168; Page v. Palmer, 48 N. H. 386; Wier v. Simmons, 55 Wis. 643, 13 N. W. 873; Curtis v. Board of Education, 43 Kan. 144, 23 Pac. 98; Gadberry v. Sheppard, 27 Miss. 207; Brown v. Caldwell, 23 W. Va. 189, 48 Am. Rep. 376; Rawson v. School Dist. 7 Allen, 128, 83 Am. Dec. 670; Kilpatrick v. Baltimore, 81 Md. 192, 27 L.R.A. 643, 48 Am. St. Rep. 509, 31 Atl. 805; Gallaher v. Herbert, 117 Ill. 169, 7 N. E. 511; Elyton Land Co. v. South & North Ala. R. Co. 100 Ala. 406, 14 So. 207; Voris v. Renshaw, 49 Ill. 430; Hunt v. Beeson, 18 Ind. 382; Jeffersonville, M. & I. R. Co. v. Barbour, 89 Ind. 378; Sumner v. Darnell, 128 Ind. 43, 13 L.R.A. 173, 27 N. E. 162; Post v. Weil, 115 N. Y. 371, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; Graves v. Deterling, 120 N. Y. 457, 24 N. E. 655; Cunningham v. Parker, 146 N. Y. 33, 48 Am. St. Rep. 765, 40 N. E. 635.

This rule of strict construction is sustained and fortified where the United States, as here, has permitted the company, from the beginning, to sell its lands without regard to the restrictions or limitations of the actual-settler clause, and, at most, has permitted the company to follow the construction placed upon the act of April 10, 1869, by the opinion of Mr. Wilson, submitted to Attorney General Williams in 1872; that is, to sell to such persons as were actual settlers upon the land on April 10, 1869, and up to the definite location of the line of railroad, which was the practice of the company.

Hewitt v. Schultz, 180 U. S. 139, 156, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309.

The construction of language claimed to create a condition subsequent, as announced and adhered to by the supreme court of the state, in which the lands are situated, becomes a rule of property, and is applicable to language in grants made by the United States which create a condition subsequent.

Seymour v. Sanders, 3 Dill. 440, Fed. Cas. No. 12,690; United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573; Wilcox v. Jackson, 13 Pet. 498, 516, 10 L. ed. 264, 273.

The United States is bound by its contracts, and such contracts must be construed in the same way and in the same manner as contracts by private parties; and when the United States seeks to enforce these contracts in a court of equity it comes into that court not as a sovereign, but as a suitor; and, with certain well-recognized exceptions, its rights must be measured by the same rules and according to the same standard as applied in the case of other suitors.

United States v. Beebee, 4 McCrary, 12, 17 Fed. 37; United States v. White, 9 Sawy. 125, 17 Fed. 565; United States v. Bostwick, 94 U. S. 53–66, 24 L. ed. 65, 66; The Siren, 7 Wall. 152–159, 19 L. ed. 129–132; Brent v. Bank of Washington, 10 Pet. 596–615, 9 L. ed. 547–555; United States v. McElroy, 25 Fed. 804; United States v. Ingate, 48 Fed. 251; United States v. Devereux, 32 C. C. A. 564, 61 U. S. App. 548, 90 Fed. 182; United States v. North American Commercial Co. 74 Fed. 151; United States v. Northern P. R. Co. 37 C. C. A. 290, 95 Fed. 880; United States v. Clark, 70 C. C. A. 584, 138 Fed. 299; United States v. Budd, 43 Fed. 634; Mountain Copper Co. v. United States, 73 C. C. A. 621, 142 Fed. 629; United States v. Flint, 4 Sawy. 58, Fed. Cas. No. 15,121, affirmed in 98 U. S. 61, 64, 25 L. ed. 93, 94; Lynch v. United States, 13 Okla. 144, 73 Pac. 1095; United States v. San Jacinto Tin Co. 125 U. S. 273, 285, 31 L. ed. 747, 751, 8 Sup. Ct. Rep. 850; United States v. Grand Rapids & I. R. Co. 91 C. C. A. 265, 165 Fed. 297; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 339, 50 L. ed. 499, 506, 26 Sup. Ct. Rep. 282; United States v. Holmes, 105 Fed. 43; United States v. American Surety Co. 110 Fed. 913; David v. Gray, 16 Wall. 203–232, 21 L. ed. 447–457; Port Royal & A. R. Co. v. South Carolina, 60 Fed. 552; United States v. Budd, 144 U. S. 154, 160, 36 L. ed. 384, 386, 12 Sup. Ct. Rep. 575; People v. Stephens, 71 N. Y. 549; Carr v. State, 127 Ind. 206, 11 L.R.A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; State v. Kilburn, 81 Conn. 12, 129 Am. St. Rep. 205, 69 Atl. 1023; People ex rel. Ambler v. Auditor General, 38 Mich. 750; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 252, 41 Am. Dec. 549; Daggett v. Bonewitz, 107 Ind. 279, 7 N. E. 900; Murray v. Charleston, 96 U. S. 432, 445, 24 L. ed. 760, 763; Camp v. Smith, 2 Minn. 155, Gil. 131.

The doctrine of waiver and equitable estoppel is applicable to the United States, and upon the facts in this case the United States must be held to have waived its right by long-continued acquiescence and affirmative action, with full knowledge of continued breaches by the company from the earliest administration of the grants to the passage of the act of August 20, 1912 (so-called "innocent purchaser's act"), and the United States is estopped under the facts disclosed by the testimony to attempt to enforce the alleged condition subsequent.

State ex rel. Douglas v. School Dist. 85 Minn. 233, 88 N. W. 751; 16 Cyc. 679; Sly v. Hunt, 159 Mass. 151, 21 L.R.A. 680, 38 Am. St. Rep. 403, 34 N. E. 187; Co. Litt. 352a; 40 Cyc. 254, notes 62, 63, 255; Norfolk & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755; Cass County v. Plotner, 149 Ind. 121, 48 N. E. 635; Woodruff v. Williams, 35 Colo. 28, 5 L.R.A.(N.S.) 986, 85 Pac. 90; Given v. Times Republican Printing Co. 52 C. C. A. 40, 114 Fed. 95; Indiana v. Milk, 11 Fed. 389; Bain v. Parker, 77 Ark. 168, 90 S. W. 1000; McClellan v. St. Louis & H. R. Co. 103 Mo. 295, 15 S. W. 546; State v. Illinois C. R. Co. 246 Ill. 234, 92 N. E. 814; Abbott v. New York & N. E. R. Co. 145 Mass. 450, 15 N. E. 91; People ex rel. McCauley v. Brooks, 16 Cal. 27; Grogan v. San Francisco, 18 Cal. 590, 609; State v. Buttles, 3 Ohio St. 319; Chicago, R. I. & P. R. Co. v. Grinnell, 51 Iowa, 485, 1 N. W. 712; Chicago, St. P. M. & O. R. Co. v. Douglas County, 134 Wis. 205, 14 L.R.A. (N.S.) 1074, 114 N. W. 511; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 600; United States v. McLaughlin, 12 Sawy. 179, 200, 30 Fed. 161; United States v. Stinson, 60 C. C. A. 615, 125 Fed. 909; Walker v. United States, 139 Fed. 412; United States v. Chandler-Dunbar Water Power Co. 81 C. C. A. 221, 152 Fed. 40, 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Shaw v. Kellogg, 170 U. S. 312, 331, 42 L. ed. 1050, 1057, 18 Sup. Ct. Rep. 632; Com. ex rel. Atty. Gen. v. Bala & B. M. Turnp. Co. 153 Pa. 54, 25 Atl. 1105; Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 1; Magee v. Doe, 22 Ala. 718; Menard v. Massey, 8 How. 293, 12 L. ed. 1085; Lessieur v. Price, 12 How. 59, 76, 13 L. ed. 893, 900; Lindsey v. Hawes, 2 Black, 554, 560, 17 L. ed. 265, 268; United States v. Winona & St. P. R. Co. 165 U. S. 463, 474, 41 L. ed. 789, 794, 17 Sup. Ct. Rep. 368; United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 955; Maxwell Land-Grant Case, 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015; Irwin v. United States, 16 How. 513, 523, 14 L. ed. 1038, 1042; State v. Flint & P. M. R. Co. 89 Mich. 481, 51 N. W. 103, affirmed in 152 U. S. 363, 38 L. ed. 478, 14 Sup. Ct. Rep. 586; United States v. Missouri, K. & T. R. Co. 37 Fed. 70; Hooper v. Cummings, 45 Me. 365; United States v. Arredondo, 6 Pet. 691, 728, 8 L. ed. 547, 561; Titus v. United States, 20 Wall. 475, 485, 22 L. ed. 400, 403; Jones v. United States, 96 U. S. 24, 29, 24 L. ed. 644, 646; Minneapolis & St. C. R. v. Duluth & W. R. Co. 45 Minn. 106, 47 N. W. 464; Barrie v. Smith, 47 Mich. 131, 10 N. W. 168; Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 60, 40 L. ed. 71, 75, 15 Sup. Ct. Rep. 1020; United States v. Wallamet Valley & C. M. Wagon Road Co. 42 Fed. 351, 140 U. S. 599, 622, 35 L. ed. 560, 567, 11 Sup. Ct. Rep. 988, 41 Fed. 493, 54 Fed. 809, 55 Fed. 718; United States v. California & O. Land Co.

148 U. S. 31, 38, 37 L. ed. 354, 358, 13 Sup. Ct. Rep. 458; Com. v. André, 3 Pick. 224; Cahn v. Barnes, 7 Sawy. 48, 5 Fed. 326; Pengra v. Munz, 29 Fed. 830; Woodruff v. Trapnall, 10 How. 190, 206, 13 L. ed. 358, 389; Michigan v. Jackson, L. & S. R. Co. 16 C. C. A. 345, 37 U. S. App. 220, 69 Fed. 116; Iowa v. Carr, 112 C. C. A. 477, 191 Fed. 266; United States v. Detroit Timber & Lumber Co. 67 C. C. A. 1, 131 Fed. 677; United States v. Chicago, M. & St. P. R. Co. 172 Fed. 271; United States v. Stinson, 197 U. S. 200, 204, 205, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; United States v. Northern P. R. Co. 177 U. S. 435, 441, 44 L. ed. 836, 838, 20 Sup. Ct. Rep. 706; United States v. Midwest Oil Co. 236 U. S. 459, 59 L. ed. 673, 35 Sup. Ct. Rep. 309; 2 Pom. Eq. Jur. § 818; State v. Taylor, 28 La. Ann. 460; State v. Ober, 34 La. Ann. 359; State v. New Orleans, C. & L. R. Co. 104 La. 685, 29 So. 312; 2 Elliott, Railroads, § 806; Central Trust Co. v. Treat, 192 Fed. 942; McKnight v. United States, 98 U. S. 179, 25 L. ed. 115; United States v. Bostwick, 94 U. S. 53, 66, 24 L. ed. 65, 66; United States v. Bank of Metropolis, 15 Pet. 377, 392, 10 L. ed. 774, 779; Clark v. United States, 95 U. S. 539, 543, 544, 24 L. ed. 518–520; State v. Bailey, 19 Ind. 454; Verdier v. Port Royal R. Co. 15 S. C. 482; Peck v. Burr, 10 N. Y. 297; Jewell Nursery Co. v. State, 4 S. D. 218, 56 N. W. 113; People ex rel. Chope v. Detroit & H. Pl. Road Co. 37 Mich. 198, 26 Am. Rep. 512; State ex rel. Smyth v. Kennedy, 60 Neb. 305, 83 N. W. 87; State ex rel. West v. Des Moines, 96 Iowa, 534, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; State ex rel. Atty. Gen. v. Janesville Water Co. 92 Wis. 504, 32 L.R.A. 391, 66 N. W. 512; Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 17 Mor. Min. Rep. 253; Lehigh Coal & Nav. Co. v. Early, 162 Pa. 338, 29 Atl. 736.

We are not, in the case at bar, dealing with the mere silence or inaction of a landlord in respect to the breach of a condition in a lease, where such condition is one of continuing obligation. As to such conditions, it has been held that mere silent acquiescence in the breach thereof will not discharge the condition, or disable the landlord from proceeding against a subsequent breach. Such rule has no application in any event to a condition subsequent, which, if taken advantage of, destroys the whole estate, since such condition, if once dispensed with, in whole or in part, is gone forever; for a condition, being an entire thing, cannot be apportioned except by act of law.

2 Washb. Real Prop. § 962; Murray v. Harway, 56 N. Y. 342; Sharon Iron Co. v. Erie, 41 Pa. 351; McKildoe v. Darracott, 13 Gratt. 278.

The case at bar is not the case of mere silence and inaction in the presence of a breach of a continuing obligation. It is a case of "nonaction in the special circumstances disclosed." (United States v. Northern P. R. Co. 177 U. S. 435, 441, 44 L. ed. 836, 838, 20 Sup. Ct. Rep. 706.) It is a case of the express or implied assent of the government (Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158); it is a case of accumulated and affirmative acts and conduct upon the part of the government, pointing irresistibly to the express or implied assent of the government to the administration of the grant as the company consistently administered it (United States v. Midwest Oil Co. 236 U. S. 459, 59 L. ed. 673, 35 Sup. Ct. Rep. 309).

Fletcher v. Peck, 6 Cranch, 87, 132, 133, 3 L. ed. 162, 176, 177; Walker v. United States, 139 Fed. 412; Sanitary Dist. v. Metropolitan West Side Elev. R. Co. 241 Ill. 645, 89 N. E. 800; Pengra v. Munz, 29 Fed. 836; Shaw v. Kellogg, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632; United States v. Hill, 120 U. S. 169, 180, 30 L. ed. 627, 631, 7 Sup. Ct. Rep. 510; Nicholas v. Austin, 82 Va. 824, 1 S. E. 132.

Under the provisions of the act of Congress of June 4, 1897, a record was kept in the Interior Department of the steps taken in the selection of forest reserve lieu lands, including a statement of the action taken by the Secretary in approving or disapproving the lieu selections, and the deeds filed as bases therefor. Both the statute and the action of the Land Department waived the actual-settler clause in the act of April 10, 1869, and the act of May 4, 1870. These lands were all within the Cascade Forest Reserve, and this was likewise a waiver of this clause, even if the company had retained the title to these lands.

Knight v. United Land Asso. 142 U. S. 161, 177, 178, 35 L. ed. 974, 979, 980, 12 Sup. Ct. Rep. 258; McDonald v. Union P. R. Co. 70 Neb. 352, 97 N. W. 440; Re Pleblo of San Francisco, 5 Land Dec. 494; Michigan Land & Lumber Co. v. Rust, 15 C. C. A. 335, 31 U. S. App. 731, 68 Fed. 165; United States v. Schwalby, 8 Tex. Civ. App. 679, 29 S. W. 90; People ex rel. Mathews v. Woodruff, 75 App. Div. 90, 77 N. Y. Supp. 722; Scofield Rolling Mill Co. v. State, 54 Ga. 642; State v. New Orleans, C. & L. R. Co. 104 La. 690, 29 So. 312; State v. Bailey, 19 Ind. 452; State v. Flint & P. M. R. Co. 89 Mich. 491, 51 N. W. 103.

Facts set forth in the reports of public

officers of the United States, and in such reports as are directly made to and filed with Congress and kept on record with that body, must be taken to be known both by Congress and by the government.

State ex rel. Wilkins v. Hallock, 20 Nev. 73, 15 Pac. 472; Michigan Land & Lumber Co. v. Rust, 15 C. C. A. 335, 31 U. S. App. 731, 68 Fed. 155; Michigan v. Jackson, L. & S. R. Co. 16 C. C. A. 345, 37 U. S. App. 220, 69 Fed. 121; Shaw v. Kellogg, 170 U. S. 339, 42 L. ed. 1060, 18 Sup. Ct. Rep. 632; United States v. Midwest Oil Co. 236 U. S. 459, 59 L. ed. 673, 35 Sup. Ct. Rep. 309.

The administration of the public land laws has been committed by Congress to the Land Department (McDonald v. Union P. R. Co. 70 Neb. 352, 97 N. W. 440), and the Secretary of the Interior, as the head of that Department, was charged by Congress with the supervision of all public business relating to the public lands.

Knight v. United Land Asso. 142 U. S. 161, 177, 178, 35 L. ed. 974, 979, 980, 12 Sup. Ct. Rep. 258; Re Pueblo of San Francisco, 5 Land Dec. 494.

It was the official duty of the Secretary, as the head of the Department, to pass upon and to approve or disapprove all of these various selections of lands made under the act of Congress in lieu of granted lands falling within the limits of forest reserves, and to pass upon and approve or disapprove the deeds constituting the base for such selections. In the performance of that duty, as indeed in all matters connected with the supervision of the public business relating to the public lands, the Secretary acted and acts as the agent of the government, duly and specially authorized to represent it in such matters. "He represents the government, which is a party in interest, in every case involving the surveying and disposal of the public lands."

Michigan Land & Lumber Co. v. Rust, 15 C. C. A. 335, 31 U. S. App. 731, 68 Fed. 165; Knight v. United Land Asso. 142 U. S. 161, 191, 35 L. ed. 974, 984, 12 Sup. Ct. Rep. 258.

His knowledge, therefore, in acting in respect to these various selections, and in acting upon the deeds constituting the base therefor, was the knowledge of the government, through its authorized representative, and the government and Congress must be charged with notice of any alleged breaches of what is now claimed to be a condition subsequent, which came to his knowledge while he was so acting.

United States v. Schwalby, 8 Tex. Civ. App. 679, 29 S. W. 90; State v. New Orleans, C. & L. R. Co. 104 La. 690, 29 So. 312; State v. Bailey, 19 Ind. 453; State v. Flint & P. M. R. Co. 89 Mich. 491, 51 N. W. 103; United States v. Stinson, 197 U. S. 200, 205, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426.

The character of the granted lands, their situation and location, rendered them unfit for disposition under the settlement laws in accordance with the terms of the condition.

Shiver v. United States, 159 U. S. 491, 497, 40 L. ed. 231, 232, 16 Sup. Ct. Rep. 54; Stone v. United States, 167 U. S. 178, 193, 42 L. ed. 127, 133, 17 Sup. Ct. Rep. 778; United States v. Ball, 31 Fed. 668; United States v. Murphy, 32 Fed. 379; Stone v. United States, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 676; United States v. Niemeyer, 94 Fed. 147; Conway v. United States, 37 C. C. A. 200, 95 Fed. 617; United States v. Budd, 43 Fed. 630, s. c. 144 U. S. 154, 166, 36 L. ed. 384, 388, 12 Sup. Ct. Rep. 575; Whitney v. Spratt, 25 Wash. 62, 87 Am. St. Rep. 738, 64 Pac. 919; Thayer v Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Ward v. Montgomery, 15 Land Dec. 280; Kelly v. Ogan, 15 Land Dec. 564; Merritt v. Philp, 16 Land Dec. 404; Robert v. Brownell, 18 Land Dec. 216; Gibson v. Smith, 18 Land Dec. 249; Gosling v. Murphy, 18 Land Dec. 308; United States v. Searles, 19 Land Dec. 258; Jones v. Aztec Land & Cattle Co. 34 Land Dec. 116; Harper v. Eiene, 26 Land Dec. 151; Rowley v. Hayes, 29 Land Dec. 606; Patton v. Quackenbush, 35 Land Dec. 561; Davis v. Gibson, 38 Land Dec. 265; Finley v. Ness, 38 Land Dec. 394; Winninghoff v. Ryan, 40 Land Dec. 342.

Even though the language used shall be construed as a condition subsequent, such condition was impossible of performance.

6 Am. & Eng. Enc. Law, 2d ed. 506; Scovill v. McMahon, 21 L.R.A. 58, and note, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479; 4 Kent, Com. 130; United States v. Arredondo, 6 Pet. 691, 745, 8 L. ed. 547, 567; Mahoning County v. Young, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96; Jones v. Chesapeake & O. R. Co. 14 W. Va. 523; Vanderslice v. Hanks, 3 Cal. 41; Burnham v. Burnham, 79 Wis. 557, 48 N. W. 661.

If an agreement is so uncertain and ambiguous that the court is unable to collect from it what the parties intended, or if the court cannot for that reason enforce it, there is no obligation, and therefore no contract.

9 Cyc. 248.

The contract of sale must be certain, or it must be so certain as that it can be made certain.

29 Am. & Eng. Enc. Law, 2d ed. 592.

If the "actual-settler" clause be a condition subsequent, certain and definite, so

as to be otherwise enforceable, then it was repugnant to the grant, and could not have been enforced without destruction of the primary and dominant purpose of Congress to aid in the construction of the road. If the land thus subject to sale could not have been so sold in time to give the aid intended, the condition was destructive of the fee intended to be granted, and the condition must give way, as repugnant to the grant.

Varner v. Rice, 44 Ark. 250; McDonogh v. Murdoch, 15 How. 367, 412, 14 L. ed. 732, 752.

Independently of any question of estoppel or waiver, where the rights of the parties have vested, as here, the contemporaneous and practical construction will be followed by the courts.

11 Enc. U. S. Sup. Ct. Rep. 136-140; Northern P. R. Co. v. United States, 36 Fed. 282; Brown v. United States, 113 U. S. 570, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; Re Northern P. R. Co. 8 Land Dec. 13; United States v. Burlington & M. River R. Co. 98 U. S. 341, 25 L. ed. 200; United States v. Philbrick, 120 U. S. 58, 30 L. ed. 561, 7 Sup. Ct. Rep. 413; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

By the term "actual settlers only" is necessarily meant that class of preferred purchasers who entered upon these lands before they were surveyed, or in advance of construction, and at some time before the finding of the Land Department that the company had earned the particular lands and was entitled to a patent therefor.

"Settler," Black's Law Dict. 2d ed. p. 1080; "Actual," Black's Law Dict. 2d ed. p. 28; Webster's New Int. Dict.; Standard Dict.; Hume v. Gracy, 86 Tex. 671, 27 S. W. 584; Davis v. Young, 2 Dana, 299; McIntyre v. Sherwood, 82 Cal. 139, 22 Pac. 937; Astor v. Merritt, 111 U. S. 202, 28 L. ed. 401, 4 Sup. Ct. Rep. 413; Kelly v. Supreme Council, C. M. B. A. 46 App. Div. 79, 61 N. Y. Supp. 394; State v. Wells, 31 Conn. 210; "Actual," Century Dict.; Adams v. Coates, 38 Land Dec. 180; Johnson v. Squires, 55 Cal. 104; Urton v. Wilson, 65 Cal. 11, 2 Pac. 411; Dillon v. Saloude, 68 Cal. 267, 9 Pac. 162; Gavitt v. Mohr, 68 Cal. 506, 10 Pac. 337; Bratton v. Cross, 22 Kan. 673; Baker v. Millman, 77 Tex. 46, 13 S. W. 618; Osborne v. San Diego Land & Town Co. 178 U. S. 22, 38, 44 L. ed. 961, 968, 20 Sup. Ct. Rep. 860.

Congress had in mind a class of actual settlers who had entered upon these lands, who might otherwise be deprived of their improvements and of their right to take the lands under the homestead or pre-emption law, unless a preferred right of purchase was given to the actual settler up to the time when the rights of the company became fixed and definite by issuance of patent.

McDonald v. Union P. R. Co. 70 Neb. 346, 97 N. W. 440; Hutton v. Frisbie, 37 Cal. 481; Clements v. Warner, 24 How. 394, 397, 16 L. ed. 695, 696; United States v. Oregon & C. R. Co. 176 U. S. 28, 47, 44 L. ed. 358, 366, 20 Sup. Ct. Rep. 261; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 748, 23 L. ed. 634, 640; Northern P. R. Co. v. Amacker, 175 U. S. 564, 567, 44 L. ed. 274, 275, 20 Sup. Ct. Rep. 236; Holmes v. United States, 55 C. C. A. 489, 118 Fed. 999; Southern P. R. Co. v. Bell, 183 U. S. 675, 679, 46 L. ed. 383, 386, 22 Sup. Ct. Rep. 232; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 638, 28 L. ed. 1122, 1125, 5 Sup. Ct. Rep. 566.

Judicial opinion as to the effect of the clause in the act of July 1, 1862, granting lands to the Union Pacific Railroad Company, which provided that the lands thereby granted, which should not be sold or disposed of by the company within three years after the entire road shall have been completed, should be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre, to be paid to the company, is interesting, in that the courts attempt to harmonize and give effect to all of the provisions of the act.

Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747, 3 Dill. 310, Fed. Cas. No. 14,382; Heath v. Northern P. R. Co. 38 Land Dec. 77.

The United States cannot by this suit do indirectly what it could not do in the face of the act of March 3, 1891, and the act of March 2, 1896, limiting the time in which suits to set aside patents may be brought to the period stated.

United States v. Arredondo, 6 Pet. 691, 728, 8 L. ed. 547, 561.

This suit is in effect a collateral attack upon these patents in this that if the United States should prevail and these lands should be forfeited and the title of the United States quieted, there would be a decree directly in the face of the formal conveyance of this title by these many patents.

United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 957.

It was the duty of the United States, acting by its Land Department, to see that the conditions of the grant were observed by the company, and this duty was a continuing one from the inception of the title to the date of issuance of patent, and even

until the statute of limitations had fully run.

United States v. Winona & St. P. R. Co. 165 U. S. 463, 475, 41 L. ed. 789, 795, 17 Sup. Ct. Rep. 368, affirming 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 450, 27 L. ed. 226, 227, 1 Sup. Ct. Rep. 389; Maxwell Land-Grant Case, 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015.

It was unnecessary to pass the joint resolution of April 30, 1908, in order to enable the United States to assert its rights in respect to these lands and determine by an appropriate proceeding whether or not there had been a breach of the alleged condition subsequent, whether the actual-settler clause created a condition subsequent, and generally to fix the status of these lands. Such suit need not have been necessarily to set aside these patents as having been erroneously issued, but the general jurisdiction of a court of equity could have been asserted by the United States in this court to determine these questions.

United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 381, 35 L. ed. 766, 773, 12 Sup. Ct. Rep. 13; Whiteside County v. Burchell, 31 Ill. 78; Dunklin County v. District County Ct. 23 Mo. 456; Cooper v. Roberts, 18 How. 181, 15 L. ed. 341; Gaston v. Scott, 5 Or. 54; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Small v. Lutz, 41 Or. 578, 67 Pac. 421, 69 Pac. 825.

While we may not quote the individual opinions of the members of Congress as expressed in the debates, to aid in the interpretation of the statute as passed (see United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Carter v. Hobbs, 92 Fed. 594; United States v. Oregon & C. R. Co. 57 Fed. 427), still we may consider what occurred in the passage of the measure, the evil to be remedied, or the historical background.

Shallus v. United States, 89 C. C. A. 445, 162 Fed. 653; Wadsworth v. Boysen, 78 C. C. A. 437, 148 Fed. 771; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; United States v. Chicago & N. W. R. Co. 157 Fed. 616; Mosle v. Bidwell, 65 C. C. A. 533, 130 Fed. 334; Platt v. Union P. R. Co. 99 U. S. 48–67, 25 L. ed. 424–430; Smith v. Townsend, 148 U. S. 495, 37 L. ed. 534, 13 Sup. Ct. Rep. 634; Mobile & O. R. Co. v. Tennessee, 153 U. S. 502, 38 L. ed. 799, 14 Sup. Ct. Rep. 968; Johnston v. Morris, 19 C. C. A. 229, 44 U. S. App. 303, 72 Fed. 896; Gold Hill v. Caledonia Silver Min. Co. 5 Sawy. 577, Fed. Cas. No. 5,512, 14 Mor. Min. Rep. 202.

These patents, whether erroneously issued or otherwise, after the period of time named had elapsed, were absolute and undoubted title.

United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 449, 52 L. ed. 881, 886, 28 Sup. Ct. Rep. 579.

Patents constitute conclusive evidence that the grantee has complied with the conditions of the grant, and to that extent the grant was thereby relieved from the possibility of forfeiture for breach of its conditions.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 250, 35 L. ed. 999, 1002, 12 Sup. Ct. Rep. 158; United States v. Northern P. R. Co. 177 U. S. 435, 441, 44 L. ed. 836, 838, 20 Sup. Ct. Rep. 706.

If the formal contention is to be made that this suit is, as matter of form, a proceeding for a forfeiture, and not directly in form a proceeding to annul or cancel the patent, it is not maintainable—no such suit could be maintained—under U. S. Rev. Stat. § 1047, Comp. Stat. 1913, § 1712.

Welles v. Graves, 41 Fed. 467; Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261.

If this suit is to be treated as a proceeding to vindicate the settlers' clause, and in aid of the rights of settlers, the United States must be taken to be a formal party only, against which, in that view, the defenses of laches and limitation will be sustained.

United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 538, 539, 35 L. ed. 1099, 1106, 1107, 12 Sup. Ct. Rep. 308.

The estate once having passed, the law of the state in which the property is situated, as determined by the supreme court of that state, will be followed, as a rule of property, in determining whether the language of the so-called "actual-settler" clause is a condition subsequent, or a covenant.

Wilcox v. Jackson, 13 Pet. 498, 517, 10 L. ed. 264, 273; Camp v. Smith, 2 Minn. 155, Gil. 143.

There is no controversy between the government and the companies as to whether or not title passed under the act of July 25, 1866, to the Oregon & California Railroad Company, as the grantee of the East Side Company, and there is no question but that that title was one in fee simple. There is therefore no room to indulge the principle that a public grant will be construed favorably to the United States, and strictly against the grantee, and that nothing will be presumed to have been granted excepting what appears upon the face of the statute or granting act.

United States v. Denver & R. G. R. Co. 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11; United States v. St. Anthony R. Co. 52 C. C. A. 354, 114 Fed. 724; Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46–55, 40 L. ed. 71–74, 15 Sup. Ct. Rep. 1020; United States ex rel. Search v. Choctaw, O. & G. R. Co. 3 Okla. 502, 41 Pac. 729; United States Trust Co. v. Atlantic & P. R. Co. 8 N. M. 689, 47 Pac. 725; Moon v. Salt Lake County, 27 Utah, 444, 76 Pac. 222.

A liberal construction in favor of the general spirit and purpose of the act of July 25, 1866, was given to that act by the Supreme Court in Bybee v. Oregon & C. R. Co. 139 U. S. 663–679, 35 L. ed. 305–309, 11 Sup. Ct. Rep. 641.

It is therefore unnecessary to interpolate words of forfeiture into the act of April 10, 1869, or of May 4, 1870, or to assume that any public land policy secondary in its purpose and character should control, and induce the court to adopt a construction which will destroy the estate granted, rather than sustain that estate.

Stuart v. Easton, 170 U. S. 383, 42 L. ed. 1078, 18 Sup. Ct. Rep. 650; Wright v. Morgan, 191 U. S. 55–58, 48 L. ed. 89–93, 24 Sup. Ct. Rep. 6; Palatine Ins. Co. v. Ewing, 34 C. C. A. 236, 92 Fed. 114.

Mr. Joseph H. Call also filed a brief for the Railroad Companies:

The "sinking fund act" of Congress of May 7, 1878, ratified the transfer of the California & Oregon Railroad and its land grants in California to the Central Pacific Railroad Company, and operated to abrogate the "settler's clause" contained in the acts of April 10, 1869, and May 4, 1870.

Sinking Fund Cases, 99 U. S. 700, 730, 25 L. ed. 496, 505; United States v. Stanford, 161 U. S. 412–431, 40 L. ed. 751–759, 16 Sup. Ct. Rep. 576; United States v. Des Moines Nav. & R. Co. 142 U. S. 543–546, 35 L. ed. 1108–1110, 12 Sup. Ct. Rep. 308.

This cause of action is barred and the title to the lands sought to be forfeited has been transferred to the defendants by virtue of U. S. Rev. Stat. § 1047, Comp. Stat. 1913, § 1712.

Welles v. Graves, 41 Fed. 467; Leffingwell v. Warren, 2 Black, 599–605, 17 L. ed. 261–263; Croxall v. Shererd, 5 Wall. 289, 18 L. ed. 580; Dickerson v. Colgrove, 100 U. S. 578–583, 25 L. ed. 618–620; Bicknell v. Comstock, 113 U. S. 149–152, 28 L. ed. 962, 963, 5 Sup. Ct. Rep. 399; Campbell v. Holt, 115 U. S. 620–625, 29 L. ed. 483–486, 6 Sup. Ct. Rep. 209; Winona & St. P. R. Co. v. United States, 165 U. S. 483, 41 L. ed. 798, 17 Sup. Ct. Rep. 381; United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Burke v. Southern P. R. Co. 234 U. S. 669–693, 58 L. ed. 1527–1550, 34 Sup. Ct. Rep. 907; Davis v. Mills, 194 U. S. 457, 48 L. ed. 1071, 24 Sup. Ct. Rep. 692; Campbell v. Holt, 115 U. S. 620–625, 29 L. ed. 483–486, 6 Sup. Ct. Rep. 209; Jones v. Jones, 18 Ala. 248; Langdell, Eq. Pl. § 118.

The act of Congress of March 2, 1896, confirmed the title of the Oregon & California Railroad to all of the lands in suit so far as patented.

United States v. Southern P. R. Co. 184 U. S. 49, 46 L. ed. 425, 22 Sup. Ct. Rep. 285; United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; Winona & St. P. R. Co. v. United States, 165 U. S. 483, 41 L. ed. 798, 17 Sup. Ct. Rep. 381; Burke v. Southern P. R. Co. 234 U. S. 669–693, 58 L. ed. 1527–1550, 34 Sup. Ct. Rep. 907; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; United States v. California & O. Land Co. 148 U. S. 38, 37 L. ed. 358, 13 Sup. Ct. Rep. 458.

Mr. John C. Spooner argued the cause, and, with Mr. John M. Gearin, filed a brief for the Union Trust Company:

Actual settlers are persons to whom lands susceptible of cultivation are sold, and who actually improve and cultivate the same.

Baker v. Millman, 77 Tex. 46, 13 S. W. 618; Gavitt v. Mohr, 68 Cal. 506, 10 Pac. 337; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Mosely v. Torrence, 71 Cal. 318, 12 Pac. 430; Clements v. Warner, 24 How. 394, 397, 16 L. ed. 695, 696.

When timbered lands had been surveyed and became valuable for the timber, it was found that they were not adapted to entry under the pre-emption or homestead laws, because not valuable, or not chiefly valuable, for cultivation.

United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575.

It was the intention of Congress that the pre-emption and homestead laws should apply only to lands susceptible of cultivation, and that lands chiefly valuable for timber should be sold at their actual value. This intention having been to a considerable extent defeated by the administration of these acts, congressional intention was emphatically declared by subsequent legislation.

Johnson v. Bridal Veil Lumbering Co. 24 Or. 182, 33 Pac. 528; Patton v. Quackenbush, 35 Land Dec. 561; Rowley v. Hayes, 29 Land Dec. 606; Porter v. Throop, 6 Land Dec. 691; Finley v. Ness, 38 Land Dec. 394;

Davis v. Gibson, 38 Land Dec. 265; Winninghoff v. Ryan, 40 Land Dec. 342.

Subsequent legislation may be considered in construing the proviso.

Endlich, Interpretation of Statutes, Am. ed. § 354; Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; Marchie Tiger v. Western Invest. Co. 221 U. S. 286–308, 55 L. ed. 738–747, 31 Sup. Ct. Rep. 578.

Contemporaneous and long-continued practical construction by the officials of the government, whose duty it was to administer the grants, settle the construction of the proviso adversely to the contention of the government in this suit.

Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; United States v. Healey, 160 U. S. 141, 40 L. ed. 371, 16 Sup. Ct. Rep. 247; United States v. Moore, 95 U. S. 760, 24 L. ed. 588; Fairbank v. United States, 181 U. S. 311, 45 L. ed. 874, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; United States v. Alger, 152 U. S. 384–397, 38 L. ed. 488, 489, 14 Sup. Ct. Rep. 635; Webster v. Luther, 163 U. S. 331–342, 41 L. ed. 179–183, 16 Sup. Ct. Rep. 963; United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306.

Interpretation should be had in the light of existing conditions.

Platt v. Union P. R. Co. 99 U. S. 48, 60, 25 L. ed. 424, 428; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 502, 38 L. ed. 793, 799, 14 Sup. Ct. Rep. 968; Bybee v. Oregon & C. R. Co. 139 U. S. 663–667, 35 L. ed. 305, 306, 11 Sup. Ct. Rep. 641.

Congress intended that the railroad company should have the power to mortgage the lands as an entirety.

Platt v. Union P. R. Co. 99 U. S. 48–60, 25 L. ed. 424–428.

A condition subsequent which is impossible of performance, or which is repugnant to the grant by which it is created, or to the estate to which it is annexed, is void, and performance is dispensed with, and the estate vests absolutely.

6 Am. & Eng. Enc. Law, 506; Elliott, Contr. § 3876; Tiffany, Real Prop. § 70; Burdis v. Burdis, 70 Am. St. Rep. 825, 830, and note, 96 Va. 81, 30 S. E. 462; Harrison v. Harrison, 105 Ga. 517, 70 Am. St. Rep. 60, 31 S. E. 455; Bain v. Parker, 77 Ark. 168, 90 S. W. 1000; Stockton v. Turner, 7 J. J. Marsh. 192; Case v. Dwire, 60 Iowa, 442, 15 N. W. 265; Jones v. Port Huron Engine & Threshing Co. 171 Ill. 502, 49 N. E. 700; Wead v. Gray, 78 Mo. 59; Kelley v. Meins, 135 Mass. 235; Davis v. Gray, 16 Wall. 203, 231, 21 L. ed. 447, 457; St. Louis, J. & G. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Potter v. Couch, 141 U. S. 315, 35 L. ed. 731, 11 Sup. Ct. Rep. 1003; Schermerhorn v. Negus, 1 Denio, 448; Barnard v. Bailey, 2 Harr. (Del.) 56; M'Cullough v. Gilmore, 11 Pa. 370; Anderson v. Cary, 36 Ohio St. 506, 38 Am. Rep. 602; Attwater v. Attwater, 18 Beav. 330, 23 L. J. Ch. N. S. 692, 18 Jur. 50, 2 Week. Rep. 81; Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Tiffany, Real Prop. § 70, p. 168; 15 Laws of England (Halsbury) p. 422; Knight v. Bluet, J. Bridg. 132; Co. Litt. 220; Crofts v. Beamish [1905] 2 I. R. 349.

The words "actual settler" cannot be ignored in order to work a forfeiture.

Jones, Real Prop. §§ 678, 679; Rice v. Minnesota & N. W. R. Co. 1 Black, 358–378, 17 L. ed. 147–153.

While the word "provided" may import a condition subsequent, it does not necessarily do so. The intent of Congress is to be gathered from the language of the acts of 1866 and 1869, read together, in the light of all the circumstances properly to be taken into consideration.

Green County v. Quinlan, 211 U. S. 594, 53 L. ed. 341, 29 Sup. Ct. Rep. 162; Clapp v. Wilder, 176 Mass. 332, 50 L.R.A. 120, 57 N. E. 692; Post v. Weil, 5 L.R.A. 422, note; Stanley v. Colt, 5 Wall. 119, 18 L. ed. 502; Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 181, 32 L. ed. 380, 9 Sup. Ct. Rep. 47; Hawley v. Kafitz, 148 Cal. 393, 3 L.R.A.(N.S.) 741, 113 Am. St. Rep. 282, 83 Pac. 248; Sohier v. Trinity Church, 109 Mass. 1; MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 3 L.R.A.(N.S.) 227, 61 Atl. 1027; Scovill v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; Avery v. New York C. & H. R. R. Co. 106 N. Y. 142, 12 N. E. 619; Ball v. Milliken, 31 R. I. 41, 37 L.R.A.(N.S.) 623, 76 Atl. 789, Ann. Cas. 1912B, 30; Druecker v. McLaughlin, 235 Ill. 367, 85 N. E. 647; Portland v. Terwilliger, 16 Or. 469, 19 Pac. 90; Elliott, Contr. §§ 1528, 1529; 10 Laws of England (Halsbury) p. 478.

In the following Massachusetts cases, although the word "condition" was used, the court held that the words were not intended by the parties to be a technical condition, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land, and are to be construed as restrictions.

Ayling v. Kramer, 133 Mass. 12; Cassidy v. Mason, 171 Mass. 507, 50 N. E. 1027; Episcopal City Mission v. Appleton, 117 Mass. 326.

Where the purpose of the grant is in its nature general and public, and not pri-

marily for the benefit of the grantor, the courts lean strongly to a construction of a restriction which will support the grant rather than defeat it.

Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; Neely v. Hoskins, 84 Me. 386, 24 Atl. 882; Episcopal City Mission v. Appleton, 117 Mass. 326; Post v. Weil, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; Avery v. New York C. & H. R. R. Co. 106 N. Y. 142, 12 N. E. 619; Carroll County Academy v. Gallatin Academy Co. 104 Ky. 621, 47 S. W. 617.

When a sovereign submits itself to a court of equity to maintain or enforce its equitable rights, and prays its aid, its claims and rights are and ought to be judiciable by the general principles and rules of equity applicable to the claims and rights of private parties under like circumstances.

United States v. International Harvester Co. 214 Fed. 1010; Davis v. Gray, 16 Wall. 203–232, 21 L. ed. 447–457; Iowa v. Carr, 112 C. C. A. 477, 191 Fed. 266.

A condition subsequent will not be implied from words used in a grant merely expressing the purpose for which the lands were to be used or employed.

Wright v. Morgan, 191 U. S. 55, 48 L. ed. 89, 24 Sup. Ct. Rep. 6.

The word "provided" may, indeed, be used in a statute merely for the purpose of noting an exception to the generality of former provisions; and in such instances the rules of construction require that the matter embraced in the proviso should be strictly construed.

United States v. Dickson, 15 Pet. 165, 10 L. ed. 698; White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171.

Where a grant is made by the state in aid of the construction of some work of a public or quasi public character, the construction of the work is the consideration of the grant, and when that is accomplished the consideration is received and retained by the government.

Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103.

This grant is taken out of the operation of the rule that public grants, in case of doubt, are to be construed most favorably to the government, by the fact that the government received and is to receive a full and adequate consideration for the lands granted.

17 Am. & Eng. Enc. Law, 14; United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 979, 14 Sup. Ct. Rep. 11; Langdon v. New York, 93 N. Y. 145; Charles River Bridge v. Warren Bridge, 7 Pick. 469, 11 Pet. 557, 9 L. ed. 828; 3 Washb. Real Prop. 3d ed. 172; Moon v. Salt Lake County, 27 Utah, 436, 76 Pac. 222; Wisconsin C. R. Co. v. Forsythe, 159 U. S. 55, 40 L. ed. 74, 15 Sup. Ct. Rep. 1020; Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; United States ex rel. Search v. Choctaw, O. & G. R. Co. 3 Okla. 479, 41 Pac. 729; United States Trust Co. v. Atlantic & P. R. Co. 8 N. M. 690, 47 Pac. 725.

The opinions expressed by members of Congress in debate cannot properly be considered, especially when the measures advocated by such members were not finally enacted.

United States v. Union P. R. Co. 91 U. S. 79, 23 L. ed. 228; United States v. Trans-Missouri Freight Asso. 166 U. S. 290–318, 41 L. ed. 1007–1020, 17 Sup. Ct. Rep. 540; Lapina v. Williams, 232 U. S. 78–90, 58 L. ed. 515–519, 34 Sup. Ct. Rep. 196.

The policy of the government passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may afford an unstable ground of statutory interpretation.

United States v. First Nat. Bank, 234 U. S. 245–260, 58 L. ed. 1298–1304, 34 Sup. Ct. Rep. 846.

The provisions of the act of 1869 and of the act of 1870 respecting actual settlers are restrictive covenants, and, if enforceable at all, are enforceable in a court of equity as to lands susceptible of settlement and cultivation only.

Chicago & A. R. Co. v. New York, L. E. & W. R. Co. 24 Fed. 516; Lumley v. Wagner, 1 DeG. M. & G. 604, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652; Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11; Singer Sewing Mach. Co. v. Union Buttonhole & Embroidery Co. Holmes, 253, Fed. Cas. No. 12,904; Wolverhampton & W. R. Co. v. London & N. W. R. Co. L. R. 16 Eq. 433, 43 L. J. Ch. N. S. 131; Doherty v. Allman, L. R. 3 App. Cas. 709, 39 L. T. N. S. 129, 26 Weck. Rep. 513; Waskey v. McNaught, 90 C. C. A. 289, 163 Fed. 929; Newbold v. Peabody Heights Co. 3 L.R.A. 579, note.

The very fact that the injury is of a public character, and such that no damage could be calculated, is an added reason for the intervention of equity.

Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932; Brown v. Kling, 101 Cal. 295, 35 Pac. 995; Atty. Gen v. Algonquin Club, 153 Mass. 447, 11 L.R.A. 500, 27 N. E. 2; 22 Cyc. 859, 860; Elliott, Contr. §§ 2, 490–492, 528.

The party who undertakes to work a for-

feiture for a breach of condition subsequent assumes the burden of establishing with strictness and certainty the facts entitling him to such forfeiture.

New York Indians v. United States, 170 U. S. 25, 42 L. ed. 935, 18 Sup. Ct. Rep. 531.

Mr. A. W. Lafferty argued the cause and filed a brief for John L. Snyder et al.

Mr. John Mills Day argued the cause, and, with Mr. M. E. Brewer, filed a brief for interveners and appellants:

If, by the proviso in question, Congress had intended to engraft upon the title conveyed by the grant, a condition subsequent, for breach of which forfeiture might be had, it would certainly have amended § 8 to so specifically provide. We contend that the rule, *expressio unius est exclusio alterius*, should be applied in interpreting the grant; that the grant should be read and interpreted as though the amendment of April 10, 1869, were in fact a part of § 6 of the original act, which in law it is.

United States v. County Ct. 99 U. S. 582, 25 L. ed. 331; Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462, 12 Am. Neg. Rep. 398.

The only thing there is in the grant or in this proviso which can be construed as importing a right of forfeiture by the government is the word "provided." This word "provided" does not always import a condition.

Co. Litt. 146 b, 203 b; Cyclopedic L. Dict. 739; Stanley v. Colt, 5 Wall. 119, 18 L. ed. 502.

And when this word imports a condition, it does not always import a condition subsequent.

Cyclopedic L. Dict. 184.

The proviso in question is a condition which neither accomplishes a pre-existing covenant in the grant, nor provides for its avoidance on breach, but creates a change in the pre-existing covenant by requiring a certain disposal of the property conveyed.

Stanley v. Colt, supra.

The government may maintain a suit to promote the public welfare even though it had no pecuniary interest in the result of the litigation.

Re Debs, 158 U. S. 584, 39 L. ed. 1102, 15 Sup. Ct. Rep. 900; United States v. Hughes, 11 How. 552, 13 L. ed. 809; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; United States v. American Bell Teleph. Co. 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424.

The government might maintain this suit to compel performance without an act of Congress specifically so authorizing.

Dugan v. United States, 3 Wheat. 172, 4 L. ed. 362.

The language of the amendment, *viz.*: "That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre," is not only a covenant which is enforceable specifically, but it is also a restraint upon alienation of the lands. Any conveyance in violation of such a restraint is absolutely void and may be so decreed at the suit of the United States.

Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; Bowling v. United States, 233 U. S. 528, 58 L. ed. 1080, 34 Sup. Ct. Rep. 659; United States v. Pelican, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. Rep. 396; United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107, 34 Sup. Ct. Rep. 1.

Whether the proviso is or is not a condition, it is a covenant.

1 Bouvier's Law Dict. p. 262; Hale v. Finch, 104 U. S. 261, 26 L. ed. 732; Platt, Covenants, 70, 71; Elyton Land Co. v. South & North Ala. R. Co. 100 Ala. 405, 14 So. 207; Parmelee v. Oswego & S. R. Co. 6 N. Y. 80; Countryman v. Deck, 13 Abb. N. C. 111; Paschall v. Passmore, 15 Pa. 307; Hartung v. Witte, 59 Wis. 292, 18 N. W. 175; 6 Am. & Eng. Enc. Law, 2d ed. 502, and note 9.

The purpose of Congress was to compel the railroad company to sell the land to settlers in small quantities. Even if the words of the proviso were not sufficient to show this purpose, the purpose of Congress may be shown by the words and acts of Congress, *in pari materia*.

United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

The attorney general could not declare a forfeiture. The legislative body alone can do so.

Minnesota v. Duluth & I. R. Co. 97 Fed. 353.

A legislative declaration of forfeiture, to be effective, must be clear and unambiguous.

Ibid.

Equity will not lend its aid to enforce a penalty or forfeiture, or to devest an estate for breach of a condition subsequent.

Smith v. Jewett, 40 N. H. 530; Chute v. Washburn, 44 Minn. 312, 46 N. W. 555; Vicksburg & M. R. Co. v. Ragsdale, 54 Miss. 200.

This maxim is as true and applicable

where the government is a party as in case of a private suitor.

Brent v. Bank of Washington, 10 Pet. 596, 9 L. ed. 547; United States v. Union P. R. Co. 105 U. S. 263, 26 L. ed. 1021.

The only exception to this rule is where Congress has declared a forfeiture, and a suit is brought in equity for the purpose of quieting in the government the title to the forfeited lands.

Atlantic & P. R. Co. v. Mingus, 165 U. S. 413, 41 L. ed. 770, 17 Sup. Ct. Rep. 348; United States v. Northern P. R. Co. 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. Rep. 706; Farnsworth v. Minnesota & P. R. Co. 92 U. S. 49, 23 L. ed. 530; United States v. Oregon & C. R. Co. 164 U. S. 526, 41 L. ed. 541, 17 Sup. Ct. Rep. 165; United States v. Tennessee & C. R. Co. 176 U. S. 242, 44 L. ed. 452, 20 Sup. Ct. Rep. 370.

A provision in the form of a condition may be specifically enforced as though it were a covenant without forfeiture, and its performance is in fact the very reverse of a forfeiture.

1 Pom. Eq. Jur. 50, note 2; Livingston v. Stickles, 8 Paige, 398, 7 Hill, 253; Carpenter v. Catlin, 44 Barb. 75; Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642.

And in order that a forfeiture may be avoided and justice promoted, equity will frequently regard a condition subsequent as a trust, and specifically enforce it for the benefit of third persons.

1 Tiffany, Real Prop. p. 185, and note; Tomlin v. Blunt, 31 Ill. App. 234; Smith v. Jewett, 40 N. H. 530; Dumpor's Case, 4 Coke, 119b, 1 Smith, Lead. Cas. 142; West v. Biscoe, 6 Harr. & J. 460.

The maxim, "he who seeks equity must do equity," has been held specifically applicable to the United States when a suitor.

Brent v. Bank of Washington, 10 Pet. 596, 9 L. ed. 547.

A vested interest in property conveyed by a public grant may be acquired by a grantee by bringing himself within the purview of the law, after its enactment.

26 Am. & Eng. Enc. Law, 2d ed. 221, and note 2.

The proposals in the law when accepted become contracts and within the protection of the Federal Constitution.

26 Am. & Eng. Enc. Law, 2d ed. 222, note 1.

Where a grant is made, charged with a trust, the interest which the *cestui que trust* has under the grant may sustain it against legislative interference, a vested equitable interest being property in the same sense and entitled to the same protection as a legal interest.

Cooley, Const. Lim. 344, note 1, p. 333, and cases cited; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.

Where one who had a right to acquire property by performing certain acts, as provided by law, had tendered performance and performed as far as permitted, he acquired a vested interest in the property.

Baty v. Sale, 43 Ill. 351, 92 Am. Dec. 128; Clements v. Warner, 24 How. 394, 16 L. ed. 695; Gough v. Dorsey, 27 Wis. 119; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424.

A vested right is an immediate fixed right of present or future enjoyment.

6 Am. & Eng. Enc. Law, 956; Kent, Com. 202.

It is also defined as a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

Cooley, Const. Lim. p. 438.

A vested right of action is property in the same sense that tangible things are property.

Cooley, Const. Lim. p. 343.

The proviso is in fact a covenant, which gives rise to a trust, and the interveners, by offering to comply with, and in so far as they are permitted, complying with, the law, have brought themselves into relation therewith as *cestuis que trustent*, and as such, have vested interests in the various tracts of land for which they have, respectively, applied.

28 Am. & Eng. Enc. Law, 2d ed. 855, 858, 865, 866, 904, 905.

This proviso was sufficiently definite to enforce specifically.

Smith's Estate, 144 Pa. 428, 27 Am. St. Rep. 641, 22 Atl. 916; Ex parte Lindley, 32 Ind. 367; Chapin v. School Dist. 35 N. H. 445; Perin v. Carey, 24 How. 465, 16 L. ed. 701; Jones v. Habersham, 107 U. S. 174–191, 27 L. ed. 401–408, 2 Sup. Ct. Rep. 336; Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; Dartmouth College v. Woodward, 4 Wheat. 522, 4 L. ed. 630; Tomlin v. Blunt, 31 Ill. App. 234.

The settler may, without parting with the possession of the subject-matter of the trust, himself assume the character of trustee, with respect to property already owned by him, or upon the acquisition of property in pursuance of a previous agreement. It is not necessary that this be done in express terms, but, in the absence of statutory requirements, any words or acts are sufficient which clearly denote his intention to relinquish his beneficial interest in the property *in præsenti* and to hold it for the benefit of another, and this without regard to whether the property is equitable

or legal, or whether it is capable or incapable of transfer at law.

28 Am. & Eng. Enc. Law, 2d ed. 898, and note 11.

If a trust has been one perfectly created with an intelligent comprehension of the nature of the act, it is irrevocable, even though it be voluntary, and the subsequent acts of the settler or the trustee cannot affect it.

28 Am. & Eng. Enc. Law, 2d ed. 899, and note 7.

And equity will aid a volunteer beneficiary in enforcing his trust even though the settlement of the trust were gratuitous.

28 Am. & Eng. Enc. Law, 2d ed. 889, 890, and notes 1, 2.

And the settler of the trust may himself compel specific performance in a court of equity.

Chapman v. Wilbur, 4 Or. 362; Warren v. Lyons City, 22 Iowa, 357; Abbott v. Gregory, 39 Mich. 68; Grissom v. Hill, 17 Ark. 483.

And the trust may be declared by a separate instrument from the one conveying or describing the estate.

28 Am. & Eng. Enc. Law, 2d ed. 900.

And where the trustee refuses or neglects to carry out the terms of the trust, the beneficiary may compel performance.

28 Am. & Eng. Enc. Law, 2d ed. 1121, and note 7.

The declaration of trust is sufficient if it shows the intention of the settler.

28 Am. & Eng. Enc. Law, 2d ed. 866.

The trust instrument must be construed to carry into effect the purpose of the settler of the trust.

28 Am. & Eng. Enc. Law, 2d ed. 910, and note 10.

Where the instrument is susceptible of two constructions, the construction which will best carry out the general scheme of the trust will be adopted.

Dexter v. Episcopal City Mission, 134 Mass. 394.

If the court construes the law otherwise, and holds that the trust was an executory trust, which gave the railroad company the right to exercise a discretion as to the amount of land within the quantitive limit fixed by the law, which it should sell to each settler, these interveners would still have a standing before this court, and would be entitled to the relief asked.

28 Am. & Eng. Enc. Law, 2d ed. 1098, 1099; Young v. Young, 1 Jur. 840.

A person for whose benefit a covenant is made may enforce the same, though not a party to the agreement.

11 Cyc. 1095, and note 37.

And he may do this though there may be no provision of the code expressly authorizing such action.

Douglass v. Branch Bank, 19 Ala. 659; Duncan v. Moon, Dud. L. 332; Johnson v. McClung, 26 W. Va. 659.

But § 27 of chapter 3 of the Code of Oregon, expressly providing that "actions shall be prosecuted in the name of the real party in interest," authorizes any person for whose benefit a contract is made, to sue thereon.

Hughes v. Oregon R. & Nav. Co. 11 Or. 439, 5 Pac. 206; Baker v. Elgin, 11 Or. 333, 8 Pac. 280; Chrisman v. State Ins. Co. 16 Or. 283, 18 Pac. 466; Strong v. Kamm, 13 Or. 172, 9 Pac. 331; Feldman v. McGuire, 34 Or. 311, 55 Pac. 872.

And the beneficiary may sue even though he was not informed of the contract until after it was made.

Schneider v. White, 12 Or. 503, 8 Pac. 652.

And the real party in interest may enforce his rights though he has acquired his rights without consideration.

Gregoire v. Rourke, 28 Or. 275, 42 Pac. 996.

Codes of a state conferring right of action might be taken advantage of in suits in the Federal courts within the state.

Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Wehrman v. Conklin, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129.

Messrs. John Mills Day and Lewis C. Garrigus also filed a brief for interveners and appellants:

This covenant required by the amendment of April 10, 1869, being incidental to the grant, and relating to the lands granted, comes within the description of covenants which run with the land.

Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198; Wells v. Benton, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; Indianapolis Water Co. v. Nulte, 126 Ind. 373, 26 N. E. 72; Wheeler v. Schad, 7 Nev. 204; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Geiszler v. De Graaf, 82 Am. St. Rep. 664, note.

Where a conveyance of an estate is made to a grantee, which requires him to dispose of the same in a particular way, or for the benefit of a particular class, a trust is thereby created.

Smith's Estate, 144 Pa. 428, 27 Am. St. Rep. 641, 22 Atl. 916; Perin v. Carey, 24 How. 465, 16 L. ed. 701; Jones v. Habersham, 107 U. S. 174–191, 27 L. ed. 401–408, 2 Sup. Ct. Rep. 336; First Nat. Bank v. Schween, 127 Ill. 578, 11 Am. St. Rep. 174, 20 N. E. 681.

Neither residence nor cultivation was necessary to constitute an "actual settler."

Hickie v. Starke, 1 Pet. 94, 7 L. ed. 67; Northern P. R. Co. v. Hinchman, 53 Fed. 523.

Mr. Charles E. Shepard also filed a brief for interveners and appellants:

This is an implied trust.

1 Perry, Tr. 6th ed. §§ 24, 25, 112; Lane v. Lane, 8 Allen, 350.

No particular form of words is required to create a trust. As to express trusts, there is no particular formality required or necessary in the creation of a trust.

1 Perry, Tr. 6th ed. §§ 82, 112, 122; Tyler v. Tyler, 25 Ill. App. 339; O'Rourke v. Beard, 151 Mass. 9, 23 N. E. 576; Gisborn v. Charter Oak L. Ins. Co. 142 U. S. 326, 35 L. ed. 1029, 12 Sup. Ct. Rep. 277; Lane v. Lane, supra.

The creation of a trust may be shown by the correspondence and agreements of the parties.

Loring v. Palmer, 118 U. S. 321, 30 L. ed. 211, 6 Sup. Ct. Rep. 1073; Dorr v. Clapp, 160 Mass. 538, 36 N. E. 474; Hutchins v. Van Vechten, 140 N. Y. 119, 35 N. E. 446; Gates v. Avery, 112 Wis. 277, 87 N. W. 1091.

No technical language is necessary to the creation of a trust; and a devise accompanied by words imperative, expressing a wish or recommendation that the devisee will apply the property to the benefit of others, may create a trust.

Colton v. Colton, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164. See also Russell v. United States Trust Co. 127 Fed. 446; McDuffie v. Montgomery, 128 Fed. 108; Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 793; Collister v. Fassitt, 163 N. Y. 289, 79 Am. St. Rep. 586, 57 N. E. 490.

Nor can there be any doubt that the United States can create a trust—as indeed it has often done.

1 Perry, Tr. 6th ed. § 30: Buchanan v. Hamilton, 5 Ves. Jr. 722; Sinking Fund Comrs. v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281.

There is no inherent incapacity of the company to act as trustee, and no consequent invalidity of the trust, arising from the fact of the company's beneficial interest, *viz.*: its rights to retain the entire proceeds of sales made under the terms of the proviso.

1 Perry, Tr. 6th ed. §§ 39, 42, 43, 59, 297, 347; Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519; Nellis v. Rickard, 133 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. 32; Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363; Robertson v. de Brulatour, 188 N. Y. 301, 80 N. E. 938; Losey v. Stanley, 147 N. Y. 560, 42 N. E. 8, 2 Perry, Tr. § 476a.

There is an abundance of cases holding that the words, "provided that" or "on condition that," and like conditional clauses, create a trust, and not a condition subsequent.

Neely v. Hoskins, 84 Me. 386, 24 Atl. 882; Mills v. Davison, 54 N. J. Eq. 659, 35 L.R.A. 113, 55 Am. St. Rep. 594, 35 Atl. 1072; Ashuelot Nat. Bank v. Keene, 74 N. H. 148, 9 L.R.A.(N.S.) 758, 65 Atl. 826; MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 3 L.R.A.(N.S.) 227, 61 Atl. 1027; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; Wright v. Wilkin, 2 Best & S. 232, 31 L. J. Q. B. N. S. 196, 6 L. T. N. S. 221, 10 Week. Rep. 403; Hoyt v. Kimball, 49 N. H. 325.

Mr. Constantine J. Smyth, Special Assistant to the Attorney General, argued the cause, and, with Assistant Attorney General Knaebel and Solicitor General Davis, filed a brief for the United States:

An act of Congress making a grant is more than a mere conveyance. It is a law as well.

Missouri K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 497, 24 L. ed. 1095, 1097; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; St. Paul, M. & M. R. Co. v. Greenhalgh, 26 Fed. 563.

In construing public grants, such as the one under consideration, all doubts must be resolved in favor of the grantor.

Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 562, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689; United States v. Oregon & C. R. Co. 164 U. S. 526, 539, 41 L. ed. 541, 544, 17 Sup. Ct. Rep. 165; Missouri, K. & T. R. Co. v. United States, 235 U. S. 37, 59 L. ed. 116, 35 Sup. Ct. Rep. 6; Bird v. United States, 187 U. S. 118, 124, 47 L. ed. 100, 103, 23 Sup. Ct. Rep. 42.

The principle applicable to private conveyances, that forfeitures are unfavored by law, and should be avoided wherever possible, has no application.

Rutherford v. Greene, 2 Wheat. 196, 4 L. ed. 218; Wilkinson v. Leland, 2 Pet. 627, 662, 7 L. ed. 542, 554; Rice v. Minnesota & W. R. Co. 1 Black, 358, 17 L. ed. 147; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 497, 24 L.

ed. 1095, 1097; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

The language of the act must be permitted to control, unless the plain meaning thereof leads to results so absurd as to force the conviction that Congress could not have intended them.

United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; Kohlsaat v. Murphy, 96 U. S. 153, 160, 24 L. ed. 844, 846.

Rules of statutory construction are employed to resolve, but never to create, doubts.

Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155.

The vesting of the title does not relate back to a date before the grantee came into existence, or before it was qualified to take.

Hall v. Russell, 101 U. S. 503, 25 L. ed. 829.

Assent was necessary.

State use of Washington County v. Baltimore & O. R. Co. 12 Gill & J. 433, 38 Am. Dec. 317; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 130; Fuller v. Kemp, 40 N. Y. S. R. 672, 16 N. Y. Supp. 158; Baker v. Johnson County, 37 Iowa, 186; Rogers v. Port Huron & L. M. R. Co. 45 Mich. 468, 8 N. W. 46.

A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551.

If an instrument is of doubtful meaning, the construction given it by the parties themselves, as shown by their acts and omissions, particularly at or about the time of its execution, will be deemed to be the true one, unless the contrary be clearly shown.

Irwin v. United States, 16 How. 513, 14 L. ed. 1038; Dakin v. Savage, 172 Mass. 23, 51 N. E. 186.

Whether a condition in a deed is precedent or subsequent is always a question of the intention of the parties.

Rannels v. Rowe, 74 C. C. A. 376, 145 Fed. 296; Jones v. Chesapeake & O. R. Co. 14 W. Va. 514; 2 Washb. Real. Prop. § 941; Carloss v. Oxford, 72 Ark. 310, 80 S. W. 144.

Assent constituted an acceptance of the offer by the government through the grant, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both.

Burke v. Southern P. R. Co. 234 U. S. 669, 58 L. ed. 1527, 34 Sup. Ct. Rep. 907; Menotti v. Dillon, 167 U. S. 721, 42 L. ed. 339, 17 Sup. Ct. Rep. 945.

The Department of the Interior would not have recognized the East Side Company as entitled to the grant if the act of 1869 had not been passed, or if the company had not assented to it. By assenting, the company received the benefits of the act without contest. May it now be heard to say that the assent was unnecessary and therefore not binding? We think not.

Bigelow, Estoppel, pp. 354–364; Sprigg v. Bank of Mt. Pleasant, 10 Pet. 257, 265, 9 L. ed. 416, 419; Goddard v. Dakin, 10 Met. 94; Johnson v. Thompson, 129 Mass. 398; Parkinson v. Sherman, 74 N. Y. 88, 30 Am. Rep. 268.

With the consent of the corporation the legislature may make any change in the charter. This consent may be shown by the corporation asking for the amendment, or expressly accepting one made without request, or by acting upon or acquiescing in one enacted without request.

8 Cyc. 964.

Whenever there is doubt touching the meaning of any document, the circumstances leading up to its execution may be considered as aids in solving the doubts; they act as side lights. So it is in case of legislation. Acts *in pari materia* and other historical facts bearing upon the legislation may be looked into.

Smith v. Townsend, 148 U. S. 490, 494, 37 L. ed. 533, 534, 13 Sup. Ct. Rep. 634; Mobile & O. R. Co. v. Tennessee, 153 U S. 486, 502, 38 L. ed. 793, 799, 14 Sup. Ct. Rep. 968.

It is equally true that the purposes of an enactment should not be confused with ideas and theories which may have prevailed at an earlier period; as, for instance, defendants in the case at bar seek to test the meaning of the act of April 10, 1869, by the purposes and policies which actuated Congress at the time of the enactment of the Pacific railroads bill on July 1, 1862.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 210, 40 L. ed. 940, 944, 5 Sup. Ct. Rep. 405; Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 245, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881.

Under the category of historical facts and circumstances surrounding legislation fall debates in Congress.

Jennison v. Kirk, 98 U. S. 453, 459, 25 L. ed. 240, 243, 4 Mor. Min. Rep. 504;

American Net & Twine Co. v. Worthington, 141 U. S. 468, 473, 35 L. ed. 821, 823, 12 Sup. Ct. Rep. 55; Church of the Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511.

Transactions relating to the disposition of the public domain do not resemble those of a private owner engaged in selling lands with the sole motive of realizing their pecuniary value.

United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 170, 34 L. ed. 640, 644, 11 Sup. Ct. Rep. 57.

The construction of the railroad was not the ultimate object, but the means of accomplishing the object which Congress had in mind. The railroad was looked upon as a means to promote settlement (Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424). Congress never intended that the grant to it would obstruct or prevent settlement.

Would it serve the congressional purpose to construe the actual-settlers provisions as a covenant? For breach of a covenant the action is for pecuniary damages.

1 Tiffany, Real Prop. p. 160.

Ordinarily covenants affect only the parties, and not the land. Conveyances in violation of a covenant are valid.

1 Warvelle, Vend. & P. 2d ed. § 451; Hale v. Finch, 104 U. S. 261, 26 L. ed. 732.

In most jurisdictions the uncertainty of the beneficiaries is a characteristic of a charitable trust.

Beach, Trusts & Trustees, § 322.

Where the trust is not a charitable one, and in some jurisdictions where it is, the beneficiaries must be definitely pointed out.

2 Pom. Eq. Jur. § 1009; Levy v. Levy, 33 N. Y. 107; Weaver v. Spurr, 56 W. Va. 105, 48 S. E. 852; Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376; Heiss v. Murphey, 40 Wis. 292; Wheeler v. Smith, 9 How. 55, 13 L. ed. 44.

Trusts are either executory or executed.

Beach, Trusts & Trustees, § 59.

The right to take advantage of the violation of the grant was in the government, and in nobody else.

Nichols v. Southern Oregon Co. 135 Fed. 232; Warrior River Coal & Land Co. v. Alabama State Land Co. 154 Ala. 135, 45 So. 53.

If cross complainants assert that the trust is a charitable one, they must also fail, because the idea of such a trust is utterly inconsistent with the idea of an exclusive interest in any of the beneficiaries. In a charitable trust the persons to be benefited must be vague, uncertain, and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being.

Perry, Trusts & Trustees, 6th ed. § 710.

They cannot select themselves. As possible beneficiaries of a charitable trust they would have absolutely no standing in court to enforce the trust.

Boenhardt v. Loch, 129 App. Div. 355, 113 N. Y. Supp. 747; Burbank v. Burbank, 152 Mass. 254, 9 L.R.A. 748, 25 N. E. 427.

Interveners had no interest which they can enforce against the government.

Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Yosemite Valley Case, 15 Wall. 77, 21 L. ed. 82.

Homesteaders and pre-emptors acquire no rights until an entry has been made by the one, and a proper notation of a pre-emption by the other, in the land office.

Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Northern P. R. Co. v. Colburn, 164 U. S. 383, 386, 41 L. ed. 479, 480, 17 Sup. Ct. Rep. 98; Lansdale v. Daniels, 100 U. S. 113, 116, 25 L. ed. 587, 588; Tarpey v. Madsen, 178 U. S. 215, 225, 44 L. ed. 1042, 1046, 20 Sup. Ct. Rep. 849.

Where an estate is granted and its continuance made to depend upon the doing of something by the grantee, it is an estate upon condition subsequent. No particular form of words is necessary to create such an estate; if the intention appears from the language used, it will be enforced. But there are certain words which, if used, necessarily evidence the existence of such an estate. They may be divided into two classes—(a) where the grant is followed by the words "provided that," "so as," "or under this condition;" in such cases words of re-entry are not necessary; and (b) where the grant is followed by words *si contingat* and the like, but these latter words must be followed by words authorizing the grantor to re-enter.

Shep. Touch. pp. 121, 122; Littleton, Tenures, §§ 328–331; Co. Litt. §§ 328–331, 203a, 203b, 204a; 4 Cruise's Dig. 352, 353, title 32, chap. 25, §§ 1–6; 3 Comyns's Dig. 74, 76, Condition A, 2, A, 4; 2 Bacon, Abr. title, Condition, A; Tiedeman, Real Prop. 3d ed. § 201; 1 Warvelle, Vend. & P. 2d ed. § 445; 2 Washb. Real Prop. §§ 938, 956; 1 Tiffany, Real Prop. § 162; Adams v. Valentine, 33 Fed. 1; Mahoning County v. Young, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96; Adams v. Ore Knob Copper Co. 4 Hughes, 589, 7 Fed. 640, 3 Mor. Min. Rep. 183.

There are a number of cases which apparently are in conflict with the foregoing rules, but a careful analysis will disclose that they are not. They may be divided into the following classes:

1. Those in which it was urged that the estate was upon a condition subsequent, but in which no words such as "provided," or "on condition," were used.

Wright v. Morgan, 191 U. S. 55, 48 L. ed. 89, 24 Sup. Ct. Rep. 6.

2. Cases in which the words "provided that," or "upon condition," were used, but in connection with other words showing that the grantor did not use them in their usual sense:

(a) Cases in which the grantor, being a trustee, was without authority to impose conditions; or the grantee was without authority to assume the burdens of conditions.

Sohier v. Trinity Church, 109 Mass. 1.

(b) Cases involving the interpretation of wills, the rule as to which differs from that as to private grants.

Stanley v. Colt, 5 Wall. 119, 18 L. ed. 502.

(c) Cases involving grants to municipal corporations or charitable institutions in which provisions, conditional in form, restricted the use of lands granted to some specific purpose, such as a burial ground or the like.

Portland v. Terwilliger, 16 Or. 465, 19 Pac. 90; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; May v. Boston, 158 Mass. 21, 32 N. E. 902; Rose v. Hawley, 118 N. Y. 502, 23 N. E. 904.

(d) Cases involving grants containing provisions conditional in form, but which inure to the benefit of some person other than the grantor or his heirs.

Countryman v. Deck, 13 Abb. N. C. 110.

(e) Cases involving grants containing provisions conditional in form, but which, if construed to be conditions, would nullify other provisions of the grant.

Episcopal City Mission v. Appleton, 117 Mass. 326.

(f) Cases in which conditions have been held to be void on grounds of public policy, etc.

Cowell v. Colorado Springs Co. 100 U. S. 55, 57, 25 L. ed. 547, 548; Taylor v. Brown, 147 U. S. 640, 646, 37 L. ed. 313, 315, 13 Sup. Ct. Rep. 549.

Whenever the grant or the deed, as the case may be, introduces the condition by the words "provided" or "upon condition," the estate has been held to be one upon condition, unless other language in the deed made it clear that the parties did not so intend.

Adams v. Valentine, 33 Fed. 1; Clapp v. Wilder, 176 Mass. 332, 50 L.R.A. 120, 57 N. E. 692; Blanchard v. Detroit, L. & L. M. R. Co. 31 Mich. 48, 18 Am. Rep. 142; Hammond v. Port Royal & A. R. Co. 15 S. C. 32; Pepin County v. Prindle, 61 Wis. 308, 21 N. W. 254; Langley v. Chapin, 134 Mass. 82.

Even in cases where the words "provided" or "condition" are not used, if it is clear from the context that it was the intention of the parties to create a condition subsequent, the court will so decide.

Wilson v. Wilson, 86 Ind. 474.

It is true that courts are reluctant to construe private grants to be conditional where the formal words are not used. In such cases the intention of the parties must be very clear, or else the court will refuse to hold the estate to be one upon condition. But it is otherwise with respect to public grants.

Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; United States v. Michigan, 190 U. S. 379, 398, 47 L. ed. 1103, 1110, 23 Sup. Ct. Rep. 742; Horner v. Chicago, M. & St. P. R. Co. 38 Wis. 175; Farnsworth v. Minnesota & P. R. Co. 92 U. S. 49, 68, 23 L. ed. 530, 536.

There are a number of decisions construing provisions of public grants affirmatively requiring the settlement of the lands by or the disposition of them to settlers. The provisions are in the form of a condition subsequent, and the courts sustain the natural and ordinary meaning of the words employed; in other words, apply the general rule invoked by the government in the case at bar.

Chapman v. Pingree, 67 Me. 198; United States v. Repentigny, 5 Wall. 211, 18 L. ed. 627; United States v. Wiggins, 14 Pet. 334, 10 L. ed. 481; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547.

There are many cases in which provisions in private grants, similar to the actual-settlers provision, were held to be conditions subsequent. Those grants contain provisions requiring or prohibiting the use of the lands in a certain manner or for a certain purpose. The authorities are practically unanimous that where these restrictions are expressed in the form of a condition, as, for instance, by the use of conditional words such as "provided" or "on condition," they will be enforced as conditions.

Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; Adams v. Valentine, 33 Fed. 1; Gray v. Blanchard, 8 Pick. 287; Blanchard v. Detroit, L. & L. M. R. Co. 31 Mich. 48, 18 Am. Rep. 142; Langley v. Chapin, 134 Mass. 82; Marston v. Marston, 47 Me. 495; May v. Boston, 158 Mass. 21, 32 N. E. 902; Tiedeman, Real Prop. 3d ed. § 205.

The omission of the word "revert" is immaterial.

United States v. Oregon & C. R. Co. 164

U. S. 526, 41 L. ed. 541, 17 Sup. Ct. Rep. 165; United States v. Northern P. R. Co. 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

If the amendatory act of 1869 is inconsistent with any part of the act of 1866, the former must prevail, because it is the last expression of the legislative will upon the subject.

United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154.

A grant is to be construed according to the plain meaning of the words used.

Missouri, K. & T. R. Co. v. United States, 235 U. S. 37, ante, 116, 35 Sup. Ct. Rep. 6.

If the lands were not susceptible of actual settlement, or the grantees had any doubt about it, they should have protected themselves either by not accepting the grants or by asking to have them amended; not having done so, they are bound by their contract.

Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762.

This suit may be maintained without inquest of office; the act of Congress authorizing the attorney general to bring it is sufficient.

United States v. Repentigny, 5 Wall. 211, 18 L. ed. 627; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Farnsworth v. Minnesota & P. R. Co. 92 U. S. 49, 23 L. ed. 530; Bybee v. Oregon & C. R. Co. 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641; Iron Mountain R. Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 113; Columbia Valley R. Co. v. Portland & S. R. Co. 89 C. C. A. 361, 162 Fed. 603; Cooke v. United States, 91 U. S. 396, 23 L. ed. 242; United States v. De Visser, 10 Fed. 647; United States v. Campbell, 10 Fed. 821; Cotton v. United States, 11 How. 229, 231, 13 L. ed. 675, 676; Smith v. Maryland, 6 Cranch, 286, 3 L. ed. 225; McMicken v. United States, 97 U. S. 204, 217, 24 L. ed. 947, 951; Van Wyck v. Knevals, 106 U. S. 360, 368, 27 L. ed. 201, 203, 1 Sup. Ct. Rep. 336; St. Louis, I. M. & S. R. Co. v. McGee, 115 U. S. 469, 473, 29 L. ed. 446, 448, 6 Sup. Ct. Rep. 123; United States v. California & O. Land Co. 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458; Schlesinger v. Kansas City & S. R. Co. 152 U. S. 444, 453, 38 L. ed. 507, 510, 14 Sup. Ct. Rep. 647; United States v. Oregon & C. R. Co. 164 U. S. 526, 41 L. ed. 541, 17 Sup. Ct. Rep. 165; Atlantic & P. R. Co. v. Mingus, 165 U. S. 413, 431, 434, 41 L. ed. 770, 777, 778, 17 Sup. Ct. Rep. 348; New York Indians v. United States, 170 U. S. 1, 24, 42 L. ed. 927, 935, 18 Sup. Ct. Rep. 531; United States v. Tennessee & C. R. Co. 176 U. S. 242, 256, 44 L. ed. 452, 458, 20 Sup. Ct. Rep. 370; United States v. Northern P. R. Co. 177 U. S. 435, 441, 44 L. ed. 836, 838, 20 Sup. Ct. Rep. 706; Hurtado v. California, 110 U. S. 535, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; Ruch v. Rock Island, 97 U. S. 693, 697, 24 L. ed. 1101, 1103; Union P. R. Co. v. Cook, 39 C. C. A. 86, 98 Fed. 284.

The general rule that equity will refuse to enforce forfeitures is not absolute. It will enforce them where the plaintiff is without an adequate remedy at law.

Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Vicksburg & M. R. Co. v. Ragsdale, 54 Miss. 208; State v. Hall, 70 Miss. 678, 13 So. 39.

Where a forfeiture is sought to be enforced to enable the government to discharge some important function, not only does the general rule against the enforcement of forfeitures not apply, but in such case a court of equity will lend its jurisdiction upon grounds of public policy.

Farnsworth v. Minnesota & P. R. Co. 92 U. S. 49, 23 L. ed. 530.

The general doctrine that equity will not entertain a suit to enforce a forfeiture is not applicable when the right of forfeiture is based upon a statute as distinguished from a private contract.

State v. Hall and Farnsworth v. Minnesota & P. R. Co. supra; Story, Eq. Jur. § 1326; Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; Powell v. Redfield, 4 Blatchf. 45, Fed. Cas. No. 11,359; Chapman v. State, 5 Or. 432; 1 Pom. Eq. Jur. § 458.

The United States is entitled to enforce its rights of property and other contract rights by all of the methods that are available to private individuals.

Cotton v. United States, 11 How. 229, 13 L. ed. 675.

To quiet a title, or remove a cloud therefrom, has always been one of the leading heads of equity jurisprudence. There is but one general limitation upon the right to maintain a suit to quiet title, and that is the general limitation applicable to all suits in equity; namely, plaintiff must be without an adequate remedy at law. This rule is sometimes carelessly stated to the effect that a suit to quiet title can only be maintained where the plaintiff has both legal title and possession. This is not correct. If he holds either under circumstances which would prevent him from having an adequate remedy at law, equity will give relief.

32 Cyc. 1337.

Possession by plaintiff is not necessary when lands are vacant and unimproved.

Christy v. Springs, 11 Okla. 710, 69 Pac. 864; Douglass v. Nuzum, 16 Kan. 515; Dav-

enport v. Stephens, 95 Wis. 456, 70 N. W. 661.

Statutes like Oregon Ann. Code, § 516, may be taken advantage of by suits in equity instituted in Federal courts.

Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Wehrman v. Conklin, 155 U. S. 314, 323, 39 L. ed. 167, 172, 15 Sup. Ct. Rep. 129; Bardon v. Land & River Improv. Co. 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067.

Will it be contended that the defendants are in actual possession of the wild, unimproved lands involved in the case at bar, within the definition of actual possession given by the supreme court of Oregon?

Hoffman v. Woods, 40 Kan. 382, 19 Pac. 805; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004.

The question of possession is immaterial when the common-law remedies are inadequate.

O'Hara v. Parker, 27 Or. 170, 39 Pac. 1004; Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2,133; Sayers v. Burkhardt, 29 C. C. A. 137, 42 U. S. App. 742, 85 Fed. 246.

When equity is properly invoked on any ground, jurisdiction will be retained to adjudicate and enforce all the rights of the parties to the suit.

Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235; Hopkins v. Grimshaw, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401.

The removal of ore from public lands will be restrained by injunction.

United States v. Gear, 3 How. 120, 133, 11 L. ed. 523, 529; United States v. Parrott, 1 McAll, 271, Fed. Cas. No. 15,998.

And it has been held that the United States may invoke the jurisdiction of equity to restrain the cutting of timber upon the public lands of the United States.

Cotton v. United States, 11 How. 229, 232, 13 L. ed. 675, 676; United States v. Tygh Valley Land & Live Stock Co. 76 Fed. 694; United States v. Guglard, 79 Fed. 23.

The doctrine that equity will lend its jurisdiction to render speedy and complete justice, and avoid the vexations and irreparable injuries resulting from a multiplicity of actions and suits, is peculiarly applicable to the circumstances of this case.

Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; Preteca v. Maxwell Land Grant Co. 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 674; Boyd v. Schneider, 65 C. C. A. 209, 131 Fed. 223.

An objection to the jurisdiction of a court of equity may be waived by the defendants. If waived, the court will proceed to adjudicate the rights of the parties.

O'Hara v. Parker, 27 Or. 173, 39 Pac. 1004; State v. Blize, 37 Or. 409, 61 Pac. 735.

Waiver necessarily implies knowledge of the right and an intention to relinquish it.

Pence v. Langdon, 99 U. S. 578, 581, 25 L. ed. 420, 421, 13 Mor. Min. Rep. 32; Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 355, 359, 26 L. ed. 990, 991.

Waiver will never be presumed from constructive knowledge alone. Besides, a party is never held to have constructive knowledge of instruments recorded subsequent to his own title.

24 Am. & Eng. Enc. Law, 146; Rannels v. Rowe, 74 C. C. A. 376, 145 Fed. 296.

Mere silent acquiescence in breaches of a condition never constitutes waiver of either the breaches or the condition.

2 Washb. Real Prop. § 962; Gray v. Blanchard, 8 Pick. 284; Union College v. New York, 173 N. Y. 38, 93 Am. St. Rep. 569, 65 N. E. 853; Howe v. Lowell, 171 Mass. 575, 51 N. E. 536.

The mere waiver of breaches of a condition will not constitute a waiver of the condition itself.

Tiedeman, Real Prop. 3d ed. § 208; 1 Tiffany, Real Prop. p. 179; Ireland v. Nichols, 46 N. Y. 417; Crocker v. Old South Soc. 106 Mass. 489; Alexander v. Hodges, 41 Mich. 691, 3 N. W. 187.

This grant, as we have seen, is a law,—an act of Congress; no one can change an act of Congress but Congress itself. It is not in the power of any executive officer of the government to amend, modify, or waive a statutory provision.

Hawkins v. United States, 96 U. S. 689, 691, 24 L. ed. 607, 608; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; United States v. Northern P. R. Co. 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. Rep. 706; Re Atlantic & P. R. Co. Land Grant, 16 Ops. Atty. Gen. 572.

Laches is not imputable to the United States.

United States v. Dallas Military Road Co. 140 U. S. 599, 632, 35 L. ed. 560, 571, 11 Sup. Ct. Rep. 988; United States v. Beebe, 180 U. S. 343, 354, 45 L. ed. 563, 570, 21 Sup. Ct. Rep. 371; United States v. Michigan, 190 U. S. 379, 405, 47 L. ed. 1103, 1112, 23 Sup. Ct. Rep. 742.

Where lands are granted by act of Congress the patents issued thereunder do not add anything to the quality or nature of the estate of the grantee.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 510, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 6, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251, 35 L. ed. 999, 1002, 12 Sup. Ct. Rep. 158; Ryan v. Carter, 93 U. S. 78, 82 23 L. ed. 807, 808; Morrow v. Whitney, 95 U. S. 551, 555, 24 L. ed. 456, 457; Whitney v. Morrow, 112 U. S. 693, 695, 28 L. ed. 871, 872, 5 Sup. Ct. Rep. 333; Wright v. Roseberry, 121 U. S. 488, 499, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985.

The executive officers of the government had no authority to refuse to issue patents because of a breach of the conditions annexed to the grant; the authority to take advantage of such a breach rested solely with Congress; and, until Congress authorized action, the executive officers of the government must continue to issue patents.

Re Minnesota R. Land Grant, 16 Ops. Atty. Gen. 401; United States v. Northern P. R. Co. 177 U. S. 435, 441, 44 L. ed. 836, 838, 20 Sup. Ct. Rep. 706.

Until patents were issued, none of the lands were subject to sale by the railroad company upon any terms or in any manner.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158.

Mr. George M. Brown, Attorney General of Oregon, filed a brief as *amicus curiæ*.

After stating the case as above, Mr. Justice McKenna delivered the opinion of the court:

A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation of construction. But the case has never been considered as having that simple directness. A bill which occupies 78 pages of the record (exclusive of exhibits), the allegations of which were iterated and reiterated by cross complainants and interveners and added to, and an answer that admitted or [412] traversed their averments with equal volume and circumstance, constituted the case for trial. 17 volumes of testimony, each of many pages, were deemed necessary to sustain the case as made. It is certain, therefore, that no averment has been omitted from the pleadings, no fact from the testimony, that has any bearing on the case; the industry of counsel has neglected no statute or citation, and their ability no comment or reason that can elucidate or persuade. As we proceed it will be seen that we have rejected some contentions. It is not the fault of counsel if we have misunderstood them.

Yet with all the research, it may be on account of it, the contestants have not preserved an exact alignment, and have shown no preference as to the company in which contentions are made or opposed.

The government contends that the provisos, we so designate them and shall so refer to them, though they differ in technical language, constitute conditions subsequent, and that by the alleged breaches indicated the lands became forfeited to the United States. The railroad company and other defendants contend that the provisos constitute restrictive and unenforceable covenants. The cross complainants insist that a trust was created for actual settlers, and the interveners urge that the trust has the broader scope of including all persons who desire to make actual settlement upon the lands.

This curious situation is presented: The government joins with the railroad in opposing the contentions of the cross complainants and interveners. Both of the latter unite with the government in contesting the position of the railroad, but join with the railroad against the government's assertion of forfeiture. The cross complainants attack the claim of the interveners, and the state of Oregon, through its attorney general, without definitely taking sides in the controversies, declares it to be to the interest of the state and expresses the hope that the lands [413] now withdrawn by the railroad shall be "subject to settlement and improvement as contemplated by the provisions of the grant, in order not only that those vast areas of the state may be improved, but also that the lands may not be withdrawn from taxation, thus depriving the state, and especially the eighteen counties in which they are situated, of a large proportion of their resources from direct taxation." The interest and hope expressed seem like a prayer against the government's contentions.

There is something more in these opposing contentions than a wrangle or medley of interests, and we are admonished that the words of the provisos, simple and direct as they are of themselves, take on, when they come to be applied, ambiguous and disputable meaning. It may be said at the outset that if ambiguity exists there may be argument in it against some of the contentions.

However, without anticipating, let us consider the provisos, and we repeat them to have them immediately under our eyes. The first is contained in the act of April 10, 1869 [16 Stat. at L. 47, chap. 27]. That act was expressed to be an amendment of the act of 1866 [14 Stat. at L. 239, chap. 242], and to relieve from the effect of the expiration of the time for filing assent to the act of 1866, and to give "such filing of assent, if done within one year from the passage of the" amending act, the same force and effect to all intents and purposes as if it had been filed within one year after the passage of the act of 1866. Then came this proviso, which was preceded by another not necessary to quote: "*And provided further*, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

The act of May 4, 1870 [16 Stat. at L. 94, chap. 69], making the grant to the West Side Company, provides in § 4 that the lands granted, excepting only such as are necessary for depots and other needful uses in operating the road, "shall be sold by the [414] company to actual settlers," the quantities and the price being designated as in the act of 1869.

These, then, are the provisos which are submitted for construction. The contention of the government is as we have seen, and it lies at the foundation of its assertion of forfeiture of the grant, that they constitute conditions subsequent.

The argument to support the contention is based first on the general considerations that experience had demonstrated to the country the evils of unrestricted grants, and that the bounty of Congress had been perverted into a means of enriching "a few financial adventurers," and that lands granted for national purposes "were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies." Informed by such experience, in substance is the contention, and solicited by petition and moved by the reasoning of some of its members, Congress changed its policy of unqualified bounty, and, while not refusing to contribute to the aid of great enterprises, sought to prevent the perversion of such aid to selfish and personal ends, and to promote the development of the country by the disposition to actual settlers of the lands granted. And, it is insisted, efficient means were adopted to secure the purpose by making the provisos conditions subsequent, with the sanction of forfeiture for violation.

These general considerations are supplemented by a special and technical argument. The provisos and their context, it is said, show the general characteristics of conditions; that is, they make the estate granted and its continuance to depend upon the doing of something by the grantee, and that the proviso in the act of 1869 is expressed in apt and technical words, by the use of which, it is further contended, it is established by authority that an estate upon condition is necessarily created. Cases are cited, and the following is quoted from page 121 of Sheppard's [415] Touchstone: "That for the most part conditions have conditional words in their frontispiece and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*. . . . But there are other words, as *si, si contingat*, and the like, that will make an estate conditional also, but then they must have other words joined with them and added to them in the close of the condition, as that then the grantor shall re-enter, or that then the estate shall be void, or the like." And words of such determining effect, it is urged, introduce and give meaning to the proviso in the amendatory act of 1869.

But it will be observed there are no such controlling words in the provision for the sale to actual settlers in the act of May 4, 1870, that is, in the grant to the West Side Company; and the government is confronted by the rule which it quotes, that in such cases there must be "words of re-entry" or a declaration "that then the estate shall be void, or the like." The government, therefore, varies and relaxes the rule it invokes, and admits that the sense of a law or terms of an instrument may be found in other words than the quoted technical ones if the intention is made clear.

It is not necessary to review the cases cited respectively to sustain and oppose the contending arguments. The principles announced in the cases are rudimentary and may be assumed to be known, and the final test of their application to be the intention of the grantor.

These principles will be kept in mind in our consideration of the acts of Congress involved, and, besides, that there may be a difference in rigor between public and private grants, and that this court has especially said that railroad land grants have the command and necessarily, therefore, the effect of law.

[416] The government reinforces its contention, as we have seen, with what it considers a change of policy in legislation, and

in effect insists that restrictions upon the disposition of the lands granted became more dominant in purpose than the building of the roads, to aid which it was admitted the lands were necessary. The argument is hard to handle, as indeed are all arguments which attempt to assign the exact or relative inducements to conjoint purposes. In the first grants to railroads there were no restrictions upon the disposition of the lands. They were given as aids to enterprises of great magnitude and uncertain success, and which might not have succeeded under a restrictive or qualified aid. However, a change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers. These purposes should be kept in mind and in their proper relation and subordination.

We shall be led into error if we conclude that because the railroad is attained it was from the beginning an assured success, and that it was a secondary, and not a primary, purpose of the acts of Congress. There is much in the argument of the defendants that the aid to the company was part of the national purpose, which this court has said induced the grants to the transcontinental railroads (United States v. Union P. R. Co. 91 U. S. 79, 23 L. ed. 228; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424; United States v. Stanford, 161 U. S. 412, 40 L. ed. 751, 16 Sup. Ct. Rep. 576). And we may say that the policy was justified by success. Empire was given a path westward and prosperous commonwealths took the place of a wilderness.

But such success had not been achieved when the grant of 1866 was made, nor in full measure when the acts of 1869 and 1870 were passed, and it may be conceded that they were intended to continue and complete such national purpose, and that it was of the first consideration, but the [417] secondary purpose was regarded and provided for in the provisos under review. Both purposes must be considered. It may be that it was not expected that actual settlers would crowd into "the vast, unpeopled territory," but the existence of such settlers at some time must have been contemplated. Both purposes, we repeat, were to be subserved, and how to be subserved is the problem of the case.

There is certainly a first impression against a forfeiture being the solution of the problem or that there was necessity for it. A forfeiture of the grant might have been the destruction of the enterprise, and settlement postponed or made impossible to any useful extent by the inaccessibility of the lands. And forfeiture was, besides, beset with many practical difficulties as a remedy. When, indeed, would it be incurred? The obligation of the provisos and the remedy for their breach were coincident. The refusal of the demand of the first actual settler (if there could be such without the consent of the railroad), or of the first applicant for settlement, would subvert the scheme of the acts of Congress. It cannot be that the grants were intended to be so dependent and precarious and the enterprises so menaced with peril, and, it might be, brought to disaster.

Are the contingencies fanciful? Such character may be asserted of any conjecture of what might have occurred, but which did not, and yet to construe a statute we must realize its inducements and aims, solving disputes about them by a consideration of what might accomplish or defeat such aims. The acts under review conferred rights as well as imposed obligations, and it could not have been intended that the latter should be so enforced as to defeat the former. We have given an instance of how this might be done by regarding the provisos as conditions subsequent. Another instance may be given. In its argument at bar the government insisted that it was the duty of [418] the railroad company to have provided the machinery for settlement, and, by optional sales, guarded by probational occupation of the lands, to demonstrate not only initial but the continued good faith of settlers, and that the omission to do so was of itself a breach of the provisos and incurred a forfeiture of the grants. But when did such obligation attach? Before or after the construction of the road—construction in sections or completely? The contention encounters the government's admission that there was no obligation imposed upon the railroad to sell. And we have the curious situation (which is made something of by cross complainants and interveners in opposition to the government's contention) of the right of settlers to buy, but no obligation on the railroad to sell, and yet a duty of providing for sales under an extreme and drastic penalty. We may repeat the question, Might not such consequences have ended the enterprise, making it and its great purpose subordinate to local settlement? Indeed, might not both have been defeated by the inversion of their purposes?

The omission to institute a plan of settlement and sale is not alleged in the bill as a breach of the provisos. The first breach alleged is the trust deed to Stephen T. Gage, and the next the trust deed to the Union Trust Company. But these deeds manifestly were but forms of security,

even if they went too far and were not binding to the extent of their excess. The government admits that the grants were intended to be used as a basis of credit; and we have argument again against a forfeiture by the dilemma to which the railroad might be brought in its attempt to comply with all the provisions of the act as well as with the provisos. If it failed to complete the road within the time required the granting act was to become "null and void" (upon which we shall presently comment). If it made efforts to complete the road by using the grants as a means of credit, it might forfeit them.

[419] But there is a better argument than what may be deduced from the solution of perplexing difficulties or the conjecture of possible contingencies. It will be observed that there was an explicit provision in the act of 1866 that upon the failure of the companies to file assent to the act and to complete the road as and within the time required, the act should "be null and void," and the lands not patented at the time of such failure should "revert to the United States." And it was provided that if the road should not be "kept in repair and fit for use," Congress by legislation might put the same in that condition and repay its expenditures from the road's income, or fix pecuniary responsibility upon the company not exceeding the value of the lands granted.

Congress, therefore, had under consideration remedies for violations of the provisions of the act and adjusted them according to what it considered the exigency. As a penalty for not completing the road as prescribed Congress declared only for a reversion of the lands *not then patented;* for not maintaining it in repair and use Congress reserved the right temporarily to sequester the road; and yet for a violation of the provision for sale to settlers it is urged that Congress condemned to forfeiture not only the lands then *unpatented, but those patented.* Mark the difference. Was noncompletion of the road of less consequence than settlement along its line?—not necessarily complete settlement, but any settlement—the refusal, it might be, of the acceptance of a single offer of settlement, or even, as it is contended, of making provision for settlement, being of greater consequence and denounced by more severe penalty than the declared conditions,—that is, assent to the act, completion of the road, and its maintenance. This is difficult, if not impossible, to believe.

It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accomplishment [420] of their purposes,—either of the construction of the road or sale to actual settlers; and we think the principle must govern that conditions subsequent are not favored, but are always strictly construed, and where there are doubts whether a clause be a covenant or condition the courts will incline against the latter construction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so. 2 Washb. Real Prop. 4. And this because "they are clauses of contingency on the happening of which the estates granted may be defeated." And it is a general principle that a court of equity is reluctant to (some authorities say never will) lend its aid to enforce a forfeiture.

By this conclusion do we leave the provisos meaningless and the government without remedy for their violation? There is no argument in a negative answer. From the defects of a provision we can deduce nothing, nor on account of them substitute one of greater efficacy.

But must the answer be in the negative, and by rejecting the contention of the government are we compelled to accept that of the railroad company?—or we may say those of the railroad company, for the contentions are many, some of which preclude the application of the provisos, some of which assert their invalidity, and others limit their application.

If not first in order, at least in more immediate connection with the contention of the government is the contention that the provisos are not conditions subsequent, but simple covenants, and, it is said, restrictive and negative only, and therefore not enforceable. In support of the contention all of the uncertainties or asserted uncertainties of the provisos are marshaled and amplified. We can only enumerate them. There is uncertainty, it is asserted, in the legal measure of duty, therefore of its performance—for whom to be performed and when; nor is the time or condition of settlement prescribed, whether [421] by the standard of the homestead or pre-emption laws; nor by what test or by what tribunal contests between applicants to purchase are to be determined; no compulsion of sale at any time, to any person, in any quantity; no mutuality in the covenant; no assurance that settlers will apply, and no obligation assumed by them. And the conclusion is deduced that the actual settlers' clauses, viewed even as covenants, were either impossible of performance or repugnant to the grants, and therefore void.

The arraignment seems very formidable, but is it not entirely artificial? It is stipulated that prior to 1887 more than 163,000 acres of the granted lands were sold, nearly

all of which were sold to actual settlers, in small quantities. If the sale of 163,000 acres of land encountered no obstacle in the enumerated uncertainties we cannot be impressed with their power to obstruct the sale of the balance of the lands. The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons, and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose "an affirmative obligation to people the country" it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made, and it is the concession of one of the briefs that the obligation is enforceable, and that, even regarding the covenant as restrictive, the "jurisdiction of a court of equity, upon a breach or threatened breach of the covenant, to enforce performance by enjoining a violation of the covenant, cannot be doubted." Apposite cases are cited to sustain the admission, and in answer to the contention of the government that it could [422] recover no damages for the breach, and hence had no enforceable remedy but forfeiture, it is said: "But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character and such that no damage could be calculated is an added reason for the intervention of equity." And cases are adduced. We concur in the reasoning and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are laws as well as grants, and must be given the exactness of laws.

If the provisos were ignorantly adopted, as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the timber and stone act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses,—the remedy was obvious. [423] Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is controversy about all of the asserted facts and conclusions.

Our conclusions, then, on the contentions of the government and the railroad company, are that the provisos are not conditions subsequent; that they are covenants, and enforceable; and we pass to the other contentions of the company.

It is contended (1) that Congress was without lawful authority on April 10, 1869, to annex a new condition, by amendment or otherwise, to the grant made by the act of 1866 as amended by the act of June 25, 1868 [15 Stat. at L. 80, chap. 80] (the latter extended the time to complete the first and subsequent sections of the road and the completion of the whole road). We do not think it is necessary to follow the involutions of the argument by which the contention is attempted to be supported. It is asserted that the California & Oregon Railroad Company filed its assent within one year and completed the first section of 20 miles within two years after the passage of the act of July 25, 1866, and that the Oregon Central Railroad Company (East Side Company) was not in default on April 10, 1869. The assertions came very late. Had they been made at that early time, questions would have been presented whose solution we need not conjecture. The West Side Company preceded the East Side Company, and on October 10, 1866, received the designation from the Oregon legislature as the road entitled to receive the grant of 1866. The East Side Company started its existence on April 22, 1867, and in 1868 attacked the legality of the incorporation of the other company, and procured the revocation of the designation of that company, and the designation of itself by the legislature. The controversy for precedence and rights continued. It was carried to Congress, and the [424] act of April 10, 1869, was passed.

Subsequently came compromises and the act of May 4, 1870. By the latter act, and in acceptance of its grant and provisions, the West Side Company took the west side of the Willamette river. The East Side Company took the east side of the river, and on June 8, 1869, by resolution, accepted the provisions of the act of 1866 "and of all acts amendatory thereof, and upon conditions therein specified, and do hereby give our assent and the assent of such company thereto." It was not then thought, as it is now asserted, that the act of 1869 annexed new and invalid conditions, nor was there such assertion afterwards. The East Side Company, on March 29, 1870, assigned its rights under the act of 1866 *and the acts amendatory thereof and supplemental thereto* to the present company, the Oregon & California Railroad Company, and then dissolved. The Oregon & California Railroad Company accepted the transfer and by resolution accepted the act of 1866 and amendments thereto and "all the benefits and emoluments therein and thereof granted, and upon the terms and conditions therein specified," and authorized the assent to be filed in the office of the Secretary of the Interior.

It is too late to declare such formal and repeated action to have been unnecessary. Every advantage was obtained, and while enjoying the benefit of it, the obligations of it cannot be denied. Had there been an assertion of rights against the act of 1869, and had there been an immediate rejection of its provisions and obligations, the question in the present case would not now be submitted for solution. It is possible to suppose that no patents to lands would have been issued, or, at any rate, the government's attention would have been challenged to the assertion of rights which it might have contested from a position of supreme advantage.

(2) It is contended that if sales were made under the [425] limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the government are adduced—indeed, the knowledge of Congress itself; and reciting what was done under the grants, counsel say: "It is a story of mortgages and sales, executory contracts and conveyances, and a stream of government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety, of public record; the railroad knew them; the people knew them, the government knew them." And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel. No one was deceived, at least no one should have been deceived; no action was or should have been induced by them that could plead ignorance of the provisions and immunity from their responsibility. The recited conduct had explanation and notice in the opinions of the Department of the Interior. They are entirely consistent with the belief expressed by Mr. Ballinger, then Commissioner, afterwards Secretary of the Interior, that their enforcement was a matter for the courts, not for executive or legislative action.

Mr. Ballinger, in a communication to a member of the House of Representatives, expressed the view that "as soon as the title vested in the company [and it was his view that it had vested by the construction of the railroad], jurisdiction over the lands passed from the executive branch of the government, and the enforcement of the [426] provision [the sale of lands to actual settlers] rests with the courts, through appropriate action by either the settlers entitled to purchase, or by the government, acting through the Department of Justice." And a doubt was expressed of the power of Congress to compel compliance with the provision. This was the position of the Department in 1907. It was not new or sudden. It was the repetition of the declaration of a much earlier time.

In an early day of the grant—1872—a communication was addressed by the then Attorney General to the Commissioner of the Land Office, accompanied by a letter from the president of the European & Oregon Land Company (this company was made a trustee of the lands granted under the acts of 1866 and 1869 to secure a bond issue of the company), in which it was stated that the board of trustees of the company, in accordance with a legal opinion given to it, had ordered that persons who had become *actual settlers* between July 25, 1866, and April 10, 1869, should have the privilege of purchasing according to the proviso, "but as to *all others* the company was not legally restricted from selling on liberal terms, for cash or credit, at reasonable rates." A request was made for an approval of the construction, and that the company be authorized "to sell on such terms as may be reasonable and just to all parties without any restrictions." This let-

ter was submitted to the then Secretary of the Interior, Mr. Delano, who replied "that the proviso *means just what it says*," "'that the lands be sold to actual settlers only'" in the designated quantities and for the designated prices; that the legislative intention was plainly to prevent the lands being held for speculative prices or disposed of to others than actual settlers, and that to construe the proviso as requested would in his "judgment entirely defeat such intention."

It being objected that the case was not submitted for decision or opinion, the Secretary replied that it was so [427] regarded, and that the opinon could not be formally withdrawn. He, however, expressed his willingness at any time, on application, to reopen the case and to hear all arguments which the company might desire to present. The opportunity was never taken advantage of, but the company proceeded upon its own construction of the proviso.

These views explain the attitude of the Department and give different color and meaning to its action than those assigned to it by the railroad company, and if the company disagreed with or defied the Department it cannot claim to have been deceived. The views of the department were no doubt the views of Congress, and its action and reluctance to prejudge are exhibited in the resolution of April 30, 1908 [35 Stat. at L. 571], under which this suit was brought. It refused, as we have seen, to determine peremptorily the rights of the United States or to anticipate judicial action.

We may observe again that the acts of Congress are laws as well as grants, and have the constancy of laws as well as their command, and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel, and even to the defenses of laches and the statute of limitations. The laws which are urged as giving such defenses and as taking away or modifying the remedies under review have no application. It would extend this opinion too much to enter upon their discussion.

A word of comment may be made upon one of the acts adduced as constituting a waiver of the breaches of the covenants, that is, upon the act passed August 20, 1912 (37 Stat. at L. 320, chap. 311), it being supplemental to the joint resolution of April 30, 1908, supra. It was passed after this suit was commenced, and brought forward with the other acts by an amendment to the answer. Counsel assert [428] of it substantially as alleged in the answer that it "is a recognition of the nonsettlement character of the lands involved, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants in this court, are unfit for settlement and were so unfit for settlement, and could not be sold to actual settlers at the time they were sold by the company to such purchasers."

We have answered the contention so far as it depends upon the character of the lands. The character of the lands furnished no excuse. It might have justified nonaction, but it did not justify antagonistic action. Moreover, the act, while it authorized compromises with purchasers from the company, explicitly excluded the application of the provision to lands in the present suit, and declared that it should create no "rights or privileges whatever in favor of any of the defendants therein," and that nothing in the act should condone any of the breaches of the conditions or provisions of the granting acts, nor be a waiver of any cause of action or remedy of the United States on account of any such breach or breaches or of any right or remedy existing in favor of the United States.[1]

With the provisos as conditions subsequent out of the way, the suit remains one to enforce a continuing covenant. It is not a suit to vacate and annul patents.

[429 (3) There is a special contention, given the pretension of a separate brief, that the "sinking fund act of Congress of May 7, 1878 [20 Stat. at L. 56, chap. 96], ratified the transfer of the California & Oregon Railroad and its land in California to the Central Pacific Company, and operated to abrogate the 'settlers' clause' contained in the acts of April 10, 1869, and May 4, 1870." The argument to support the contention is that the Central Pacific Railroad Company became, with the consent of Congress, the owner of the California & Oregon Railroad (to avoid confusion this company

[1] "Sec. 6. That nothing in this act contained, nor action taken pursuant to the provisions of this act, shall be construed as a condonation of any of the breaches of any of the conditions or provisions annexed to any of the grants designated in said joint resolution approved April thirtieth, nineteen hundred and eight, nor as a waiver of any of said conditions or provisions, nor as a waiver of any right of forfeiture in favor of the United States on account of any breach or breaches of any of said conditions, nor as a waiver of any cause of action or remedy of the United States on account of any breach or breaches of any of said conditions or provisions, nor as a waiver of any other rights or remedies existing in favor of the United States."

must be kept distinct from the defendant Oregon & California Railroad) in 1870, and that after such transfer and date it became impossible for the latter company to sell the lands for the prescribed price, or for any other price, or to settlers in any quantities, "for the reason that the company had parted with its title to the entire grant, and this was recognized, approved, and validated by the United States." The contention seems to be directed more to the settlers' clause viewed as a condition subsequent than to it considered as a covenant. It is, however, said that the clause "has been entirely abrogated by said legislation and the acts of the government." We are not impressed by the contention. It seems to be a tardy claim in the case and is the dare of an extreme ingenuity against the admissions and averments of the answers and many assertions which the record contains of ownership of and dominion over the lands by the Oregon & California Company and of their disposition by it. Indeed, it is opposed to the whole scheme of the suit and the defenses to it and to the stipulation of the parties. It there appears that after the designated date patents were applied for and issued to the Oregon & California Railroad Company, defendant herein, for 323,078.68 acres of land, over 163,000 acres of which were sold by that company to actual settlers. Indeed, all of the activities in the administration of the grants were those of the Oregon & California [430] Railroad. It made contracts and executed deeds for particular parcels; it made trust deeds for the whole of them; it went into receivership and emerged from it to resume its activities, and made the reports to Congress upon which it bases the acquiescence of the government in the breaches of the provisos.

It is true that there appears in the stipulation the confusion of a statement that there was an amalgamation and consolidation of the Central Pacific, Western Pacific, and Oregon Central Railroad Companies into the Central Pacific Company, and that at the time the articles of amalgamation and consolidation were filed (June 23, 1870) the California & Oregon Railroad Company "was the owner of all unsold lands in California" granted by the act of July 25, 1866; that from the date of filing such articles of amalgamation and consolidation the Central Pacific Railroad Company remained owner of all of the lands granted by the act of 1866 and two other acts which made grants to the latter company until 1899, when what remained unsold of the lands were granted to the Central Pacific Railway. But it is stipulated that the statements "concerning the ownership and conveyance of the lands granted by said acts of Congress are made subject to the terms and provisions of said acts of Congress respectively, and all rights of the United States thereunder—the title to said lands not being an issue in the suit at bar." Why these facts were stipulated it is hard to guess, but it is certain they cannot be given effect against all other facts stipulated. It will be observed the stipulation is concerned only with the California & Oregon Railroad, not with the defendant Oregon & California Railroad. The explanation of the government is, therefore, correct that the Oregon part of the grant was by the grant itself treated as substantially distinct from the California part, and that the Oregon part has always been claimed, used, and enjoyed by defendant, the Oregon & [431] California Railroad Company or its predecessors in title, and never by the Central Pacific.

The provisos of the act having been thus established as covenants, not conditions subsequent, between the government and the defendants, and their continuing obligation determined, we are brought to the consideration of the rights of the cross complainants and interveners thereunder.

It may be said that in some of the aspects of our discussion there was implication against their contentions, but it also may be said there is implication for them. Undoubtedly the provisos expressed the policy of the settlement of the lands and a sale to settlers, but the cross complainants and interveners assert a right more definite —a trust, indeed, and personal—of compulsory obligation upon the railroad company, to be enforced in individual suits.

Snyder and 63 others, alleging themselves to be *actual* settlers upon specified lands, brought suits nearly a year before the present suit was commenced. They were brought into this suit and are now here as cross complainants. They pray that the grants be declared to be grants in trust, and ask for protection, "whatever form of decree may be entered." They further ask "that receivers or trustees be appointed, whose duty it shall be to formulate, with the approval of the district court, suitable rules and regulations for the sale of all the lands here involved, in accordance with the acts of Congress making the grants." They deny having anything in common with the interveners, and, as we have seen, vigorously attack the claim of the government for a forfeiture of the grants.

The interveners concur with the cross complainants that the acts created a trust, but assert that they have a broader extent. In other words, and as their counsel ex-

press it, the intention of Congress was to create a trust [432] in the granted lands for the benefit of those who might desire to acquire title thereto; that is, not actual settlement was the condition of purchase, but an intention to settle, with the qualification to do so.

Here, then, is a conflict between the asserted beneficiaries of the asserted trust—whether *actual* settlers, as cross complainants contend, or *applicants* for settlement, as the interveners insist. The distinction would seem to be real and cannot be confounded. The word "actual" expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos it would seem that interveners' claims to be beneficiaries of the trust, if there is a trust, must be refuted.

The cross complainants present arguments of more difficulty, supported by appealing considerations. "Actual settlers" are the words of the provisos, and we may assume actual settlers were contemplated and sales of the lands were restricted to them; but how were actual settlers to be ascertained, and by whom? And was there compulsion or option as to sales? There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell. The acts of Congress omit regulation. Their language is not directive; it is restrictive only. With this exception the grant is unqualified. The lands were granted to aid in the construction of the road; and while it is a certain inference that disposition of them was contemplated, necessarily there was conferred a discretion as to time. There was certainly no limitation of it expressed.

The contending considerations we have already stated and their respective weights, and decision must necessarily turn upon a judgment of the purposes of the granting acts, and in what manner they were intended to be accomplished, not of the provisos alone. There is plausibility in the argument which represents that if the provisos [433] be held to give to the railroad a discretion of sale, the choice of time and settlers, their requirement is impotent, and instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain.

We feel the strength of the argument, but cannot yield to it. There are countervailing ones. We have already indicated that nothing can be deduced from the imperfections of the granting acts. Indeed, the argument of cross complainants, like a great many other contentions in the case, get their plausibility from the abuses of the granting acts, not their uses. We have seen that in the early days of the grants settlements were normally made and the railroad, in the exercise of its discretion, responded to such settlement by sales to settlers.

There was no embarrassment then in the selection of settlers and no question by anybody that there was a discretion of sale on the part of the railroad company. A denial came later and the assertion of a peremptory right against the company of settlement and purchase, both to be acquired by an intrusion upon the company's possession, if it can be said to have had possession. Of course, the delay in the assertion of a right is not conclusive against its existence. There is, however, argument in it, and if it may be said that settlers were not in such numbers and urgency as to bring their rights to attention and assertion, a conjecture may be engendered that some other purpose than the acquisition of homes had led to a denial of rights which no one theretofore had questioned. It is asserted that not a desire of settlement, but the rise in the price of lumber, has created an eager demand for the lands.

There are, however, further considerations. By the acts of 1866 and 1870 it is provided that upon the survey and location of the roads the government shall withdraw from sale the granted lands, and the provision would [434] seem to withdraw the lands from the specific operation of the land laws, and certainly from a complete analogy to them. The public land laws had test of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred. This purpose we have sufficiently estimated. Nor need we pause to consider the differences between charitable trusts and other trusts, the class, not individual interest, which the former must have, as it is contended, and the certainty in the beneficiaries which the cases have assigned to the latter. And certainly the words "actual settlers" indicate no particular individuals. They describe a class or body of individuals without habitation or name. As Judge Wolverton, in his opinion in the district court (186 Fed. 861, 910), said: "There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a *cestui que trust* under the theory until and unless he becomes such a settler. This is a palpable demonstration of the un-

certainty as to the beneficiary, for who, of the vast concourse of humanity, is going to come and claim the right and privilege of settling upon the land?" We cannot construe the grants as confined or encumbered by rights so indefinite.

There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the government that the company "might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres." And we add, it might choose [435] the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say "restrictions imposed" to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure, divested of the obligations of the provisos.

To use the grant for credit might become, indeed, did become, a necessity. The construction of the road halted for funds. They were raised by trust deeds, as we have seen. The accomplishment of the purpose of the grants determines, we repeat, against the creation of a trust.

In conclusion we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions, and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants, but as laws, and accepted as both; granting rights, but imposing obligations,—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, whatever the difficulties of performance, relief could have been applied for, and, it might be, have been secured, through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to.

Nor can their obligation be magnified by looking backwards, by the results achieved rather than when they were only hoped for, by conditions of which there was not even prophecy.

We have seen that one company failed under the burdens which it assumed. The other company took it up and struggled for years under it and its own burden. It may, indeed, have finally succeeded by a *disregard* of [436] the provisos. It might, however, have succeeded by a strict observance of them. We are not required to decide between the suppositions. We can only enforce the provisos as written, not relieve from them.

For the same reason we cannot, at the instance of the government, give a greater sanction to them than Congress intended, nor give to cross complainants and interveners a right which the granting acts did not confer upon them.

Rejecting, then, the contention of the government and the contentions of the cross complainants and interveners, and regarding the settlers' clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the district court, of course, and clearly an injunction against further violations of the covenants. There certainly should be no repetition of them. What they were the record exhibits.

We need not comment on them or point out how opposed they were to the covenants, how antagonistic to the policy and purpose of the government expressed in the covenants. The contrast of a sale to a single purchaser of 160 acres (the maximum amount) with a sale of 1,000, 2,000, 20,000, and 45,000 acres to a single purchaser needs no emphasis; nor the contrast of a use of the lands to establish homes with their use for immediate or speculative enterprises.

In view of such disregard of the covenants, and gain of illegal emolument, and in view of the government's interest in the exact observance of them, it might seem that restriction upon the future conduct of the railroad company and its various agencies is imperfect relief; but the government has not asked for more.

In its bill it has distinguished between the sold and unsold lands and between the respective rights and interest, vested, contingent, or expectant, in them; and while it is asserted that all have become forfeited, only the unsold [437] lands and the rights and interest in them are included in this suit. And the reason is given that the purchasers were many, the names and places of residence of only a few of them were known, and the names of the others could not have been ascertained in time to make them parties to the suit. Besides, that such purchases and interests were made and acquired under greatly varying circumstances and that it would be inequitable to make a few purchasers representatives of all, and to make all parties would postpone and might ultimately defeat the public interests. That, therefore, this suit was brought, it is alleged, to determine the rights and remedies as to the unsold lands, and that subsequently other suits will be instituted as

to the sold lands, rights and remedies as to them being in effect reserved.

Therefore, the decree in this suit shall be without prejudice to any other suits, rights, or remedies which the government may have by law or under the joint resolution of April 30, 1908, supra, or under the act of Congress passed August 20, 1912, supra.

However, an injunction simply against future violations of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the government.

The government alleged in its bill that more than 1,000 persons had made application to purchase from the railroad company in conformity to the covenants. In answering the defendants averred that such applications were made by persons who desired to obtain title on account of the timber, and not otherwise, and for the purpose of speculation only, and not in good faith as actual settlers. And it was averred that the lands were chiefly and in most instances solely of value because of the timber thereon, and were not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of [438] homes thereon at no time "exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser, at prices not exceeding $2.50 per acre."

A great deal of testimony was introduced, consisting not only of that of witnesses, but of maps, photographs, reports, and publications, which tended to establish the asserted character of the lands. And there was evidence in rebuttal. We cannot pause to determine the relative probative force of the opposing testimonies. It is, however, clear, even from the government's summary of the evidence, that lands which may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, for our present purpose we may accept the assertion of defendants; and we have seen that Congress extended the timber and stone act to the reserved lands, and, by the act of August 20, 1912, supra, it has withdrawn from entry or the initiation of any right whatever under any of the public land laws of the United States the lands which might revert to the United States by reason of this suit.

This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, [439] and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the district court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the consideration and decision of the case.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Plff. in Err.,

v.

MATT YURKONIS.

(See S. C. Reporter's ed. 439-445.)

Error to circuit court of appeals — jurisdiction below.

Allegations in the complaint in an action by an employee of a railway company to recover damages for the injuries received by him while mining coal in a colliery owned and operated by the railway company, that such coal was intended for use by the railway company in its conduct of interstate commerce, do not bring the case within the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and therefore do not deprive the judgment of the Federal circuit court of appeals in such case of the finality which attends the judgments of that court when the jurisdiction

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

below is dependent entirely upon diverse citizenship.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

[No. 852.]

Submitted May 3, 1915. Decided June 21, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of the District Court for the Eastern District of New York in favor of plaintiff in a personal-injury action. Dismissed for want of jurisdiction.

See same case below, — C. C. A. —, 220 Fed. 429.

The facts are stated in the opinion.

Messrs. William S. Jenney and Everett Warren submitted the cause for plaintiff in error. Mr. F. W. Thompson was on the brief:

When a judgment of the United States circuit court of appeals denies to a party to an action at law a right conferred by a Federal statute, the party aggrieved may have such judgment reviewed by the United States Supreme Court upon a writ of error.

Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389.

As the judgment below may perhaps stand if the Federal act is not applicable, but falls certainly if the act is applicable, the judgment in respect to the application of the Federal act is not a final judgment, or, in other words, is not a judgment which can be reviewed only by certiorari.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134.

The right of appeal exists in the case at bar because the plaintiff's bill of complaint, as amended, constituting his pleading, sets up a ground of Federal jurisdiction other than diversity of citizenship.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 528, 47 L. ed. 575, 580, 23 Sup. Ct. Rep. 365; Montana Min. Co. v. St. Louis Min. & Mill Co. 204 U. S. 204, 212, 51 L.ed. 444, 447, 27 Sup. Ct. Rep. 254; Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 409, 52 L. ed. 547, 550, 28 Sup. Ct. Rep. 389; Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. ed. 546, 548, 22 Sup. Ct. Rep. 452; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Railroad Commission v. Worthington, 225 U. S. 101, 104, 56 L. ed. 1004, 1006, 32 Sup. Ct. Rep. 653; Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Loveland, App. Jur. § 165.

The test to determine whether the jurisdiction of the Federal court is dependent solely upon diversity of citizenship is to strike from the pleadings allegations as to diversity of citizenship, and then, if no other ground of Federal jurisdiction appears, the case must be dismissed.

Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; Warner v. Searle & H. Co. 191 U. S. 195, 205, 48 L. ed. 145, 147, 24 Sup. Ct. Rep. 79.

Mr. George C. Holt submitted the cause for defendant in error. Messrs. John Vernon Bouvier, Jr., and William Montague Geer, Jr., were on the brief:

No merchandise is a subject of interstate commerce until its transportation between the states has commenced.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; The Daniel Ball, 10 Wall. 565, 19 L. ed. 1002; Illinois C. R. Co. v. Behrens, 233 U. S. 478, 58 L. ed. 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Bay v. Merrill & R. Lumber Co. 211 Fed. 717; Nordgard v. Marysville & N. R. Co. 211 Fed. 721; Shanks v. Delaware, L. & W. R. Co. 214 N. Y. 413, 108 N. E. 644.

If the plaintiff asserts jurisdiction on the ground that the case is one arising under the laws of the United States and also upon the ground of diversity of citizenship, and he fails to state or prove a case involving a Federal question, the decision of the circuit court of appeals is final, and can only be reviewed on certiorari.

Banker's Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 374, 48 L. ed. 484, 24 Sup. Ct. Rep. 325; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; Loveland, App. Jur. 275.

Where the jurisdiction of the United States court is originally invoked, as here, upon the ground of diversity of citizenship, it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is required in good pleading.

Empire State-Idaho Min. & Developing Co. v. Hanley, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

The parties were not engaged in interstate commerce, and the alleged stipulation did not make them so. It is a case where the Federal act did not apply; and unless the parties had been of diverse citizenship, the Federal court would have been under an obligation to remand the case to the state court.

Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598.

If the ground of jurisdiction in the suit as originally begun is one in respect to which the decision of the circuit court of appeals is final, even the fact that some Federal question is subsequently brought into the case does not make it reviewable here by a writ of error. It can only be reviewed by certiorari.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Ex parte Jones, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Spencer v. Duplan Silk Co. 191 U. S. 526, 530, 48 L. ed. 287, 290, 24 Sup. Ct. Rep. 174.

Waiving, however, the objection as to the time of the introduction of the alleged Federal issue, and assuming that it was originally in the case, we still submit that the writ should be dismissed. The parties were not engaged in interstate commerce; the Federal employers' liability act did not apply, and its construction or application is in no way involved. As the Federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed.

Wabash R. Co. v. Flannigan, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224; East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; Hull v. Burr, 234 U. S. 720, 58 L. ed. 1561, 34 Sup. Ct. Rep. 892.

[442] Mr. Justice Day delivered the opinion of the court:

This case was brought in the supreme court of New York to recover damages for injuries sustained by the plaintiff while in the employ of the defendant railroad company. The complaint charged that the injuries were received while the plaintiff was employed in the defendant's colliery in Luzerne county, Pennsylvania. As to the manner of injury, the complaint averred that while the plaintiff was in the employ of the defendant in its colliery, and was engaged in and about the performance of his duties, preparing and setting off a charge of dynamite for the purpose of blasting coal, the explosive gases which accumulated at the place where plaintiff was working suddenly ignited and exploded, causing a squib attached to the charge of dynamite to catch fire and to be immediately consumed, so that the charge of dynamite was exploded and discharged, and as a result thereof the plaintiff received great, severe, and permanent injuries.

The complaint also charged the carelessness and negligence of the defendant in failing to provide and keep a safe place for the plaintiff to work, and certain other acts unnecessary to be repeated, but alleged to be of a negligent character. The complaint also charged a violation of the law of the state of Pennsylvania, providing for the health and safety of persons employed in or about the coal mines of that state. Upon the petition of the railroad company the case was removed to the district court of the United States for the eastern district of New York, where trial was had and judgment rendered in favor of the plaintiff.

The petition for removal alleged that the plaintiff, at the beginning of the suit and since, resided in Richmond county, New York, and was, at the time of the beginning of the action, and still was, an alien and citizen of a foreign country, and that the defendant railroad company was a corporation organized and existing under the laws of the [443] state of Pennsylvania. After the removal of the case to the United States district court, the defendant filed an answer, taking issue upon the allegations of the complaint. Five months after the removal, the plaintiff filed an amended complaint, which contained the same allegations as to the manner of the injury, and allegations as to the common law and statutory liability of the defendant. The amended complaint added certain allegations wherein it was alleged that the defendant, for the purpose of its railroad, owned, managed, and operated a certain mine or colliery known as the "Pettibone" colliery in the state of Pennsylvania, in which plaintiff was employed at the time of the injury, and where, at all of the times covered by the complaint, the defendant did and still does mine and prepare anthracite coal for use in its locomotives and engines and other equipment used in its business as a common carrier in interstate commerce. That at the time of receiving the injury plaintiff was employed by the defendant at said mine or colliery in such interstate commerce. The amended complaint did not change the allegations as to the manner in which plaintiff received his injuries. The defendant took issue upon the

amended complaint and the case came on for trial. In the course of the trial, during examination of a witness, while evidence was being offered to show the disposition of the coal mined, counsel for defendant stated that it used the coal mined in its locomotives in interstate commerce. He said that as a matter of fact and as a matter of law coal which plaintiff mined was used in that way, and that "we are engaged in interstate commerce." At the close of the evidence the defendant moved for the direction of a verdict upon the ground that the evidence had established liability under the Federal employers' liability act, and that as the amended complaint had been served more than two years after the injuries occurred, the action was barred by the statute of limitations. Thereupon plaintiff's counsel moved to [444] amend the amended complaint by striking out the allegations relating to interstate commerce. The court denied this motion and submitted the case to the jury, upon the issues joined under the common law and Pennsylvania statute. The circuit court of appeals held that the trial court should have granted this motion, but that the case was devoid of any showing that the Federal employers' act applied under the circumstances, and that, had it applied, it would have been the controlling law of the case, and the court affirmed the judgment of the district court.

There is a motion to dismiss for want of jurisdiction of this court to review the judgment of the circuit court of appeals. It is well settled that, in order to review the judgment of the circuit court of appeals, jurisdiction in the district court must not have rested upon diverse citizenship alone, but that jurisdiction must in part, at least, have arisen because of averments showing a cause of action under the Constitution or laws of the United States; and in order to come to this court by writ of error to the circuit court of appeals such allegations of Federal right must be found in the complaint. MacFadden v. United States, 210 U. S. 436, 52 L. ed. 1137, 28 Sup. Ct. Rep. 762. The allegations in that respect must show as a basis of action a substantial controversy respecting the Constitution or laws of the United States. Hull v. Burr, 234 U. S. 713, 58 L. ed. 1559, 34 Sup. Ct. Rep. 892. In the absence of such allegations in the complaint the jurisdiction of the circuit court of appeals is final. St. Anthony's Church v. Pennsylvania R. Co. [237 U. S. 575, ante, 1119, 35 Sup. Ct. Rep. 729] decided June 1, 1915, and G. & C. Merriam Co. v. Syndicate Pub. Co. [237 U. S. 618, ante, 1148, 35 Sup. Ct. Rep. 708], decided on the same day.

The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was [445] mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce,—facts essential to recovery under the employers' liability act.

It therefore follows that the jurisdiction of the court of appeals in this case was final. The plaintiff in error insists that the court of appeals should have reversed the case and remanded it to the district court with instructions to remand the case to the state court for want of jurisdiction in the Federal court, and this because, in the course of the testimony, the plaintiff said that he had been a citizen of the United States some years before the action was begun, and the defendant alleges that the record shows, notwithstanding the allegations in its petition for removal, that plaintiff did not remove to New York from Pennsylvania until after the suit was brought, the result being that, if there was no foundation for the suit under a Federal statute, the want of diverse citizenship ousted the jurisdiction of the district court. Without expressing any opinion as to what the circuit court of appeals should have done, we are not concerned with its action unless we have jurisdiction to review the judgment of that court, which we do not have, for the reasons already stated.

Dismissed for want of jurisdiction.

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[446] W. T. PRICE, Plff. in Err.,
v.
PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 446-455.)

Error to state court — scope of review — statutory construction.

1. The correctness of a state court's construction of a state statute is simply a question of local law which the Federal Supreme Court cannot review when determin-

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan,

ing on writ of error to the state court the validity of such statute under the Federal Constitution.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — police power — forbidding sale of food preservatives containing boric acid.

2. The prohibition against the sale of food preservatives containing boric acid which is made in the avowed exercise of the police power to protect the public health by Hurd's (Ill.) Rev. Stat. chap. 127b, §§ 8, 22, as construed by the state courts, is not so arbitrary or unreasonable as to amount to a deprivation of property without due process of law.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 3, d, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — sale of food preservatives containing boric acid.

3. The sale of food preservatives containing boric acid may be forbidden, as is done by Hurd's (Ill.) Rev. Stat. chap. 127b, §§ 8, 22, as construed by the state courts, without denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, d, in Digest Sup. Ct. 1908.]

Commerce — original packages — envelops suitable for retail trade.

4. Small packages (envelops) of a food preservative suitable for the consumer, which are associated in their interstate shipment, and are subsequently sold separately in various lots, cannot be classed as original packages, although respectively in the original envelops, so as to escape the prohibition of Hurd's (Ill.) Rev. Stat. chap. 127b, §§ 8, 22, against the sale of food preservatives containing boric acid.

[For other cases, see Commerce, IV. b, 3, in Digest Sup. Ct. 1908.]

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39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what constitutes an original or unbroken package—see note to State v. Maire, 39 L.R.A. (N.S.) 1051.

[No. 274.]

Argued May 12, 1915. Decided June 21, 1915.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a conviction in the Municipal Court of Chicago, in that state, of a violation of the state pure food law. Affirmed.

See same case below, 257 Ill. 587, 101 N. E. 196, Ann. Cas. 1914A, 1154.

The facts are stated in the opinion.

Mr. **Trafford N. Jayne** argued the cause and filed a brief for plaintiff in error:

The legislature cannot destroy rights of liberty or property by a legislative declaration which is contrary to fact.

People ex rel. Deneen v. Economy Light & P. Co. 241 Ill. 290, 89 N. E. 760; Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938.

The sale of a pure article of food or preservative is as much within the constitutional protection of liberty and property as the sale of any other proper article of commerce.

Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Helena v. Dwyer, 64 Ark. 424, 39 L.R.A. 266, 62 Am. St. Rep. 206, 42 S. W. 1071; Re Jacobs, 98 N. Y. 110, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; People v. Biesecker, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534, 61 N. E. 990.

The prohibition of the sale of the defendant's preservative merely because it contains boric acid would be invalid for the further reason that thereby he would be denied the equal protection of the laws.

Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A. (N.S.) 1074, 94 N. E. 141.

A state is without power to prohibit the introduction of articles of commerce from another state and their sale in the original package. Whether a particular article is detrimental is for the United States, and not the state, to determine, and what the United States permits a state cannot forbid.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Salzenstein v. Mavis, 91 Ill. 391; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223,

5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Worthen, 4 Inters. Com. Rep. 484, 58 Fed. 467; Re Sanders, 18 L.R.A. 549, 4 Inters. Com. Rep. 305, 52 Fed. 802; Re Gooch, 10 L.R.A. 830, 3 Inters. Com. Rep. 530, 44 Fed. 276.

The determination by a state of the tests of adulteration of articles which are the subjects of interstate commerce, and the prohibition of the importation of such articles when adulterated according to state standards, are directly in conflict with the power of Congress which has been exercised by legislation upon this subject-matter. In such a case the state enactment fails.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686.

Even, however, if Congress had not legislated in regard to interstate commerce in food and drugs, the Illinois dairy and food law, so far as it might be construed to affect such commerce, would still be invalid under the principle laid down in Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, that the absence of affirmative enactments by Congress concerning commerce between the states amounts to a determination that such commerce shall be unrestricted.

State legislatures may not either amplify or limit the operation of a national law.

McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39.

Mr. Lester H. Strawn argued the cause, and, with Mr. Patrick J. Lucey, Attorney General of Illinois, filed a brief for defendant in error:

The supreme court of the state of Illinois has construed this act to mean that the sale of a compound containing boric acid is prohibited when the compound is to be used to preserve fruits and vegetables, and that a compound cannot be sold in Illinois for use in food as a preservative which contains boric acid.

People v. Price, 257 Ill. 593, 101 N. E. 196, Ann. Cas. 1914A, 1154.

The construction put upon a statute by the highest court of the state must be accepted by the courts of the United States and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 73, 5 L. ed. 369, 375, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 466, 45 L. ed. 619, 625, 21 Sup. Ct. Rep. 423; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 166, 36 L. ed. 925, 928, 13 Sup Ct. Rep. 54; Olsen v. Smith, 195 U. S. 332, 342, 49 L. ed. 224, 229, 25 Sup. Ct. Rep. 52; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 198, 57 L. ed. 184, 186, 33 Sup. Ct. Rep 44.

The 14th Amendment to the Federal Constitution was not designed to interfere with the exercise of the police power by the state for the protection of health, the prevention of fraud, and the preservation of public morals.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 Sup. Ct. Rep. 596; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Schmidinger v. Chicago, 226 U. S. 578, 588, 57 L. ed. 364, 368, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Adams v. Milwaukee, 228 U. S. 572, 582, 57 L. ed. 971, 976, 33 Sup. Ct. Rep. 610; Barrett v. Indiana, 229 U. S. 26, 29, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 325, 58 L. ed. 245, 249, L.R.A. 1915A, 1196, 34 Sup. Ct. Rep. 60; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

In the exercise of the police powers of the state the legislature may forbid the sale of a compound which contains boric acid to be used in food, unless the court can say, from facts of which the court must take judicial cognizance, that boric acid has, in fact, no real or substantial relation to the subject of health. That is to say, unless the court can say that boric acid is so universally conceded to be wholesome that it will take judicial notice of that fact.

Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992; Hammond Packing Co. v. Montana, 233 U. S. 331, 333, 58 L. ed. 985, 987, 34 Sup. Ct. Rep. 596; State v. Layton, 160 Mo. 481, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; Adams v. Milwaukee, 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518; Sanders v. Com. 117 Ky. 1, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219, 77 S. W. 358; People v. Cipperly, 101 N. Y. 634, 4 N. E. 107; State v. Schlenker, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; St. Louis v. Schuler, 190 Mo. 524, 1 L.R.A.(N.S.) 928,

89 S. W. 621; St. Louis v. Grafeman Dairy Co. 190 Mo. 492, 1 L.R.A.(N.S.) 936, 89 S. W. 617; State v. Earl, 152 Mo. App. 235, 133 S. W. 402; Curtice Bros. Co. v. Barnard, 126 C. C. A. 411, 209 Fed. 589; Smith v. Alphin, 150 N. C. 425, 64 S. E. 210; Com. v. Pilaum, 236 Pa. 294, 84 Atl. 842, Ann. Cas. 1913E, 1287; State v. Armour Packing Co. 124 Iowa, 323, 100 N. W. 59, 2 Ann. Cas. 448; People v. Rotter, 131 Mich. 250, 91 N. W. 167; Wright v. State, 88 Md. 436, 41 Atl. 795.

The courts cannot take judicial notice that boric acid is wholesome. On the contrary, there are many authorities to the effect that it is a deleterious ingredient and unwholesome and injurious.

Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364.

The power of the state to prohibit the sale of adulterated foods within its borders is not repugnant to the commerce clause of the Federal Constitution, but is a valid exercise of its police powers.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234.

A police measure, otherwise within the constitutional powers of the state, will not be held unconstitutional under the commerce clause of the Federal Constitution because it incidentally and remotely affects interstate commerce.

New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 42, 53 L. ed. 75, 80, 29 Sup. Ct. Rep. 10; Savage v. Jones, 225 U. S. 501, 525, 56 L. ed. 1182, 1191, 32 Sup. Ct. Rep. 715; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 361, 43 L. ed. 191, 197, 18 Sup. Ct. Rep. 862; Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 408, 57 L. ed. 1511, 1545, 33 Sup. Ct. Rep. 729.

Plaintiff is not protected in the sale of preservatives under the doctrine of the original-package decisions of the Supreme Court of the United States. That doctrine does not apply to sales in packages of a size to suit the convenience of local consumers.

Austin v. Tennessee, 179 U. S. 343, 356, 45 L. ed. 224, 231, 21 Sup. Ct. Rep. 132; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44.

A state is authorized under its police power to enact health laws, notwithstanding there is a Federal act or regulation upon the same subject.

Hemenway, Public Health, § 249; Jacobson v. Massachusetts, 197 U. S. 11, 25, 49 L. ed. 643, 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

Mr. Justice **Hughes** delivered the opinion of the court:

This is a writ of error to review a judgment of the supreme court of Illinois, which affirmed a judgment of the municipal court of Chicago, finding the plaintiff in error guilty of a violation of the "pure food" statute of that state, and imposing a fine. 257 Ill. 587, 101 N. E. 196, Ann. Cas. 1914A, 1154.

The violation consisted of a sale in Chicago of a preservative compound known as "Mrs. Price's Canning Compound," alleged to be intended as a "preservative of food," and to be "unwholesome and injurious in that it contained boric acid."

The statute (Laws of Illinois 1907, p. 543; Hurd's Rev. Stat. chap. 127b, §§ 8 and 22) provides:

"§ 8. Defines Adulteration. That for the purpose of this act an article shall be deemed to be adulterated: . . .

"In case of food: . . .

[448] "Fifth—If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, that where in the preparation of food products for shipment they are preserved by an external application, applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservatives shall be printed on the covering of the package, the provisions of this act shall be construed as applying only when such products are ready for consumption; and formaldehyde, hydrofluoric acid, boric acid, salicylic acid and all compounds and derivatives thereof are hereby declared unwholesome and injurious. . . .

"§ 22. Sale of Preservatives Prohibited. No person, firm or corporation shall manufacture for sale, advertise, offer or expose for sale, or sell, any mixture or compound intended for use as a preservative or other adulterant of milk, cream, butter or cheese, nor shall he manufacture for sale, advertise, offer or expose for sale, or sell any unwholesome or injurious preservative or any mixture or compound thereof intended as a preservative of any food: *Provided, however*, that this section shall not apply to pure salt added to butter and cheese."

A trial by jury was waived. There was a stipulation of facts setting forth, in substance, that the defendant had sold in Chi-

cago two packages of the preservative in question; that the compound contained "boric acid;" that the label on the packages bore the following statement: "It is not claimed for this compound that it contains anything of food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling;" that the preservative was not offered for sale or sold in any food product, but only separately as a preservative; and that the defendant was accorded a hearing before [449] the State Food Commission pursuant to the provisions of the food law.

There was also introduced in evidence on behalf of the state an envelop, used for inclosing the compound, upon which were statements as to its uses, prices, etc. It was thus stated that the preservative could be used "in canning all kinds of fruit," and was "especially valuable for corn, beans, peas," etc. There was also the statement on the envelop that the contents "of this package" were sufficient for "four quarts," and that the retail prices were from 10 cents for one "package" to $1 for fifteen "packages." That was the case for the state.

A motion to dismiss was denied. The plaintiff then made an offer of proof, and thereupon it was stipulated that a witness in court, if sworn, would testify that the "Price Canning Compound is an article of commerce, which has been sold under that distinct name for a period of years, with the ingredients and in the proportions contained in the sample taken by the Food Department, which is the subject of this suit; that it has acquired a wide reputation over a large number of states in the Union as a distinctive article, used for canning by the housewife;" that "it is not sold to manufacturers of food or canners of food for sale;" and that "boric acid is a constituent part of the compound and has been such during all the time that the compound has been sold."

Objection to evidence offered that "there is no added ingredient of any kind whatever, whether it be injurious, deleterious, or otherwise," was sustained as not being addressed to the charge made. The defendant (the plaintiff in error) also offered to prove "that boric acid is not injurious to health or to the human system," and that the "Price Canning Compound is not adulterated or mislabeled in any way." The offer was rejected, and the defendant excepted. In response to a further offer, it was conceded that the witness, if placed upon the stand, would [450] testify that the *compound* "is an article of commerce, sold in Illinois in the original package manufactured in Minnesota."

Upon this state of the record, the contention of the plaintiff in error that the statute was inapplicable, or, if applicable, was repugnant to the Constitution of the state, and to the commerce clause and the 14th Amendment of the Federal Constitution, was overruled.

The supreme court of the state thus construed the statute:

"We will first notice the objection of plaintiff in error that § 8 deals only with foods; that the declaration in that section that boric acid is injurious and unwholesome is limited to foods containing that substance as an added ingredient, and has no application to a preservative which is not, and does not purport to be, a food.

"Both §§ 8 and 22 are parts of one act, and the act as a whole should be so construed as to give effect to its manifest purpose and intent. Its main purpose is to protect health by preventing adulteration of food by any unwholesome and injurious ingredient. Boric acid is declared to be unwholesome and injurious, and the sale of any food to which it is an added ingredient is prohibited. It was well known to the legislature that various compounds are manufactured and sold for preserving foods of different kinds. If such preservatives contain unwholesome and injurious ingredients, their use by the housewife, or anyone else, in preserving fruits or food, would be as injurious to the health as if they had been added by a dealer or manufacturer to fruits or other foods before placing them on the market. The object of the act is to protect the public health by preventing dealers from selling food to which had been added, for the purpose of preserving it, ingredients injurious to the health, or from selling any compound as a preservative which contained any such ingredients. The prohibition is not against the [451] sale of all preservatives, but is against only unwholesome or injurious preservatives. . . . It is just as important to prohibit the sale to the housewife of a compound containing boric acid, to be used by her to preserve fruits and vegetables put up by her for family use, as it is to prohibit the sale of fruits and vegetables after such an ingredient has been added. We think the reasonable construction of the act to be that the prohibition against boric acid is not limited to foods to which it is an added ingredient, but extends to compounds sold as a food preservative which contain boric acid. The danger to health is as great from one as the other, and the prohibition of both was necessary to effect the evident purpose of the legislature." 257 Ill. pp. 592, 593.

The plaintiff in error challenges the correctness of this construction, but this question is simply one of local law with which we are not concerned. We accept the decision of the supreme court of the state as to the meaning of the statute, and, in the light of this construction, the validity of the act under the Federal Constitution must be determined. Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 414, 41 L. ed. 489, 494, 17 Sup. Ct. Rep. 130; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 466, 45 L. ed. 619, 925, 21 Sup. Ct. Rep. 423; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 73, 55 L. ed. 369, 375, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Purity Extract Tonic Co. v. Lynch, 226 U. S. 192, 198, 57 L. ed 184, 186, 33 Sup. Ct. Rep. 44.

The first Federal question is presented by the contention that the statute, as applied, effects a deprivation of property without due process of law and a denial of the equal protection of the laws, contrary to the 14th Amendment.

The state has undoubted power to protect the health of its people and to impose restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the state and the safeguards required. In the avowed exercise of this power, the legislature of Illinois has enacted a prohibition—as the statute is [452] construed—against the sale of food preservatives containing boric acid. And unless this prohibition is palpably unreasonable and arbitrary we are not at liberty to say that it passes beyond the limits of the state's protective authority. Powell v. Pennsylvania, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; Crowley v. Christensen, 137 U. S. 86, 91, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13; Holden v. Hardy, 169 U. S. 366, 395, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 246, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; Jacobson v. Massachusetts, 197 U. S. 11, 25, 49 L. ed. 643, 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 39, 53 L. ed. 75, 79, 29 Sup. Ct. Rep. 10; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 198, 57 L. ed. 184, 186, 33 Sup. Ct. Rep. 44; Hammond Packing Co. v. Montana, 233 U. S. 331, 333, 58 L. ed. 985, 987, 34 Sup. Ct. Rep. 596. The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses; that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided. It is not a case where the legislature has confined its action to the prohibition of that which is described in general terms as unwholesome or injurious, leaving the issue to be determined in each case as it arises. The legislature is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 288, 58 L. ed. 1312, 1316, 34 Sup. Ct. Rep. 829. Legislative particularization in the exercise of protective power has many familiar illustrations. The present case is one of such particularization, where the statute—read as the [453] state court reads it—especially prohibits preservatives containing boric acid. The legislature thus expressed its judgment, and it is sufficient to say, without passing upon the opinions of others adduced in argument, that the action of the legislature cannot be considered to be arbitrary. Its judgment appears to have sufficient support to be taken out of that category. See Hipolite Egg Co. v. United States, 220 U. S. 45, 51, 55 L. ed. 364, 365, 31 Sup. Ct. Rep. 364; Circular No. 15 (June 23, 1904), Bureau of Chemistry; Food Inspection Decision 76 (July 13, 1907); Bulletin (December 31, 1914), Bureau of Chemistry;—U. S. Department of Agriculture.

It is further urged that the enactment, as construed, contains an unconstitutional discrimination against the plaintiff in error, but in this aspect, again, the question is whether the classification made by the legislature can be said to be without any reasonable basis. The legislature is entitled to estimate degrees of evil, and to adjust its legislation according to the exigency found to exist. And, applying familiar principle, it cannot be said that the legislature exceeded the bounds of reasonable discretion in classification when it enacted the prohibition in question relating to foods and compounds sold as food preservatives. Ozan Lumber Co. v. UnionCounty Nat. Bank, 207 U. S. 251, 256, 52 L. ed. 195, 197, 28 Sup. Ct. Rep. 89; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 354, 52 L. ed. 236, 243, 28 Sup. Ct.

Rep. 114; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 56 L. ed. 175, 179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Eberle v. Michigan, 232 U. S. 700, 706, 58 L. ed. 803, 806, 34 Sup. Ct. Rep. 464; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856; Miller v. Wilson, 236 U. S. 373, 383, 384, ante, 628, 631, 632, 35 Sup. Ct. Rep. 342. We find no ground for holding the statute to be repugnant to the 14th Amendment.

The remaining contention is that the statute as applied violates the commerce clause. Treating the article as one on a footing with adulterated food, the power of the state to prohibit sales within its borders is broadly asserted on its behalf. On the other hand, the plaintiff in error insists that the compound is not an adulterated [454] food, and was not charged to be such, but was an article of commerce manufactured in another state; and that whatever may be the power of the state of Illinois over manufacture and sale apart from interstate commerce, the state could not prohibit its introduction and sale in the course of interstate commerce. It is not necessary, however, to deal with the question in the scope thus suggested. The sole ground for invoking the commerce clause in order to escape the restrictions of the state law is sought to be found in the doctrine with respect to sales in original packages. Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Schollenberger v. Pennsylvania, 171 U. S. 1, 22, 23, 43 L. ed. 49, 57, 18 Sup. Ct. Rep. 75. The record, however, is wholly insufficient to support the contention. The stipulation of facts read in evidence by the state set forth that the defendant had sold in Chicago "two packages" of the compound. The state then introduced in evidence an "envelop used for inclosing the compound." This, among other things, bore a statement that the content of "this package is sufficient for four quarts." And it set forth prices as follows: "Retail Price. 1 Package, 10c. 3 Packages, 25c. 7 Packages, 50c. 15 Packages, $1." The clear inference from this evidence was that the compound was offered for sale at retail in small packages (in envelops) suitable for the consumer. The defendant made an offer of proof, and in lieu of the offered testimony it was conceded that the witness, if sworn, would testify that the compound mentioned in the statement of claim "is an article of commerce sold in Illinois, in the original package manufactured and made in Minnesota." As to the nature of the package, nothing more was shown. All that was admitted was entirely consistent with the view that the original package referred to was simply the small package in the envelop which the state had described, and no error can be charged to the state court in so regarding it. Nothing appeared as to the character [455] of the shipment from Minnesota to Illinois, and it would be wholly unjustifiable to assume that, in commercial shipments into the state, the small package was segregated or separately introduced. If these small packages were associated in their shipment into the state, as they naturally would be, and were subsequently sold separately or in various lots, these separate packages, although respectively in the original envelops, would not be classed as "original packages" within the rule invoked, so as to escape the local law governing domestic transactions. We have repeatedly so held, in cases not materially different in this respect. Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 199-201, 57 L. ed. 184, 186-188, 33 Sup. Ct. Rep. 44. The testimony offered by the plaintiff in error, and treated as received, taken in connection with what had already been proved as to the character of the packages put up for retail sale, fell far short of the proof required to constitute a defense upon the ground that the state law, otherwise valid, was applied in contravention of the commerce clause.

It should be added that no question is presented in the present case as to the power of Congress to make provision with respect to the immediate containers (as well as the larger receptacle in which the latter are shipped) of articles prepared in one state and transported to another, so as suitably to enforce its regulations as to interstate trade. McDermott v. Wisconsin, 228 U. S. 115, 135, 57 L. ed. 754, 767, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431. It does not appear that the state law as here applied is in conflict with any Federal rule.

Judgment affirmed.

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[456] PENNSYLVANIA RAILROAD COMPANY, Plff. in Err.,

v.

CLARK BROTHERS COAL MINING COMPANY.

(See S. C. Reporter's ed. 456-473.)

Interstate Commerce Commission — powers — redressing unjust car distribution.

1. Unjust discrimination in the matter of coal-car distribution to a mine owner

may be redressed by the Interstate Commerce Commission where the coal, although sold f. o. b. cars at the mine, was to be transported to other states.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — redressing unjust car distribution.

2. The ascertainment of the damages occasioned by a carrier's rules as to car distribution, which are unduly discriminatory, is as much within the scope of the Interstate Commerce Commission's authority, under the act of February 4, 1887 (24 Stat. at L. 382, chap. 104, Comp. Stat. 1913, § 8573), §§ 8, 9, 13, 16, as though the damages were due to the exaction of unreasonable rates.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

State courts—jurisdiction—suit against interstate carrier — effect of prior action of Interstate Commerce Commission — redress for unjust car distribution.

3. A shipper who has demanded and obtained a ruling from the Interstate Commerce Commission that a carrier's practice in the matter of the distribution to mine owners of cars intended for the interstate transportation of coal was unjustly discriminatory cannot maintain an action in a state court to recover damages under a state statute with respect to the same transaction, although the Commission may not yet have made its award of damages, since the express requirement, in the act of February 4, 1887 (24 Stat. at L. 382, chap. 104, Comp. Stat. 1913, § 8573), § 9, of an election between a proceeding before the Commission and a suit in the Federal courts, leaves no room for the conclusion that there is an option to resort to a state court in the first instance, and the suit on reparation orders, authorized by § 16, as amended by the act of June 18, 1910 (36 Stat. at L. 554, chap. 309, Comp. Stat 1913, § 8584), either in the state or Federal court, may be brought only after the Commission's award has been made.

[For other cases, see Courts, VI. a, in Digest Sup. Ct. 1908.]

[No. 290.]

Argued May 14, 1915. Decided June 21, 1915.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Clearfield County, in that state, in favor of plaintiffs in an action to recover damages from a carrier for unjust discrimination in the distribution of coal cars. Reversed and remanded for further proceedings.

See same case below, 241 Pa. 515, 88 Atl. 754.

The facts are stated in the opinion.

Messrs. Francis I. Gowen and John G. Johnson argued the cause, and, with Mr. F. D. McKenney, filed a brief for plaintiff in error:

The award of the Interstate Commerce Commission is a bar to any other proceeding in respect to the cause of action which formed the basis of the award.

Black, Judgm. §§ 526, 688; 3 Cyc. 729; Western N. Y. & P. R. Co. v. Penn Ref. Co. 70 C. C. A. 23, 137 Fed. 343.

Messrs. A. M. Liveright and A. L. Cole argued the cause and filed a brief for defendant in error:

The award made by the Interstate Commerce Commission is not a bar.

Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. 229 Pa. 61, 140 Am. St. Rep. 700, 78 Atl. 28; Judson, Interstate Commerce, 2d ed. p. 489; Meeker v. Lehigh Valley R. Co. 236 U. S. 412, ante, 644, P.U.R. 1915D, 1072, 35 Sup. Ct. Rep. 328.

It will hardly be contended seriously that an order of the Commission which merely establishes a rebuttable presumption constitutes a bar.

23 Cyc. 1226; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18; New Orleans v. Citizens' Bank, 167 U. S. 371, 397, 42 L. ed. 202, 211, 17 Sup. Ct. Rep. 905; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 687, 39 L. ed. 861, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205.

The Pennsylvania statute of 1883 involved in this case was passed in aid of and in exercise of the police power of the state.

Puritan Coal Min. Co. v. Pennsylvania R. Co. 237 Pa. 453, 85 Atl. 426, Ann. Cas. 1914B, 37; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Louisville & N.

R. Co. v. Kentucky, 183 U. S. 503, 518, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A. (N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, ante, 405, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought in January, 1912, by the Clark Brothers Coal Mining Company (defendant in error) in the court of common pleas of Clearfield county, Pennsylvania, to recover damages for inadequate and unjustly discriminatory car service and supply. The complaint related to the action of the defendant company with respect to cars required for the transportation of coal from the plaintiff's mines known as Falcon, Nos. 2, 3, [459] and 4, in Clearfield county, and Falcon, Nos. 5 and 6, in Indiana county, Pennsylvania, between October, 1905, and April 30, 1907. A statute of Pennsylvania (act of June 4, 1883, P. L. 72, 4 Purdons 3906; see Const. [Pa.] 1873, art. 17) prohibits undue or unreasonable discrimination by any common carrier "in charges for or in facilities for the transportation of freight within this state or coming from or going to any other state," and provides that the carrier guilty of unjust discrimination shall be liable "for damages treble the amount of injury suffered."

On behalf of the defendant (plaintiff in error) the jurisdiction of the court to entertain the action was challenged upon the ground that, with respect to car distribution, the defendant was subject to the act to regulate commerce, and that the claim of the plaintiff was cognizable only by the Interstate Commerce Commission or by the courts of the United States. It was urged further that in a proceeding before the Interstate Commerce Commission, which had been instituted by the plaintiff against the defendant prior to the beginning of this action, the Commission had found that the method of car distribution practised by the defendant with respect to the plaintiff's mines known as Falcon, Nos. 2, 3, and 4, was unjustly discriminatory, and that the Commission had made an award of damages accordingly; and that by reason of this proceeding and the action of the Commission the plaintiff was precluded from maintaining the present action so far as it related to the alleged loss sustained with respect to the mines last described.

The trial court overruled these contentions of the defendant. The jury, finding discrimination, assessed the damage at $41,481 and trebled the amount, making $124,443. Motions in arrest of judgment and for a new trial and for judgment *non obstante veredicto*, upon the grounds above stated (and others), were denied. Judgment for the total amount of the verdict was entered and [460] was affirmed by the supreme court of the state, 241 Pa. 515, 88 Atl. 754. And this writ of error has been sued out.

It clearly appeared that the proceeding before the Interstate Commerce Commission as to the mines Falcon Nos. 2, 3, and 4, embraced substantially the same claim as that litigated in this action. As the trial judge said: "It" (the plaintiff) "did get an award of damages for what we understand to be practically the same subject-matter." That proceeding was instituted by the plaintiff in June, 1907. Its petition, among other things, alleged that it had been, and was, "engaged in mining and shipping coal to points and places of delivery and to the coal markets beyond the state of Pennsylvania," and that it had, during all the period mentioned, to wit, "from the 15th day of October, 1905, to the date of the filing of this complaint," orders for coal to be mined and shipped "beyond the lines of said state." It complained of the rating of its mines by the defendant and also of unjust and unreasonable discrimination against it in the daily distribution of cars "for the transportation of its coal into the interstate markets," that it had suffered "great loss and damage in its business as a producer, shipper, and seller of bituminous coal" in the interstate coal trade, and that such damage amounted in the aggregate to $36,401.12. It prayed for hearing, for an ascertainment of the damages which it had sustained in its interstate business by reason of unreasonable preferences given to its competitors, as alleged, and for a determination of the proper basis of car distribution to be observed. After hearing, the Commissioner made its report on March 7, 1910. 19 Inters. Com. Rep. 392. On the same day, the Commission rendered its decision in Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. (19 Inters. Com. Rep. 356), involving similar questions as to the method practised by the defendant in distributing "its available coal-car equipment." Upon this point, the Commission there said:

"Under a rule announced by it on February 1, 1903, [461] the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in

addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant, advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

"On January 1, 1906, the defendant divided all cars into two classes which it designated as 'assigned' and 'unassigned' cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any 'assigned' cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all 'unassigned' or system cars." Id. p. 362.

After illustrating the operation of this system and the advantage in distribution thus given to mines having assigned cars (id. pp. 363, 364), the Commission concluded:

"Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination."

[462] In the case of the plaintiff's petition, the Commission held that so far as the rating of its mines was concerned "there was no substantial basis for any finding of discrimination." But, in the matter of car distribution, unjust discrimination was found. The Commission said (19 Inters. Com. Rep. 394-396):

"There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Company, one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2. The same 'D' coal vein is worked in these two mines. The quality of the coal is therefore the same, and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first of these two complaints. . . .

"But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal & Mining Company, was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of the actions. . . .

"It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers and were therefore kept in operation almost continuously while the complaintants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal.

Under the rules of defendant, fully explained in Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. supra, the ownership [463] of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby."

Order was entered accordingly, condemning the defendant's rule and practice of distribution (as stated) as a violation of § 3 of the act to regulate commerce, requiring the defendant to desist from that practice, and reserving the question of damages for further consideration. Subsequently, in April, 1911, this question was submitted, and it was determined on March 11, 1912. 23 Inters. Com. Rep. 191. The Commission then made its report as follows: "We now find that the damages sustained by this claimant as result thereof" (the discrimination found) "amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907."

The Commission set forth its primary findings of fact upon which this ultimate finding was based, showing its calculations with respect to shipments, selling prices, cost of production, and profits, during the times in question. It found the number of tons, in case of each of the mines, actually

shipped, and the amount which would have been shipped and sold, with a proper car supply, for "interstate destinations;" that is, for points without the state of Pennsylvania.

This action was brought after the first report of the Commission, and while the question of damages was under [464] its consideration. The trial judge in charging the jury described the system of car distribution in use, and the practice of the defendant prior to and after January 1, 1906. Referring to the rule promulgated on that date, it was recognized that it in effect gave a distinct advantage to the mine having "assigned cars" over one that did not have them, but the jury were instructed that "for the purposes of this case," it might "be considered that it was a fair rule of distribution." The subject committed to them was thus stated in the concluding portion of the instructions: "In considering the damages, therefore, in case you find discrimination, you must first ascertain what would have been, under all the circumstances testified to, a fair rating of the plaintiff's mines in both regions. Second, if, after having such fair rating, a comparison with the alleged preferred shippers would entitle it to an increased number of cars, and what that increased number of cars would be; and if the evidence at the same time shows that the preferred shipper received day by day and month by month throughout the period of the action, an excess over its proper *pro rata* share, the plaintiff would be entitled to recover at your hands a verdict for what you may find its fair share of such excess of cars amounted to in tons, estimated just as we have laid down the rule with respect to the method of calculating. Now, then, if you allow for discrimination, then you may disregard all question as to inadequacy or insufficiency of car supply, because you cannot allow for both. For discrimination, after you have made an estimate of the amount of damages and found a definite sum as compensation for the injuries which it sustained, that would be single damages; and if you find that there was discrimination, as claimed by the plaintiff's counsel, then you can go to the question as to whether there shall be treble damages under the act of 1883. . . . If you find discrimination, therefore, and you arrive at or estimate the amount of single damages which you believe [465] the plaintiff has sustained by reason of such undue and unreasonably discriminatory acts practised against it, it is for you to say whether or not that amount should be trebled; that is, multiplied by three." The jury, as we have said, did find discrimination, and trebled the damages.

In considering the right of the plaintiff to maintain this action, despite the proceeding before the Commission, an initial question is presented as to the nature of the commerce involved. It appeared, as stated by the state court, that practically all the coal mined by the plaintiff was sold f. o. b. cars at the mines. About 95 or 98 per cent was sold in this way. Hence, it is said, it is "not subject to Interstate Commerce regulation."

We do not understand that it is questioned that a very large part of the damages recovered in this action pertain to coal which, with a fair method of car distribution, would have been shipped from the mines to purchasers in other states. There is no controversy as to the course of business. The plaintiff sold to persons within and without the state of Pennsylvania. The coal was loaded on cars to be transported to various points of destination not only in Pennsylvania, but in other states. The transportation to other states absolutely depended upon a proper supply of cars, and it is manifest that unjust discrimination against the plaintiff in car distribution would improperly obstruct the freedom of such transportation, in which the plaintiff had a direct interest. And the question presented is whether unjust discrimination of this character is a subject which falls without the scope of the jurisdiction conferred upon the Interstate Commerce Commission; that is, whether there is an absence of such jurisdiction merely because the plaintiff sold its product, which was to be transported to other states, f. o. b. at its mines.

This question must be answered in the negative. In [466] determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and provisions of the act to regulate commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply. Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 108, 110, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Savage v. Jones, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 127, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229; Railroad Commission

v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Illinois C. R. Co. v. DeFuentes, 236 U. S. 157, 163, ante, 517, 519, 35 Sup. Ct. Rep. 275. Thus, in the case of Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279, cotton seed cake which had been purchased by one Young at various places in Texas was shipped to him at the port of Galveston, where it was prepared for export. The court sustained the jurisdiction of the Interstate Commerce Commission with respect to the transportation to Galveston, although between Texas points, it being an incident to the export movement, and held that the special privileges given by the Terminal Company to Young on the wharf were undue preferences. As the commodity was destined for export it made no difference, said the court, "that the shipments of the products were not made on through bills of lading, or whether their initial points were Galveston or some other points in Texas." In Railroad Commission v. Worthington, 225 U. S. 101, 108, 110, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653, it appeared that the State Commission had established a rate on what was called "lake cargo coal" transported from a coal field in eastern Ohio to ports in the same state on Lake Erie for carriage thence by lake vessels to other states. Ordinarily, the shipper had the coal transported "upon bills of lading to himself, or to [467] another for himself," at Huron, Ohio. The rate covered the transportation to Huron and the placing of the coal on the vessels and trimming it for its interstate journey. In view of the proved nature of the movement, the court held that the action of the State Commission was an attempt directly to regulate interstate commerce, and the enforcement of the order of the State Commission was enjoined. Again, in Savage v. Jones, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715, the complainant was a manufacturer in Minnesota and sold his commodity to purchasers in Indiana, the delivery being f. o. b. cars at Minneapolis for transportation to Indiana in the original unbroken packages, the freight being paid by the purchasers. Referring to an objection similar to the one here urged, the court said: "In answer, it must again be said that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159. It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product, manufactured in Minnesota, was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce in the freedom of which from any unconstitutional burden the complainant had a direct interest." In Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 127, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229, it was found that the Powell Company bought lumber for export to different ports in Europe through the ports of Sabine and Port Arthur, both in Texas. To fill its export contracts, it purchased of the Sabine Tram Company a large amount of lumber, which, according to the seller's option, was delivered f. o. b. cars at Sabine, Texas. There were separate bills of lading for delivery at Sabine to the Sabine Tram Company. Upon arrival at Sabine, the lumber was carried a short distance beyond the station to the dock, where it was unloaded from [468] cars into water of the slip, ready for loading upon ships. The Sabine Tram Company had no connection with the further carriage. The railroad company collected, over protest, the rates fixed by tariffs filed with the Interstate Commerce Commission, and the Sabine Tram Company brought suit to recover the difference between the amount thus paid and the amount which would have been payable at the rate fixed by the State Commission. The court held that the rate fixed by the Interstate Commerce Commission was applicable, as the lumber was destined for export, and that, as the movement was one actually in the course of transportation to a foreign destination, the form of the billing to Sabine, and the transactions there, were not determinative.

Thus, in varying circumstances, the same principle has been applied in these cases and in the others cited; and that principle is that the jurisdiction of the Commission is determined by the essential character of the commerce in question. In the present case, to repeat, it appears that for the purpose of filling contracts with purchasers in other states, coal is delivered f. o. b. at the mines for transportation to such purchasers. The movement thus initiated is an interstate movement, and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis, and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress

or the jurisdiction of the Commission which Congress has established.

In this view, we come to the consideration of the effect of the proceeding before the Commission.

1. The question whether the rule or method of car distribution practised by the railroad company as unjustly [469] discriminatory was one which the Commission had authority to pass upon. Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 313, 57 L. ed. 1494, 1497, 33 Sup. Ct. Rep. 938; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 131, ante, 867, 873, 35 Sup. Ct. Rep. 484. Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 441, 448, 51 L. ed. 553, 559, 562, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 493, 54 L. ed. 292, 297, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 511, 56 L. ed. 288, 290, 32 Sup. Ct. Rep. 114; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 107, 57 L. ed. 742, 749, 33 Sup. Ct. Rep. 443; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 313, 57 L. ed. 1494, 1497, 33 Sup. Ct. Rep. 938; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 131, ante, 867, 873, 35 Sup. Ct. Rep. 484. The Commission also had authority to make examination and report upon the amount of damages which the plaintiff had suffered from the unjust discrimination alleged in its complaint. We deem the provisions of the act to be clear upon this point. See §§ 8, 9, 13, 16. There is nothing in the act to suggest that the damages which may thus be ascertained are only those arising from unreasonable or unjustly discriminatory rates. Rules as to car distribution that are unjustly discriminatory are within the purview of § 3, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the act, and their ascertainment is within the scope of the Commission's authority. See Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 257, 57 L. ed. 1472, 1476, 33 Sup. Ct. Rep. 916; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 313, 57 L. ed. 1494, 1497, 33 Sup. Ct. Rep. 938; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 131, ante, 867, 873, 33 Sup. Ct. Rep. 484.

2. Where, as in this case, it appears that the act has [470] been violated, and the requisite ruling as to the unreasonableness of the practice assailed has been made by the Commission, the provisions of § 9 are applicable. This section provides:

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ." [24 Stat. at L. 382, chap. 104, Comp. Stat. 1913, § 8573.]

This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before the Commission and suit in the Federal court leaves no room for the conclusion that there is an option in such case to resort to the state court. Where the proceeding has been had before the Commission and reparation awarded, suit under § 16 (as amended in 1910 [36 Stat. at L. 554, chap. 309, § 13, Comp. Stat. 1913, § 8584]) may be brought in either a state or a Federal court, but this is after the Commission's award has been made.

In Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 131, ante, 867, 873, 35 Sup. Ct. Rep. 484, construing § 9, the court said: "It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a state court. . . . In Mitchell Coal & Coke [471] Co. v. Pennsylvania R. Co. 230 U. S. 250, 57 L. ed. 1473, 33 Sup. Ct. Rep. 916, the same view of the statute was taken in discussing another, but related, question. This construction is also supported by the legislative history of the statute. For while the Hepburn act [34 Stat. at L. 584, chap. 3591,

Comp. Stat. 1913, § 8563], as a convenience to shippers, permitted suits on reparation orders to be brought in the Federal court of the district where the plaintiff resided or the company had its principal office; and while the act of 1910 (36 Stat. at L. 554, chap. 309, Comp. Stat. 1913, § 8584), in further aid of shippers, permitted suits on reparation orders to be brought in state or Federal courts, it made no change in §§ 8 and 9, which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States court." Referring to the proviso in § 22, with respect to the preservation of existing remedies, it was then pointed out that the proviso was not intended to nullify other parts of the act, but to maintain existing rights which were not inconsistent with those which the statute created. And, finally, with regard to a case such as the present one, where the Commission, at the instance of the injured party, has made its ruling as to the unreasonableness or unjustly discriminatory character of the practice attacked, the court thus defined the remedy available: "Until that body" (the Commission) "has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in § 9."

3. It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged, [472] was held in the Puritan Case. See also Illinois C. R. Co. v. Mulberry Hill Coal Co. decided June 14, 1915 [238 U. S. 275, ante, 1306, 35 Sup. Ct. Rep. 760]. The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case, it had done so. It went before the Commission, with its complaint under the act, assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the Federal statute. This follows necessarily from the supremacy of the Federal legislation in relation to interstate commerce. So long as the creative provisions of the Federal act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail itself of common-law remedies or of those afforded by local statutes. But when, as a result of its own insistence upon its Federal right under the act, it appeared that the act had been violated and that the special remedial provisions of the act were applicable, it was not possible for the plaintiff to ignore the statute it had thus called into play, and disregard its provisions for the purpose of measuring relief by local standards. The Federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court, and there to secure treble damages under the state statute with respect to the same transactions.

This is not to say that the finding of the Commission as to the amount of damages has any other effect than [473] that prescribed in § 16 of the act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practised, was then entitled to proceed for the recovery of damages in accordance with the act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the Federal act.

We conclude, therefore, that with respect to the damage sustained by the plaintiff in its interstate business by reason of the unjustly discriminatory distribution of cars for interstate shipments, the plaintiff was not entitled to maintain this action under the state statute. The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

WILLIAM H. MILLS,[1] as Surviving Partner and Liquidator of J. Mitchell Clark, William H. Mills, and J. Armstrong Rawlins, Copartners, Trading under the Firm Name of Naylor & Company, Plff. in Err.,

v.

LEHIGH VALLEY RAILROAD COMPANY, Buffalo, Rochester, & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, et al.

(See S. C. Reporter's ed. 473–482.)

Interstate Commerce Commission — reports — ultimate or evidentiary facts.

1. The ultimate facts rather than the evidential facts are to be stated by the Interstate Commerce Commission in the report which that Commission, under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 14, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), must make upon investigating a complaint, which report, under that statute, "shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," and if damages be awarded "shall include the findings of fact on which the award is made."

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — reports — findings.

2. A report of the Interstate Commerce Commission, made after investigation of a shipper's complaint, which showed the relation of the parties as shipper and carrier in interstate commerce, the general character of the traffic involved, and the amount of the shipment with respect to which reparation was claimed, the determination that the rate exacted, which was specified, was unjust and unreasonable to the extent that it exceeded the established rate, also specified, and the determination that the carriers respectively should pay a stated amount as reparation for the collection of unreasonable charges on the quantities mentioned,—satisfies the requirement of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 14, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), that the Commission must make, upon investigating a complaint, a report which "shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," and if damages be awarded "shall include the findings of fact on which the award is made."

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Costs — attorneys' fees — services before Interstate Commerce Commission.

3. The services for which an attorney's fee is to be taxed and collected under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), §§ 8, 16, as amended by the act of June 29, 1906 (34 Stat. at. L. 584, chap. 3591, Comp. Stat. 1913, § 8563), in case of plaintiff's final success in an action to recover from a carrier the damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the carrier's violation of the provisions of those statutes, must be deemed to be those incident to the action in which the recovery is had, and not to those before the Commission, in view of the fact that the Commission is not to allow a fee, but only to find the amount of the damages and fix a time for payment, and that if the carrier pays the award within the time named no right to an attorney's fee arises.

[Attorneys' fees, see Costs and Fees, IV., in Digest Sup. Ct. 1908.]

[No. 631.]

Argued May 11, 1915. Decided June 21, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of Pennsylvania in favor of plaintiffs in an action to recover from the defendant carriers the damages alleged to have been sustained by shippers by reason of the exaction of excessive freight rates, and awarded to them by the Interstate Commerce Commission. Judgment of Circuit Court of Appeals reversed; judgment of District Court modified by eliminating an allowance of attorneys' fees for services before the Commission, and as so modified, affirmed.

See same case below, 125 C. C. A. 235, 207 Fed. 717.

The facts are stated in the opinion.

Messrs. V. F. Gable and Arthur R. Thompson argued the cause, and, with Mr. Frank Van Sant, filed a brief for plaintiff in error:

A reparation order and report should contain the essentials that go to the heart of the issue and make up the substance, and without which, in one form or another, it could not exist.

Meeker v. Lehigh Valley R. Co. 236 U.

NOTE.—On validity of statutory provision for attorneys' fees—see note to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 910.

On unconstitutional inequality or discrimination in statutes allowing attorneys' fees—see note to Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 821.

[1] Death of J. Mitchell Clark and J. Armstrong Rawlins suggested and William H. Mills, as surviving partner and liquidator, substituted April 12, 1915, as plaintiff in error.

S. 412, ante, 644, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328.

The consideration by the Commission of any result reached by it or of questions determined by it in subsequent reports and orders is proper and regular when its doing so is made to appear in the record, and the facts thus noted are specified.

United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14–20, 57 L. ed. 104–107, 33 Sup. Ct. Rep. 5.

Under the act to regulate commerce the award of damages takes the place of the verdict of the jury; and findings that would support a verdict in an action at law would support an award of the Commission under the interstate commerce act. The only findings that the Commission is required to make are the ultimate findings, upon which liability at law may be predicated.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

There was no error in the trial court's charge to the jury and it could properly have directed a verdict for the plaintiffs.

Slocum v. New York L. Ins. Co. 228 U. S. 364, 375, 57 L. ed. 879, 885, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

An examination of the reports of the Interstate Commerce Commission from practically the date of its creation will show that it has always required a full and exhaustive presentation of the evidence in reparation cases to the point of enabling it to determine that reparation is due to the complainant in consequence of charges found unreasonable. Otherwise it will decline to award such reparation.

Perry v. Florida C. & P. R. Co. 3 Inters. Com. Rep. 416, 5 I. C. C. Rep. 118; Castle v. Baltimore & O. R. Co. 8 Inters. Com. Rep. 333.

The Commission has repeatedly held that where it finds the rate exacted to have been unreasonable, it may award reparation by the difference between that rate and that which is reasonable, notwithstanding the former was the rate duly established by the carrier for the time being.

Allen v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 293; Commercial Club v. Chicago & N. W. R. Co. 7 Inters. Com. Rep. 386.

The trial court gave the proper legal effect to the reports.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

The counsel for plaintiffs are entitled to attorneys' fees for services rendered in the appellate court as well as for those in the trial court, if they finally prevail.

Louisville & N. R. Co. v. Dickerson, 112 C. C. A. 295, 191 Fed. 705.

The findings of fact in reports and orders of the Interstate Commerce Commission awarding reparation under the act are, in their conclusiveness, accorded by a court the same weight as the findings of fact by the United States court of claims. Such findings should be the ultimate facts, and where they justify the judgments rendered, and there is any evidence on which such findings could be made, alleged errors of fact are not subject to revision by the court.

Hathaway v. First Nat. Bank, 134 U. S. 494, 33 L. ed. 1004, 10 Sup. Ct. Rep. 608; McClure v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321; Burr v. Des Moines, 1 Wall. 99, 102, 17 L. ed. 561, 562; United States v. Pugh, 99 U. S. 265, 25 L. ed. 322; Stone v. United States, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71; Union P. R. Co. v. United States, 116 U. S. 154, 29 L. ed. 584, 6 Sup. Ct. Rep. 325.

The Commission has always proceeded in awarding reparation on the theory that it was doing so in compliance with the requirements of the act; and it will work a great injustice to the plaintiff if, after experiencing the travail of prosecuting this claim, he should be denied reparation for the want of compliance with a mere technicality or matter of form as opposed to substance.

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 488, 58 L. ed. 1055, 1061, 34 Sup. Ct. Rep. 641; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 77, 78, 52 L. ed. 108, 110, 111, 28 Sup. Ct. Rep. 28; Riverside Mills v. Atlantic Coast Line R. Co. 168 Fed. 989; United States v. Hill, 120 U. S. 169, 180, 30 L. ed. 627, 631, 7 Sup. Ct. Rep. 510; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 402, 50 L. ed. 515, 525, 526, 26 Sup. Ct. Rep. 272; Logan v. Davis, 233 U. S. 613, 627, 58 L. ed. 1121, 1128, 34 Sup. Ct. Rep. 685.

The defendants in the case at bar offered no evidence in rebuttal to that presented by the plaintiff, but were content to rely on the insufficiency of the reports and orders of the Commission introduced in evidence, when they should have pointed out to the trial court that the evidence presented before the Commission did not support the findings of fact in the report, or they should have produced affirmative evidence tending to show that the plaintiff sustained no damages as a result of the exaction of the unreasonable rate, or not the amount of

damages awarded by the Commission. Inasmuch as they did none of these things, they cannot now be heard to question the correctness of the award made.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 258, 57 L. ed. 1472, 1476, 33 Sup. Ct. Rep. 916; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

Mr. Henry S. Drinker, Jr., argued the cause, and, with Messrs. Edgar H. Boles, John G. Johnson, and Samuel Dickson, filed a brief for defendants in error:

Before any party can recover under the act, he must show not merely the wrong of the carrier, but that that wrong has in effect operated to his injury.

Parsons v. Chicago & N. W. R. Co. 167 U. S. 460, 42 L. ed. 236, 17 Sup. Ct. Rep. 887.

The Meeker Case (236 U. S. 412, ante, 644, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328) was one involving essentially the inherent reasonableness of the rate; the case at bar involved merely the relation of rates.

In the Meeker Case the Commission expressly found that the complainant was damaged in a specified amount; the Commission's opinions and orders in the case at bar contain no such finding.

The Commission merely awarded reparation on the basis of the different rates, taking it for granted, as was customary prior to the International Coal Mining Case, that if the Commission in its discretion concluded to award reparation, the measure thereof was the difference in the rates. (See 230 U. S. 241, 57 L. ed. 1469, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315.)

In the petition it is nowhere alleged that the complainant has suffered actual damage.

Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315.

Mr. Justice Hughes delivered the opinion of the court:

During the years 1906 and 1907, Naylor & Company—a firm of which the plaintiff in error is surviving partner—were shippers of pyrites cinder over the lines of the defendants in error from Buffalo, New York, to points in Pennsylvania and New Jersey. The published rate was $2 per gross ton. On April 4, 1908, these shippers filed a complaint with the Interstate Commerce Commission, alleging that the rate was "excessive," "unreasonable," and "unjustly discriminatory." They asked that the railroad companies be ordered to desist from exacting the rate, that a lower rate be fixed, and that reparation be granted. The defendants answered and, after hearing, the Commission made its report on January 5, 1909, holding "that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo." The rate on iron ore was $1.45 per [476] ton to points of destination to which there was a rate of $2 on pyrites cinder. Reparation was refused. Naylor & Co. v. Lehigh Valley R. Co. 15 Inters. Com. Rep. 9. Order was made accordingly.

On May 8, 1909, Naylor & Company filed with the Interstate Commerce Commission a motion for a rehearing on the question of reparation alone, and the motion was granted. Additional evidence was taken and various sums were awarded by the Commission against the respective companies as reparation on shipments made within the period of limitation. The order was made on June 2, 1910.

In May, 1911, this suit was brought, pursuant to § 16 of the act to regulate commerce, in the circuit court of the United States for the eastern district of Pennsylvania, to recover the several amounts of money set forth "as and for damages and reparation" in accordance with the Commission's order. Issue was joined by a plea of not guilty. Upon the trial, the two reports and orders of the Interstate Commerce Commission, above mentioned, were received in evidence over objection. There was testimony that the amounts awarded had not been paid. That constituted the case for the plaintiffs, and the defendants offered no evidence. A request by the defendants for "binding instructions" in their favor was refused. The case was submitted to the jury with the instruction, in substance, that the finding of the Commission was prima facie evidence of the facts, and that it was for the jury to say whether the plaintiffs were entitled to recover the amount of money claimed. A verdict was returned for the plaintiffs in specified amounts which appear to be the same as those awarded by the Commission with interest to date. The defendants then moved for judgment *non obstante veredicto*. The motion was dismissed and judgment ordered for the plaintiffs on October 30, 1912. At the same time, the trial court allowed to the counsel for the plaintiffs a fee of $1,000 for their services in the proceedings [477] before the Interstate Commerce Commission and a further fee of like amount for their services in this suit; and to this allowance the defendants excepted. Exceptions having also been taken to the refusal of the request of the court to direct a verdict for the defendants, to the instruction given, and to the dismissal of the motion for judgment *non obstante veredicto*, proceedings in error

were had before the circuit court of appeals, where the judgment was reversed, without directing a new trial. Lehigh Valley R. Co. v. Clark, 125 C. C. A. 235, 207 Fed. 717. And to review the judgment, this writ of error has been prosecuted.

The grounds of the ruling of the court below are: first, that there were no sufficient findings of fact in the reports of the Commission, as required by the statute; and, second, that the plaintiffs had failed to present any evidence which made out a prima facie case of damage sustained. That is, it is said that if the statements in the first report of the Commission could be regarded as findings of fact within the meaning of the statute so as to make them prima facie evidence of the facts found, they were not sufficient to support the plaintiffs' claim; and that there were no facts found in the second report which entitled the plaintiffs to go to the jury.

The fundamental question thus presented, with respect to the effect of the Commission's reports and orders, has recently been determined in Meeker v. Lehigh Valley R. Co. 236 U. S. 412, ante, 644, 35 Sup. Ct. Rep. 328, and, in the light of the conclusion there reached, little need now be said. In dealing with the objection that the reports and orders of the Commission then before the court did not contain any findings of fact, or at least not enough to sustain an award of damages, it was held that the statute does not require a statement of the evidential or primary facts. The court said: "We think this is not the right view of the statute, and that what it requires is a finding of the ultimate facts,—a finding which, as applied to the present case, would disclose [478] (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered, and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practised against the shipper . . .; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper . . . was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages."

In the case now under consideration, the first report of the Commission was concerned only with the rates which should be charged. No reparation was allowed and no findings whatever were made as to damages.

The second report is as follows:

"In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, New York, to points in the states of Pennsylvania and New Jersey, the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. Naylor & Co. v. Lehigh Valley R. Co. 15 Inters. Com. Rep. 9.

"Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.

[479] "We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations. Detroit Chemical Works v. Northern C. R. Co. 13 Inters. Com. Rep. 357; Detroit Chemical Works v. Erie R. Co. 13 Inters. Com. Rep. 363.

"The Buffalo, Rochester & Pittsburgh Railway Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,846.55, with interest from November 21, 1907, as reparation for the collection of unreasonable charges on 189 carloads of pyrites cinder aggregating 5,175 $\frac{1129}{2240}$ tons in weight moving from Buffalo to various Pennsylvania points.

"The New York Central & Hudson River Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $248.93, with interest from April 19, 1907, as reparation for the collection of unreasonable charges on 13 carloads of pyrites cinder aggregating 452 $\frac{807}{2240}$ tons in weight, moving from Buffalo to various Pennsylvania points.

"The Delaware, Lackawanna, & Western Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $487.52, with interest from September 23, 1907, as reparation for the collection of unreasonable charges on 31 carloads of pyrites cinder ag-

gregating 886 $\frac{220}{2240}$ tons in weight, moving from Buffalo to Newark, New Jersey.

"The Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $1,024.15, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 74 carloads of pyrites cinder [480] aggregating 1,862 $\frac{220}{2240}$ tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

"The Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,362.23, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 172 carloads of pyrites cinder aggregating 4,295 $\frac{220}{2240}$ tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

"It will be ordered accordingly."

This report, it will be observed, shows the relation of the parties as shipper and carrier in interstate commerce; the general character of the traffic involved and the amount of the shipment with respect to which reparation was claimed; the determination that the rate exacted (which was specified) was unjust and unreasonable to the extent that it exceeded the established rate (also specified); and, further, the determination that the companies respectively should pay a stated amount "as reparation for the collection of unreasonable charges" on the quantities mentioned. It is at once apparent that these findings meet the test laid down in the Meeker Case, unless it can be said that they were insufficient as to the amount of damages suffered. Thus, there would seem to be no room for question that the finding that the rate charged was unreasonable is a sufficient finding. The Commission stated: "We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton." It is insisted that, in view of the provisions of the first order, and the Commission's description of it in the second report, the essential basis of the ruling was not the inherent reasonableness of the rate established, but its relation to the rate on a competitive commodity. We think, however, that the specific [481] finding in the second report that the rate exacted "was unjust and unreasonable" to the extent specified was a finding as to the ultimate fact of unreasonableness which should be taken precisely as made. The finding in this respect is substantially the same as that in the second Meeker Case (236 U. S. 434, 435, 436, ante, 659, 660, 35 Sup. Ct. Rep. 337).

As to the amount of damage sustained, there would be no question if the Commission had found, as in the case last cited, that the shipper "was damaged" to the amount mentioned. The distinction attempted to be drawn is that, in the case referred to, there was a statement that the shipper "was damaged," while in the present case the Commission held that he was entitled to the stated amount "as reparation." In both cases, the amount actually allowed was the difference between the amount charged and that which would have been payable at the rate sanctioned. The difference between the findings in the two cases, we think, is merely in the form of words used.

When the Commission made the award "*as reparation*" they undoubtedly expressed the decision, as a matter of ultimate fact, that there was injury in this extent to be repaired. No other intelligent construction can be put upon their statement. If, as was held in the second Meeker Case, a finding of the amount of damage as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole,—to be compensated for a loss because of an illegal and unreasonable exaction; and the amount which they stated as the sum to be paid "as reparation" on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the [482] Commission effect as prima facie evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, prima facie the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case.

There was error, however, in the allowance of the fee for services before the Commission. 236 U. S. 432, 433, ante, 658, 35 Sup. Ct. Rep. 328.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is modified by striking out the allowance of $1,000 as attorney's fee for services before the Commission, and is affirmed as so modified.

It is so ordered.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Plff. in Err.,
v.
ADELIA P. DANAHER.

(See S. C. Reporter's ed. 482–491.)

Constitutional law — due process of law — excessive penalties.

The imposition upon a telephone company under the supposed authority of Kirby's (Ark.) Dig. § 7948, of penalties aggregating $6,300, because of its impartial enforcement against one of its patrons of a regulation that it will not furnish telephone service to any patron in arrears for past service, and will not accord to a patron so in arrears the discount usually allowed for paying in advance of a designated time, takes the company's property without due process of law, contrary to U. S. Const., 14th Amend., where such regulation was not expressly prohibited by the statute, and there was no judicial decision in the state holding or indicating that it was unreasonable, and it had been adopted in good faith, and had been uniformly and impartially enforced for many years.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 43.]

Submitted March 17, 1914. Ordered for reargument April 6, 1914. Argued April 22, 1914. Decided June 21, 1915.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which, on a second appeal, affirmed a judgment of the Pulaski Circuit Court, in that state, enforcing a statutory penalty against a telephone company for alleged discrimination against a patron. Reversed.

See same case below on first appeal, 94 Ark. 533, 30 L.R.A.(N.S.) 1027, 127 S. W. 963; on second appeal, 102 Ark. 547, 144 S. W. 925.

The facts are stated in the opinion.

Mr. Charles T. Coleman for plaintiff in error on original submission and reargument:

The act of March 31, 1885 (Kirby's Ark. Dig. § 7948), as construed by the supreme court of Arkansas, is in conflict with the due process clause of the 14th Amendment to the Constitution of the United States.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961.

Public service corporations have the right to make reasonable rules and regulations for the government of the public in its dealings with them.

Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C. C. A. 268, 160 Fed. 316, 15 Ann. Cas. 1210; Stamey v. Western U. Teleg. Co. 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008; McDaniel v. Faubush Teleph. Co. 32 Ky. L. Rep. 572, 106 S. W. 825; Western U. Teleg. Co. v. Neel, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15; Davis v. Western U. Teleg. Co. 46 W. Va. 48, 32 S. E. 1026; 3 Thomp. Corp. 2d ed. § 2110; 37 Cyc. 1619.

The plaintiff in error promulgated a rule that it would not furnish telephone service to anyone who owed for service rendered in the past. The rule was designed to protect the revenues of the company. It directly benefited the company, and indirectly benefited the public. It was enforced against all alike, without partiality or discrimination. It was adopted in good faith, under the belief that it was entirely reasonable, and that the company had a legal right to make and enforce it. Similar regulations had been held to be reasonable and valid by numerous courts.

Rushville Co-op. Teleph. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327; Tacoma Hotel Co. v. Tacoma Light & Water Co. 3 Wash. 316, 14 L.R.A. 669, 28 Am. St. Rep. 35, 28 Pac. 516; Western U. Teleg. Co. v. McGuire, 104 Ind. 130, 54 Am. Rep. 296, 2 N. E. 201; Vanderberg v. Kansas City Missouri Gas Co. 126 Mo. App. 600, 105 S. W. 17; Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985; Watauga Water Co. v. Wolfe, 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060; Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320; Buffalo County Teleph. Co. v. Turner, 82 Neb. 841, 19 L.R.A.(N.S.) 693, 130 Am. St. Rep. 699, 118 N. W. 1064; Brass v. Rathbone, 153 N. Y. 435, 47 N. E. 905; Hewlett v. Western U. Teleg. Co. 28 Fed. 181.

And the supreme court of Arkansas had

NOTE.—On the right to refuse telephone service to coerce payment of bill—see note to Danaher v. Southwestern Teleg. & Teleph. Co. 30 L.R.A.(N.S.) 265.

On the right of public service corporation to impose penalty or added amount for failure to pay service bills promptly—see notes to Ford v. Vicksburg Waterworks Co. 43 L.R.A.(N.S.) 63, and Phelan v. Boone Gas Co. 31 L.R.A.(N.S.) 319.

As to what constitutes due process of law, generally,—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On excessive penalty as denial of constitutional rights—see notes to State v. Crawford, 46 L.R.A.(N.S.) 1033, and Rail & River Coal Co. v. Yaple, ante, 607.

inferentially sanctioned such a rule, for it had held that the statute did not prevent telephone companies from requiring their patrons to pay in advance.

Yancey v. Batesville Teleph. Co. 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135.

The court had previously held that the statute was directed solely against discrimination,—an interpretation which was approved and followed by the Federal court of appeals in construing the Tennessee statute, which was a literal copy of the act in question.

Phillips v. Southwestern Teleg. & Teleph. Co. 72 Ark. 478, 81 S. W. 605; Yancey v. Batesville Teleph. Co. supra; Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C. C. A. 268, 160 Fed. 316, 15 Ann. Cas. 1210.

Act of March 31, 1885, as construed by the supreme court of Arkansas, is in conflict with the equal protection clause of the 14th Amendment to the Constitution of the United States.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 100, 46 L. ed. 92, 105, 22 Sup. Ct. Rep. 30; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Mrs. Adelia P. Danaher, *in propria persona*, for defendant in error on original submission:

This case is controlled by Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28, and Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

Where the legislature does not state what is reasonable, the courts must decide that question when controversies arise.

Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 283, 37 N. E. 247; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

Every court before which this question has arisen has decided that such a rule as the one in question is unreasonable.

State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; Wood v. Auburn, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; American Waterworks Co. v. State, 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; Crumley v. Watauga Water Co. 99 Tenn. 420, 41 S. W. 1058.

Messrs. David A. Frank and Mike Danaher for defendant in error on reargument.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action against a telephone company by one of its patrons to recover penalties at the rate of $100 per day for sixty-three days for alleged discrimination against the plaintiff, the right of recovery being grounded upon a statute of Arkansas, Kirby's Digest, § 7948, reading as follows:

"Every telephone company doing business in this state and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of $100 for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

[486] For several years the company had been conducting a general telephone exchange at Little Rock, Arkansas, with over 5,000 patrons, among them being the plaintiff. One of its established regulations was to the effect that it would not furnish telephone service to any patron in arrears for past service, and would not accord to a patron so in arrears the discount usually allowed for paying in advance of a designated time.

The customary monthly rate was $2 during the first part of the period in question, and thereafter $2.75, with a deduction of 50 cents if payment was made before the 15th of the month.

The discrimination charged by the plaintiff consisted (a) in arbitrarily refusing for forty days to permit her to use the telephone in her residence when she had made prompt payment therefor at the customary monthly rate, and had fully complied with all existing rules, notwithstanding other patrons similarly situated were permitted

to use the telephones in their residences during that period; and (b) in requiring her to pay at the rate of $2.75 per month for the period covering the next twenty-three days when other patrons similarly situated were required to pay only $2.25 per month for the same period. In its answer the company denied the plaintiff's allegations of payment and discrimination, as also her compliance with existing rules, and relied upon the regulation before mentioned as justifying the company's action in denying her the use of the telephone during the forty days, and in requiring her to pay the full rate of $2.75 for the month covering the next twenty-three days. In that connection it was alleged in the answer that the regulation was adopted in good faith several years before, and had been uniformly and impartially enforced; that at the times when the plaintiff's telephone was disconnected, and when she was refused the discount of 50 cents, she was indebted to the company in the sum of $4 for the service for two months preceding; that the company's acts were in entire accord with the regulation [487] and with timely notices theretofore given to the plaintiff, and that the statute, if held to authorize or require the infliction of the designated penalties by reason of what was done in impartially enforcing the regulation, would be purely arbitrary and would result in depriving the company of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

At the trial the plaintiff produced evidence tending to establish the charges in in her complaint, and when the company was introducing its evidence it offered to prove that when the plaintiff's telephone was disconnected and when she was refused the discount of 50 cents she had failed and refused to pay her telephone rental for two months preceding, although she frequently had been requested to pay it, and knew the telephone would be disconnected if payment was not made; that the regulation before named had been in force for several years and had been applied universally against all delinquent patrons without partiality or discrimination, and that the plaintiff was denied the use of the telephone and refused the discount only because she was delinquent at the time. This evidence was rejected, and in its charge to the jury the court, at the plaintiff's request, said: "Under the law, the defendant should not refuse to serve the plaintiff because she had not paid a debt contracted for services rendered in the past, and if you find that the defendant did refuse to render her services for that reason, your verdict should be for the plaintiff." The defendant asked the court to say to the jury: "If you find from the evidence that the defendant enforced against plaintiff the same rule or regulation that it enforced against all others in like situation with the plaintiff, your verdict will be for the defendant," and this request was refused. The trial resulted in a verdict and judgment for the plaintiff for the penalties claimed, amounting to $6,300, and the judgment was affirmed [488] by the supreme court of the state. 102 Ark. 547, 144 S. W. 925. At a former trial the defendant had prevailed, but that judgment was reversed and a new trial directed, the supreme court saying on that occasion (94 Ark. 533, 537, 30 L.R.A.(N.S.) 1027, 127 S. W. 963): "A telephone company, being a public servant, cannot refuse to serve any one of the public in that capacity in which it has undertaken to serve the public when such one offers to pay its rates and comply with its reasonable rules and regulations. It cannot refuse to serve him until he pays a debt contracted for services rendered in the past. For the present services it has a right to demand no more than the rate of charge fixed for such services. It transcended its duty to the public when it demanded more." Of course what was then said led to the rulings just stated upon the second trial. In affirming the second judgment the supreme court adhered to its prior decision, pronounced the regulation unreasonable, and held that its enforcement against the plaintiff was a discrimination against her within the meaning of the statute, and subjected the company to the penalties therein prescribed.

It was not doubted by the state court, but, on the contrary, was fully recognized, that the telephone company was entitled to adopt reasonable regulations respecting the conduct of its business and the terms upon which it would serve its patrons, and could enforce such regulations against any patron refusing or failing to comply therewith by suspending or discontinuing the service to him during the continuance of his refusal or failure without being chargeable with discrimination or incurring any liability under the statute. Thus the questions for decision arising out of the rulings at the trial were whether the regulation dealing with patrons in arrear with their rental was reasonable, and whether its impartial enforcement in the circumstances of this case could be made the occasion, consistently with the due process of law clause in the 14th Amendment, for inflicting upon the company penalties [489] aggregating $6,300. As before indicated, the first question was answered in the negative and the second in the affirmative.

Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve. What, then, are the circumstances in the light of which this question must be determined?

Regulations like that which the telephone company applied to the plaintiff were not declared unreasonable by the statute. It left that matter entirely open and to be determined according to general principles of law. The state court did not hold otherwise. The regulation, according to the rejected proof, was adopted in good faith, had been uniformly and impartially enforced for many years, and was impartially applied in this instance. There had been no decision in the state holding or indicating that it was unreasonable. Like regulations often had been pronounced reasonable and valid in other jurisdictions[1] and while some differences of opinion upon the subject were disclosed in reported decisions, the weight of authority was on that side. It also was strongly supported in reason, for not only are telephone rates fixed and regulated in the expectation that they will be paid, but the [490] company's ability properly to serve the public largely depends upon their prompt payment. They usually are only a few dollars per month, and the expense incident to collecting them by legal process would be almost prohibitive. It uniformly is held that a regulation requiring payment in advance or a fair deposit to secure payment is reasonable, and this is recognized in the brief for the plaintiff where it is said that to protect themselves against loss telephone companies "can demand payment in advance." If they may do this, it is difficult to perceive why the more lenient regulation in question was not reasonable.

If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. And if it be assumed that the company should have known that the supreme court of the state, in the exercise of its judicial power, might hold the regulation unreasonable, even though the prevailing view elsewhere was otherwise, the question remains whether, in the circumstances, penalties aggregating $6,300 could be imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law. In our opinion the question must be answered in the negative. There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not, as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially judicially testing the regulation's reason-enforcing it. There was no mode of [491] ableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law. Missouri P. R. Co. v. Tucker, 230 U. S. 340, 351, 57 L. ed. 1507, 1511, 33 Sup. Ct. Rep. 961, and cases cited; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 661-666, ante, 405, 411-413, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214; Vaught v. East Tennessee Teleph. Co. 123 Tenn. 318, 328, 31 L.R.A.(N.S.) 315, 130 S. W. 1050, Ann. Cas. 1912C, 132.

It follows that the rulings of the trial court, as sustained by the Supreme Court of the state, tended to deprive the defendant of a right secured and protected by the 14th Amendment.

Judgment reversed.

[1] See People ex rel. Kennedy v. Manhattan Gaslight Co. 45 Barb. 136; Tacoma Hotel Co. v. Tacoma Light & Water Co. 3 Wash. 316, 14 L.R.A. 669, 28 Am. St. Rep. 35, 28 Pac. 516; Wood v. Auburn, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; Rushville Co-op. Teleph. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327; Irvin v. Rushville Coöp. Teleph. Co. 161 Ind. 524, 69 N. E. 258; Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985; Cox v. Cynthiana, 123 Ky. 363, 96 S. W. 456; Mansfield v. Humphreys Mfg. Co. 82 Ohio St. 216, 31 L.R.A.(N.S.) 301, 92 N. E. 233, 19 Ann. Cas. 842; Woodley v. Carolina Teleph. & Teleg. Co. 163 N. C. 284, 79 S. E. 598, Ann. Cas. 1914D, 116; Vanderberg v. Kansas City Missouri Gas Co. 126 Mo. App. 600, 608, 105 S. W. 17; Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320; Vaught v. East Tennessee Teleph. Co. 123 Tenn. 318, 31 L.R.A.(N.S.) 315, 130 S. W. 1050, Ann. Cas. 1912C, 132.

CHICAGO, MILWAUKEE, & ST. PAUL RAILROAD COMPANY, Plff. in Err.,
v.
STATE OF WISCONSIN.

(See S. C. Reporter's ed. 491–502.)

Constitutional law — due process of law — police power — regulating upper berths in sleeping cars.

1. A state statute which, like Wis. Laws 1911, chap. 272, prohibits the letting down of an unengaged and unoccupied upper berth in a sleeping car when the lower berth in the same section is occupied, takes property without compensation, contrary to the due process of law clause of U. S. Const., 14th Amend., and cannot be sustained as a reasonable exercise of the state's police power.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 3, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — reserved right to amend corporate charter.

2. The reserved right of a state to amend corporate charters cannot be exercised so as to take the property of a corporation without due process of law.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 177.]

Argued March 8, 1915. Decided June 21, 1915.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which reversed a judgment of the Circuit Court of Dane County, in that state, dismissing the complaint in a suit to recover a statutory penalty from a railway company operating sleeping cars for letting down an unengaged upper berth when the lower berth in the same section was occupied. Reversed and remanded for further proceedings.

See same case below, 152 Wis. 341, 140 N. W. 70, Ann. Cas. 1914C, 478.

NOTE.—On what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power, generally —see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to reserved power to alter, amend, or repeal corporate charters—see notes to Greenwood v. Union Freight R. Co. 26 L. ed. U. S. 961; and Lord v. Equitable Life Assur. Soc. 22 L.R.A.(N.S.) 420.

Statement by Mr. Justice Lamar:

In 1911 the state of Wisconsin passed a statute imposing a penalty upon sleeping car companies if, the lower berth being occupied, the upper berth was let down before it was actually engaged. Suit was brought against the plaintiff in error for the recovery of the statutory penalty, based on the fact that on the night of August 11, 1911, James T. Hall boarded the company's sleeping car at Portage, Wisconsin. He engaged lower berth, section 11, and occupied the same, as an intrastate passenger, between Portage, Wisconsin, and Star Lake, Wisconsin. The upper berth of No. 11 was not engaged or occupied, but was let down and kept down during the night by the porter.

The company answered that its cars, like those of others in the United States, were so arranged as to provide units consisting of lower berths, upper berths, sections, drawing rooms, and compartments; that the lower berth, and upper berth units are so arranged that when [493] prepared for occupancy each of said units is a compartment separated from all other space in the car; that the charge for the use of each of said units is fixed by tariffs established by the state of Wisconsin and by the Interstate Commerce Commission respectively. Under the Wisconsin law the rate from Portage to Star Lake was $1.50 for a lower berth, $1.20 for the upper berth, and $2.70 for the section. It was averred and admitted that Hall, while demanding of the defendant's conductor "that the upper berth be put back and kept there so that he might have the use of the entire section, paid for the use of the lower berth only, and did not offer to pay the tariff for the entire section."

The railroad company further averred that it operated sleeping cars over its system of more than 7,000 miles of interstate roads, and that the Interstate Commerce Commission had prescribed rates for each of said sleeping car units on trains running to and from the state of Wisconsin. The rate fixed for the upper was 80 per cent of the charge for the use of the lower; the price for the whole section being the sum of the two rates. No order had been made by the Interstate Commission which prohibits the use of the upper berth while the lower berth is occupied. It was averred that a compliance with the Wisconsin statute would convenience the occupant of the particular lower berth only, and would not add to the comfort or promote the health, safety, or convenience of the other occupants of the car, but would injuriously affect passengers occupying lower berths.

The company insisted that the statute

was arbitrary and unreasonable; not designed to accomplish a legitimate public purpose, and contrary to natural justice. It claimed that the statute denied to it the equal protection of the laws; took its property without due process of law, in violation of the 14th Amendment, and attempted to regulate interstate commerce.

[494] There was a hearing before the court without a jury. Some of the averments in the railroad's answer were admitted to be true. In addition witnesses were sworn whose testimony—admitted over objection—was to the effect that, while the company had a pecuniary interest in having the upper berth kept down when the lower was occupied, yet such lowering was necessary to secure the comfort of the occupant of the lower berth, and to prevent him or her from being wakened or disturbed if it became necessary to put down the upper berth and arrange it so that it could be occupied by a passenger who had purchased such upper space during the night. The evidence was to the effect that the opening of the curtains, the glare of the light, the noise of lowering the berth, the work of arranging the bedding for the upper berth and securing the holding wires would necessarily inconvenience the man or woman occupying the lower berth; deprive him or her of the privacy to which they were entitled, and interrupt the rest and sleep to secure which they had engaged the berth.

There was evidence that an ordinary sleeping car was better ventilated than an ordinary passenger coach, said to be due to the fact that the coach not only carried more passengers, but did not have the ventilating appliances in use on sleeping cars.

There was in addition much evidence, admitted over objection, to prove the methods by which and the extent to which sleeping cars were ventilated. It appeared that a car of ordinary size contained about 5,000 cubic feet of air and that, by means of a series of suction ventilators, operated by the movement of the train, the air therein was sucked through openings in the top of the car. The faster the movement the more rapid the suction. By measuring the air escaping through the ventilators, it had been shown that when the train was running at 35 miles an hour the air in the sleeping car was renewed every two minutes. This air was replaced by that coming through doors, end [495] openings for ventilating purposes, screens or windows as the case might be. There was also testimony that when the upper berth was down and the curtains closed the air came in and went out of the lower berth through windows, screens, air spaces, and numerous openings between the curtain and the bed.

There was evidence that while the circulation in the lower berth was not so good as that in the aisle, yet the air in the car and in such lower berth was not injurious to health, as demonstrated by repeated chemical analyses of a sample of air taken from such lower berths, from the aisles and from other portions of the cars. There was evidence, and contention based on common knowledge, that the letting down of the upper berth did not affect the health or convenience of the occupants of the car or of either berth. This was demonstrated by the absence of injurious effects and the fact that lower berths with the upper berths down had thus been constantly used by travelers since sleeping cars were invented.

There was further evidence that the car in question was arranged substantially like those operated by sleeping car companies throughout the United States. In all of them the upper berth was regularly put down when the lower was occupied, unless the whole section was engaged by one person. There was a further contention that this was true in every state in the Union,—no one of which prohibited the letting down of the upper when the lower was occupied.

The court found as a fact:

"That the closing of upper berths in sleeping cars has very little effect upon the circulation of air in such sleeping cars when all lower berths are made up and ready for occupancy.

"That the lowering of upper berths does not endanger the lives, health, or safety of persons occupying lower berths in sleeping cars.

[496] "That the closing of the upper berth will be a convenience to the person occupying the berth below the same, and will add to the comfort of such person alone, and not to that of the public generally.

"That the defendant has a right to charge for the use of the space occupied by the upper berth, and that such right is the property of the defendant."

He concluded, as matter of law, that the state was not entitled to recover the penalty, and dismissed the complaint. The case was then taken to the supreme court of Wisconsin, which (152 Wis. 348, 140 N. W. 70, Ann. Cas. 1914C, 478) said that the trial court held that the evidence showed a compliance with the act would affect the convenience and comfort of the traveling public in but a slight degree, but that "the court's view of the evidence was evidently the result of the court's erroneous idea of what, in the legal sense, is essential to present an occasion or exigency involving the general welfare." The court further said that "in the light of such common

knowledge the evidence in the case tends to show that the effects of this regulation do contribute to the comfort and convenience of the traveling public and thereby contribute to promote their health and the general welfare;" that the regulating "statute was a legal exercise of the police power;" and that the regulations only incidentally affect interstate commerce. The "law permits the berths to be occupied and used when any person desires them, and thus the defendant is secured against loss for services it may be able to furnish the public." It thereupon reversed the judgment of the trial court. The railroad company then brought the case here, assigning as error that the judgment sustaining the statute deprived it of property without due process of law, interfered with its management of cars, and made a discrimination between the privileges accorded state and interstate passengers in the same car at the same time.

Mr. Frank B. Kellogg argued the cause, and, with Messrs. Burton Hanson and Gustavus S. Fernald, filed a brief for plaintiff in error:

Chapter 272 of the 1911 Laws of Wisconsin deprives plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws in taking its property for public use without compensation, and is therefore in violation of the 14th Amendment to the Constitution of the United States.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; State ex rel. McGrael v. Phelps, 144 Wis. 18, 35 L.R.A.(N.S.) 353, 128 N. W. 1041; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681.

The passenger named in the complaint in this action, who purchased the lower berth, might, regardless of the statute here involved, have obtained the use of the upper berth and right to have it open or closed, as he chose, upon payment of $1.20. His right to do that is unquestioned.

Searles v. Mann Boudoir Car Co. 45 Fed. 330.

The legislature, in enacting the law in question, attempted to save it as an exercise of the police power by giving it the name of a health regulation; but when such an enactment involves a question of invasion of constitutional rights, the courts will examine for themselves to determine whether the statute is a proper exercise of the power, or whether under a guise it violates the Constitution.

Asbell v. Kansas, 209 U. S. 251, 256, 52 L. ed. 778, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273.

This court is not concluded by the opinion of the supreme court of the state, but will examine and determine for itself whether the enactment does violate the Federal Constitution or invade the Federal domain.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190.

We deny, absolutely, that the legislature has power to say that no sleeping car company shall use any upper berths.

Coppage v. Kansas, 236 U. S. 1, ante, 441, P.U.R.1915C, 960, 35 Sup. Ct. Rep. 240; Delaware, L. & W. R. Co. v. Public Utilities Comrs. 85 N. J. L. 28, 88 Atl. 849; South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, ante, 350, L.R.A. 1915F, —, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158.

The statute in question cannot be justified as a valid exercise of the power reserved in the state Constitution to alter or repeal the corporate charter of the plaintiff in error.

Miller v. New York, 15 Wall. 478, 498, 21 L. ed. 60, 104; Holyoke Water Power Co. v. Lyman, 15 Wall. 500, 522, 21 L. ed. 133, 140; Shields v. Ohio, 95 U. S. 319, 324, 24 L. ed. 357, 359; Sinking Fund Cases, 99 U. S. 710, 720, 25 L. ed. 496, 501; Stearns v. Minnesota, 179 U. S. 223, 240, 45 L. ed. 162, 172, 21 Sup. Ct. Rep. 73; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 211, 213, 48 L. ed. 406, 412, 413, 24 Sup. Ct. 241, 113 Fed. 930; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Adirondack R. Co. v.

New York, 176 U. S. 335, 344, 44 L. ed. 492, 498, 20 Sup. Ct. Rep. 460; Duluth & I. Range R. Co. v. St. Louis County, 179 U. S. 302, 45 L. ed. 201, 21 Sup. Ct. Rep. 124; State ex rel. Northern P. R. Co. v. Railroad Commission, 140 Wis. 157, 121 N. W. 919; Water Power Cases, 148 Wis. 124, 38 L.R.A.(N.S.) 526, 134 N. W. 330; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, L.R.A. —, —, 142 N. W. 491, Ann. Cas. 1915A, 911; State ex rel. Atty. Gen. v. Northern P. R. Co. 157 Wis. 73, 147 N. W. 219; Com. v. Essex Co. 13 Gray, 239; Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 147, 5 N. W. 281; Delaware, L. & W. R. Co. v. Public Utilities Comrs. 85 N. J. L. 28, 88 Atl. 849; Venner v. Chicago City R. Co. 246 Ill. 170, 138 Am. St. Rep. 229, 92 N. E. 643, 20 Ann. Cas. 607; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

Mr. Walter C. Drew argued the cause, and, with Mr. W. C. Owen, Attorney General of Wisconsin, filed a brief for defendant in error:

The police power is an attribute of sovereignty inherent in government. The police power of the state is a power which has not been delegated to the Federal government, but has been reserved to the states.

License Cases, 5 How. 504, 12 L. ed. 256; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

The case is analogous to that where a state assumes to take or authorize the taking of private property for a public use under the sovereign power of eminent domain, and it is alleged that the taking is in reality for a private use, and, hence, unconstitutional. In such a case, this court has held repeatedly that, although it has jurisdiction to determine the question for itself, it will defer to the judgment of the highest court of the state as to whether the use be private or public, and will accept that judgment unless it appears to be "clearly without ground."

Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 218, 219, 58 L. ed. 924, 928, 34 Sup. Ct. Rep. 522.

Likewise, this court accepts the judgment of the highest court of the state as to whether a state tax is a license tax or a property tax, although Federal constitutional questions are involved.

Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578.

Also, this court has repeatedly said that it is its duty to defer to the judgment of the legislative and judicial authorities of the state as to the reasonableness, propriety, and validity of local enactments for the preservation of the public health and safety.

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 315, 30 Sup. Ct. Rep. 301; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567.

The Wisconsin upper berth law (chap. 272, Laws of 1911) is a legitimate exercise of the police power of the state in behalf of the public health and welfare.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Nevin v. Pullman Palace Car Co. 106 Ill. 222, 46 Am. Rep. 688; McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829.

A police measure need not be the most adequate conceivable to accomplish the legislative purpose. It is sufficient that the measure adopted tends to reduce the danger or promote the public health or convenience.

Freund, Pol. Power, § 149; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; Atlantic Coast Line v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; International Harvester Co. v. Missouri, 234

U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859.

A state may classify with reference to the evil to be prevented.

Patsone v. Pennsylvania, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281.

And the legislature may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.

Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66.

The legislature has a broad power to classify and a wide range of discretion in that regard, and the courts will not interfere if there is any rational basis for the classification.

Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 315, 316, 58 L. ed. 974, 979, 980, 34 Sup. Ct. Rep. 493; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 418, 58 L. ed. 1011, 1024, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; International Harvester Co. v. Missouri, 234 U. S. 199, 211, 214, 58 L. ed. 1276, 1282, 1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856.

The 14th Amendment does not require that state laws shall be perfect, or that classifications made by the legislature shall be in all cases exact.

Missouri K. & T. R. Co. v. Cade, 233 U. S. 642, 649, 650, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678.

It is only when the legislative classification amounts to "clear and hostile discrimination" that this court will declare it violative of the 14th Amendment.

Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 331, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 833.

So far as the construction of the state court, limiting the application of the statute to intrastate passengers, presents any question of classification, there is clearly a legitimate basis in that this construction is adopted in recognition of the limitation upon the state's power.

Brown-Forman Co. v. Kentucky, 217 U. S. 563, 576, 54 L. ed. 883, 888, 30 Sup. Ct. Rep. 578.

The Wisconsin upper berth law, chap. 272, Laws of 1911, does not violate any rights of the plaintiff in error guaranteed by the 14th Amendment.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 559, 58 L. ed. 721, 726, 727, 34 Sup. Ct. Rep. 364; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; Noble State Bank v. Haskell, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

The Wisconsin upper berth law is a valid exercise of the power reserved to the state legislature by art. 11, § 1, of the state Constitution, to alter the corporate franchise of the plaintiff in error.

This power reserved has been always held by the supreme court of the state to apply to special acts of incorporation as well as to general laws.

Pratt v. Brown, 3 Wis. 603; Madison, W. & M. Pl. Road Co. v. Reynolds, 3 Wis. 287; Blair v. Milwaukee & P. du C. R. Co. 20 Wis. 254, 10 Am. Neg. Cas. 518; State v. Milwaukee Gaslight Co. 29 Wis. 454, 9 Am. Rep. 598.

So that whether the plaintiff in error derives its corporate franchises and privileges from general or special acts of the legislature of Wisconsin is immaterial. Its corporate charter is in all respects subject to the power expressly reserved by the above quoted provision of the state Constitution, and its corporate charter, within the meaning of such a reservation to the legislature of the power to alter, amend, or repeal the same, consists of all laws, special and general, which incorporate it, prescribe its rights, confer powers or impose duties upon it.

Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; Com. v. Eastern R. Co. 103 Mass. 254, 4 Am. Rep. 555; Worcester v. Norwich & W. R. Co. 109 Mass. 103; Bangor, O. & M. R. Co. v. Smith, 47 Me. 34; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341; State, Morris & E. R. Co. Prosecutors, v. Railroad Taxation Comr. 37 N. J. L. 237; Taggart ex rel. Mason v. Perkins, 73 Mich. 303, 41 S. W. 426; State ex rel. Ross v. Anderson, 31 Ind. App. 34, 67 N. E. 207; Garey v. St. Joe Min. Co. 32 Utah, 497, 12 L.R.A.(N.S.) 554, 91 Pac. 369; Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97.

It appears that the authority of the legislature under a power reserved to alter or amend the terms and conditions of a grant of special privilege is somewhat broader, as against a constitutional objection urged by the grantee of such privilege, than the authority of the legislature to impose restraints and regulations generally in the exercise of the police power. Thus, while, as we have seen, the exercise of the police

power by the legislature is limited to such legislation as subserves a legitimate public purpose and is reasonably adapted to serve that purpose, under an express reservation of power to alter, amend, or repeal such grant of special privilege, the legislature may make any amendment of the corporate charter which is consistent with the object and scope of the corporation, and is not unreasonably harsh and oppressive.

Shields v. Ohio, 95 U. S. 319, 324, 24 L. ed. 357, 359; Fairhaven & W. R. Co. v. New Haven, 203 U. S. 379, 388, 389, 51 L. ed. 237, 240, 241, 27 Sup. Ct. Rep. 74; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 576; State v. Chicago & N. W. R. Co. 128 Wis. 505, 108 N. W. 594.

The decisions of the highest court of the state have always given a broad scope and effect to this constitutional reserve power of the legislature, affecting not only the franchise of corporate existence, but including all franchises and privileges acquired by the corporation and emanating directly or indirectly from the legislature.

Madison, W. & M. Pl. Road Co. v. Reynolds, 3 Wis. 287; Pratt v. Brown, 3 Wis. 611; Nazro v. Merchants' Mut. Ins. Co. 14 Wis. 299; Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 17; Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 198, 3 Am. Rep. 30; Pick v. Rubicon Hydraulic Co. 27 Wis. 440; State v. Milwaukee Gaslight Co. 29 Wis. 461, 9 Am. Rep. 598; Chapin v. Crusen, 31 Wis. 215; West Wisconsin R. Co. v. Trempealeau County, 35 Wis. 270; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 509; State ex rel. Cream City R. Co. v. Hilbert, 72 Wis. 192, 39 N. W. 326; Ashland v. Wheeler, 88 Wis. 616, 60 N. W. 818; State v. Chicago & N. W. R. Co. 128 Wis. 505; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 28, 140 Am. St. Rep. 1050, 129 N. W. 925; La Crosse v. La Crosse Gas & Electric Co. 145 Wis. 415, 130 N. W. 530.

Had the general laws under which the plaintiff in error was first incorporated provided that all upper berths in its sleeping cars, when neither occupied nor engaged, should be kept closed when the under berth was occupied or engaged, such provision would have been a part of its charter without question. A subsequent act repealing such provision, or putting it into the law for the first time, alters or amends the charter. Under the reserved power the legislature can, within the limitations noted, put anything into the charter it could have placed there originally in creating the corporation.

Sinking Fund Cases, 99 U. S. 700, 720, 25 L. ed. 496, 501; Fairhaven & W. R. Co. v. New Haven, 203 U. S. 379, 388, 51 L. ed. 237, 240, 27 Sup. Ct. Rep. 74.

Accordingly, it has been held that a law requiring a railroad company to build a station, although confiscatory, as an exercise of the police power, is valid as an amendment to the corporate charter of the road.

Com. v. Eastern R. Co. 103 Mass. 254, 4 Am. Rep. 555; Worcester v. Norwich & W. R. Co. 109 Mass. 103; Bangor, O. & M. R. Co. v. Smith, 47 Me. 34.

This power reserved in the state Constitution to alter the corporate charter preserved to the state plenary power to regulate the services, uses, and tolls of railway corporations created by it.

Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382.

Such reservation of power to alter, amend, or repeal is given broad effect in the decisions of this court, and is held in many cases to permit, in the exercise of such reserved power, legislation affecting property rights which would scarcely be sustained as an exercise of the general police power of the state. In the cases cited infra, the power of alteration, amendment, or repeal was held to confer upon the legislature authority to amend or repeal charters, franchises, and privileges as follows:

To repeal an exemption from taxation conferred upon a railroad corporation.

Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204.

To require a corporation to establish a sinking fund for the payment of its debts.

Sinking Fund Cases, 99 U. S. 700, 730, 25 L. ed. 496, 505.

To change the class entitled to elect trustees to manage a corporation, and to devest incorporators of real property upon fair terms against their consent.

Close v. Glenwood Cemetery, 107 U. S. 466, 477, 27 L. ed. 408, 412, 2 Sup. Ct. Rep. 267.

To change and regulate transportation rates of a railroad corporation.

Shields v. Ohio, 95 U. S. 319, 324, 24 L. ed. 357, 359.

To deprive a waterworks corporation of representation upon a board of commissioners authorized to fix its rates.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 353, 356, 28 L. ed. 173, 176, 177, 4 Sup. Ct. Rep. 48.

To repeal the exclusive feature of a corporate franchise of a company incorporated to sell gas in a city named.

Hamilton Gaslight & Coke Co. v. Hamil-

ton, 146 U. S. 258, 270, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90.

To repeal an immunity from taxation granted to a railroad corporation.

Northern C. R. Co. v. Maryland, 187 U. S. 258, 268, 269, 47 L. ed. 167, 172, 173, 23 Sup. Ct. Rep. 62.

To change the rate of return allowed irrigation companies under regulation of their rates by county commissioners.

Stanislaus County v. San Joaquin & K. Canal & Irrig. Co. 192 U. S. 201, 211, 213, 48 L. ed. 406, 412, 413, 24 Sup. Ct. Rep. 241.

To change and increase the burden imposed on a street railway corporation for the repairing of street paving.

Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 388, 390, 51 L. ed. 237, 240, 241, 27 Sup. Ct. Rep. 74.

To repeal the franchise of a corporation to be a body corporate, and to act as a body corporate under its corporate name.

Calder v. Michigan, 218 U. S. 591, 600, 54 L. ed. 1163, 1168, 31 Sup. Ct. Rep. 122.

To create a corporation commission and empower it to regulate rates, and thus amend a railroad charter by which was expressly conferred upon the corporation authority to fix its own rates.

Matthews v. Corporation Comrs. 97 Fed. 400.

To compel a state banking corporation to contribute to a fund to secure depositors in other banks against loss.

Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

To require a railroad corporation to pay its employees semimonthly instead of monthly.

Erie R. Co. v. Williams, 233 U. S. 685, 700, 702, 58 L. ed. 1155, 1161, 1162, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

There have been two statutes in Wisconsin relating to [498] letting down the upper berth when the lower was occupied. The first[1] left the matter to the decision of the occupant of the lower berth. The second[2] absolutely prohibits the upper from being let down before it is engaged or occupied.

Concerning the act of 1907, which provided that the occupant of the lower "should have the right to direct whether the unoccupied upper should be opened or closed," the supreme court (State v. Redmon, 134 Wis. 89, 113, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408) held that the statute was "not in reality a police regulation, but an unwarranted interference with property rights; an attempt . . . to give to any person at his option who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof; an obvious . . . attempt . . . to appropriate the property of one for the benefit of another in violation of several constitutional safeguards that might be referred to, but particularly the guaranty that 'no person shall be . . . deprived of life, liberty, or property without due process of law.' . . . It follows that an arbitrary appropriation in the name of law of the space of an upper berth in a sleeping car for the greater comfort and safety, as regards the health of the occupant of the lower berth at his option, . . . is highly oppressive."

1. But the language of the act of 1911, now under review, [499] does not remove the fundamental objection to that class of legislation. For as the state could not authorize the occupant of the lower berth to *take* salable space without pay, neither can the present statute compel the company to *give* that occupant the free use of that space until it is actually purchased by another passenger. The owner's right to property is protected even when it is not actually in use, and the company cannot be compelled to permit a third person to have the free use of such property until a buyer appears.

2. While this principle is recognized, it is said that this act of 1911 was not passed for the purpose of benefiting the occupant of the lower berth, but as a health measure, and in the interest of all the occupants of the car. But the statute does not purport to be a health measure, and cannot be sustained as such. For if lowering the upper berth injuriously interfered with the ventilation of the car and the health of the

[1] "An Act . . . Relating to the Health and Comfort of Occupants of Sleeping-Car Berths.

"Sec. 1. Whenever a person pays for the use of a double lower berth in a sleeping car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person; and the proprietor of the car and the person in charge of it shall comply with such direction." Laws of 1907, chap. 266.

[2] "1. Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied." Laws of 1911, chap. 272.

passengers, it would follow that upper berths should not be lowered; and if it was harmful to let down the uppers, it would be even more harmful to permit additional passengers to come into the car and occupy them. The testimony of witnesses and common knowledge coincide with the trial court's finding of fact that the lowering of upper berths does not endanger the lives, health, or safety of persons occupying the lower berth, and that keeping the upper closed will not add to the comfort of the public generally. Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 692, 43 L. ed. 862, 19 Sup. Ct. Rep. 565. There are some inconveniences and discomforts incident to traveling on a sleeping car, but none of those resulting from the lowering of the upper berth are of a character that can be treated as a nuisance either in law or in fact. For lowering the upper berth is not only not treated as a nuisance or a serious inconvenience and discomfort to passengers, but the language of the statute itself recognizes that the sleeping car company might lawfully sell all of the upper berths and have each of them [500] occupied. The same is true of the order of the State Commission fixing a rate of $1.50 for the lower berth, $1.20 for the upper berth, and $2.70 for the section. This treats that the space in the section is salable, as a whole or in parts; and, if the space is thus lawfully salable, it is property entitled to protection.

3. The state supreme court cited Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418, and, after discussing the extent of the police power and the conditions under which it can be exercised, held that it was a reasonable exercise of such power to prohibit the upper berth from being lowered if not engaged or occupied, saying that "if compliance with this [statutory] command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. Sweet v. Rechel, 159 U. S. 380, 400, 40 L. ed. 188, 196, 16 Sup. Ct. Rep. 43.

4. The plaintiff also insists that the requirement that the upper berth should not be let down until actually engaged also deprives the company of its right of management, and prevents it from conducting its business so as to secure the privacy of the man or woman occupying the lower berth. It is not necessary to refer to the evidence on that subject because it is a matter of common knowledge that to let down the upper berth during the night would [501] necessarily be an intrusion upon the privacy of those occupying lower berths. For the glare of the lights and the noise of lowering the upper berth would disturb any except the soundest sleepers. In this respect the statute would lessen the ability of the company to furnish the place of sleep and rest which it offers to the public. A sleeping car may not be an "inn on wheels," but the operating company does engage to furnish its patrons with a place in which they can rest without intrusion upon their privacy. Holding out these inducements and seeking this patronage, the company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety, and convenience of the public. The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management, or the taking of the carrier's property without compensation. Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Northern P. R. Co. v. North Dakota, 236 U. S. 585, ante, 735, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 529, 56 L. ed. 863, 870, 32 Sup. Ct. Rep. 535; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; Great Northern R. Co. v. Minnesota, 238 U. S. 340, ante, 1337, 35 Sup. Ct. Rep. 753, just decided.

5. In the brief of counsel for the state it is argued that the statute can be sustained as a valid exercise of the state's reserved power to alter the charter of the company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed, such a ruling would seem to have been opposed to State ex rel. Northern P. R. Co. v. Railroad Commission, 140 Wis. 157, 121 N. W. 919, and the Water Power Cases,

148 Wis. 124, 38 L.R.A.(N.S.) 526, 134 N. W. 330, where it was held that the right to amend a charter does not authorize the taking of the company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example, in Shields v. Ohio, 95 U. S. 324, 24 L. ed. 359, it was said [502] that "the power of alteration and amendment is not without limit. The alterations must be reasonable . . . and be consistent with the scope and object of the act of incorporation." . . . Again, in Stearns v. Minnesota, 179 U. S. 223, 259, 45 L. ed. 162, 180, 21 Sup. Ct. Rep. 73, it was held that the reserved right to amend a corporate charter "does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by . . . taking of property without due process of law." Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 690, 43 L. ed. 861, 19 Sup. Ct. Rep. 565; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Sinking Fund Cases, 99 U. S. 720, 25 L. ed. 501; Miller v. New York, 15 Wall. 498, 21 L. ed. 104; see also Delaware, L. & W. R. Co. v. Public Utilities, 85 N. J. L. 28, 38, 88 Atl. 849, where it was held that, under such a power, the company could not be required to furnish free transportation to certain designated officials. This conclusion makes it unnecessary to discuss the assignments relating to interstate commerce.

The judgment is reversed and the case remanded to the Supreme Court of Wisconsin for further proceedings not in conflict with this opinion.

Reversed.

Mr. Justice McKenna and Mr. Justice Holmes dissent.

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[503] WELLS FARGO & COMPANY EXPRESS, and the United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

D. W. FORD, Deft. in Err.

(See S. C. Reporter's ed. 503-506.)

Judgment — of sister state — full faith and credit.

A judgment of a state court against an express company in a replevin suit brought by the consignee of a C. O. D. shipment is not denied full faith and credit by the refusal of a court of another state to treat such judgment as a bar to the right of the consignor to hold the express company liable for the value of the consigned goods, where such refusal was based upon the express company's failure to prove that it gave the consignor prompt notice of the pendency of the replevin suit.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

[No. 259.]

Submitted May 5, 1915. Decided June 21, 1915.

IN ERROR to the County Court of Madison County in the State of Texas to review a judgment against an express company in a suit by the consignor to recover the value of a C. O. D. shipment which had been delivered to the consignee under a judgment in replevin of a court of another state. Affirmed.

The facts are stated in the opinion.

Mr. H. M. Garwood submitted the cause for plaintiffs in error. Mr. C. W. Stockton was on the brief:

The seizure of goods in the possession of a carrier by virtue of a writ valid on its face, notice thereon being promptly given to the shipper or owner of the goods, constitutes a complete defense in a suit by the shipper or owner for their alleged conversion.

1 Moore, Carr. 2d. pp. 327-331.

There can be and is no question but that the process and judgment of the Illinois court was such as was recognized as regular and valid by the courts of Illinois, and it follows that it must be and should be recognized as valid and regular by the courts of Texas, the writ and proceedings being regular on their face under the law of both states.

Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109; Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177; Mutual L. Ins. Co. v. Harris, 97 U. S. 331, 24 L. ed. 959; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960.

No appearance for defendant in error.

NOTE.—Generally, as to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Mills v. Duryee, 3 L. ed. U. S. 411; Darby v. Mayer, 6 L. ed. U. S. 367; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

Mr. Justice **Lamar** delivered the opinion of the court:

D. W. Ford was a traveling salesman who was much of the time on the road, but considered Madisonville, Texas, as his home. On September 16, 1912, he shipped from that place to the Walker-Edmond Company, at Chicago, a package containing a ring with "C. O. D. charges thereon amounting to $35." When the package arrived in Chicago it was tendered to the consignee, who refused to receive it or pay the $35. The Walker-Edmond Company, in order to obtain possession of the ring, forthwith brought an action in replevin against Ford and the express company in the municipal court of Chicago. The writ, returnable October 4, was only served on the express company—the officer making return that Ford was not to be found. The Chicago agent of the express company on September 21 wrote the agent at Madisonville to notify Ford of the pendency of the suit to be tried on October 4. There is a claim that the agent at once wrote the Chicago office that Ford did not desire to employ counsel, and would hold the company responsible under its C. O. D. contract. The record shows that the local agent, on October 2, mailed a letter to Ford at Madisonville, containing a notice that judgment would go by default unless Ford defended by October 4.

Ford claimed that he was absent from Madisonville during the months of September and October, and received no notice of the pendency of the suit until after its return in November, and after the municipal court of Chicago had entered a default judgment, finding that Walker-Edmond Company was entitled to the possession of the ring.

Subsequently Ford demanded that the express company [**505**] should return him the property or else pay him $35, which it had been instructed to "collect on delivery." On its failure to comply, Ford brought suit in a Texas court against the express company, which defended on the ground that it was not liable because the package had been taken from it by judicial process. In support of that defense it offered a copy of the Illinois record in the case of Walker-Edmond Co. v. Wells, Fargo, & Co. Express and D. W. Ford. The judge of the county court found that Ford had not been served in any way provided by law, and "on account of the express company's negligence in failing to give the plaintiff legal notice of the pendency of the suit in Chicago, it is liable on account of its negligence." Judgment was thereupon entered for Ford by the county court of Madison county, Texas,—the highest court of that state having jurisdiction of the case,—and the express company brought the case here by writ of error in which it complains of the failure of the Texas court to give full faith and credit to the judicial proceedings of the municipal court exercising jurisdiction under the laws of the state of Illinois.

In the brief it is said that, while the case is for a small sum, the writ of error is prosecuted to test the constantly recurring and, to it, important question as to whether the express company can be held liable to consignors who sue in one state to recover property which has been taken from the carrier by the judicial processes of another state. But the law is well settled. The carrier cannot be held for goods taken from its custody by valid legal process, provided it gives the owner prompt notice of the suit so that he may have an opportunity to protect his interest. For, as the land carrier is not bound (The M. M. Chase, 37 Fed. 708) to make a defense, it is all the more bound to give the consignor notice of the suit so that he may appear and make his own defense. Ohio & M. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727: Merz v. Chicago & N. W. R. Co. 86 [**506**] Minn. 35, 90 N. W. 7; Bliven v. Hudson River R. Co. 36 N. Y. 403, 407. If the carrier gives such notice and the consignor fails to appear, or fails in his defense, and the property is seized, held, or sold under judicial process, the carrier cannot thereafter be held responsible for yielding to what must then be treated as *vis major*.

In the present case the carrier, in recognition of its duty to give notice, instructed the agent at Madisonville to notify Ford of the pendency of the suit. The local agent, without making inquiries to learn whether Ford was in town or absent, in the course of his business as a traveling salesman, contented himself with mailing a letter directed to Ford at Madisonville. This letter was posted only two days before the trial in Chicago, and was not received by Ford until after his return to Madisonville, and after the judgment in the replevin suit had been entered against the express company. The Texas court held that the carrier was liable for the value of the consigned goods because it had been guilty of negligence in failing to give Ford legal notice.

That judgment, based on that common-law ground, did not deny full faith and credit to the Illinois judgment, which was treated as valid between Walker-Edmond Company and the express company. It, however, was not available to the express company because it established only one of the two elements which the carrier had to prove in order to make out its defense when sued by Ford for the property. For the carrier not only had to show that the package had

been taken from it by a valid judicial process, but it also had to show that Ford had been given prompt notice of the pendency of the suit in which that process issued. The decision against the express company was based on its failure to prove that it gave the notice which was the condition precedent of its right to use the valid Illinois judgment.

Affirmed,

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[507] CENTRAL VERMONT RAILWAY COMPANY, Plff. in Err.,

v.

MARY THERESA WHITE, Administratrix of the Estate of Enoch L. White.

(See S. C. Reporter's ed. 507–516.)

Appeal and error — assignments of error — number.

1. The practice of filing a large number of assignments of error cannot be approved, as it perverts the purpose sought to be subserved by the rule requiring assignments of error, which was intended to present to the court a clear and concise statement of material points on which the plaintiff in error intends to rely.

[For other cases, see Appeal and Error, V. t, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — non-Federal question.

2. Questions in a suit under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8658), which relate to matters of pleading, to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial courts involving no construction of the Federal statute, cannot be considered on a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — negligence.

3. A finding that the death of a railway brakeman in a rear end collision was due to the fault of the agents of the railway company is sustained by evidence that, unknown to him and the other employees on the train, such train was followed by a faster train which had received a clearance card indicating that the track ahead was clear so that it might safely proceed, and that the engine of the following train had a leaking cylinder from which steam escaped in such quantities as to make it impossible to see the lights of the train ahead, as a result of which the collision occurred.

[For other cases, see Evidence, XII. d, in Digest Sup Ct. 1908.]

Master and servant — assumption of risk — unknown defects.

4. A railway employee does not assume the risk arising from unknown defects in engines, machinery, or appliances.

[For other cases, see Master and Servant, II. b, 3; II. b, 4, in Digest Sup. Ct. 1908.]

Conflict of laws — burden of proof — contributory negligence.

5. The question of the burden of proof respecting contributory negligence in a suit brought in a state court under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8658), is to be determined according to the rules in the Federal courts which place the burden on the defendant, and not according to any local rule of procedure which imposes that burden on the plaintiff.

[For other cases, see Conflict of Laws, II. a, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — following decision below — local practice.

6. The ruling of the highest court of a state that the failure of the original declaration in a suit under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8658), to show that the employee was engaged in interstate commerce at the time of his injury, was cured by a charge in the plea and admission in the replication that he was so employed, is binding on the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2209–2226, in Digest Sup. Ct. 1908.]

Trial — verdict — apportioning damages.

7. A general verdict for the plaintiff may be returned by the jury in an action brought by the administratrix under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8658), for the benefit of the widow and minor children of the deceased employee without apportioning the damages between the beneficiaries.

[For other cases, see Trial, IX. a, in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On *volenti non fit injuria* as a defense to actions by injured servants—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 162.

On the constitutionality, application, and effect of the Federal employers' liability act —see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

On review of questions of local practice and procedure upon writ of error from the Federal Supreme Court to a state court—see note to Texas & N. O. R. Co. v. Miller, 55 L. ed. U. S. 789.

Error to state court — scope of review — questions of general law.

8. Questions of general law, raised in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8658), which involve no construction of the Federal statute, and neither directly nor indirectly affect any Federal right, will not be reviewed on a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 2072–2123, in Digest Sup. Ct. 1908.]

[No. 407.]

Argued April 23, 1915. Decided June 21, 1915.

IN ERROR to the Supreme Court of the State of Vermont to review a judgment which affirmed a judgment of the County Court of Franklin County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, 87 Vt. 330, 89 Atl. 618.

The facts are stated in the opinion.

Mr. J. W. Redmond argued the cause and filed a brief for plaintiff in error:

The supreme court of Vermont erred in holding that, under the Federal employers' liability act, the burden in respect of contributory negligence was on plaintiff in error.

Shumm v. Rutland R. Co. 81 Vt. 186, 19 L.R.A.(N.S.) 973, 69 Atl. 945; Whart. Confl. L. 3d ed. § 478 B, p. 1107; 1 Wigmore, Ev. § 6, p. 19; Story, Confl. L. 8th ed. p. 775; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

Every question involved in the rendition of a judgment is reached by an exception to its rendition.

C. H. Eddy & Co. v. Field, 85 Vt. 188, 81 Atl. 249; Farrant v. Bates, 60 Vt. 37, 11 Atl. 693; Morrisette v. Canadian P. R. Co. 74 Vt. 232, 52 Atl. 520.

The question of whether the jury should have apportioned the verdict was properly raised below, and is clearly and formally presented for the consideration of this court.

Chapman v. Goodnow (Chapman v Crane) 123 U. S. 540, 549, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

The jury must apportion to each beneficiary the amount of his or her recovery.

Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

The supreme court of Vermont in legal effect denied the defense of assumed risk to the defendant, because such court overruled a motion to instruct a verdict for the defendant on that ground, for the trial court nowhere instructed the jury on the proposition of assumed risk, although requested so to do, and the supreme court sustained this action of the trial court.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

Mr. Warren R. Austin argued the cause and filed a brief for defendant in error:

A decision, not that the claims have no merit, but that they have been waived or cured, does not involve a Federal question.

Brown v. Massachusetts, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757.

A decision that defects of declaration are cured by allegations of plea supplying omissions involves nothing more than a question of pleading and practice in the state courts.

Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 417, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534.

Errors assigned upon the record, relating to matters of pleading and practice under the laws of a state, involve no Federal question.

Buena Vista County v. Iowa Falls & S. C. R. Co. 112 U. S. 165, 28 L. ed. 680, 5 Sup. Ct. Rep. 84; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250.

This court has repeatedly held that a defective declaration of a good cause of action is cured by a plea which supplies the allegations omitted, by waiving demurrer, pleading over, and going to trial on the merits, and by a verdict which necessarily finds the facts so omitted.

United States v. Morris, 10 Wheat. 246, 6 L. ed. 314; Vickery v. New London Northern R. Co. 87 Conn. 634, 89 Atl. 277; Baker v. Warner, 231 U. S. 588, 58 L. ed. 384, 34 Sup. Ct. Rep. 175; Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606.

It was not necessary to refer expressly to the Federal act.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 51, 56 L. ed. 327, 347, 38 L.R.A.

(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Mention of a state statute would not invalidate the declaration.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 574, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 114B, 134.

A request in such general terms, on the subject of assumption of risk, as not to give the jury a correct understanding of the law, was properly refused.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Bishop v. Readsboro Chair Mfg. Co. 85 Vt. 141, 36 L.R.A. (N.S.) 1171, 81 Atl. 454, Ann. Cas. 1914B, 1163; French v. Ware, 65 Vt. 338, 26 Atl. 1096; Vaughan v. Porter, 16 Vt. 266; Westmore v. Sheffield, 56 Vt. 239.

An exception taken as an entirety to rulings upon several requested instructions is unavailing.

Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731; McCabe & S. Constr. Co. v. Wilson, 209 U. S. 275, 52 L. ed. 788, 28 Sup. Ct. Rep. 558.

Questions of evidence are not reviewable on writ of error to a state court.

Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; Martin v. Marks, 97 U. S. 345, 24 L. ed. 940; Williams v. Norris, 12 Wheat. 117, 6 L. ed. 571; Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038; Dower v. Richards, 151 U. S. 658, 667, 38 L. ed. 305, 309, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

Plaintiff may go to the jury where there is any evidence that fairly and reasonably tends to establish liability.

Fadden v. McKinney, 87 Vt. 316, 89 Atl. 351; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 58 L. ed. 521, 34 Sup. Ct. Rep. 229; North Carolina R. Co. v. Zachary, 232 U. S. 248, 259, 58 L. ed. 591, 596, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274.

The burden of proof of contributory negligence is on the defendant.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 118, 57 L. ed. 1096, 1100, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580.

An objection to the charge of the trial court upon the subject of damages comes too late when raised in the Federal Supreme Court for the first time.

Phœnix R. Co. v. Landis, 231 U. S. 578, 58 L. ed. 377, 34 Sup. Ct. Rep. 179.

This case differs from Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, in this, that all the beneficiaries were dependent solely on the plaintiff's intestate.

The action is for the benefit of the same person, whether under the Vermont statute or under the Federal statute.

Kimball v. Kimball, 174 U. S. 158, 161, 43 L. ed. 932, 933, 19 Sup. Ct. Rep. 639.

Mr. Justice **Lamar** delivered the opinion of the court:

1. On January 12, 1912, Enoch L. White was killed in a rear end collision while employed as brakeman on the Vermont Central, an interstate railway. His administratrix sued the company, in a Vermont court, for "the benefit of the widow and next of kin, minor children." The jury returned a verdict for $7,168. The judgment thereon was affirmed by the supreme court of the state (87 Vt. 330, 89 Atl. 618), and the case was brought here on a record containing so many assignments, covering 18 [**509**] printed pages, as to make it proper to repeat the ruling in Phillips & C. Constr. Co. v. Seymour, 91 U. S. 648, 23 L. ed. 342, that the "practice of filing a large number of assignments cannot be approved. It perverts the purpose sought to be subserved by the rule requiring any assignments." "It points to nothing and thwarts the purpose of the rule" (Chicago G. W. R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 659), which was intended to present to the court a clear and concise statement of material points on which the plaintiff in error intends to rely. Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial court which involve no construction of the employers' liability act, and which, therefore, cannot be considered on writ of error from a state court. Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 486, 56 L. ed. 1171, 1175, 32 Sup. Ct. Rep. 790.

2. We shall therefore only consider those assignments, discussed in the brief, which raise a Federal question. Among them is the contention that the court failed to direct a verdict for the defendant because the proof failed to show negligence of the company, or to prove the facts necessary to establish liability under the Federal law. Southern P. Co. v. Schuyler, 227 U. S. 601, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

The evidence showed that on the night of January 1st, 1912, Enoch L. White was employed by the Central Vermont Railway Company as brakeman on extra freight train No. 401. It had passed several miles

north of Bethel, Vermont, and was proceeding up grade at a low rate of speed. White and the other employees thereon had no notice that it was followed by a faster freight train (No. 708), which, at Bethel, had received a "clearance card" indicating that the track ahead was clear and that it might proceed. The engine pulling train No. 708 had a leaking cylinder, from which steam escaped in such [510] quantities as to make it impossible for the engineer to see the tail lights of the train on which White was employed. The result was that the faster train (708) ran into the slower train (401) and in the collision White was killed. The evidence was amply sufficient to sustain a finding that the death of White was due to the fault of the agents of the railway company.

3. Complaint is made because the court failed to instruct the jury as to the law respecting the assumption of risks. But there was not only no request to charge on that subject, but there is no evidence that White knew of the negligence of the agent in giving a "clearance card" or of the leaking cylinder which obscured the vision of the engineer. He did not assume the risk arising from unknown defects in engines, machinery, or appliances, while the statute abolishes the fellow-servant rule. 35 Stat. at L. 65, chap. 149, § 2, Comp. Stat. 1913, § 8658. Under the facts there was, therefore, no error in failing to charge the jury on the subject of assumption of risks. Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 102, 58 L. ed. 524, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635.

4. The defendant, however, insisted that White knew his train was behind time and running at a low rate of speed. The company contended that, in view of these circumstances, it was his duty, under the rules, to put out lighted fuses and torpedoes in order to give warning of the presence of train No. 401 on the track. On that theory the company asked the court to charge that the burden was on the administratrix to show that White was not guilty of contributory negligence. In considering that exception the supreme court of Vermont held that the defendant's contention was based on a correct statement of the state rule, but said: "This case, however, is brought upon an act of Congress . . . [which] supersedes the laws of the state in so far as the latter cover the same field. . . . Consequently the question of the burden of proof respecting [511] contributory negligence on the part of the injured employee is to be determined according to the provisions of that act," citing Seaboard Air Line R. Co. v. Moore, 113 C. C. A. 668, 193 Fed. 1022, s. c. 228 U. S. 434, 57 L. ed. 907, 33 Sup. Ct. Rep. 580.

In this court the argument was devoted principally to a discussion of this ruling—counsel for the railroad company earnestly insisting that "the *lex fori* must determine all questions of evidence, including that of the burden of proof. Whart. Confl. L. 3d ed. § 478b." It was argued that there is nothing in the Federal statute indicating an intent to change the state rule as to the burden of proof, and it is claimed that because of the court's mistaken construction of the Federal act the railway company has been deprived of a right to which it was entitled under the laws of Vermont.

There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought (M'Niel v. Holbrook, 12 Pet. 89, 9 L. ed. 1011). But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy, but destroys the liability. A. J. Phillips Co. v. Grand Trunk Western R. Co. 236 U. S. 662, ante, 774, 35 Sup. Ct. Rep. 444; Boyd v. Clark, 8 Fed. 849; Hallowell v. Harwich, 14 Mass. 188; Cooper v. Lyons, 9 Lea, 597 (2); Newcomb v. The Clermont No. 2, 3 G. Greene, 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere [512] matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law.

But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he

must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff. Washington & G. R. Co. v. Gladmon, 15 Wall. 401 (1), 407, 408, 21 L. ed. 114-116; Hough v. Texas & P. R. Co. 100 U. S. 225, 25 L. ed. 617; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551 (4), 557, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 581, 37 L. ed. 288, 13 Sup. Ct. Rep. 557; Hemingway v. Illinois C. R. Co. 52 C. C. A. 477, 114 Fed. 843. Congress, in passing the Federal employers' liability act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line R. Co. v. Moore, 228 U. S. 434, 57 L. ed. 907, 33 Sup. Ct. Rep. 580. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof.

[513] 5. There are, however, a series of assignments in this record which must be disposed of in conformity with the general principle that matters affecting the remedy are to be governed by the law of the forum. They are all based on the fact that, while the railway company had lines running through Massachusetts and Vermont into Canada, the declaration contained no allegation that White was engaged in interstate commerce at the time of the collision. The company made this the ground of a plea in bar. The administratrix thereupon filed a replication admitting that the deceased was engaged in such commerce at the time of his death. The company demurred to the replication on the ground that it was a departure from the cause of action under the state law, and the assertion a new cause of action under the Federal employers' liability law. This demurrer was overruled and after verdict the defendant made the same facts the basis of a motion in arrest of judgment.

The evidence showed a liability under the employers' liability act, and without stopping to discuss whether, on general principles, the motion should not have been overruled because the declaration was amendable to conform to the proof (Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 48, 58 L. ed. 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, ante, 671, 35 Sup. Ct. Rep. 306), it is sufficient to say that the supreme court of the state held that the defect in the original declaration had been cured by the charge in the plea and the admission in the replication that White was employed in interstate commerce. That decision on a matter of state pleading and practice is binding on this court.

6. Another assignment relates to the form of the verdict: The administratrix brought suit "for the benefit of the widow and next of kin, minor children." The defendant did not ask the court to instruct the jury to apportion the damages, and there was a verdict for the plaintiff for $7,168. The defendant then moved in arrest "because [514] the verdict of the jury in this case was a general verdict." In this court there was a departure from the language of the exception and error is assigned "because the judgment, being *in solido*, is void under the Federal employers' liability law for the reason that damages must be apportioned by the jury in accordance with the dependency of the relatives entitled to recover for his death." In support of that contention, the defendant relies on the statement in Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 176, 57 L. ed. 787, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, that "though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss." That statement must be read in the light of the record then before the court. It showed that one of those named as a beneficiary was a married daughter of the deceased, living with her husband, and supported by him. The jury actually apportioned the damages, so the question as to the validity of a verdict *in solido* was not raised by the record. The quoted language is part of its holding, that it was error to refuse to charge that the married daughter was not a dependent of her deceased father. But there was nothing in that record which would support a ruling that a general verdict was invalid, or that the verdict could be set aside because

it failed to fix the amount each beneficiary was to receive.

Under Lord Campbell's act (9 & 10 Vict. chap. 93, § 2) and in a few of the American states the jury is required to apportion the damages in this class of cases. But even in those states the distribution is held to be of no concern to the defendant, and the failure to apportion the damages is held not to be reversible error (Norfolk & W. R. Co. v. Stevens, 97 Va. 631 (1), 634, 46 L.R.A. 367, 34 S. E. 525; International & G. N. R. Co. v. Lehman, — Tex. Civ. App. —, 72 S. W. 619),—certainly not unless the defendant can show that it has been injured by such [515] failure. The employers' liability act is substantially like Lord Campbell's act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the states in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased,—a matter for probate courts, and not for jurors. If, as in the McGinnis Case, the plaintiff sues for the benefit of one who is not entitled to share in the recovery (Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159), and if her inclusion in the suit might increase the amount of the recovery, the defendant may raise the question in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery for one not entitled to share in the benefits of the Federal act. But no such question was or could have been raised in the present case, since, as matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father. 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657.

7. Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the "clearance card" and the refusal to permit the railway company to show that, under the Federal law, all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the Federal statute, and neither directly nor indirectly affect any [516] Federal right. Those assignments, therefore, under Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214], Rev. Stat. § 729, will not be reviewed on a writ of error to a state court. Seaboard Air Line R. Co. v. Duvall. See also Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, and Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, ante, 277, 35 Sup. Ct. Rep. 130, which state the rule where similar cases are brought here by writ of error to a Federal court.

Judgment affirmed.

UNITED STATES, Appt.,

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY and the Delaware, Lackawanna, & Western Coal Company.

(See S. C. Reporter's ed. 516–537.)

Carriers — government control — association with commodity carried — stock ownership.

1. The mere ownership by railway shareholders of the stock of a coal company cannot be used as a test by which to determine the legality of the interstate transportation of the coal company's coal by the railway company, under the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), making it unlawful for any railway company to transport in interstate commerce any article which it may own, or in which it may have any interest, direct or indirect.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Carriers — association with commodity carried — sale to carrier's agent — monopolistic contract.

2. A contract between a railway company owning anthracite coal mines and a coal company, with practically identical stock ownership and management, by which the railway company sold the coal at the mouth of the mines to the coal company and instantly regained possession as carrier, retaining such possession until delivery at the conclusion of the interstate transportation to the coal company, which subsequently paid therefor at the contract price, *viz.*, 65 per cent of the New York market price on the day of delivery at the mines,—violates both the commodities clause of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), making it unlawful for any railway company to

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Note.—On illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

transport in interstate commerce any article which it may own or in which it may have any interest, direct or indirect, and the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), prohibiting contracts in restraint of interstate trade, where such coal company was created for the express purpose of becoming a party to such contract, under which it was to handle nothing except the railway company's coal, and was dependent solely upon the railway company for the amount it could procure and sell, and was absolutely excluded from the right to purchase elsewhere without the consent of the railway company (which, however, was under no corresponding obligation to supply any definite amount at any definite date), and was to conduct the selling of the coal so as best to conserve the interests, good will, and markets of the coal mined by the railway company, and was to continue to fill the orders of present responsible customers of the railway company, even if some of such sales might be unprofitable.

[For other cases, see Carriers, III.; Monopoly, II. b, in Digest Sup. Ct. 1908.]

[No. 517.]

Argued December 9 and 10, 1914. Decided June 21, 1915.

APPEAL from the District Court of the United States for the District of New Jersey to review a decree which dismissed without prejudice the bill in a suit by the United States, founded upon asserted violations by a railway company and a coal company of the commodities clause of the Hepburn act, and of the provisions of the Sherman anti-trust act. Reversed.

See same case below, 213 Fed. 240.

Statement by Mr. Justice Lamar:

The appellee was chartered not only as a railroad company, but was authorized to mine and sell coal. The commodity clause of the Hepburn act of 1906 [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563] made it unlawful for the carrier to haul its own coal beyond the limits of the state of Pennsylvania, and desiring to continue the business of mining and transporting coal, the railroad adopted a plan under which it was to make a sale and devest itself of title to the coal, at the mouth of the mines, before transportation began. Accordingly it caused to be incorporated, under the laws of New Jersey, the Delaware, Lackawanna, & Western *Coal* Company with a capital stock of $6,800,000, divided into shares of $50 each. The railroad company then invited its own stockholders to subscribe to the capital stock of the coal company at the rate of one share of the latter for each four shares of the former. Ninety-nine per cent of these stockholders did, as was expected, subscribe for the stock of the coal company, their subscriptions being paid for in full out of a cash dividend of $13,600,000 previously declared by the railroad company. The new corporation was then organized by electing the vice president of the railroad company as president of the coal company, and other officers and directors of the coal company were also officers and directors of the railroad company.

As soon as the organization was completed, the railroad company prepared and submitted to the coal company a contract by which the railroad company, reserving what it needed for its railway locomotives, "agreed to sell and the coal company agreed to buy, f. o. b. the mines, all coal which, during the term of the contract, the railroad company should produce from its own mines or purchase from anyone else." The price for prepared sizes—the more important commercial coal—was fixed at 65 per [519] cent of the price in New York on the day of delivery at the mines. The railroad company also leased to the coal company all its trestles, docks, and shipping facilities.

The contract—thus prepared by the railroad company—was then signed by both corporations, and, on August 2, 1909, the coal company took possession of the leased property; those who had been agents of the railroad in its sales department became agents of the coal company in its sales department, and the two corporations, with managing officers in common, also had offices in common in the city of New York.

Thereafter the railroad company continued its mining business, annually producing about 7,000,000 tons and purchasing about 1,500,000 tons from operators whose mines were located on its railway. After retaining what was needed for use on its railway engines, it sold the balance, aggregating about 7,000,000 tons, to the coal company at the contract prices f. o. b. the mines. The coal thus sold by the railroad company was then transported by the railroad company to destination, where it was delivered to the coal company, which paid the regular tariff freight rate and the contract prices on the 20th of each month. This course of dealing continued until February, 1913, when the government filed a petition, against both corporations, alleging that the two were practically one, and attacking the validity of the contract.

The petition alleged that the coal business was extremely profitable, and in order to continue it, in all its branches, the railroad company (which was controlled by a group of 25 persons, owning a majority of

its stock) had determined "to cause the organization of a new corporation to be under their own control, whose stockholders would be substantially the same as those of the railroad company, and through it to conduct the business theretofore carried on by the railroad sales department, thus securing, in effect, the continued unity of [520] mining, transporting, and selling, in substance, as theretofore, and depriving the public of the benefits which the commodity clause was intended to produce."

The petition alleged that when the contract was made, in August, 1909, the stockholders of the two corporations were practically identical; that a large majority of the stock in both is still owned by the same persons, and that by virtue of the terms and provisions of the contract the railroad had such an *interest* in the coal as to make it unlawful for it to transport such commodity in interstate commerce.

It was further charged that the transportation of the coal sold to the coal company was not only a violation of the commodity clause, but that the contract tended to create a monopoly and unlawfully to hinder and restrain trade in coal, in violation of the provisions of the anti-trust act [26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820]. In this connection it was also charged that the railroad company not only mined coal, but purchased the product of other mines located along its railway, and had acquired the output of other collieries on its line, giving to it the disposition of more than 90 per cent of the market, with power to arbitrarily fix prices. The petition averred:

"By reason of the arrangements described, the support of the railroad company, and the peculiar advantages and facilities acquired, the coal company at once secured and has ever since maintained an unlawful monopoly of the sale of coal produced along defendant's railroad, and has completely dominated the markets at all points thereon not reached by any other railroad. Its position, power, and support, render effective competition with it practically impossible, and the monopoly which it now holds will continue indefinitely unless restrained."

Both defendants answered. There was practically no dispute as to the facts, though both corporations contended that the facts alleged and proved did not support [521] the legal conclusions sought to be drawn therefrom by the government. Each insisted that the two corporations were separate in law and in fact; contented that the railroad company had no interest in the coal, and insisted that the coal company acted independently of the railroad company and was not subject to its control.

At the hearing there was evidence that at the date of the making of the contract all except 2,249 shares in the coal company were held by those who held stock in the railroad company. By reason of sales of both stocks, it appeared that in October, 1913, 88,116 shares of the railroad stock were held by those who were not then interested in the coal company, and 6,907 shares of stock in the coal company were held by those who were not owners of the railroad stock.

There was also evidence that many of the officers of the coal company were not officers of the railroad company; that the management of the two corporations was separate and distinct; that the coal company kept its own books, deposited its funds in its name in banks of its own choosing, and that the profits went solely to its own stockholders. The coal company paid the same rates of freight and demurrage as other shippers, and received no discriminating favors from the railroad company. In 1910 the amount paid to the railroad for the purchase price of coal under the contract was about $20,000,000, and for the freight thereon about $14,000,000. Since the contract was made the coal company has bought coal from other persons, the quantity being 3,847 tons in 1909; 2,267 tons in 1910; 6,600 tons in 1911; 92,004 tons in 1912; 310,645 tons in the first ten months in 1913.

There are about 70,000,000 tons of anthracite coal produced annually, of which 20,000,000 tons are sold at tidewater. Of the 7,000,000 tons sold by the Delaware, Lackawanna, & Western Railroad Company about 2,000,000 [522] tons are transported to tidewater points, and of this 500,000 tons are prepared sizes. The coal company at large expense bought land, built trestles and storage facility at various points in addition to those leased to it by the railroad company.

The district court held that the business of the two corporations had not been so commingled as to make their affairs indistinguishable; that they are two distinct and separate legal beings actually engaged in separate and distinct operations, and that the railroad does not own the coal, either in whole or in part, during its carriage, but has in good faith dissociated itself therefrom before the beginning of the act of transportation.

In answer to the claim that the railroad will be the gainer from a high price at tide, since this will necessarily increase the price at the mines, and therefore that this interest in the price is such an interest in the coal itself as is condemned by the statute, the court said: "Undoubtedly it

is correct to say that the railroad has an interest in the price, but . . . that 'interest' merely means that the railroad will gain by a higher price at tide, and does not mean that the railroad has power to control the coal or the price for which it sells." The alleged power to increase the price by increasing the freight was held to be ineffective because freight rates were controlled by the Commerce Commission. "The railroad company does not fix prices; it does not decide how much coal is to go to New York harbor, and it does not determine the sum for which the coal is to be sold at that point." The 65 per cent basis had its origin many years ago, and affords a convenient basis for calculating the price to be paid for future deliveries. The railroad retains nothing more after the title passes to the coal company at the mines than an interest in the price, and this is not the same thing as an interest in the coal. The commodity clause deals with an "interest, [523] direct or indirect," in the commodities themselves, and this must mean some kind or degree of ownership in the thing transported or some power to deal with it or to control it. The railroad company neither owns nor controls the coal after it has been loaded on the cars at the breakers. Thereafter the coal company is the owner and the master, and fixes prices, routes, and destination at its own will.

The court further said that the bill of complaint makes a formal charge against both defendants under the anti-trust act, but the oral argument left us under the impression that this charge was not much insisted on. For that reason the anti-trust branch of the complaint was regarded as comparatively unimportant, and for that reason we shall not undertake what we think would be the needless task of discussing the evidence bearing upon the charge of restraining or monopolizing commerce. If we are mistaken in this supposition the error can easily be corrected.

The petition was thereupon dismissed without prejudice to the government's right to begin a second proceeding whenever it may be so advised. 213 Fed. 240. The government then brought the case here by appeal.

In the government's brief it is stated that while it did not now ask for a ruling as to the right of the railroad company to purchase and sell coal produced in mines along its railroad, it did ask that if the decree was affirmed it should be without prejudice to the right of the United States to institute such proceedings.

Mr. G. Carroll Todd, Assistant to the Attorney General, and Solicitor General Davis, argued the cause and filed a brief for appellant:

There can be no such thing as a "dissociation" which accomplishes by indirection that which the commodities clause prohibits.

United States v. Lehigh Valley R. Co. 220 U. S. 257, 274, 55 L. ed. 458, 464, 31 Sup. Ct. Rep. 387.

The commodities clause is a legislative expression of the conception that, regardless of any question of discrimination, for a railroad company, directly or indirectly, to be a shipper over its own lines in competition with other shippers, is of itself an evil which should be prohibited, because the power, the profits, and the greater command of capital enjoyed by a railroad company as a public carrier put other shippers over its lines at a hopeless disadvantage in competing with it. This has long been the theory of the common law.

Atty. Gen. v. Great Northern R. Co. 29 L. J. Ch. N. S. 794, 6 Jur. N. S. 1006, 8 Week. Rep. 556; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 393, 50 L. ed. 515, 522, 26 Sup. Ct. Rep. 272; Delaware, L. & W. R. Co. v. United States, 231 U. S. 363, 370, 58 L. ed. 269, 272, 34 Sup. Ct. Rep. 65; Tap Line Cases (United States v. Louisiana & P. R. Co.) 234 U. S. 1, 27, 58 L. ed. 1185, 1195, 34 Sup. Ct. Rep. 741.

The controlling stockholders of the railroad company always have been the controlling stockholders of the coal company; and this, not as an accidental result of the normal operations of business, but by design of the railroad company. In principle and effect this is the same as if the stock of the coal company had been vested directly in the railroad company itself.

United States v. Union P. R. Co. 226 U. S. 470, 475, 57 L. ed. 306, 308, 33 Sup. Ct. Rep. 162.

The district court disregarded the fact that the common ownership has been exercised here so as to give the railroad company complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad.

United States v. Lehigh Valley R. Co. 220 U. S. 257, 273, 55 L. ed. 458, 463, 31 Sup. Ct. Rep. 387.

The contract of August 2, 1909, between the railroad company and the coal company restrains interstate trade and commerce, in violation of the Federal anti-trust act.

Standard Oil Co. v. United States, 221 U. S. 1, 56, 59, 55 L. ed. 619, 643, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Northern Securities

Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

Mr. William S. Jenney and John G. Johnson argued the cause and filed a brief for appellees:

The railroad company, by a sale of its coal under the terms of the contract in issue, to the coal company, has in good faith dissociated itself from such coal before transportation.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; Delaware, L. & W. R. Co. v. United States, 231 U. S. 363, 370, 58 L. ed. 269, 272, 34 Sup. Ct. Rep. 65; United States v. Erie R. Co. 220 U. S. 275, 55 L. ed. 464, 31 Sup. Ct. Rep. 392.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The commodity clause of the Hepburn act was intended to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper; and, in order to separate the business of transportation from the business of selling, that statute made it unlawful for railroads to transport in interstate commerce any coal in which the company had "*any interest, direct or indirect.*"[1] United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 415, 53 L. ed. 851, 29 Sup. Ct. Rep. 527; Delaware, L. & W. R. Co. v. United States, 231 U. S. 363, 371, 58 L. ed. 269, 273, 34 Sup. Ct. Rep. 65.

As will be seen from the statement of facts, the Delaware, Lackawanna, & Western Railroad Company was, at the time of the passage of the Hepburn act of 1906, one of the great coal roads engaged in the fourfold business of mining, buying, transporting, and selling coal. As the commodity clause made it unlawful to transport its own coal to market, the railway company decided to adopt a plan by which to devest itself of title after it had [526] been mined, but before transportation began. It thereupon caused a coal company to be incorporated having stockholders and officers in common with the railroad company. The two corporations, thus having a common management, then made a contract—prepared by the railroad company—under which the railroad company did not go out of the mining and selling business, but when the coal was brought to the surface the railroad company lost title by a sale to the coal company f. o. b. the mines and instantly regained possession as carrier. It retained that possession until delivery to the coal company, which subsequently paid therefor at the contract price.

The district court held that it was not illegal for the same person to own a majority of the stock in the two corporations, and that their contract of sale was lawful.

From the decree, dismissing the bill, the government appealed to this court, where much of the argument was directed to the question as to whether the fact that the two corporations had practically the same shareholders left the railroad company in a position where it could lawfully transport coal which it had sold at the mouth of the mine to the coal company.

1. But mere stock ownership by a railroad, or by its stockholders, in a producing company, cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the commodity clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the commodity clause was construed to mean that it was not necessarily [527] unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock. United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 414, 53 L. ed. 851, 29 Sup. Ct. Rep. 527. For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company.

Nevertheless, the commodity clause of the Hepburn act of 1906 rendered unlawful many transactions which, prior to that time, had been expressly authorized by the statutes of the states which had chartered the coal roads. And, while the Hepburn act provided that, in the future, interstate railroads should not occupy the dual posi-

[1] "From and after May 1, 1908, it shall be unlawful for any railroad company to transport [in interstate commerce] any article or commodity other than timber . . . manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." 34 Stat. at L. 585, chap. 3591, Comp. Stat. 1913, § 8563.

tion of carrier and shipper, there was, of course, no intent on the part of Congress to confiscate property or to destroy the interest of the stockholders. But, still, upon adoption of the commodity clause, this appellee railroad was confronted with a difficult situation. To shut down the mines, because the coal could not be transported, would have meant not only a vast monetary loss to the company and its stockholders, but would have been even more harmful to the interests of the public, which required a constant supply of fuel. The character of coal property was such as to make it impossible to divide the same in kind among the railroad stockholders, while the value of the coal land was so great as to make it impracticable to find a purchaser in ordinary course of trade. It was, therefore, natural, if not necessary, to organize a corporation with which a contract could be made, and out of cash received or stock issued to pay for or preserve the equity which the railroad shareholders had in the coal.

In this situation there may have been no impropriety in the railroad company taking the preliminary steps of organizing such a corporation. Neither was it illegal for the stockholders of the railroad company to take stock in the coal company, for there are many instances [528] in which the law recognizes that there may be diversity of corporate interest even when there is an identity of corporate members. A city and the county in which it is located may both have the same population, but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may nevertheless make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or mnaaged, make contracts which affect the interest of minority stockholders, or of third persons, or of the public, the fact of their unity of management must be considered in testing the validity and bona fides of the contracts under review.

2. That principle is to be specially borne in mind in the present case. For this is not an instance of a coal road and a coal company, both of which existed and had made contracts prior to the commodity clause, but a case where a coal company was created with the express purpose that, with stockholders in common, it should be a party to a contract intended to enable the railroad company to meet the requirements of the commodity clause and at the same time continue the business of buying, mining, selling, and transporting coal.

It is also to be noted that the Delaware, Lackawanna, & Western Railroad Company did not part with title to its coal lands, mines, and mining machinery, as seems to have been done, on terms not fully stated (United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 398 (5), 392, 53 L. ed. 836, 842, 29 Sup. Ct. Rep. 527), in some of the instances discussed in the commodity cases. In them the ownership of the mines had passed completely from the railroads to the producing companies, and the coal property was no longer subject to the debts of the railroad companies. After such sale of the coal lands there was both a technical and a practical separation of the legal interest of the two corporations in the coal under the ground, on the surface, when it was transported, and [529] when it was sold. The fact that the railroad held stock in the producing company, and received dividends thereon, did not give to the railroad company, any more than to any other stockholder in any other corporation, a legal interest in the property of the coal company. Nor would the fact that the railroad company had once owned it have made any difference, if, by a normal and bona fide sale at the point of production, the carrier had lost all power of control and all right, title, and interest in the coal before the transportation began. United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 413, top, 53 L. ed. 851, 29 Sup. Ct. Rep. 527.

3. But the decisions construing the statute recognize that one corporation can be an agent for another corporation, and that by means of stock ownership one of such companies may be converted into a mere agent or instrumentality of the other. United States v. Lehigh Valley R. Co. 220 U. S. 257, 273, 55 L. ed. 458, 463, 31 Sup. Ct. Rep. 387. And this use of one by the other—or this power of one over the other—does not depend upon control by virtue of the fact that stock therein is held by the railroad company or by its shareholders. For dominance of the coal company may be secured by a carrier (New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 363, 50 L. ed. 515, 26 Sup. Ct. Rep. 272) not only by an express contract of agency, but by any contract which, in its practical operation, gives to the railroad company a control or an "interest, direct or indirect," in the coal sold, at the mouth of the mines.

Assuming, then, that the incorporation and organization of the coal company under the auspices of the railroad company was legal; assuming that the election of railroad officers as the first managers of the coal company was not illegal; assuming that, as officers of the railroad, they could contract with themselves as officers of the coal com-

pany; assuming that at the time of organization it was not unlawful for the railroad company and the coal company not only to have officers but offices in common; and finally assuming that all these [530] facts together did not, in and of themselves, establish an identity of corporate interest,—still these facts, taken together, are most significant. They at least prove that the relation between the parties was so friendly that they were not trading at arm's length. And the further fact that one of the parties was under a statutory disability as to hauling coal makes it necessary to carefully scrutinize their arrangement in order to determine whether it was a bona fide and lawful contract of sale, or a means by which the railroad, though parting with the legal title, retained an interest and control in what had been sold.

4. That contract is published in full in 213 Fed. 255-259. The provisions material in the present inquiry may be thus summarized:

(a) The railroad company agreed to sell and the coal company agreed to buy all of the coal mined or acquired by the railroad company during the continuance of the contract; (b) the price for the more important commercial grades was to be 65 per cent of the New York price on the day of delivery; (c) the amount of coal to be sold and delivered was at the absolute option of the railroad company as its interests might determine; (d) the coal company was not to buy coal from any other person or corporation without the written consent of the railroad company; (e) the coal company was to conduct the selling of the coal so as best to conserve the interests, good will, and markets of the coal mined by the railroad company; (f) the coal company was to continue to fill the orders of present responsible customers of the railroad company, even if some of such sales might be unprofitable; (g) the railroad leased to the coal company all of its trestles, docks, and shipping facilities at a rental of 5 per cent of their value; (h) the contract could be terminated by either party on giving six months' notice.

[531] The most cursory examination of the contract shows that—while it provides for the sale of coal before transportation begins—it is coupled with onerous and unusual provisions which make it difficult to determine the exact legal character of the agreement. If it amounted to a sales agency the transportation was illegal because the railroad company could not haul coal which it was to sell in its own name or through an agent. If the contract was in restraint of trade it was void because in violation of the Sherman anti-trust law. The validity of the contract cannot be determined by consideration of the single fact that it did provide for a sale. It must be considered as a whole, and in the light of the fact that the sale at the mine was but one link in the business of a railroad engaged in buying, mining, selling, and transporting coal.

5. By virtue of the fact that the railroad company bought, mined, and sold, it—like any other dealer—was interested in maintaining prices, since the contract did not fix a definite sum to be paid for all of the coal sold, but provided that the railroad company was to receive 65 per cent of the New York price on the day the coal was loaded into the cars. The higher the rate in New York, the better for the seller. And, by the contract, the railroad reserved a power which, when exercised, could not only curtail production, but shipments. Thus by decreasing the amount transported, the supply in New York could be lessened. This would tend to raise New York prices, and thus increase the sum the railroad was to receive.

The railroad company was in the business of selling, and it is not to be presumed that its power to limit deliveries or to prevent the coal company from obtaining coal elsewhere would be often exercised. Yet the power did exist and it was reserved for some purpose—not, as argued, to prevent controversy as to failure to deliver [532] in cases of strikes or accidents, for such is not the language or intent of the contract. Nor is room left for the implication (necessary to the validity of such an exclusive contract, Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 80 (3), 89, 90, 35 L. ed. 97, 101, 102, 11 Sup. Ct. Rep. 490) that the seller would deliver reasonable amounts at reasonable times. All such defensive arguments are excluded by the express and emphatic terms of the contract that "the amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire."

It might be said that if such a power was exercised the coal company could then go into the market and purchase from other coal dealers. But this contract deprives the buyer even of that ordinary business privilege, declaring "that the coal company will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller."

6. Reading these two clauses together, it is evident that the coal company was neither an independent buyer nor a free

agent. It was to handle nothing except the railroad's coal, and was the instrument through which the railroad sold all its product. The coal company, though incorporated to do a general coal business, was dependent solely upon the railroad for the amount it could procure and sell, and was absolutely excluded from the right to purchase elsewhere without the consent of the railroad company, which, however, was under no corresponding obligation to supply any definite amount at any definite date.

Restrictive contracts should at least be reciprocal and mutual,—for if A is bound to purchase only from B, the latter should certainly be bound to furnish what A wishes to buy (Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. supra),—[533] especially is this true when the subject of the contract is an article in which the public is interested. Even at common law, in passing upon the validity of contracts in restraint of trade, the "public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than protection to the other party requires the contract may be sustained." Gibbs v. Consolidated Gas Co. 130 U. S. 396, 409, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553; Fowle v. Park, 131 U. S. 97, 33 L. ed. 74, 9 Sup. Ct. Rep. 658.

In this case the subject of the contract was anthracite coal—an article of public necessity and of limited supply, one-tenth being controlled by the appellee. The railroad company might have justly insisted on contract provisions intended to secure payment for all that it produced. But going beyond what was required for its own protection, it restrained the coal company from buying from anyone else, and—what is probably more significant in this case—thereby prohibited the coal company from competing with the railroad company for the purchase of coal mined on the railroad lines. And this was not a mere perfunctory provision, because the railroad company was a buyer of coal and purchased 1,500,000 tons per annum from mines on its system. By this contract it excluded from that market the coal company, which, with its capital of $6,000,000, could have been a strong competitor. Such a provision may not have actually effected a monopoly. But considering the financial strength of the carrier; its control of the means of transportation; its powers to fix the time when transportation of the very coal sold was to begin; its power in furnishing cars to favor those from whom it bought or to whom it sold,—such a contract would undoubtedly have that tendency. In that respect it was opposed to that policy of the law, which was the underlying reason for the adoption of the commodity clause. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 373, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

[534] 7. There is another provision of the contract which shows that the railroad had such an interest in the coal as enabled it to dictate to whom it should be sold, even at unprofitable prices. The agreement provides:

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable, it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit."

This is not a mere stipulation that the coal company would not injure the reputation of the railroad company's coal; while the further provision that the coal company would "continue to fill the orders of all responsible present customers, even though some of such sales might be unprofitable," was a further indication of the fact that both parties recognized the railroad had an interest in the coal and used the coal company to preserve and secure that interest even after transportation began.

The unusual, onerous, and restrictive terms imposed by this contract may, as between the parties, have been negligible—certainly so as long as the stockholders remained the same, since a loss to the coal company would be presumably represented by a gain to the railroad company. But the commodity clause and the anti-trust act are not concerned with the interest of the parties, but with the interest of the public, and it therefore makes no difference whether this contract dictated by the railroad company was for the permanent advantage of the coal company.

8. It is argued, however, that the contract has not operated to the injury of the parties or of the public. [535] And, in answer to those urged by the government, it is said that some of the objections now insisted on were not pressed in the lower court; that there is no complaint that the railroad charged the coal company exorbitant prices; or that it ever raised the New York prices; or that it failed to make prompt deliveries; or that it has prevented the coal company from buying coal from other operators; or that the railroad monopolized the coal mined on its railway; or that it deprived such mining companies of an open market. From this it is argued that the present objections to the contract are

purely academic. But its validity depends upon its terms. And if, as a matter of law, the contract is in restraint of trade, or if the coal company is practically the agent of the railroad company, then the transportation of the coal by the latter is unlawful.

9. As already pointed out, the contract has in it elements of sale and elements of a sales agency. It provides that the railroad company will sell and that the coal company will buy all coal that is mined during the continuance of the contract; but it prevents the coal company from buying from anyone else. It requires it to sell to present railroad customers at the old price, even though those prices may be unprofitable. The seller is not bound to make deliveries of fixed quantities at fixed dates, and by decreasing what it will sell and determining when it will ship it has a power in connection with its power as a carrier, which, if exerted, would tend to increase prices in New York. Besides all this, the contract prevents the coal company from competing with the railroad company in the purchase of coal along the railway line. Taking it as a whole, and bearing in mind the policy of the commodity clause to dissociate the railroad company from the transportation of the property in which it is interested, and that the Sherman anti-trust act prohibits contracts in restraint of trade, [536] there would seem to be no doubt that this agreement violated both statutes.

10. The railroad company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It cannot retain the title nor can it sell through an agent. It cannot call that agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet, subject to the control of the railroad company. If the railroad sells coal at the mouth of the mines to one buyer or to many, it must not only part with all interest, direct or indirect, in the property, but also with all control over it or over those to whom the coal is sold at the mines. It must leave the buyer as free as any other buyer who pays for what he has bought. It should not sell to a corporation with officers and offices in common, for the policy of the statute requires that instead of being managed by the same officers, they should studiously and in good faith avoid anything, either in contract or conduct, that remotely savors of joint action, joint interest, or the dominance of one company by the other. If the seller wishes —by a lawful and bona fide contract, whose provisions as to delivery and otherwise are not in restraint of trade—to sell all of its coal to one buying company, then that one buyer can be bound by reasonable terms and required to pay according to the contract. But such buyer should otherwise be absolutely free to extend its business to buy when, where, and from whom it pleases, and otherwise to act as an independent dealer in active competition with the railroad company.

What has been said is sufficient to show that the contract was invalid. That makes it unnecessary to discuss other questions raised but not disposed of by the district court, and the decision herein is without prejudice to the right of the United States to institute proceedings [537] in reference thereto or to test the right of the railroad company to purchase coal for sale.

The decree is reversed, with directions to enter a decree enjoining the railroad from further transporting coal sold under the provisions of the contract of August 2, 1909, referred to in the petition.

Reversed.

Mr. Justices McReynolds took no part in the decision of this case.

OLIVER P. NEWMAN, Plff. in Err.,
v.
UNITED STATES OF AMERICA EX REL. WILLIAM J. FRIZZELL.

(See S. C. Reporter's ed. 537-553.)

Quo warranto — who may maintain — citizen and taxpayer.

1. A citizen and taxpayer who makes no claim to the office cannot be deemed a "person interested" whom D. C. Code, § 1540 [31 Stat. at L. 1420, chap. 854], authorizes to apply to the court, upon the refusal of the Attorney General and the district attorney to act, for leave to have a writ of quo warranto issued against the usurper of any office, civil or military, in the District, in view of the provisions of § 1539 that a "third person" may institute such proceedings only after he has secured the consent both of the law officers and of the court; and the rule is the same whether the office in question is elective or appointive.

[Matters as to quo warranto, see Quo Warranto, in Digest Sup. Ct. 1908.]

Error to District of Columbia court of appeals — construction of Federal law.

2. The quo warranto sections of the Code of the District of Columbia, *viz.*, D.

NOTE.—On the scope of discretion of public prosecutor with respect to institution of proceedings in nature of quo warranto—see note to People ex rel. Raster v. Healy, 15 L.R.A.(N.S.) 603.

On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 289.

C. Code, §§ 1538-1540 (31 Stat. at L. 1419, 1420, chap. 854), under which, in proper cases, proceedings may be instituted by proper officers or persons against national officers of the United States who perform official duties within the District, must be regarded, for the purpose of testing the appellate jurisdiction of the Federal Supreme Court of a writ of error to the court of appeals of the District of Columbia in a case in which the construction of such sections is involved, as general laws of the United States, and not as mere local laws of the District.

[For other cases, see Appeal and Error; III. d, 6, in Digest Sup. Ct. 1908.]

[No. 813.]

Argued April 13, 1915. Decided June 21, 1915.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, ousting a person from public office. Reversed and remanded with instructions to dismiss the proceedings. Also

AN APPLICATION for a Writ of Certiorari to review the same judgment. Denied.

See same case below, 43 App. D. C. 53.

Statement by Mr. Justice Lamar:

[539] The President, on June 23, 1913, nominated Oliver P. Newman as civil commissioner of the District of Columbia. The nomination was referred to a standing committee of the Senate. Certain persons filed objections to the confirmation on the ground that "Newman had not been an actual resident of the District for three years immediately prior to his nomination," and therefore was not qualified to hold the office under the provision of the act of 1878[1] (20 Stat. at L. 103, § 2, chap. 180).

At the hearing before the committee there was testimony that Newman, who was a newspaper correspondent, came to Washington in March, 1910, with the intention of becoming a resident of the District. He rented an apartment in which he resided until the opening of the Presidential Campaign, in the summer of 1912. He was then assigned to newspaper work which took him out of the city. He accepted the employment upon the understanding that it was a temporary arrangement and that he was to return to Washington as soon as the campaign was over. In the discharge of his duties as correspondent he was absent in Chicago and other places until the inauguration. He then returned to Washington and was there living when on June 23, 1913, he was appointed one of the civil commissioners of the District. The committee made a favorable report and he was then confirmed by the Senate.

Thereafter William J. Frizzell called the attention of the Attorney General and the district attorney to facts which, he insisted, "proved that Newman had not been an actual resident of the District for three years next preceding his nomination." On the basis of such facts [540] he requested those officers to institute quo warranto proceedings for the purpose of ousting Newman from the office. Both officers declined the request, and thereupon Frizzell, alleging himself to be a citizen and a taxpayer of the District, applied to the supreme court of the District for permission to use the name of the government in quo warranto proceedings. The court granted the request, and thereupon this case of the "United States on the relation of William J. Frizzell v. Oliver P. Newman" was instituted.

The respondent demurred on many grounds; among others, that Frizzell was not an interested person, and that the court could not go behind the finding of the President and of the Senate that Newman was qualified. The demurrer was overruled and the case submitted to the jury to decide the question of fact as to Newman's residence. Testimony was taken explanatory of his absence from Washington on newspaper work. The court, among other things, charged the jury that there was a difference between "legal residence" and "actual residence." Under the charge, the jury found against Newman. The judgment ousting him from the office was affirmed by the Court of appeals of the District—one judge dissenting.

The case is here on a writ of error which raises several important questions which, however, cannot be decided if, under the laws of the District of Columbia, Frizzell, as a private citizen, was not authorized to institute this proceeding to test the title to a public office to which he himself made no claim.

Messrs. Jackson H. Ralston and John W. Davis argued the cause, and, with Messrs. William E. Richardson, George W. Hott, and Conrad H. Syme, filed a brief for plaintiff in error and petitioner:

A private relator having no claim or interest other than that shared by the general

[1] "The two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else, . . ."

public may not proceed by quo warranto against the holder of a public office.

High, Extr. Rem. § 654; Ramsey v. Carhart, 27 Ark. 12; Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 646; People ex rel. Byers v. Grand River Bridge Co. 13 Colo. 12, 16 Am. St. Rep. 182, 21 Pac. 898; Territory ex rel. Peterson v. Hauxhurst, 3 Dak. 205, 14 N. W. 432; Robinson v. Jones, 14 Fla. 256; State ex rel. Atty. Gen. v. Gleason, 12 Fla. 190; Toncray v. Budge, 14 Idaho, 621, 95 Pac. 26; Porter v. People, 182 Ill. 516, 55 N. E. 349; People ex rel. Jones v. North Chicago R. Co. 88 Ill. 537; People ex rel. Raster v. Healy, 230 Ill. 280, 15 L.R.A. (N.S.) 603, 82 N. E. 599; People v. Lake Street Elev. R. Co. 54 Ill. App. 363; State ex rel. Davis v. Smith, 32 Ind. 213; State ex rel. Antrim v. Reardon, 161 Ind. 249, 68 N. E. 169; State ex rel. Davis v. Johnston, 173 Ind. 14, 89 N. E. 393; Modlin v. State, 175 Ind. 511, 94 N. E. 826, Ann. Cas. 1913C, 669; Hudson v. Conklin, 77 Kan. 764, 93 Pac. 585; Miller v. Palermo, 12 Kan. 14; Craft v. Jackson County, 5 Kan. 518; King v. Kahne, 27 Ky. L. Rep. 1080, 87 S. W. 807; Wilson v. Tye, 126 Ky. 34, 102 S. W. 856; Scholl v. Bell, 125 Ky. 750, 102 S. W. 248; State v. Mason, 14 La. Ann. 506; Ex parte Davis, 41 Me. 57; Littlefield v. Newell, 85 Me. 273, 27 Atl. 156; Goddard v. Smithett, 3 Gray, 117; Com. v. Fowler, 10 Mass. 290; Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080; People ex rel. Yates v. Atty. Gen. 41 Mich. 728, 3 N. W. 205; Vrooman v. Michie, 69 Mich. 42, 36 N. W. 749; Lamoreaux v. Ellis, 89 Mich. 146, 50 N. W. 812; Barnum v. Gilman, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; State ex rel. Wetzel v. Tracy, 48 Minn. 497, 51 N. W. 613; State ex rel. Dowdall v. Dahl, 69 Minn. 108, 71 N. W. 910; State ex rel. Wah-We-Yea-Cumin v. Olson, 107 Minn. 136, 21 L.R.A.(N.S.) 685, 119 N. W. 799; Harrison v. Greaves, 59 Miss. 453; Andrews v. State, 69 Miss. 740, 13 So. 853; State ex rel. Kempf v. Boal, 46 Mo. 528; State ex rel. Hequembourg v. Lawrence, 38 Mo. 535; State ex rel. McIlhany v. Stewart, 32 Mo. 379; State ex rel. Folk v. Talty, 166 Mo. 529, 66 S. W. 361; State ex rel. Dorian v. Taylor, 208 Mo. 442, 106 S. W. 1023, 13 Ann. Cas. 1058; State ex rel. Birkhauser v. Moores, 52 Neb. 634, 72 N. W. 1056; State ex rel. Glenn v. Stein, 13 Neb. 529, 14 N. W. 481; Boyd v. Thayer, 143 U. S. 135, 157, 36 L. ed. 103, 108, 12 Sup. Ct. Rep. 375; State ex rel. McMillan v. Sadler, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; Osgood v. Jones, 60 N. H 543; Demarest v. Wickham, 63 N. Y. 320; Concord Soc. v. Stanton, 38 Hun, 1; People *ex rel.* Peabody v. Atty. Gen. 22 Barb. 114; Saunders v. Gatling, 81 N. C. 298; State ex rel. Foard v. Hall, 111 N. C. 369, 16 S. E. 420; Wishek v. Becker, 10 N. D. 63, 84 N. W. 590; State ex rel. Wasson v. Taylor, 50 Ohio St. 120, 38 N. E. 24; Thompson v. Watson, 48 Ohio St. 552, 31 N. E. 742; Bank of Mt. Pleasant Case, 5 Ohio, 249; State ex rel. Loomis v. Moffit, 5 Ohio, 358; State ex rel. Slater v. Johnson, 8 Ohio C. C. N. S. 535; Territory ex rel. Oklahoma Gas & Electric Co. v. De Wolfe, 13 Okla. 454, 74 Pac. 98; State v. Douglas County Road Co. 10 Or. 198; Everding v. McGinn, 23 Or. 15, 35 Pac. 178; State ex rel. French v. Cook, 39 Or. 377, 65 Pac. 89; Com. v. Burrell, 7 Pa. 34; Murphy v. Farmers' Bank, 20 Pa. 415; Com. ex rel. McLaughlin v. Cluley, 56 Pa. 270, 94 Am. Dec. 75; Com. ex rel. Butterfield v. McCarter, 98 Pa. 607; Com. ex rel. McAndrew v. Stevens, 6 Luzerne Leg. Reg. 37; Com. ex rel. Trimble v. Jenkins, 6 Kulp, 17; Com. ex rel. Heacock v. Horne, 10 Phila. 164; Com. ex rel. Lewellen v. Wisler, 11 W. N. C. 513; Ney v. Whitley, 26 R. I. 464, 59 Atl. 400; State ex rel. Johnson v. Campbell, 8 Lea, 74; State v. McConnell, 3 Lea, 332; Deaver v. State, 27 Tex. Civ. App. 453, 66 S. W. 256; Brumby v. Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874; State ex rel. Murdock v. Ryan, 41 Utah, 327, 125 Pac. 666; People ex rel. Dickson v. Clayton, 4 Utah, 421, 11 Pac. 206; Brown v. Alderman, 82 Vt. 529, 74 Atl. 230; Watkins v. Venable, 99 Va. 441, 39 S. E. 147; Mills v. State, 2 Wash. 566, 27 Pac. 560; State ex rel. White v. Point Roberts Reef Fish Co. 42 Wash. 409, 85 Pac. 22; State ex rel. Depue v. Matthews, 44 W. Va. 372, 29 S. E. 994; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690.

Mr. Joseph W. Bailey argued the cause, and, with Messrs. Arthur A. Birney and William J. Neale, filed a brief for defendant in error and respondent:

The construction of a law of the United States was not drawn in question, within the meaning of the Judicial Code.

American Secur. & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553.

The Code was adopted after the decision of this court that the private citizen has standing to seek the performance of a public duty (Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428), and of the court of appeals of the District that a taxpayer has standing, as such, to secure an injunction against threatened public wrong (Downing v. Ross, 1 App. D. C. 253).

The great weight of authority has established the rule that any citizen taxpayer is a person interested to such extent that he may sue in quo warranto to oust an

unlawfully appointed or elected incumbent of a municipal office.

State ex rel. Mitchell v. Tolan, 33 N. J. L. 195; State ex rel. Richards v. Hammer, 42 N. J. L. 435; State ex rel. Hann v. Bedell, 67 N. J. L. 148, 50 Atl. 364; State ex rel. Waterbury v. Martin, 46 Conn. 479; State ex rel. Atty. Gen. v. Vail, 53 Mo. 97; Davis v. Dawson, 90 Ga. 817, 17 S. E. 110; Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891; State ex rel. Saunders v. Kohnke, 109 La. 838, 33 So. 793, overruling Voisin v. Leche, 23 La. Ann. 25; State ex rel. White v. Barker, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204; State ex rel. Foard v. Hall, 111 N. C. 369, 16 S. E. 420; Pike County v. People, 11 Ill. 202; State ex rel. Kelleher v. Fordyce, 115 Wis. 608, 92 N. W. 430; State ex rel. Williams v. Samuelson, 131 Wis. 499, 111 N. W. 712; People ex rel. Barton v. Londoner, 13 Colo. 303, 6 L.R.A. 444, 22 Pac. 764; Com. ex rel. Yard v. Meeser, 44 Pa. 341; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; Rex v. White, 5 Ad. & El. 613, 1 Nev. & P. 84, 2 Harr. & W. 403, 6 L. J. K. B. N. S. 23; Rex v. Parry, 6 Ad. & El. 810, 2 Nev. & P. 414; Reg. v. Quayle, 11 Ad. & El. 508, 5 Jur. 386; Mechem, Pub. Off. § 490; 7 Lawson, Rights, Rem. & Pr. § 4012; High, Extr. Rem. §§ 701, 702; Paine, Elections, § 873; Throop, Pub. Off. § 781.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

1. Usurpation of a public office from an early day was treated as a crime, and, like all other crimes, could be prosecuted only in the name of the King by his duly authorized law officers. When a judgment was obtained against the intruder he was not only ousted from his office, [544] but fined for his criminal usurpation. A private citizen could no more prosecute such a proceeding in his own name than he could in his own name prosecute for the crime of murder, even though the victim was his near kinsman.

2. But in time the criminal features were modified and it was recognized that there might be many cases which, though justifying quo warranto proceedings, were not of such general importance as to require the Attorney General to take charge of the litigation. This was especially true in reference to the usurpation of certain municipal offices named in 9th Anne, chap. 20. By that act, passed in 1710, it was therefore provided that it should be lawful "for the proper officer, by leave of the court, to exhibit an information in the nature of a quo warranto *at the relation of any person desiring to prosecute the same*" against the designated municipal officers. The writ thus came to be used as a means of determining which of two claimants was entitled to an office, but continued to be so far treated as a criminal proceeding as to warrant not only a judgment of ouster, but a fine against the respondent, if he was found to have been guilty of usurpation. Standard Oil Co. v. Missouri, 224 U. S. 282, 56 L. ed. 768, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936. This quasi criminal act was adopted in some of the American states and formed the basis of statutes in others. It does not seem ever to have been of force in any form in the District of Columbia. Torbert v. Bennett, 24 Wash. L. Rep. 156.

In 1902 Congress adopted a District Code, containing a chapter on quo warranto which though modeled after the English statute, differed therefrom in several material particulars. The writ was treated as a civil remedy; it was not limited to proceedings against municipal officers, but to *all* persons who in the District exercised *any office, civil or military*. It was made available to test the right to exercise a public franchise, or to hold an office in a private corporation. instead of providing that "*any person desiring to prosecute*" might do so with the consent [545] of the court, certain restrictions were imposed and one enlargement of the right was made. These provisions[2] have never received judicial interpretation. This case must, therefore, be determined according to the special language of that Code, in the light of general principles applicable to

[2] Sec. 1538. Against whom issued.—A quo warranto may be issued from the supreme court of the District in the name of the United States—

First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation.

Second. Against any one or more persons who act as a corporation within the District without being duly authorized, or exercise within the District any corporate rights, privileges, or franchises not granted them by the laws in force in said District.

And said proceedings shall be deemed a civil action.

Sec. 1539. Who may institute.—The Attorney General or the district attorney may institute such proceeding on his own motion, or on the relation of a third person. But such writ shall not be issued on the relation of a third person, except by leave of the court, to be applied for by the relator, by a petition duly verified, setting forth the grounds of the application, or until the relator shall file a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court may prescribe, conditioned for the

quo warranto,—the prerogative writ by which [546] the government can call upon any person to show by what warrant he holds a public office or exercises a public franchise.

3. The District Code still treats usurpation of office as a public wrong which can be corrected only by proceeding in the name of the government itself. It permits those proceedings to be instituted by the Attorney General of the United States and by the attorney for the District of Columbia. By virtue of their position, they, at their discretion, and acting under the sense of official responsibility, can institute such proceedings in any case they deem proper. But there are so many reasons of public policy against permitting a public officer to be harassed with litigation over his right to hold office, that the Code not only does not authorize a private citizen, on his own motion, to attack the incumbent's title, but it throws obstacles in the way of all such private attacks. It recognizes, however, that there might be instances in which it would be proper to allow such proceedings to be instituted by a third person, but it provides that such "third person" must not only secure the consent of the law officers of the government, but the consent of the supreme court of the District of Columbia, before he can use the name of the government in quo warranto proceedings.

4. The Code—making a distinction between a "third person" and an "interested person"—recognizes also that there might be instances in which a person might have such an *interest* in the matter as to entitle him to a hearing, even where he had failed to secure the consent of the Attorney General or district attorney to use the name of the United States. Section 1540 deals with that case and provides that where these law officers have refused the request of a "person interested," "he may apply to the court by a verified petition for leave to have said writ issue." If, in the opinion of the court, his reasons are sufficient in law, the said writ shall be allowed to be [547] issued in the name of the United States on the relation of said interested person on his giving security for costs.

If the question of Frizzell's "interest" here had depended upon a matter about which the evidence was in conflict, the finding of the supreme court might not be subject to review. But if the established facts show that, as a matter of law, he was not an "interested person," the court had no authority to grant him permission to use the name of the government, and the case must be dismissed. So that the fundamental question is whether the law of force in the District permitted him, as a private citizen, without the consent of the law officers, to test Newman's title to the public office of civil commissioner.

Frizzell does not allege that he had been an incumbent of that office and had been unlawfully ousted before his term expired. He does not set up any claim to the office. And, of course, if he, as a citizen and a taxpayer, has the right to institute these proceedings, any other citizen and taxpayer has a similar right to institute proceedings against Newman and all others who "exercise within the District . . . a public office, civil or military." District Code, § 1538 (1). Such result would defeat the whole policy of the law which still regards usurpation as a public wrong to be dealt with primarily by the public prosecutors.

5. In a sense—in a very important sense—every citizen and every taxpayer is interested in the enforcement of law, in the administration of law, and in having only qualified officers execute the law. But that general interest is not a private but a public interest. Being such, it is to be represented by the Attorney General or the district attorney, who are expected by themselves or those they authorize to institute quo warranto proceedings against usurpers in the same way that they are expected to institute proceedings against any other violator of the law. [548] That general public interest is not sufficient to authorize a private citizen to institute such proceedings; for if it was, then every citizen and every taxpayer would have the same interest and the same right to institute such proceedings, and a public officer might, from the beginning to the end of his term, be harassed with proceedings to try his title.

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payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.

Sec. 1540. If Attorney General and district attorney refuse.—If the Attorney General and district attorney shall refuse to institute such proceeding on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued, and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in the last section as to security for costs.

Sec. 1541. Relator claiming office.—When such proceeding is against a person for usurping an office on the relation of a person claiming the same office, the relator shall set forth in his petition the facts upon which he claims to be entitled to the office. [31 Stat. at L. 1419, 1420, chap. 854.]

6. As pointed out in the carefully prepared opinion of the majority of the court of appeals of the District, there is much conflict as to the meaning of the phrase "interested person" in this class of cases. At first reading the conflict seems irreconcilable. But upon examination it will appear that the difference is often due to a difference in the public policy and statutes of the respective states. In some, the writ issues only at the request of the government's law officers; in others, at the instance of a person claiming the office; in others, at the request of a person claiming the office or interested therein; in others, at the instance of a person interested; in others, at the request of any person who can secure the consent of the court; and in five or six others the legislature has thrown open the door and permitted *any person* who desires to do so to use the writ. This is true of the acts underlying some of the decisions relied on by the relator, Frizzell.

For example, the English cases are based on the statute of 9th Anne, chap. 20, which, in terms, related to suits against those "who unlawfully exercise an office within cities, towns and boroughs." It expressly authorized the courts to permit informations in the nature of quo warranto "at the relation of *any person . . . desiring to sue or prosecute the same.*" Some of the other decisions cited are from states where the statute provides that the proceedings might be instituted at the relation of "any person desiring to present the same;" "upon the complaint of any private party:" "upon the relation of any person desiring to sue or prosecute the same." But there [549] are so many and such weighty reasons against permitting private persons to raise questions as to the incumbent's title to a public office that, even in those states which permit "*any person*" to institute quo warranto, the courts have always required the relator to show that he was a citizen and taxpayer.

The act of Congress of force in the District, instead of being limited to municipal officers, applies to any office, "*civil or military,*" and differs from those in any of these states. It specially differs from those which treat the writ as being available to *any person.* The Code provides that a "third person"—the equivalent of "any person"—may institute the proceedings only after he had secured the consent of the law officers and the court. It makes a distinction between a "third person" and an "interested person," and provides that if the Attorney General refuses to give his consent to the latter, such "interested person" may secure the right to use the name of the government by satisfying the supreme court of the District that his reasons for applying therefor are sufficient in law.

Frizzell applied to the Attorney General for permission to institute the proceedings. Failing to secure that consent, he then applied to the supreme court claiming that the fact that he was a citizen and a taxpayer made him an "interested person," entitled to the use of the writ. But such a construction would practically nullify the requirement to obtain the consent of the Attorney General and the district attorney. For if being a citizen and a taxpayer was sufficient to warrant the court in giving the consent, it was useless to require an application to be first made to the Attorney General because practically every litigant would have the qualification of citizenship, and many would have that of being a property owner.

7. Considering the ancient policy of the law and the restrictions imposed by the language of the Code, it is evident that, in passing this statute, Congress used the [550] words "third person" in the sense of "any person," and the phrase "person interested" in the sense in which it so often occurs in the law, prohibiting a judge from presiding in a case in which he is interested; preventing a juror from sitting in a case in which he is interested; and permitting interested persons to institute quo warranto proceedings. In the illustrations suggested, the interest which a judge had as a member of the public would not disqualify him from sitting in a case of great public importance and in which the community at large was concerned. The interest which disqualifies a juror from serving, as well as the interest which would authorize this plaintiff to sue, must be some personal and direct interest in the subject of the litigation. The same definition has often been given in quo warranto cases. The interest which will justify such a proceeding by a private individual must be more than that of another taxpayer. It must be "an interest in the office itself, and must be peculiar to the applicant." Demarest v. Wickham, 63 N. Y. 320. Com. ex rel. McLaughlin v. Cluley, 56 Pa. 272, 94 Am. Dec. 75; State ex rel. Dorian v. Taylor, 208 Mo. 442, 106 S. W. 1023, 13 Ann. Cas. 1058; Robinson v. Jones, 14 Fla. 256; State ex rel. Glenn v. Stein, 13 Neb. 529, 14 N. W. 481; State ex rel. Depue v. Matthews, 44 W. Va. 372, 384, 29 S. E. 994; Com. ex rel. Butterfield v. McCarter, 98 Pa. 607; State ex rel. Kempf v. Boal, 46 Mo. 528; Brown v. Alderman, 82 Vt. 529, 74 Atl. 230; Mills v. State, 2 Wash. 572, 27 Pac. 560; State ex rel. Antrim v. Reardon, 161 Ind. 250, 68 N. E. 169; Harrison v. Greaves, 59 Miss. 455; Andrews v. State, 69

Miss. 740 (3), 746, 13 So. 853; Tontray v. Budge, 14 Idaho, 639, 95 Pac. 26; Hudson v. Conklin, 77 Kan. 764, 93 Pac. 585; Vrooman v. Michie, 69 Mich. 47, 36 N. W. 749; Territory ex rel. Peterson v. Hauxhurst, 3 Dak. 205, 14 N. W. 432.

The language of the Code, supported by the history and policy of the law, sustains the proposition that one who has no interest except that which is common to every other member of the public is not entitled to use the name of the government in quo warranto proceedings. [551] For if the allegations in such a suit by a private citizen set out any cause of action at all, it shows on its face that it was a cause of action belonging to the whole body of the public, and which, therefore, should be prosecuted by the public representative.

The rule is the same regardless whether the office is elective or appointive. For in neither case is there any intent to permit the public office to be the subject-matter of private litigation at the instance of one who has no interest therein which differs from that of every other member of the public. The claim that this construction makes the statute nugatory cannot be sustained, for the statute, as already pointed out, gives a person who has been unlawfully ousted before his term expired, a right, on proof of interest, to the issuance of the writ, and there might be cases under the civil service law in which the relator would have an interest and therefore a right to be heard.

8. The conclusion that the relator must have a personal interest in the office before he can sue in the name of the United States is strengthened by the fact that the courts of the District not only have jurisdiction to issue quo warranto against officers of the District, but against all those, attached to the seat of government, who held a statutory office. For, if a private citizen and taxpayer could institute quo warranto proceedings to test the title to the office of civil commissioner of the District, he could, under the same claim of right, institute like proceedings against any of those statutory officers of the United States who, in the District, exercise many important functions which affect persons and things throughout the entire country.

The President has the power of removal, and there have been few, if any, cases brought to test the title of Federal offices. But such cases might arise as to statutory officers attached to the seat of government, and if [552] they did, the supreme court of the District could exercise quo warranto jurisdiction, as it now does in cases of mandamus and injunction against appointed Federal officers who perform duties in Washington. This appears from comparing the provisions of Rev. Stat. §§ 1795 and 1796 [Comp. Stat. 1913, §§ 3306, 3307] with § 1538 (1) of the District Code. The Revised Statutes declare that the District of Columbia shall be the seat of government, and "all offices attached to the seat of government *shall be exercised in the District of Columbia.*" The Code (§ 1538 (1)) provides that the supreme court shall have jurisdiction to grant quo warranto "against a person who unlawfully holds or *exercises within the District* a . . . public office, civil or military." It was probably because of this fact that national officers might be involved, that the Attorney General of the United States was given power to institute such proceedings, instead of leaving that power to the district attorney alone, as would probably have been the case if only District officers were referred to in the Code.

Manifestly, Congress did not intend that all these officers attached to the executive branch of the government at Washington should be subject to attacks by persons who had no claim on the office, no right in the office, and no interest which was different from that of every other citizen and taxpayer of the United States.

9. This fact also shows that §§ 1538-1540 of the District Code, in proper cases, instituted by proper officers or persons, may be enforceable against national officers of the United States. The sections are therefore to be treated as general laws of the United States, not as mere local laws of the District. Being a law of general operation, it can be reviewed on writ of error from this Court. American Security & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553; McGowan v. Parish, 228 U. S. 317, 57 L. ed. 851, 33 Sup. Ct. Rep. 462.

It follows that the motion to dismiss is denied; the [553] application for a writ of certiorari is refused; the judgment is reversed; and the case remanded with instructions to dismiss the quo warranto proceedings.

Reversed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

Mr. Justice Van Devanter dissents upon the ground that, the sections of the District Code being local laws, the case cannot be reviewed here on writ of error.

UNITED STATES, Plff. in Err.,
v.
HIAWASSEE LUMBER COMPANY.

(See S. C. Reporter's ed. 553–571.)

Real property — registration of title — curative act.

1. A deed of North Carolina land, duly and properly acknowledged before a North Carolina commissioner in the District of Columbia, who duly certified the same so that the fiat or order for its registration contemplated by N. C. Rev. Code 1855, chap 37, § 5, would duly issue, as of course, upon its presentation to the court of pleas and quarter sessions of the county where the property is situated, or to one of the judges of the supreme court or of the superior courts of the state, was, notwithstanding the lack of any such order or fiat, probated, within the meaning of the curative provision of N. C. Laws 1869-70, p. 69, that "the probate of all deeds and other instruments required to be registered, heretofore taken under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared valid to all intents and purposes, and shall be admitted to registration as if the probate had been taken under existing laws."

[For other cases, see Real Property, II. b, in Digest Sup. Ct. 1908.]

Real property — registration of title — curative act.

2. Deeds already registered, as well as those that remained unregistered, were embraced by the curative provision of N. C. Laws 1869-70, p. 69, that "the probate of all deeds and other instruments required to be registered, heretofore taken under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared to be valid to all intents and purposes, and shall be admitted to registration as if the probate had been taken under the existing laws;" and if the deed was already registered when the statute was adopted, the legislative fiat for registration, which took the place of the judicial fiat contemplated by Rev. Code 1855, chap. 37, applied to such deed *nunc pro tunc.*

[For other cases, see Real Property, II. b, in Digest Sup. Ct. 1908.]

Real property — registration of title — curative act.

3. The necessity of registration within two years from the date of the deed, imposed by N. C. Rev. Code 1855, chap. 37, § 1, was not dispensed with by the curative provision of N. C. Laws 1869-70, p. 69, that "the probate of all deeds and other instruments required to be registered, heretofore taken under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared to be valid to all intents and purposes, and shall be admitted to registration as if the probate had been taken under existing laws."

[For other cases, see Real Property, II. b, in Digest Sup. Ct. 1908.]

Real property — registration of title — curative act.

4. The curative provisions of N. C. Laws 1876–77, p. 68, with respect to defectively probated deeds, have no application to a deed which was not registered within two years after the ratification of that statute, as by its terms was required.

[For other cases, see Real Property, II. b, in Digest Sup. Ct. 1908.]

Real property — registration of title — constructive notice.

5. The registration of a deed after the adoption of N. C. Laws 1885, chap. 147, providing that deeds shall not be valid as against creditors or purchasers for value from the donor, bargainer, or lessor except from the date of registration, but that "no purchase from any such donor, bargainer or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, . . . when the person or persons claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder," makes it valid as against persons who do not claim under the grantor therein, but under his grantor by a deed made and registered in the meantime, where they had constructive notice of the deed to the grantor in the first-mentioned deed by reason of its registration in 1869, and the curative act of 1869-70, p. 69.

[For other cases, see Real Property, II. d, in Digest Sup. Ct. 1908.]

[No. 133.]

Argued March 2, 1915. Decided June 21, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of North Carolina, in favor of defendant in an action of ejectment. Reversed and remanded for further proceedings.

See same case below, 120 C. C. A. 289, 202 Fed. 35.

Statement by Mr. Justice Pitney:

This was an action of ejectment brought by the United States against the Hiawassee Lumber Company in the circuit court of the United States for the western district of North Carolina to recover a tract of land situate in Clay county, in that district and state, described as [554] follows: "Grant No. three thousand, one hundred and ten, containing five thousand acres, and beginning at a chestnut on the top of Tusquita Ball [Tusquita Bald] on the Macon County Line, and runs east three hundred and twenty poles to a chestnut on a mountain

side, thence south seven hundred poles to a pine, thence west twelve hundred and forty poles to a stake, thence north seven hundred poles to a stake and hickory, thence east nine hundred and twenty poles to the beginning." Defendant's answer denied generally the allegations of the complaint, set up possession and title in itself to a part of the tract, and demanded judgment that it was the owner and entitled to the possession of said land. The trial court directed a verdict in favor of defendant, and the resulting judgment was affirmed by the circuit court of appeals (120 C. C. A. 289, 202 Fed. 35).

From the bill of exceptions it appears that both parties claim under one Edwin B. Olmsted, who derived title to the lands from the state of North Carolina by certain grants dated November 10, 1867. One of these is grant No. 3110, for 5,000 acres, described as in plaintiff's declaration. There are 16 other grants, each for 640 acres, the tracts adjoining each other in such manner as to form a quadrangle that admittedly includes the land claimed by plaintiff as well as much land besides. Plaintiff claims through deeds purporting to convey the 5,000-acre tract as described in grant No. 3110. Defendant claims under a series of conveyances purporting to convey the 16 tracts of 640 acres each. So far as the bill of exceptions shows, there was no evidence of possession on either side, and the question turns upon the paper titles.

Plaintiff's chain of title is made up of the 17 grants to Olmsted and two deeds of conveyance. The first deed is dated February 7, 1868, made by Edwin B Olmsted and wife, of the city of Washington, District of Columbia, to Levi Stevens, of the same city and District, purporting [555] to convey the 5,000-acre tract in question. It was acknowledged in due form on the day of its date in the District of Columbia by Olmsted and wife (she being privately examined), before John S. Hollingshead, a commissioner for the state of North Carolina in and for the District of Columbia. Besides the certificate of acknowledgment, it bears the following indorsements: (a) One showing that it was recorded December 14, 1868, in the land records for Cherokee county; but this may be disregarded, since it is not questioned that the lands described in the deed lie in Clay county, which was formed out of a portion of Cherokee in the year 1861. (b) Next is a certificate by the register of Clay county that the deed was "duly registered in the register's office of Clay county" on February 23, 1869, mentioning the book and page. (c) Next is a certificate dated May 20, 1896, made by the clerk of the superior court of Clay county, stating that the certificate of Hollingshead, commissioner, "having been exhibited before me with the seal of his office attached, the same is adjudged to be in due form and according to law. Therefore let the foregoing instrument with all the certificates be registered." And, finally, there is a certificate of the registration of the deed on May 20, 1896, in Clay county.

The second deed is dated March 15, 1869, made by Stevens and wife, of Washington, District of Columbia, to the United States, purporting to convey certain tracts granted by the state of North Carolina to E. B. Olmsted November 10, 1867, and describing 45 different tracts, one of which is the 5,000-acre tract in question. This was duly acknowledged by Stevens and wife before a commissioner for the state of North Carolina in and for the state of Pennsylvania on March 15, 1869. It was registered in Cherokee county August 4, 1871; but this is immaterial so far as its effect upon the lands in Clay county is concerned. [556] It was not registered in the latter county until May 20, 1896, and it was then registered after compliance with all the requirements of law.

Testimony was introduced on both sides upon the question of location; a map was introduced purporting to show the location of the 5,000-acre tract, and of the sixteen 640-acre tracts; it was testified that the former was located by an actual survey beginning at a chestnut on the Tusquita Bald, in the Macon county line, as indicated by the description and the map; and it was admitted that there was evidence sufficient to go to the jury as to location.

Defendant claimed to derive title from Olmsted through, first, a decree of the superior court of Macon county, North Carolina, in an equity action brought by one Swepson against Olmsted in the year 1882, resulting in a deed of conveyance, made pursuant to the decree and order of the court, by Kope Elias, commissioner, to A. Rosenthal, dated October 28, 1882, and duly registered in Clay county October 17, 1890; secondly, a quitclaim deed from Olmsted and wife to Rosenthal, dated October 31, 1882, registered in Clay county November 12, 1906, quitclaiming all interest of the grantors in the lands described in the Kope Elias deed; and, thirdly, certain special proceedings in the superior court of Alamance county, North Carolina, taken by the executrix of Swepson in the year 1884 for the sale of Swepson's "equitable and legal real estate," which resulted in a deed made by order of the court from Swepson's executrix to Rufus Y. McAden, dated May 11, 1888, duly registered in Clay coun-

ty June 28, in the same year. Both the Kope Elias deed and the deed from Swepson's executrix to McAden purport to convey some interest in the 16 grants of 640 acres each. Other deeds were introduced to show that whatever estate or interest was conveyed by the deeds specified had become vested in defendant.

Assistant Attorney General **Knaebel** argued the cause, and, with Mr. S. W. Williams, filed a brief for plaintiff in error:

The order for registration, the supposed omission of which led both courts below to reject the registration entirely, was a mere precautionary formality, designed to supplement the real probate of the instrument which occurred before the commissioner when the execution took place.

Holmes v. Marshall, 72 N. C. 37; Young v. Jackson, 92 N. C. 144; Darden v. Neuse & T. R. S. B. Co. 107 N. C. 437, 12 S. E. 46.

In view of the conceded sufficiency of the commissioner's certification, the fact of registration by the proper state official and the long lapse of time, the existence of a proper order of registration, if necessary, should be presumed.

Knox County v. Ninth Nat. Bank, 147 U. S. 91, 97, 37 L. ed. 93, 95, 13 Sup. Ct. Rep. 267; Nofire v. United States, 164 U. S. 657, 660, 41 L. ed. 588, 589, 17 Sup. Ct. Rep. 212; Cochran v. Linville Improv. Co. 127 N. C. 398, 37 S. E. 496; Moore v. Quickle, 159 N. C. 130, 74 S. E. 927; Love v. Harbin, 87 N. C. 253.

A remedial statute should be construed so as to effectuate the purpose of the legislature.

Logan v. Davis, 233 U. S. 613, 58 L. ed. 1121, 34 Sup. Ct. Rep. 685; Tatom v. White, 95 N. C. 459.

The registration of the government's deeds in 1896 was authorized by the Connor act, and its effect was to render those conveyances in the defendant's chain of title which were executed later, and those which were registered later, though executed before, absolutely void, unless supported by other conveyances of earlier registration.

Cowen v. Withrow, 116 N. C. 771, 21 S. E. 676; Laton v. Crowell, 136 N. C. 380, 48 S. E. 767.

The act by its terms protects only creditors or purchasers for a valuable consideration.

Tyner v. Barnes, 142 N. C. 110, 54 S. E. 1008, 24 Am. & Eng. Enc. Law, 120.

And as against conveyances made before December 1, 1886, it protects only those taking without actual or constructive notice.

Cowen v. Withrow, supra.

A purchaser is supposed to ascertain the location of the land he buys; and he is charged with notice of the information contained in his title papers.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239; Burwell v. Fauber, 21 Gratt. 463; Washington Securities Co. v. United States, 234 U. S. 76, 79, 58 L. ed. 1220, 1223, 34 Sup. Ct. Rep. 725.

Where constructive notice exists, it carries with it all the information that could be obtained by a careful inquiry.

Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

Messrs. **Marshall W. Bell** and **James H. Merrimon** argued the cause and filed a brief for defendant in error:

It has been uniformly held, since the enactment of the statute controlling this matter in 1868, when the acknowledgment of a deed, or other instrument requiring registration, has been taken before some official outside the state, that in order to a valid probate, the deed, with a proper certificate, should be presented to the resident clerk for approval, and there should be an express adjudication by the local officer, and an order of registration.

Cozad v. McAden, 150 N. C. 209, 63 S. E. 944.

This deed passed no title until properly registered on May 20, 1896, due registration being essential and taking the place of livery of seisin.

Hogan v. Strayhorn, 65 N. C. 279; Olcott v. Bynum, 17 Wall. 44, 21 L. ed. 570.

This court follows the decisions of the state courts as to recording acts of the state, if there is a uniform course of decisions.

Townsend v. Todd, 91 U. S. 452, 23 L. ed. 413; Abraham v. Casey, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88; Clarke v. Clarke, 178 U. S. 186–190, 44 L. ed. 1028–1030, 20 Sup. Ct. Rep. 873.

There was no probate of either deed without the adjudication of the clerk and his order that it be spread upon the records.

Cozad v. McAden, supra.

The register has no authority to put the deed upon his books unless proved and so adjudged in some one of the modes prescribed by the statute. The probate is his warrant for doing so, and without the warrant, it does not create such an equity as to affect creditors or subsequent purchasers.

Evans v. Etheridge, 99 N. C. 43, 5 S. E. 386.

The original deeds from Olmsted to Stevens and from Stevens to the plaintiff were introduced, and there can be no sug-

gestion that an order of registration might be preserved in the effort to cure the defective probate. No such order appeared on the original deeds or elsewhere. The fact is that the deeds were never ordered to record until May 14–20, 1896.

Brown v. Hutchison, 155 N. C. 208, 71 S. E. 302; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877.

Revisal, § 980, does not apply where the sealed instrument was executed prior to December 1, 1885. The rights of the parties will be determined by the law as it stood prior to the enactment of chapter 147, Laws of 1885.

McNeill v. Allen, 146 N. C. 283, 59 S. E. 689.

By virtue of the various acts which have been uniformly passed once in every two years, extending the time for the registration of deeds, a registration at any time relates back to the delivery of the deed, and makes it valid from that time, unless between its delivery and registration some period occurred during which a lien was acquired available to a purchaser under execution.

Scales v. Fewell, 10 N. C. (3 Hawks) 18; Hill v Jackson, 31 N. C. (9 Ired. L.) 333; Isler v. Foy, 66 N. C. 551.

An unauthorized registration is neither actual nor constructive notice to purchasers.

Todd v. Outlaw, 79 N. C. 235; Lance v. Tainter, 137 N. C. 250, 49 S. E. 211; Smith v. Fuller, 152 N. C. 13, 67 S. E. 48; North State Piano Co. v. Spruill & Bro. 150 N. C. 169, 63 S. E. 723; Cozad v. McAden, 148 N. C. 10, 61 S. E. 633; Johnson v. Eversole Lumber Co. 147 N. C. 250, 60 S. E. 1129.

No notice, however full and formal, can supply the notice of registration, required by law.

Tremaine v. Williams, 144 N. C. 114, 56 S. E. 694; Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99; Hinton v. Leigh, 102 N. C. 28, 8 S. E. 890; Collins v. Davis, 132 N. C. 106, 43 S. E. 579; Blalock v. Strain, 122 N. C. 283, 29 S. E. 408; Patterson v. Mills, 121 N. C. 267, 28 S. E. 368.

The register has no authority to put the deed upon his books unless proved and so adjudged in one of the modes prescribed by the statute.

Evans v. Etheridge, 99 N. C. 48, 5 S. E. 386; Todd v. Outlaw, 79 N. C. 235; Bernhardt v. Brown, 122 N. C. 591, 65 Am. St. Rep. 725, 29 S. E. 884.

The adjudication upon the certificate of the commissioner by a proper officer is indispensable.

Johnson v. Eversole Lumber Co. 147 N. C. 249, 60 S. E. 1129; Cozad v. McAden, 150 N. C. 209, 63 S. E. 944.

Rosenthal would have found nothing by the most thorough search of everything disclosed by plaintiff's deed to put him on notice that the title to these 16 tracts was defective.

Robinson v. Willoughby, 70 N. C. 358; Allen v. Bolen, 114 N. C. 560, 18 S. E. 964; Hooker v. Nichols, 116 N. C. 157, 21 S. E. 207; Collins v. Davis, 132 N. C. 109, 43 S. E. 579.

When the United States comes to the Federal courts, to litigate with one of its citizens, it must submit to the rules of practice and procedure of its courts; and its rights and privileges at every stage in the trial of the cause are substantially in every respect the same as those of the citizen, and it cannot have any superior advantages.

Fink v. O'Neil, 106 U. S. 272, 27 L. ed. 196, 1 Sup. Ct. Rep. 325; United States v. Union P. R. Co. 105 U. S. 263, 26 L. ed. 1021; United States v. Thompson, 93 U. S. 586, 23 L. ed. 982; Carr v. United States, 98 U. S. 433, 25 L. ed. 209.

A deed shall not be valid against purchasers except from the registration thereof.

Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

One is a purchaser for value when he pays a fair consideration which, though it may not be the full price, is not one which causes surprise, or makes anyone exclaim, "He got the land for nothing; there must have been some fraud or contrivance about it."

Worthy v. Caddell, 76 N. C. 82; Collins v. Davis, 132 N. C. 110, 43 S. E. 579; Babcock Printing Press Mfg. Co. v. Herbert, 137 N. C. 320, 49 S. E. 349.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

In order to simplify matters, we will dispose at the outset of a point that was ruled by the circuit court of appeals in favor of plaintiff in error. As tending to sustain the ruling of the trial judge in directing a verdict for defendant, it was and is insisted that the 640-acre grants which figure in defendant's chain of title have priority over the 5,000-acre grant to which the deeds in plaintiff's chain of title refer. It is said that the lands were entered under the Cherokee land law, Laws 1852, chap. 169; Code of 1883, §§ 2464 et seq.; that the 5,000-acre grant is invalid for noncompliance with certain formalities prescribed by the law, and that even if valid it is subordinate to the 16 grants of 640 acres each, because, as is said, grants of this nature have effect

according to the dates of the repective land entries, and the 16 grants were based upon entries antedating that upon which the 5,000-acre grant rests. We do not stop to examine the statutes upon which this contention rests, because we agree with the court of appeals that it is quite immaterial whether the 5,000-acre grant, independently considered, was valid or invalid. It is admitted that the 16 grants cover the same land, and all the grants were made to the same grantee upon the same day. It results that, in one mode or another, Olmsted on that day acquired the title of the state of North Carolina to the 5,000 acres. His deed to Stevens described that tract by its metes and bounds, as well as by reference to the grant number. If that deed is otherwise valid as [558] against defendant it conveys his title to the tract thus described, whether that title was derived from the state through grant No. 3110 or through the other 16 grants.

The principal controversy turns upon the probate and registration of the deed from Olmsted to Stevens. The trial court held that under the laws of North Carolina the registration of 1869 was invalid as notice or for any purpose, but admitted in evidence the registration of 1896. The direction of a verdict in favor of defendant was based upon the theory that because the deed from Kope Elias, commissioner, to Rosenthal, was registered prior to the registration in 1896 of the deed from Olmsted to Stevens, Rosenthal thereby acquired the legal title as a purchaser for value without notice, and that his rights and the rights of those claiming under him were not affected by the registration of the Olmsted and Stevens deed in the year 1896.

The circuit court of appeals, apparently deeming that there was no distinction, so far as registration was concerned, between the status of the Olmsted-Stevens deed and that of the deed made by Stevens to the United States, considered the question with respect to the latter deed, and, finding that its registration prior to 1896 (erroneously assumed to have been made in Clay county in 1871) was not valid, and no title passed thereby, concluded that the same was true of the registration of the Olmsted-Stevens deed in Clay county in the year 1869. But it so happens that between the acknowledgment of the Olmsted deed in February, 1868, and the acknowledgment of the Stevens deed in March, 1869, the law of North Carolina was changed in a material respect; and, for this and other reasons that will appear, we deem it proper to consider the earlier deed first.

The deed from Olmsted to Stevens was dated and acknowledged February 7, 1868. At that time the provisions of law governing the acknowledgment, proof, and registration of deeds were those found in Rev. Code 1855, [559] chap. 37, "Deeds and Conveyances," and chap. 21, "Commissioners of Affidavits and Probate of Deeds." We set forth the material portions in the margin.[1]

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[1] Revised Code 1855.

Chapter 37.

1. No conveyance for land shall be good and available in law, unless the same shall be acknowledged by the grantor, or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall lie, within two years after the date of the said deed; and all deeds so executed and registered shall be valid, and pass estates in land, without livery of seisin, attornment, or other ceremony whatever.

2. All deeds, . . . and other instruments of writing required or allowed to be registered, may be admitted to registration in the proper county, upon being acknowledged by the grantor, or proved on oath before one of the judges of the supreme or superior court, or in the county court of the county where the land or estate is situate, unless otherwise directed, or before the clerk of such court, or his deputy. Provided, that nothing herein contained shall be construed to allow the privy examination of *femes covert* to be taken otherwise, than by law is specially directed.

. . . . . .

4. When any person shall desire to have registered any such deed [if the grantor or subscribing witness be beyond the limits of the state] . . . the court of pleas and quarter sessions . . . may issue a commission . . . to a commissioner or commissioners, authorizing any one or more of them to take the acknowledgment of the parties, or the examination of any one of the subscribing witnesses thereto, or other due proof thereof; and also the examination of any *feme covert* party to the same; and the proceedings of the commissioners, so authorized, being returned to the court, the court may proceed to adjudge that such deed or other instrument of writing is duly acknowledged or proved, and that the said examination is in due form: and thereupon the same, with the said proceedings, shall be registered; and such registration shall have the same effect as if the proceedings had been in open court.

5. When any deed conveying lands in this state . . . shall have been executed by any person, and it may be desired to take the probate or acknowledgment thereof out of this state, but within the United States, and the same shall be personally acknowledged by the person executing the same . . . before some one of the judges of supreme jurisdiction, or a judge of the courts of law of superior jurisdiction within the state, territory, or district where the

[560] There is no question that the Olmsted deed was duly and properly acknowledged before a North Carolina commissioner in the District of Columbia, and the acknowledgment duly certified by him; so that, under the law as it then stood, upon the presentation of the deed with the accompanying certificate to the court of pleas and quarter sessions of Clay county, or to one of the judges of the supreme court or of the superior courts of North Carolina, a fiat for its registration would have followed, as of course.

[561] After the deed was acknowledged, but before it was registered, the change to which we have referred was produced by the adoption of the Code of Civil Procedure in the month of August, 1868. Of that Code, title xix. applies to probate courts, and its second chapter relates to the probate of deeds.[2] It required that deeds conveying lands in the state "must be offered for probate, or a certified probate thereof must be exhibited before the judge of probate of the county in which the real estate is situated," and it applied this to deeds acknowledged before North Carolina commissioners in other states or in the District of Columbia, at the same time requiring an adjudication that the deed was duly acknowledged, etc.

The query at once arises, whether this act can be fairly construed to apply to deeds previously executed and acknowledged in accordance with the requirements of the prior law. The act is a Code of Civil Procedure, and § 429 prescribes the *mode* in which the probate of deeds shall be made and the certified probate thereof passed upon. There is nothing in this section, nor, so far as we [562] have observed, is there anything in the act of which it forms a part, that attempts expressly to regulate or impose conditions upon the registration of deeds or other instruments. We are referred to no decision by the courts of North Carolina that makes the new procedure a condition precedent to registration of a deed previously made and acknowledged and thereafter registered within two years after its date, pursuant to Rev. Code 1855, chap. 37, § 1.

But we deem it unnecessary to pass upon the question here suggested, for reasons that will presently appear.

It will be observed that in the Code of 1855 a very different effect was given by § 5 of chapter 37 to a certificate of acknowledgment taken by one of the commissioners appointed by the governor under chapter 21, from the effect given to the proceedings of a commissioner or commissioners specially appointed under § 4 of chapter 37. Proceedings before a special

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parties may be,—and if any of the parties shall be a *feme covert* and she shall be privily examined by such judge, whether she doth voluntarily assent thereto— . . . Or when such deed, . . . or other instrument as aforesaid shall be so acknowledged or proved, and the privy examination taken as aforesaid, before any commissioners appointed by the governor of this state, according to law, and duly certified by him, such deed . . . or other instrument, being exhibited in the court of pleas and quarter sessions of the county where the property is situate, or to one of the judges of the supreme court or of the superior courts of this state, *shall be ordered to be registered with the certificates thereto annexed; and the same being registered in the county wherein the property may be situate, pursuant to such order . . . shall be valid in law for the purpose intended thereby, and shall be received in evidence in any court without further proof.*

Chapter 21.

. . . . . .

2. The governor is hereby authorized to appoint and commission one or more commissioners in such of the states of the United States, or in the District of Columbia, or any of the territories, as he may deem expedient, who shall continue in office during the pleasure of the governor, and shall have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. Any such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, *shall have the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this state.*

[2] Code of Civil Procedure 1868.

Probate of Deeds.

§ 429. How made.

All deeds conveying lands in this state . . . must be offered for probate, or a certified probate thereof must be exhibited before the judge of probate of the county in which the real estate is situated, in the manner following: . . .

4. Where the acknowledgment or proof of any deed or other instrument is taken or made, in the manner directed by the laws of this state, before any commissioner of affidavits for the state of North Carolina, appointed by the governor thereof, in any of the states or territories of the United States or in the District of Columbia; and where such acknowledgment or proof is certified by such commissioner, *the judge of probate, having jurisdiction, upon the same being exhibited to him, shall adjudge such deed or other instrument to be duly acknowledged or proved in the same manner as if made or taken before him.*

commissioner, being returned to the court, simply formed the basis upon which the court might proceed to adjudge that the deed was duly acknowledged or proved. But an acknowledgment taken by a standing commissioner (an official commissioned by the governor and holding office during his pleasure), being duly certified, was not to be reviewed judicially before being ordered to registration. So it was expressly held by the supreme court of North Carolina in Johnson v. Eversole Lumber Co. (1908) 147 N. C. 249, 251, 60 S. E. 1129. And see, to the same effect, Cozad v. McAden, 148 N. C. 10, 12, 61 S. E. 633; s. c. 150 N. C. 206, 209, 210, 63 S. E. 944. That such was the law prior to the adoption of the Code of Civil Procedure was recognized by the circuit court of appeals (120 C. C. A. 295, 202 Fed. 41).

The Code of 1855 did contemplate an order or fiat for registration, and there is no evidence that the Olmsted-Stevens deed, when registered in 1869, was accompanied by such an order, except the official certificate that it was "*duly* registered." But it has been in effect held that the statutory provision for such an order is directory, [563] not mandatory; and that, if the deed be in fact registered after proper probate, the fiat becomes nonessential. Holmes v. Marshall, 72 N. C. 37, 40; Young v. Jackson, 92 N. C. 144, 147; Darden v. Neuse & T. R. S. B. Co. 107 N. C. 437, 445, 12 S. E. 46. The first two of these cases were distinguished in Evans v. Etheridge, 99 N. C. 43, 47, 5 S. E. 386; but this case did not hold that the absence of the fiat for registry was fatal.

However, assuming the amendment of 1868 to have a retrospective effect, and to be so construed as to require the certificate of acknowledgment of the Olmsted-Stevens deed to be submitted to the adjudication of the judge of probate, and then to the approval of the proper court or judge, and an order for its registration to be made, as conditions precedent to registration, we have next to consider the effect of an act of the general assembly of North Carolina, ratified January 27, 1870 (Laws 1869-1870, p. 69), and entitled, "An Act Concerning the Probate and Registration of Deeds and Other Instruments." Its language is: "*That the probate of all deeds and other instruments required to be registered, heretofore taken under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared valid to all intents and purposes, and shall be admitted to registration as if the probate had been taken under existing laws.*" The form of expression indicates a legislative intent to validate probates theretofore taken in accordance with the requirements of the law as it existed before the Code, including probates thus taken subsequent to the ratification of the Code and before the validating act. And see Cozad v. McAden, 148 N. C. 10, 12, 61 S. E. 633, containing a *dictum* to that effect. But we need not go so far, since it is not and cannot be questioned that the act validates and admits to registration probates taken before the Code and in accordance with the law as it stood when they were taken. The court of appeals, referring to this act and to a later curative [564] act ratified December 12, 1876 (Laws 1876-1877, p. 68), and considering their effect upon the registration of the two deeds under which plaintiff claims, said (120 C. C. A. 302, 202 Fed. 48): "There is nothing contained in the foregoing that could be construed to relate to the defects alleged as respects the probate of these deeds. *In this instance there was no probate at all* [italics ours]. Therefore it cannot be said that this act, which undertakes to cure defective probates, can have any relation to instruments attempted to be registered in the manner these were. For that reason we do not think this act applies to the case at bar."

Confining ourselves to the effect of the 1870 act upon the Olmsted-Stevens deed, in our opinion the court erred in holding there was "no probate" of the deed, within the meaning of the curative act.

It is possible that, after the Code of Civil Procedure extended to other cases the requirement of adjudication which, before that time, had applied only with respect to acknowledgments and proofs taken before specially appointed commissioners, the word "probate" may have come to be used with reference to the act of judicial approval by the judge of probate, rather than to the certificate of acknowledgment or proof submitted for such approval.

But the act of 1870 employed the term "probate" with respect to proceedings taken under laws that existed prior to the adoption of the Code of Civil Procedure, and we must look to the prior law in order to determine in what sense the word was used in the curative act. In general usage the term is applied rather to wills than to deeds, and signifies official proof, sometimes *ex parte*, before a judicial or quasi judicial officer or tribunal. In North Carolina, from an early day, it has been applied to the proof or acknowledgment required to be made of deeds and other instruments in writing as a [565] condition precedent to registration. In early times, probate was made before the county courts. Laws 1807, chap. 16, p. 10; Laws 1814, chap. 11, p. 12; chap. 19, p. 14. Afterwards, deeds were allowed to be acknowledged or proved "either before

one of the judges of the supreme court or of the superior court, or in the court of the county where the land lieth." Rev. Stat. 1837, chap. 37, § 1. And in the Revised Code of 1855, chap. 37, § 2, the clerk of the county court and his deputy were included among those who might take acknowledgments and proofs within the state. Such acknowledgment or proof was frequently referred to as "probate." Thus, we find that chapter 21 of Rev. Code 1855, under which the commissioner who took the acknowledgment in question was appointed, has for its title, "Commissioners of Affidavits and *Probate of Deeds*." The index at the head of the chapter and the index note in the margin read: "Governor may appoint commissioners to take and certify *probate* of deeds, etc., in other states." And so with respect to chapter 37: the word "probate" is employed in the head and marginal indexes with respect to §§ 4 and 5, and is also employed in the body of § 5. In short, the word appears to have been commonly employed, prior to the Code of Civil Procedure, as referring to the proof or acknowledgment of deeds as a condition precedent to registration, irrespective of whether it was taken before a court or a commissioner. And it was so employed in judicial opinions. M'Kinnon v. M'Lean (1836) 19 N. C. (2 Dev. & B. L.) 79, 83-86; Carrier v. Hampton (1850) 33 N. C. (11 Ired. L.) 307, 310; Freeman v. Hatley (1855) 48 N. C. (3 Jones, L.) 115, 117-119; Williams v. Griffin (1856) 49 N. C. (4 Jones, L.) 31, 32; Johnson v. Pendergrass (1857) 49 N. C. (4 Jones, L.) 479, 480; Simmons v. Gholson (1858) 50 N. C. (5 Jones, L.) 401, 403.

Indeed, this meaning of the term "probate" is recognized in § 429 of the Code of Civil Procedure itself, for [566] this requires that deeds "must be offered for probate, *or a certified probate thereof must be exhibited* before the judge of probate;" and, in going on to specify the manner of doing this, it treats the certificate of acknowledgment or proof as the certified probate thus required to be exhibited.

To construe the act of 1870 as applying only to proceedings such as were first prescribed by the Code of Civil Procedure would leave it nearly or quite devoid of force. The things to be validated were probates taken under laws that existed prior to the adoption of that Code. We cannot limit this to proceedings that would be deemed probate under the test adopted by the Code itself, for these would require no validation. And in Cozad v. McAden, 148 N. C. 10, 12, 61 S. E. 633, the supreme court of North Carolina, *arguendo*, construed the act of 1870 as dispensing with the adjudication by the judge of probate, and "making probates in the previous manner valid up to 27 January, 1870."

We deem it equally clear that the effect of the curative act is not confined to deeds that remained unregistered. With regard to these, it contained a legislative fiat that they should be admitted to registration. But, certainly, it was not intended that similar deeds already registered should stand on a less favorable footing. On the contrary, the intent is that all deeds probated in such manner that under the previous laws they were entitled to be admitted to registration shall be validated "to all intents and purposes." The result is that if already registered when the act of 1870 was ratified, the legislative fiat for registration, which took the place of the judicial fiat, applied to them *nunc pro tunc*. Considering the change in the law that had been produced by the then recent act of 1868, and the confusion naturally attributable to it, we think the construction we have placed upon the act of 1870 correctly expresses the legislative purpose.

[567] The result of this is that, at least from the ratification of the curative act, the Olmsted-Stevens deed became "good and available in law," and notice to all the world, including those under whom defendant claims.

The court of appeals (120 C. C. A. 296, 202 Fed. 42) said: "It was not contended by counsel for the plaintiff in the court below that the attempted registration of the deed from Olmstead to Stevens was sufficient to devest Olmstead of the legal title." If by this it was meant that counsel did not assert whatever rights plaintiff had under the registration of 1869, or waived any rights so asserted, or did not fairly except to the adverse rulings of the trial court upon the question, we cannot agree. The first exception (taken when the Olmsted deed was offered, and the court excluded from evidence the registration of 1869) shows that, in response to an inquiry from the court, "Upon which registration are you offering the deed?" plaintiff's counsel answered, "Both." And in the ensuing colloquy the court stated the respective positions of opposing counsel as follows: "He [meaning plaintiff's counsel] says that I am offering a deed registered in 1868 [meaning 1869], and also one which we say was registered in 1896. Defendant's counsel says this deed registered in 1868 [1869] cannot be accepted, as it is not legally registered and is void." And plaintiff's exception was: "To the ruling of the court excluding the record offered in evidence of the registration of the deed in 1869." It is true that after the court had ruled this

point against plaintiff, and after the introduction of defendant's evidence, plaintiff again offered the record of the registration of 1869, "not for the purpose of showing title [that purpose had already been overruled], but as evidence of notice to the purchasers, simply as a circumstance giving notice." This did not amount to a waiver of the point previously reserved. Besides, at the close of all the evidence, plaintiff asked for certain instructions based in effect upon the 1869 [**568**] registration, and took exceptions to the action of the trial judge in refusing these and in instructing a verdict for defendant. The question we have passed on was clearly reserved by the exceptions.

The deed from Olmsted to Stevens, its probate, and its registration in Clay county in 1869, having been validated "to all intents and purposes" by the act of 1870,—long prior to the derivation of defendant's title from Olmsted,—we must next consider the deed from Stevens to the United States. For, of course, plaintiff must succeed on the strength of its own title, and the latter deed is an essential link in the chain.

This deed stands upon a different footing from the Olmsted deed, for it was both made and acknowledged after the ratification of the Code of Civil Procedure in 1868, and it was not registered in Clay county within two years after its date, nor until sometime in 1896, being then accompanied with certificates of probate that complied with the provisions of the Code of Civil Procedure. It was acknowledged before the act of January 27, 1870; but, supposing that act to be applicable to deeds acknowledged after the adoption of the Code of Civil Procedure, and in a mode not conforming to its provisions, but conforming to the provisions of the previous law, it cannot avail plaintiff because it did not dispense with the necessity of registration within two years from the date of the deed, imposed by Rev. Code 1855, chap. 37, § 1.

Nor do we think the deed comes within the act of December 12, 1876, for it was not registered within two years after the ratification of that act, as by its terms was required.

As we have already seen, Rev. Code 1855, chap. 37, § 1, declared that no conveyance of land should be "available in law" unless registered in the county where the land lay, within two years after its date. Prior to the Connor act of 1885, presently to be mentioned, it was settled law in [**569**] North Carolina that an unregistered deed could not be introduced in evidence and did not create a perfect legal title. It was sometimes treated as an executory contract between the parties, sometimes as conferring an equitable title, or an incomplete legal title; the difference is immaterial for present purposes. Unless registered within the two years allowed by the Code of 1855, or as allowed by statutes extending the time, of which there were many, but none that applies here, the deed was not "available in law." On the other hand, when recorded within the time allowed by any act of the legislature, it related back to the time of its execution, and conveyed a complete legal title as of that date, which was paramount even to the title acquired by a purchaser for value from the same grantor without notice of the unregistered deed. Phifer v. Barnhart (1883) 88 N. C. 333, 338, and cases cited; Austin v. King (1884) 91 N. C. 286, 289; Laton v. Crowell (1904) 136 N. C. 377, 379, 48 S. E. 767.

But by § 1 of the Connor act—chap. 147, Pub. Laws 1885—§ 1245 of the Code of 1883 was struck out (this had taken the place of Rev. Code 1855, chap. 37, § 1), and in its place the following was inserted:

"No conveyance of land . . . shall be valid to pass any property, as against creditors or purchasers, for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth: *Provided however*, that the provisions of this act shall not apply to . . . deeds already executed, until the first day of January, one thousand eight hundred and eighty-six: *Provided further*, that no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, [**570**] either in person or by his, her, or their tenants, at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder."

By § 2, provision was made for registering deeds executed prior to the year 1855 upon special proof. And, by § 3, all other deeds, having been acknowledged or proven in the manner prescribed by law, were permitted to be registered, "and all deeds so executed and registered shall be valid, and pass title and estates without livery of seisin, attornment or other ceremony whatever."

Under this act, as has been uniformly held by the supreme court of the state, there is no limitation as to the time when the deed shall be registered; the act simply

provides that the deed shall not be valid against creditors or purchasers for value except from registration. Hallyburton v. Slagle, 130 N. C. 482, 484, 41 S. E. 877; Cozad v. McAden, 148 N. C. 10, 11, 61 S. E. 633; Brown v. Hutchinson, 155 N. C. 205, 208, 71 S. E. 302.

Therefore, the registration of the deed from Stevens to the United States in Clay county in 1896 made it valid to pass title as between the parties and for all purposes, unless its effect is limited by what is contained in § 1 of the same act. But it will be observed that the primary design of that section is to protect "creditors or purchasers, for a valuable consideration *from the donor, bargainor or lessor*" in the unregistered instrument,—those, in short, who may be presumed to have relied upon his apparent ownership of the land. And, by the terms of the second proviso, "no purchaser from any *such* donor, bargainor or lessor shall avail or pass title as against any unregistered deed [such as the Stevens deed] . . . when the person or persons claiming under or taking *such second deed*, had [571] at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder." Stevens made no "second deed." And since defendant and its predecessors in title did not claim under him, but claimed under Olmsted,—of whose deed to Stevens they had constructive notice, by reason of its registration in 1869 and the curative act of 1870,—it follows that the registration of the Stevens deed in 1896 makes it good as against defendant.

It thus appears that plaintiff's paper title as registered must prevail over that of defendant. This renders it unnecessary to consider whether, aside from registration of the Olmsted deed in 1869, defendant and those under whom it claims were purchasers without notice, within the meaning of the second proviso of § 1 of the Connor act. Upon this question, therefore, we express no opinion.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

Mr. Justice **Day** and Mr. Justice **Hughes** concur in the result, because, while agreeing with the circuit court of appeals as to its disposition of the case otherwise, they think there was testimony tending to show that Rosenthal was not a purchaser for value, and that question should have been submitted to the jury under proper instructions, since, unless Rosenthal was such purchaser within the terms of the Connor act, plaintiff was entitled to recover.

Mr. Justice **McReynolds** took no part in the consideration or decision of this case.

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[572] CHARLES HARTWELL CHATER, a Minor, by His Next Friend and Guardian, Charles H. Chater, et al., Appts.,

v.

ALFRED W. CARTER, Trustee; Alfred W. Carter, Executor of the Last Will and Testament of Alfred S. Hartwell, Deceased; Mabel R. Hartwell, and Hawaiian Sugar Company.

(See S. C. Reporter's ed. 572–586.)

Trust — failure — resulting trust for donor.

A trust in corporate stock failed both as to dividends and principal, and a resulting trust in favor of the donor arose upon the death, before January 1, 1910, of the beneficiary in a trust created in favor of the donor's married daughter in view of her approaching maternity, by an instrument dated March 27, 1909, which recites that the trust is to cause the dividends on corporate stock represented by an accompanying certificate issued to a specified person as her trustee "to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living."

[For other cases, see Trusts, I. e; I. d, in Digest Sup. Ct. 1908.]

[No. 544.]

Argued April 30 and May 3, 1915. Decided June 21, 1915.

APPEAL from the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of the Circuit Court for the First Circuit in that territory, dismissing the bill in a suit founded upon an alleged trust. Affirmed.

See same case below, 22 Haw. 34.

Statement by Mr. Justice **Pitney**:

This is an appeal from a decree of the supreme court of Hawaii (22 Haw. 34.), affirming a decree of the circuit court of the same territory, which dismissed a bill

in equity brought by Charles Hartwell Chater, a minor, by his father, Charles H. Chater, as next friend and guardian, in which the father joined as a complainant in his own right and as administrator of the estate of his deceased wife, Charlotte Lee Hartwell Chater; the defendants being Alfred W. Carter, as trustee of a trust [573] created by the late Alfred S. Hartwell, deceased, in his lifetime, Alfred W. Carter, as the executor of the will of Alfred S. Hartwell, deceased, Mabel R. Hartwell, and the Hawaiian Sugar Company, a corporation organized and existing under the laws of the territory of Hawaii. The object of the bill was to require an accounting and transfer of 585 shares of the capital stock of the Sugar Company and the dividends declared thereon since August, 1909, including 292½ shares of new stock issued as a dividend. The case was heard upon an agreed statement of facts in substance as follows:

"Alfred S. Hartwell died in Honolulu on the 30th day of August, 1912, leaving a will, duly proved in the circuit court of the first circuit, territory of Hawaii, on the 15th day of October, 1912. The defendant Alfred W. Carter was appointed executor in said will and qualified and is now acting as such. Charles A. Hartwell, also appointed, did not qualify. The deceased was from 1868 to 1874 a judge of the supreme court of Hawaii, from 1874 to 1904 one of the leading attorneys in Hawaii, and from 1904 to 1907 a judge, and from 1907 to 1911 chief justice of the supreme court of Hawaii. He was the father of seven daughters, all of whom, except Charlotte Lee Hartwell Chater, now survive, to wit, the five named in the instrument dated March 27, 1909, attached to the complaint herein and marked 'exhibit A,' namely: Charlotte Lee Hartwell Chater, Mabel R. Hartwell, Dorothy Hartwell, Bernice Hartwell, and Juliette Hartwell ('Lottie Lee,' named in said instrument exhibit 'A,' being Charlotte Lee Hartwell Chater, and 'Mabel,' being Mabel R. Hartwell), and also Madeline Hartwell Judd and Edith Hartwell Carter, the latter being then and now the wife of Alfred W. Carter, defendant. Charlotte Lee Hartwell Chater had been married to the complainant, Charles H. Chater, shortly before the date of said instrument, to wit, on July 15, 1908, and was then on March 27, 1909, [574] of the age of thirty-two years and without children. The daughters named in said instrument, other than said Charlotte and Mabel, were at that time unmarried. All the daughters were of age. Mabel had children, who still survive.

"Charlotte Lee Hartwell Chater died in Natick, in the county of Middlesex, commonwealth of Massachusetts, where she had been residing with her husband, Charles H. Chater, on the 3d day of September, 1909, in childbirth, intestate, leaving the complainants, her husband, Charles H. Chater, and one child, the complainant, Charles Hartwell Chater, who was born on August 30, 1909; thereafterwards on the 15th day of November, 1909, the probate court of the county of Middlesex duly appointed the complainant, Charles H. Chater, administrator of the estate of said Charlotte Lee Hartwell Chater, and issued letters to him, and he duly qualified as such and is now acting: and said probate court, on the 17th day of December, 1909, duly appointed said Charles H. Chater guardian of the person and estate of the complainant, Charles Hartwell Chater, and issued letters of guardianship to said Charles H. Chater, who qualified and is now guardian of said Charles Hartwell Chater.

"The Hawaiian Sugar Company is and was at all times hereinafter named a corporation existing under the laws of the territory of Hawaii, having its usual place of business in Honolulu, in said territory.

"Said Alfred S. Hartwell, being a man of ample means and the owner of a large number of shares in the Hawaiian Sugar Company, on the 27th day of March, 1909, transferred to the name of Alfred W. Carter, as trustee for Charlotte Lee Hartwell Chater, 585 of such shares and caused a certificate to be issued to the said Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater for said 585 shares, and delivered said certificate to said Alfred [575] W. Carter, trustee, and, at the same time, executed and delivered a declaration of trust, as follows:

"Honolulu, T. H., March 27, 1909.

"Mr. Alfred W. Carter,

"City.

"Dear Alfred:—

"I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

"The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares go to Bernice, if living, otherwise to all the surviving

sisters equally. I am aware that this is simply a temporary arrangement—I hope it is—and that either of them has a right to call upon you to make over the shares to her at any time.

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as [576] Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.

"I also enclose for you to retain for Mabel certificate No. — in her name for 200 shares Hawaiian Sugar Stock.

"I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month their dividends. I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

"I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for 250 shares which I formerly gave her is. I think it would be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

"Very truly,

"Alfred S. Hartwell."

"This declaration of trust is the aforesaid 'exhibit A.'

"At the same time, similar certificates were issued and delivered to said Alfred W. Carter, as trustee for Juliette Hartwell and Dorothy Hartwell, for the shares mentioned in said declaration.

"On the same day Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for the 250 shares referred to in the declaration of trust, which certificate was also handed to said Alfred W. Carter.

"Charlotte Lee Hartwell Chater was duly notified of these transactions, the information coming through a letter from Alfred S. Hartwell to Charles H. Chater on March 29, 1909, as follows:

[577] "Honolulu, T. H., March 29, 1909.

"Mr. Charles H. Chater,

"South Natick, Mass.

"My Dear Mr. Chater:—

"I have not been a good Correspondent for I have many cares and responsibilities resting upon me.

"I am simply writing to you now about a matter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar stock paying regularly a monthly dividend of $75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust (as explained in my letter to him) 'to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.'

"I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee $200 a month on my account; I am now writing them to send her $250 instead on April 15, May 15, and [578] June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares which he holds in trust, which will be $175.50 a month. I accordingly inclose receipts for Lottie Lee to sign and send to him.

"I will also cause the Brewers to continue to send the $75 a month for April, May, and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June—I hope to do

so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for the entire $250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

"It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

"I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

"I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha's house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new Cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there at any time when it will not interfere with Mabel and her family going there. At any rate I have not been there since my sister's death and that will be the place in [579] which I should like to stay, it now seems to me, when I am in the east in the summers.

"You will know best whether to trouble Lottie Lee just now to look this letter over. Do entirely as you think fit.

"Faithfully yours,

"(S'g'd) Alfred S. Hartwell."

"Alfred W. Carter indorsed and deposited the dividend warrants on said 585 shares for the months of April, May, and June, 1909, in the bank to the credit of Alfred S. Hartwell, who subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent to said Alfred W. Carter receipts for the same, the receipt for the dividends for the month of April reading as follows, the receipts for the months of May and June being in the same form:

"Boston, Mass., April 15, 1909.

"Received of Alfred W. Carter, Trustee, per Charles Brewer & Co., one hundred seventy-five and 50/100 ($175.50) dollars, April dividends on 585 shares of Hawaiian Sugar Co. stock, held by him as my trustee.

"(Signed) Charlotte L. H. Chater."

"Alfred W. Carter indorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of the said dividends to Charlotte Lee Hartwell Chater.

"Alfred W. Carter indorsed and delivered the dividend warrants on said shares for September, 1909, and the following months to A. S. Hartwell, until the transfer of said shares to A. S. Hartwell.

"After the death of said Charlotte Lee Hartwell Chater the defendant Alfred W. Carter delivered to her said administrator said certificate for 250 shares, but without the knowledge or consent of the complainants, indorsed as trustee for Charlotte Lee Hartwell Chater, said certificate for 585 shares to said Alfred S. Hartwell, and a new certificate was on November 29, 1909, issued to said [580] Alfred S. Hartwell in his own name by the defendant the Hawaiian Sugar Company. On the 18th day of May, 1910, said Alfred S. Hartwell transferred said certificate for 585 shares to the defendant, Mabel R. Hartwell, and the defendant Hawaiian Sugar Company issued a new certificate on that date to said defendant, Mabel R. Hartwell, in her name for 585 shares, she not knowing at the time that the stock was the same stock which her father had previously transferred to Alfred W. Carter, trustee for her sister, Charlotte Lee Hartwell Chater, and having no knowledge of the terms of that trust, but receiving the same without consideration and as a gift from her father, and not on any secret trust or understanding.

"It is conceded, if admissible, that the said transfer of said stock by Alfred W. Carter to Alfred S. Hartwell was made by said Alfred W. Carter in good faith and on demand of said Alfred S. Hartwell, and under the advice of counsel sought and received by said Alfred W. Carter, and that the said transfer of said stock by Alfred S. Hartwell to Mabel R. Hartwell was made by said Alfred S. Hartwell in good faith and under the advice of counsel sought and obtained by him after the demand for said stock made on him by said Charles H. Chater.

"On the 1st day of July, 1910, the Hawaiian Sugar Company declared a stock dividend of 50 per cent, paid the said Mabel R. Hartwell $20 for a fractional one-half share, and on July 2d issued to the said Mabel R. Hartwell as said dividend 292 shares additional stock, which were included in a new certificate for 1,552 shares in Mabel R. Hartwell's name, which 1,552 shares are still standing in her name."

It was further stipulated that cash dividends were paid as they accrued to A. W. Carter, trustee, from September, 1909, to

January, 1910, to Alfred S. Hartwell from that date until May, 1910, and thereafter until the commencement [581] of the suit to Mabel R. Hartwell, subsequent dividends having been retained by the company. The market value of the stock is likewise stated, showing that the sum in controversy exceeds the amount requisite for an appeal to this court. The following also appears:

"The estate of said Charlotte Lee Hartwell Chater is not indebted to anyone; the known heirs are the complainants, Charles H. Chater and Charles Hartwell Chater; and the said Charles H. Chater consents that any interest which he may have in said stock or said dividends may be accounted for and paid to himself as guardian for said Charles Hartwell Chater."

Mr. **David L. Withington** argued the cause, and, with Mr. Joseph P. Bell, filed a brief for appellants:

An equitable title passed to Mrs. Chater, subject to the trust.

Pom. Eq. Jur. § 147; Hancock v. Watson [1902] A. C. 14, 71 L. J. Ch. N. S. 149, 50 Week. Rep. 321, 85 L. T. N. S. 729; Pearson v. Dolman, L. R. 3 Eq. 315, 36 L. J. Ch. N. S. 258, 15 Week. Rep. 120; Re Barclay, 152 Cal. 753, 93 Pac. 1012; Chauncey v. Francis, 181 Mass. 513, 63 N. E. 913; Hayward v. Rowe, 190 Mass. 1, 76 N. E. 286; Lippincott v. Pancoast, 47 N. J. Eq. 21, 20 Atl. 360; Re Schmitt, 137 App. Div. 286, 121 N. Y. Supp. 982; Greene v. Wilbur, 15 R. I. 251, 3 Atl. 4; Denton v. Denton, 17 Md. 403; Canfield v. Canfield, 55 C. C. A. 169, 118 Fed. 1; Re Currie [1910] 1 Ch. 329, 79 L. J. Ch. N. S. 285, 101 L. T. N. S. 899, 54 Sol. Jo. 270; Lassence v. Tierney, 1 Macn. & G. 551, 2 Hall & Tw. 115, 14 Jur. 182; Kellett v. Kellett, L. R. 3 H. L. 160; Gerrish v. New Bedford Inst. for Sav. 128 Mass. 159, 35 Am. Rep. 365; Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69; Atkinson's Petition, 16 R. I. 413, 3 L.R.A. 392, 27 Am. St. Rep. 745, 16 Atl. 712; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Connecticut River Sav. Bank v. Albee, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. 487; Sayre v. Weil, 94 Ala. 466, 15 L.R.A. 544, 10 So. 546; Petty v. Petty, 22 L. J. Ch. N. S. 1065, 17 Jur. 646; Given v. Hilton, 95 U. S. 591, 24 L. ed. 458; Patrick v. Blair, 119 Mo. 105, 24 S. W. 767; Fay v. Phipps, 10 Met. 341; Fuller v. Winthrop, 3 Allen, 51; Holden v. Binney, 119 Mass. 421.

The trust having expired by its own limitation, without dévesting the beneficiary of her equitable title, the title of the beneficiary becomes complete, and the legal title follows the equitable title to the beneficiary or her estate.

Hancock v. Watson [1902] A. C. 14, 71 L. J. Ch. N. S. 149, 50 Week. Rep. 321, 85 L. T. N. S. 729; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869, approved in Young v. Bradley, 101 U. S. 782, 788, 25 L. ed. 1044, 1045.

There is no resulting trust to the donor in the case of a gift to a child.

2 Bl. Com. p. 297; 4 Kent, Com. *464; Washb. Real Prop. § 1424; Jackson v. Jackson, 91 U. S. 122, 23 L. ed. 258; 39 Cyc. 143; Doyle v. Crean [1905] 1 I. R. 252; Sweetman v. Butler [1908] 1 I. R. 517; Ward v. Dyas, Lloyd & Goold (t. Sugden) 177; Campbell v. Brownrigg, 1 Phill. Ch. 301, 13 L. J. Ch. N. S. 7; Cape v. Cape, 2 Younge & C. Exch. 543, 1 Jur. 307; Dyer v. Dyer, 2 Cox, Ch. Cas. 92, 2 Revised Rep. 14; Tiffany & B. Trusts, 24; Lewin, Trusts, 12th ed. 164, 165.

The same rules of construction apply to deeds as to wills.

Tindall v. Tindall, 167 Mo. 218, 66 S. W. 1092; Underhill & S. Wills, 1906, p. 267; Perry, Trusts, § 320; Young v. Bradley, 101 U. S. 782, 788, 25 L. ed. 1044, 1045.

The law favors a vested, rather than a contingent, interest.

McArthur v. Scott, 113 U. S. 340, 28 L. e. 1015, 5 Sup. Ct. Rep. 652; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869; 24 Am. & Eng. Enc. Law, 2d ed. 392, note 4; 30 Am. & Eng. Enc. Law, 2d ed. 765, note 5; Carr v. Smith, 25 App. Div. 217, 49 N. Y. Supp. 351; Carstensen's Estate, 196 Pa. 325, 46 Atl. 495.

A gift of intervening income is evidence of an immediate vesting of the gift of the principal, even though the gift be contingent in form.

Theobald, Wills, 7th ed. p. 586; Hersey v. Purington, 96 Me. 166, 51 Atl. 865; Fuller v. Winthrop, 3 Allen, 60; Newberry v. Hinman, 49 Conn. 130; Toms v. Williams, 41 Mich. 565, 2 N. W. 814; Mostyn v. Brunton, 17 Ir. Ch. Rep. 153; Re Orme, 1 Ir. Ch. Rep. 175.

Failure of the donor to provide a gift over is evidence that the gift was not intended to be contingent.

Fay v. Phipps, 10 Met. 343; Fuller v. Winthrop, 3 Allen, 60; Holden v. Binney, 119 Mass. 425.

The fact that other like gifts made at the same time, in the same way, and referred to in the same letter, were treated by the donor as vested, is evidence that the Chater gift was vested.

Chauncey v. Francis, 181 Mass. 513, 63 N. E. 913.

Language in a trust is to be construed most strongly against the party using it; that is, it will be construed in favor of the beneficiary rather than the donor.

Rothschild v. Dickinson, 169 Mich. 200,

134 N. W. 1035; Ringrose v. Gleadall, 17 Cal. App. 666, 121 Pac. 407; Jones v. Butler, 30 Barb. 641.

The language of the transaction itself shows a vested gift.

Hyde v. Rainey, 233 Pa. 540, 82 Atl. 781, Ann. Cas. 1913B, 726; Cooper v. Pridgeon, 17 N. C. (2 Dev. Eq.) 98; Weston v. Weston, 125 Mass. 271; 17 Am. & Eng. Enc. Law, 2d ed. 25.

That the word "if" does not necessarily import a condition in cases of this character, note the cases given below, where "if" is held to mean "when."

Crosby v. Wendell, 6 Paige, 548; Furness v. Fox, 1 Cush. 134, 48 Am. Dec. 593; Buck v. Paine, 75 Me. 582; Janney v. Sprigg, 7 Gill, 202, 48 Am. Dec. 557; Smart v. Clark, 3 Russ. Ch. 365, 5 L. J. Ch. 111, 27 Revised Rep. 96; Billings v. Sandon, 1 Bro. Ch. 393; Rood, Wills, 1904, § 585.

The words at the end, "my object being, . . . as to these additional 585 shares, they shall remain in my family," add nothing to what has gone before, since, on the terms already expressed, if Mrs. Chater had lived the three years, put the stock in her own name, and then died, leaving the child, a third interest in the stock would have passed to Mr. Chater. All that was intended by this clause was that the donor did not wish Mrs. Chater to retain a vested interest in the stock unless there was a child living at the end of three years.

Holden v. Binney, 119 Mass. 421.

There is an implied gift to Charles Hartwell Chater on the death of his mother before January 1, 1913.

Lewin, Trusts, 12th ed. p. 124, note; Metcalf v. Framingham, 128 Mass. 370; Underhill v. Roden, L. R. 2 Ch. Div. 498, 45 L. J. Ch. N. S. 266, 34 L. T. N. S. 227, 24 Week. Rep. 574; Close v. Farmers' Loan & T. Co. 195 N. Y. 92, 87 N. E. 1005; Beilstein v. Beilstein, 194 Pa. 152, 75 Am. St. Rep. 692, 45 Atl. 73; Ball v. Phelan, 94 Miss. 293, 23 L.R.A.(N.S.) 895, 49 So. 956; Holton v. White, 23 N. J. L. 330.

A gift of property or an interest in property may be made in the form of a trust.

14 Am. & Eng. Enc. Law, 2d ed. 1026; 20 Cyc. 1199.

Where language sets out a complete gift, the court will not override or cut it down unless the language *contra* is clear and unequivocal.

Federhen v. Kibbey, 204 Mass. 291, 90 N. E. 417; Foster v. Smith, 156 Mass. 379, 31 N. E. 291; McClellan v. Mackenzie, 61 C. C. A. 619, 126 Fed. 701; 30 Am. & Eng. Enc. Law, 2d ed. 687, 688.

We have been unable to find any cases on the precise question whether a gift of income or dividends for a term of years passes to the estate of the beneficiary, but there are many analogous cases.

(a) An annuity so passes.

Re Ord, L. R. 12 Ch. Div. 22, 41 L. T. N. S. 13.

(b) Gifts of income of real estate for years or for a particular period do not terminate on the death of the beneficiary, but pass to the estate of the beneficiary.

Hellwig v. Bachman, 26 Ill. App. 165; Jacquat v. Bachman, 26 Ill. App. 169; Hopewell v. Patterson, — Tex. Civ. App. —, 36 S. W. 319; Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968; Alsup v. Banks, 68 Miss. 664, 13 L.R.A. 598, 24 Am. St. Rep. 294, 9 So. 895.

(c) An interest in a life insurance policy, issued for the benefit of a person other than the insured, although payable at a future time, vests immediately, and on the death of the beneficiary passes to his estate.

Millard v. Brayton, 177 Mass. 533, 52 L.R.A. 117, 83 Am. St. Rep. 294, 59 N. E. 436; Continental L. Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 530; Connecticut Mut. L. Ins. Co. v. Fish, 59 N. H. 126; Preston v. Connecticut Mut. L. Ins. Co. 95 Md. 101, 51 Atl. 838; Entwistle v. Travelers' Ins. Co. 202 Pa. 141, 51 Atl. 759; D'Arcy v. Mutual L. Ins. Co. 108 Tenn, 567, 69 S. W. 768.

That the act of the parties would control, see—

Anderson v. Kemper, 116 Ky. 339, 76 S. W. 122; Re Lorenz, 124 Cal. 495, 57 Pac. 381; Ives v. Sanguinetti, 10 Ariz. 83, 85 Pac. 480.

In any event, a trust, when effectually declared, becomes at once binding, even though it may by its terms commence in the future.

24 Am. & Eng. Enc. Law, 2d ed. 437; 39 Cyc. 43.

Mabel R. Hartwell was not a purchaser for value, and therefore is liable for the stock and dividends received.

Joslyn v. Downing, 80 C. C. A. 205, 150 Fed. 317; Otis v. Otis, 167 Mass. 245, 45 N. E. 737, 39 Cyc. 567, note 76.

Alfred W. Carter is not excused by the fact that he acted under advice of counsel.

Freeman v. Cook, 41 N. C. (6 Ired. Eq.) 373; Owings v. Rhodes, 65 Md. 408, 9 Atl. 903; Gilmore v. Tuttle, 32 N. J. Eq. 611.

The Hawaiian Sugar Company is bound because the stock certificate gave them notice of the trust.

Loring v. Salisbury Mills, 125 Mass. 138; Bayard v. Farmers' & M. Bank, 52 Pa. 232. See also Duncan v. Jaudon, 15 Wall. 165, 21 L. ed. 142.

The transference of the stock and the issuance of the new certificate in the name of "Alfred W. Carter, trustee for Charlotte Lee Hartwell Chater," was a complete and

irrovocable gift, immediate in its nature, which separated this stock from the donor's estate and vested the legal estate in the trustee, and the entire equitable interest in the *cestui que trust.*

Ellis v. Newell, 120 Iowa, 71, 94 N. W. 463; Snowden v. Crown Cork & Seal Co. 114 Md. 650, 80 Atl. 510, Ann. Cas. 1912A, 679; Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221; Gerrish v. New Bedford Inst. for Sav. 128 Mass. 159, 35 Am. Rep. 365; Bath Sav. Inst. v. Hathorn, 88 Me. 122, 32 L.R.A. 377, 51 Am. St. Rep. 382, 33 Atl. 836; Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935; King v. Smith, 54 L.R.A. 708, 49 C. C. A. 46, 110 Fed. 95; Kimble v. White, 50 N. J. Eq. 28, 24 Atl. 400, citing 2 Jarman, Wills, 470; Harris v. Judd, 3 Haw. 437; Stone v. Hackett, 12 Gray, 230; McCandless v. Castle, 19 Haw. 515.

The word "family" is shown by the context to be used in its secondary meaning, as those descended from one common progenitor.

Re Bennett, 134 Cal. 320, 66 Pac. 370; Dodge v. Boston & P. R. Co. 154 Mass. 299, 13 L.R.A. 318, 28 N. E. 243.

The presumption is that Judge Hartwell did not intend to disinherit a grandchild.

McCaffrey v. Manogue, 196 U. S. 563, 49 L. ed. 600, 25 Sup. Ct. Rep. 319; Afong v. Chun Tung Afong, 5 Haw. 191.

There is a clear gift of the dividends until January 1, 1914 (including the interim), the period selected by the donor to ascertain whether Mrs. Chater would or would not have a child living, which would determine whether the other members of his family should have any interest in the stock.

Burnham v. Aiken, 6 N. H. 328; Pearson v. Chace, 10 R. I. 455.

Where there is an ultimate disposition, as here, to the sisters and their children of property, the inclination of the court is to assume that it takes effect in a contingency not in terms mentioned, but which must have been in the giver's mind.

Jarman, Wills, chap. 50; 2 Parsons, Contr. 513; 2 Devlin, Deeds, § 843; Baring v. Christie, 5 East, 398, 3 Bos. & P. 201, 14 Eng. Rul. Cas. 155; Bold v. Molineux, 1 Dyer, 14b.

The appellees' only claim rests on a resulting trust. Such a trust has for its source and underlying principle the equitable theory of consideration, and reverts to the source and origin of the consideration, whatever may be its character and nature.

Pom. Eq. Jur. § 1031; Kaiawahakena v. Makapuu, 6 Haw. 188; Jarrett v. Manini, 2 Haw. 667; Smithsonian Inst. v. Meech, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396; Jackson v. Jackson, 91 U. S. 122, 23 L. ed. 258; Co. Litt. 23a.

Where the gift and direction as to payment are distinct or there are words importing a gift in addition to the direction then the interest may be vested.

40 Cyc. 1656.

Very slight evidence has been held sufficient to show the intention of gift in connection with the direction.

30 Am. & Eng. Enc. Law, 2d ed. 773.

Many cases hold that there is a vested gift of income on facts very similar to our own.

Eales v. Cardigan, 9 Sim. 384, 8 L. J. Ch. N. S. 11; Lewes v. Lewes, 16 Sim. 266, 17 L. J. Ch. N. S. 425; Jones v. Randall, 1 Jac. & W. 100, 20 Revised Rep. 237; Bryan v. Twigg, L. R. 3 Eq. Cas. 433; Morse v. Ballou, 109 Me. 264, 83 Atl. 799; Stanwood v. Stanwood, 179 Mass. 223, 60 N. E. 584.

A devise or gift to a child passes a vested interest unless a contrary intention is shown by the will.

Morse v. Ballou, 109 Me. 264, 83 Atl. 799; Stanwood v. Stanwood, 179 Mass. 226, 60 N. E. 584; Bryant v. Plummer, 111 Me. 511, 90 Atl. 171; Hale v. Hobson, 167 Mass. 397, 45 N. E. 913.

Mr. **Robbins B. Anderson** argued the cause and filed a brief for appellees:

"If" imports contingency and makes a gift conditional.

Colt v. Hubbard, 33 Conn. 285; Robnett v. Ashlock, 49 Mo. 175; Edwards v. Hammond, cited in Bromfield v. Crowder, 1 Bos. & P. N. R. 324.

Where, as in the present case, there is no express gift to the beneficiary, but the only gift to her husband is contained in a direction to the trustee to pay over or transfer the subject of the gift to the beneficiary at some future time, unless the payment be postponed for the convenience of the estate, or to let in some other interest, the gift is contingent, and not vested until the time designated for payment arrives, and lapses on the death of the beneficiary prior to that time. This applies in the present case both to the gift of stock and to the gift of dividends.

Kountz's Estate, 213 Pa. 395, 3 L.R.A. (N.S.) 639, 62 Atl. 1103, 5 Ann. Cas. 427; Lewisohn v. Henry, 179 N. Y. 361, 72 N. E. 239; Russell v. Girard Trust Co. 171 Fed. 161, 102 C. C. A. 592, 179 Fed. 446; Andrews v. Rice, 53 Conn. 570, 5 Atl. 823; Morris v. Bolles, 65 Conn. 48, 31 Atl. 538; Smith v. Edwards, 88 N. Y. 95; Willett v. Rutter, 84 Ky. 320, 1 S. W. 640; Lamb v. Lamb, 8 Watts, 186; Hale v. Hobson, 167 Mass. 399, 45 N. E. 913; Re Baer, 147 N. Y. 354, 41 N. E. 702; Reilly v. Bristow, 105 Md. 334, 66 Atl. 262; Rosengarten v. Ash-

ton, 228 Pa. 393, 77 Atl. 562; Elphinstone, Interpretation of Deeds, Rule 149, p. 391; 2 Williams, Exrs. p. 1334 (1232); Hubert v. Parsons, 2 Ves. Sr. 262; Hall v. Terry, 1 Atk. 502.

The rule that a future and otherwise contingent gift of principal of the subject-matter of the gift tends to vest at once if there is an immediate gift of the income of the principal has its origin in the civil law, and like many other rules of construction applies only to cases of wills, and not to deeds.

Fonnereau v. Fonnereau, 1 Ves. Sr. 119, 3 Atk. 645; Hubert v. Parsons, 2 Ves. Sr. 262; Teynham v. Webb, 2 Ves. Sr. 198; Chandos v. Talbot, 2 P. Wms. 613; Bolger v. Mackell, 5 Ves. Jr. 509; Harvey v. Aston, 1 Atk. 361; Gawler v. Standerwick, 2 Cox, Ch. Cas. 15; 2 Williams, Exrs. 1352, 1353 (1252–1254).

Even in wills, if there is no express gift of the principal, but the only clause of gift is found in the direction for payment or transfer of the principal at a future time, the immediate gift of the income will not vest the future gift of the principal, and the latter will be held conditional. This is especially true in cases where the intermediate income is dividends on stock.

Batsford v. Kebbell, 3 Ves. Jr. 363, 4 Revised Rep. 15; Hubert v. Parsons, 2 Ves. Sr. 262; Spencer v. Wilson, L. R. 16 Eq. Cas. 501, 42 L. J. Ch. N. S. 754, 29 L. T. N. S. 19; Sansbury v. Read, 12 Ves. Jr. 75; Leake v. Robinson, 2 Meriv. 363, 16 Revised Rep. 168; Bolger v. Mackell, 5 Ves. Jr. 509; Taylor v. Bacon, 8 Sim. 100; Pleasonton's Appeal, 99 Pa. 362; King v. King, 1 Watts & S. 205, 37 Am. Dec. 450; High v. Pollock, 114 Md. 580, 80 Atl. 43; 1 Roper, Legacies, 581, 587; 2 Williams, Exrs. 1338; Elphinstone, Interpretation of Deeds, Rule 149, pp. 391, 393.

The said rule does not apply when the conditional word is "if," as distinguished from "when" or "at."

Doe in dem. Wheedon v. Lea, 3 T. R. 41; Colt v. Hubbard, 33 Conn. 281.

One of the most interesting cases is found in England. There was a future gift of principal "in case" the beneficiary should be "then living," and an intermediate gift of income to the same person. It was held that the gift was not vested, and that it lapsed on the death of the beneficiary before the time fixed.

Parsons v. Parsons, 5 Ves. Jr. 578. See also Doe v. Brabant, 3 Bro. Ch. 393, 4 T. R. 706; Denn ex dem. Radclyffe v. Bagshaw, 6 T. R. 512; Nahaolelua v. Heen, 20 Haw. 372.

In many of the foregoing cases the courts, having held that the gifts of principal were contingent and lapsed on the death of the beneficiary, held also, either expressly or impliedly, that the gifts of income lapsed likewise. We refer to cases where the gift of income was immediate, and not postponed to the future, as in the present case, which postponement renders the gift of income contingent independent of the contingency of the gift of the principal.

See, for example:

High v. Pollock, 114 Md. 580, 80 Atl. 43; Taylor v. Bacon, 8 Sim. 100; Gawler v. Standerwick, 2 Cox, Ch. Cas. 15.

Where a gift is made upon trusts that fail in whole or in part by lapse on the death of a beneficial donee, if there is no gift over that can take effect, a trust will result to the donor if he is still alive, or to his estate if he is dead.

Hill, Trustees, 4th Am. ed. 179; 1 Perry, Trusts, § 160; 3 Pom. Eq. Jur. §§ 1032, 1034; Elphinstone, Interpretation of Deeds, rule 115, p. 294.

The presumption against intestacy which needs to be supported by such artificial aid and rules of forced construction is not matched by a presumption of equal force in a trust created *inter vivos*.

Bispham, Principles of Equity, § 87.

Moreover, even in the case of wills, a gift will be implied only when that is the only intention which can reasonably be imputed to the testator.

Robison v. Female Orphan Asylum, 123 U. S. 702, 31 L. ed. 293, 8 Sup. Ct. Rep. 327.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court:

We have here a trust declared in writing by the late Judge Hartwell, of Hawaii, a man of ample means and of long experience as a practising lawyer and judge, the father of seven daughters, four married, three unmarried, of whom five were named and in some way provided for in the trust instrument. The subject of the controversy is 585 shares of the stock of the Hawaiian Sugar Company, for which a certificate accompanied the trust instrument, the certificate being in the name of "Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater;" separate certificates being at the same time issued and delivered to Mr. Carter as trustee for Juliette Hartwell and Dorothy [583] Hartwell respectively, and a certificate for 250 shares in the name of Charlotte Lee Hartwell Chater being also delivered to him.

The date of the trust instrument is March 27, 1909. The particular clause out of which the controversy arises reads as follows:

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family."

The substance of this was copied into Judge Hartwell's explanatory letter to his son-in-law, Mr. Chater, dated two days after the trust instrument, and which all parties have treated as throwing a legitimate light upon the meaning of that instrument.

The trust for Mrs. Chater was evidently created in view of her approaching maternity, an event that occurred about four months before "January 1st, next," and was followed by her death on the 3d of September, 1909, leaving a son, who still survives. The question is, Who is entitled to the shares of stock and to the dividends accruing after January 1, 1910?

Appellants contend (1) that upon the establishment of the trust accompanied by the delivery to the trustee of the stock certificate naming her as beneficiary, an equitable title passed to Mrs. Chater, subject only to [584] the trust, and that when the trust expired by its own limitations the legal title followed the equitable title and became vested in Mrs. Chater's estate; or (2) that there was a vested future interest in Mrs. Chater, which did not lapse upon her death; or (3) that even if the gift to Mrs. Chater was not vested, there was an implied gift to her son upon her death prior to January 1, 1913. And, in any event, it is contended (4) that the gift of the dividends to Mrs. Chater for the period of three years from and after January 1, 1910, was absolute and passed to her estate.

Appellees contend, on the other hand, that by the terms and true meaning of the trust instrument there was no present gift to the beneficiary, expressed or implied, creating any interest, legal or equitable, but only a direction to the trustee to pay or transfer the subject of the trust to the beneficiary at a future time upon express condition that she was then living; that her death before the 1st of January, 1910, defeated the trust as to the dividends as well as the principal; and that since the trustee was thus left without directions or authority to transfer the stock or dividends to any beneficiary, and could not hold them for himself, a resulting trust arose in favor of the donor.

The declaration of trust is in the form of a letter, and is clearly and simply phrased, without employment of technical terms. In seeking its true construction, little assistance can be had from technical rules. The guiding principle must be, to seek the intention of the settlor. We mean, of course, his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test.

We cannot yield to the argument that because the stock certificate was caused to be issued in the name of Mr. Carter as trustee for Mrs. Chater there was a present transfer of the equitable title to her, subject only to the terms of the declaration. The mention of her name in [585] the certificate had its proper purpose in earmarking the stock and identifying the trust to which it pertained; but the terms of that trust must be found in the accompanying letter.

In construing it, we are not called upon to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed. Judge Hartwell evidently contemplated that Mrs. Chater was to become a mother, and he makes the ultimate disposition of the stock (if she survives) turn upon the question whether she shall have a child or children living at the end of the designated period of three years from January 1, 1910; yet he makes no provision for the child in the event of her death in the meantime. And even the payment of dividends to Mrs. Chater is postponed until January 1, 1910. We are left without explanation of this, unless it be attributable to a purpose that the inception of the trust should depend upon her surviving the perils of childbirth. We must therefore reject the theory that there was a vested future interest in Mrs. Chater or an implied gift to her child in the event of her death prior to January 1, 1913. As to the dividends, the gift of these must likewise be treated as contingent upon her surviving to receive them; for it was not even a gift in terms, but only a direction to pay them to her during the three years from January 1, 1910.

The main purpose, as expressed, was to hold the principal fund until January 1, 1913, when, if Mrs. Chater were living and had a living child or children, she should decide for herself whether to take the fund into her own hands or allow the trustee to continue to hold it for her benefit; but if

she had no child living, the trustee was to hold the fund, giving her the income only, and at her death dividing the fund among her sisters, etc.,—"my object being, as Mr. Chater will observe, that as to these additional shares they shall remain in my family."

[586] Mrs. Chater was the chief object of the bounty. What she was to receive, and when she was to receive it, were stated in plain terms. Beyond this, we think there are none of the implications that are deemed to arise in cases of wills.

But the event that happened,—her death before January 1, 1910,—although evidently in contemplation as a possible event, was not provided for. What then happens? The trust has failed; the trustee is *functus officio;* he cannot in equity retain the fund for himself; he must simply redeliver it to him from whom it came. In other words, there is a resulting trust for the donor.

The entire matter is so fully and satisfactorily discussed in the opinion of the Supreme Court of Hawaii that we need not further elaborate it.

Decree affirmed.

E. L. BRAND, JR., and E. Belle Brand Atwell, as Surviving Executors of the Estate of Edwin L. Brand, Deceased, Plffs. in Err.,

v.

UNION ELEVATED RAILROAD COMPANY, the Lake Street Elevated Railroad Company, the South Side Elevated Railroad Company, et al.

(See S. C. Reporter's ed. 586–599.)

Constitutional law — due process of law — compensation for property taken for public use — taking case from jury — evidence.

The property rights of an abutting owner are not taken without compensation, contrary to the due process of law clause of U. S. Const., 14th Amend., because, in a suit by him to recover for the loss in market value consequent upon the erection and operation of an elevated railway in the street, the trial judge directed a verdict in favor of the railway company, refusing to submit questions of damage to the jury under positive instruction to exclude from market value subsequent to the construction of the railway such enhancement, if any, as resulted from facilities furnished by the improvement itself, where the only testimony relating to market value either before or just after the road was built shows that no change in such value occurred, and there was no evidence as to what enhancement, if any, resulted from the improvement.

[For other cases, see Constitutional Law, IV. b, 4; IV. b, 8, d, in Digest Sup. Ct. 1908.]

[No. 268.]

Argued May 6 and 7, 1915. Decided June 21, 1915.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Appellate Court for the First District, affirming a judgment of the Superior Court of Cook County, in that state, in favor of defendants in an action by an abutting owner to recover for the loss in market value consequent upon the construction and operation of an elevated railway in the street. Affirmed.

See same case below, 258 Ill. 133, L.R.A.—, —, 101 N. E. 247, Ann. Cas. 1914B, 473.

The facts are stated in the opinion.

Messrs. **Harry S. Mecartney** and **John S. Miller** argued the cause and filed a brief for plaintiffs in error:

If the case of plaintiffs in error rested upon the statute alone, and there had been no prior state court construction of the same, the appeal to this court from the judgment rendered here would be well based; for it would be an appeal from an arbitrary denial of a right based upon a statute too plain to bear construction,—too plain for any reasonable difference of opinion.

Keithsburg & E. R. Co. v. Henry, 79 Ill. 290.

The Illinois courts uniformly and consistently, for a period of over twenty-two years, construed this statute as called for by its plain terms. Such was the settled rule when Mr. Brand purchased the premises in question in 1889.

Page v. Chicago, M. & St. P. R. Co. 70 Ill. 324; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; Hyde Park v. Dunham, 85 Ill. 569; Rigney v. Chicago, 102 Ill. 64; St. Louis, J. & S. R. Co. v. Kirby, 104 Ill. 345; McReynolds v. Burlington & O. River R. Co. 106 Ill. 152; Dupuis v. Chicago & N. W. R. Co. 115 Ill. 97, 3 N. E. 720; Chicago & E. R. Co. v. Blake, 116 Ill. 163, 4 N. E. 488; Hyde Park v. Washington Ice Co. 117 Ill. 233, 7 N. E. 523; Concordia Cemetery Asso.

NOTE.—On the right to set off benefit against damages in eminent domain proceedings—see note to Peoria, B. & C. Traction Co. v. Vance, 9 L.R.A.(N.S.) 783.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

v. Minnesota & N. W. R. Co. 121 Ill. 199, 12 N. E. 536; Chicago, B. & N. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Kiernan v. Chicago, S. E. & C. R. Co. 123 Ill. 188, 14 N. E. 18; Harwood v. Bloomington, 124 Ill. 48, 16 N. E. 91; Wabash, St. L. & P. R. Co. v. McDougall, 126 Ill. 111, 1 L.R.A. 207, 9 Am. St. Rep. 539, 18 N. E. 291; Chicago, P. & St. L. R. Co. v. Aldrich, 134 Ill. 9, 24 N. E. 763; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378.

The whole trend of authority in substantive law, and of legislation, is to support the rule of this plain statute.

Lewis, Em. Dom. 3d ed. 1909, §§ 692, 702, 703, p. 1216; Beveridge v. Lewis, 137 Cal. 619, 59 L.R.A. 581, 92 Am. St. Rep. 188, 67 Pac. 1040, 70 Pac. 1083; Mantorville R. & Transfer Co. v. Slingerland, 101 Minn. 488, 11 L.R.A.(N.S.) 277, 118 Am. St. Rep. 647, 112 N. W. 1033; Kimball v. Salt Lake City, 32 Utah, 253, 10 L.R.A.(N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395; Elliott, Roads & Streets, 3d ed. § 277; Eagle v. Charing Cross R. Co. L. R. 2 C. P. 638, 36 L. J. C. P. N. S. 297, 16 L. T. N. S. 593, 15 Week. Rep. 1016; Winona & St. P. R. Co. v. Waldron, 11 Minn. 534, 88 Am. Dec. 100, Gil. 392; Roberts v. Brown County, 21 Kan. 247; Pochila v. Calvert, W. & B. Valley R. Co. 31 Tex. Civ. App. 398, 72 S. W. 255; Hickman v. Kansas City, 120 Mo. 110, 23 L.R.A. 658, 41 Am. St. Rep. 684, 25 S. W. 225; Shimer v. Easton R. Co. 205 Pa. 648, 55 Atl. 769; Heninger v. Perry, 102 Va. 896, 47 S. E. 1013; Rourke v. Holmes Street R. Co. 221 Mo. 46, 133 Am. St. Rep. 468, 119 S. W. 1094.

Later cases either simply follow the contradictions of Metropolitan West Side Elev. R. Co. v. Stickney, 150 Ill. 362, 26 L.R.A. 773, 37 N. E. 1098, or expressly reaffirm the prior law and the plainly worded statute.

Aldrich v. Metropolitan West Side Elev. R. Co. 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155; Illinois C. R. Co. v. Trustees of Schools, 212 Ill. 406, 72 N. E. 39; Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013, 1135; Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117; Harwood v. Bloomington, 124 Ill. 48, 16 N. E. 91; Illinois, I. & M. R. Co. v. Borms, 219 Ill. 179, 76 N. E. 149; Peoria, B. & C. Traction Co. v. Vance, 225 Ill. 270, 9 L.R.A. (N.S.) 781, 80 N. E. 134; Eldorado, M. & S. W. R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281.

To exclude any one property owner from sharing in the general local benefit is to deny him the equal protection of the laws.

Beveridge v. Lewis, 137 Cal. 625, 59 L.R.A. 581, 92 Am. St. Rep. 188, 67 Pac. 1040, 70 Pac. 1083; Mantorville R. & Transfer Co. v. Slingerland, 101 Minn. 490, 11 L.R.A. (N.S.) 277, 118 Am. St. Rep. 647, 112 N. W. 1033; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290.

One of the very bases of the right of the public authorities to grant to private persons or corporations the right of eminent domain is the prospective benefit in market value to the property in the district to be served.

Mantorville R. & Transfer Co. v. Slingerland, supra.

Since diversion of traffic from the neighborhood or from the premises is no element of damage in these cases, and is beyond the scope of the inquiry, how could increase of the same kind of traffic be an element of benefit?

Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013, 1135.

The attempt to reduce physical damage by offsetting benefits from the public work, *i. e.*, the enterprise (no matter how it is estimated, *i. e.*, guessed at), is, after all, assessing the abutter for the cost of the work. And it could only be founded on the principle of taxation.

Lewis, Em. Dom. 3d ed. § 5; Newby v. Platte County, 25 Mo. 258.

Mr. Roger L. Foote argued the cause, and, with Messrs. Francis W. Walker, Randall W. Burns, and Addison L. Gardner, filed a brief for defendants in error:

There has been no change in decision by the Illinois supreme court in the case at bar, announcing a rule of law and of property different from that in force prior to the purchase of the property in question by plaintiff in error; and the case at bar is not within the doctrine of the case of Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

State v. Evans, 3 Ill. 208; Alton & S. R. Co. v. Carpenter, 14 Ill. 190; People ex rel. Southern Park Comrs. v. Williams, 51 Ill. 63; Hayes v. Ottawa, O. & F. R. Valley R. Co. 54 Ill. 373; Chicago & P. R. Co. v. Francis, 70 Ill. 238; Page v. Chicago, M. & St. P. R. Co. 70 Ill. 324; Eberhart v. Chicago, M. & St. P. R. Co. 70 Ill. 347; Chicago & P. R. Co. v. Stein, 75 Ill. 41; Emerson v. Western Union R. Co. 75 Ill. 176; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; St. Louis, V. & T. H. R. Co. v. Haller, 82 Ill. 208; Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; Hyde Park v. Dunham, 85 Ill. 569; Chicago, M. & St. P. R. Co. v. Hall, 90 Ill. 42; St. Louis, J. & S. R. Co. v. Kirby, 104 Ill. 345; McReynolds v. Burlington & O. River R. Co. 106 Ill. 152; Chicago & E. R. Co. v. Blake, 116 Ill. 163, 4 N. E. 488; Concordia Cemetery Asso. v. Minnesota & N. W. R. Co. 121 Ill.

199, 12 N. E. 536; Chicago, B. & N. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Kiernan v. Chicago, S. F. & C. R. Co. 123 Ill. 188, 14 N. E. 18; Harwood v. Bloomington, 124 Ill. 48, 16 N. E. 91; Chicago, P. & St. L. R. Co. v. Aldrich, 134 Ill. 9, 24 N. E. 763; Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378; Metropolitan West Side Elev. R. Co. v. Stickney, 150 Ill. 362, 26 L.R.A. 773, 37 N. E. 1098; Metropolitan West Side Elev. R. Co. v. White, 166 Ill. 375, 46 N. E. 978; Peoria, B. & C. Traction Co. v. Vance, 225 Ill. 270, 9 L.R.A.(N.S.) 781, 80 N. E. 134; Eldorado, M. & S. W. R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281; Brand v. Union Elev. R. Co. 258 Ill. 133, L.R.A.—, —, 101 N. E. 247, Ann. Cas. 1914B, 473; Geohegan v. Union Elev. R. Co. 266 Ill. 499, 107 N. E. 786; Sanitary Dist. v. Boening, 267 Ill. 118, 107 N. E. 810.

When parties have been regularly heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law. The statute not being attacked for unconstitutionality, this court will not disturb the state supreme court's interpretation of that statute, or harmonize its decisions if they are conflicting.

Willoughby v. Chicago, 235 U. S. 45, ante, 123, 35 Sup. Ct. Rep. 23; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 58 L. ed. 1503, 34 Sup. Ct. Rep. 941; Central Land Co. v. Laidley, 159 U. S. 103, 111, 112, 40 L. ed. 91, 94, 95, 16 Sup. Ct. Rep. 80; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 166, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 566, 567, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445.

Section 9 of the Illinois statute on eminent domain has no application to an action such as the one at bar, for damages to property, no part of which is taken; and no property rights or contractual obligations accrue to the plaintiff by virtue of the proviso of said section.

White v. Metropolitan West Side Elev. R. Co. 154 Ill. 620, 39 N. E. 270; Metropolitan West Side Elev. R. Co. v. Johnson, 159 Ill. 434, 42 N. E. 871; Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138; Metropolitan West Side Elev. R. Co. v. Goll, 100 Ill. App. 323; Chicago v. McShane, 102 Ill. App. 239.

To give this court jurisdiction on the claim that the state has passed some law impairing the obligation of a contract, a clear and definite contractual relation must exist, capable of being accurately stated, which existed prior to the enactment of the law complained of as violating the contract obligation alleged. In the case at bar, the statute in question was enacted in 1872; the property was not purchased until 1889. It is not claimed that the statute is unconstitutional, or that it impairs the obligation of any contract. If the statute was construed one way prior to 1889, and a different way after 1889, such different constructions do not in any way impair the obligation of any contract, nor is it a denial of the equal protection of the law, nor the taking of property without due process of law.

Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Willoughby v. Chicago, 235 U. S. 45, ante, 123, 35 Sup. Ct. Rep. 23; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, ante, 127, 35 Sup. Ct. Rep. 21; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 58 L. ed. 1503, 34 Sup. Ct. Rep. 941; Ross v. Oregon, 227 U. S. 150, 162, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Central Land Co. v. Laidley, 159 U. S. 103, 111, 112, 40 L. ed. 91, 94, 95, 16 Sup. Ct. Rep. 80; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 166, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; Marchant v. Pennsylvania R. Co. 153 U. S. 389, 38 L. ed. 756, 14 Sup. Ct. Rep. 894.

Mr. Justice McReynolds delivered the opinion of the court:

By ordinary warranty deed from Calvin F. Rice, dated November 13, 1889, Edwin L. Brand became owner in fee simple of a lot, with five-story building (No. 259), fronting east on Wabash avenue, described as follows: "The north twenty-five (25) feet of lot five (5) in block seven (7) in fractional section fifteen (15) addition to Chicago." The record reveals no other facts concerning any rights acquired by the grantee, who held possession until his death in 1900; and there is nothing to show how or conditions under which the city obtained and holds the street. Proceeding under a city ordinance the Union Elevated Railroad

Company and other defendants during 1896 and 1897 caused construction of a double-track [588] elevated railroad along the center of Wabash avenue (100 feet wide); and since October 3, 1897, have operated the same.

On October 2, 1902, plaintiffs—Brand's executors—commenced this common-law action to recover a lump sum for damage consequent upon construction, permanent maintenance, and operation of the railroad in front of the above-described premises. After alleging such construction, method of operation, noise, dust, dirt, vibration, and other objectionable results, the declaration concludes: "All of which said disturbances and injuries and grievances above complained of, have continued from and since, to wit, said October 3, 1897, hitherto, and have caused and are now causing and will henceforth continue to cause a great and permanent damage and injury to said premises and building and said rights and easements therein, and by means thereof the said real estate has been greatly reduced in market value, to wit, in the sum of twenty-five thousand dollars ($25,000).

"And the plaintiffs aver that said defendants became and are bound to make full compensation to plaintiffs for the said loss and damage under the Constitution and laws of the state of Illinois; but the said defendants, though often requested, have not, nor has any or either of them, paid said loss and damage or any part thereof, but hitherto have wholly neglected and refused and still neglect and refuse to do so, to the damage of said plaintiffs of twenty-five thousand dollars ($25,000); wherefore they bring this suit."

Twelve years after the road was put into operation and seven after institution of the cause it was brought on for hearing—November, 1909—upon a plea of not guilty. Before the premises were viewed or any evidence taken, plaintiffs' counsel in his opening statement outlining facts and issues said: "They allege and claim that the premises known as No. 259 Wabash avenue, owned by [589] Mr. Brand in his lifetime, and this cause of action surviving to them as executors of his estate; that that property has been damaged in its market value by the construction of the Elevated Railroad structure in front of the premises for public railroad uses. . . . The law as it will be given to you, as we understand it, is, that under the Constitution of Illinois . . . private property shall not be taken or damaged for public use without just compensation, and we sue under that clause of the Constitution and upon the idea, and the basis, as we expect the law to be given to you, that notwithstanding the city ordinance allowed the construction of the road, that that is no bar to our recovery if damages have been in fact sustained. Damage in the eye of the law is damage to the market value of the property, usually arising from some interference with the private enjoyment or use of the property. . . . The theory is that this structure was built for public uses by the companies organized under the railroad act of Illinois; . . . but it is a railroad in a street and upon a structure which is violative of the ordinary rights of the abutter in the street, unless in some way they can show some particular, special, immediate, well-defined benefit to that property itself. . . . The theory of the law is that, so far as public works are concerned, if a damage is created to the property, the property owner recovers in one lump sum for the damage, past, present, and future. . . . Now we expect the evidence—and your view of the premises will be, as we think, the most important thing in the case—the actual, physical structure and its mode of operation and the noise and racket and pandemonium, as we would call it, that the road makes in front of the premises; the more or less obstruction to light and other inconvenience—some inconvenience of access and egress for wagons, and all that, all affecting the use of the property, and as we think, that will appear to you to be self-evident and the damage [590] prima facie established; and then it will be for the opposition, if they can in any way show to you that there are any particular special benefits to this property apart from property generally and apart from the general travel convenience which this property had a right to after the road was established."

Without objection, the jury viewed the premises; Brand's title was established by deed from Rice, and right of plaintiffs to sue by their letters, etc.; copy of ordinance granting authority for construction of the railroad was put in evidence, and also street sketch showing outline and location of rails, supports, etc. Plaintiffs introduced a single witness, engaged in the real estate business, who had been agent for the property and collector of the rents since prior to the road's construction. He testified concerning the locality, the property, character of improvements, building of the road in 1896–97, operation, noise, dirt, obstruction to light, etc., resulting therefrom, and the effect, the rents received, market conditions of lands in Chicago, the advance therein about 1898, etc. He declared the property's market value was $4,800 per front foot before and for three years after the construction, and somewhat later increased to $6,500. They also endeavored to

prove by him values on Michigan avenue to the east and on State street to the west, but this was declared inadmissible. On defendant's motion the court directed a verdict of not guilty, stating the following reasons therefor: "Now I agree fully with your [counsel for plaintiffs] contention that the measure of damages is the difference in the value of the property in question with the structure and that without the structure. But how is that measured? What is the basis of measure of those damages? Why, it is the price before the construction and the price immediately afterwards. That is the readiest and most available test of determining whether or not there was damage. If there was testimony here that [591] without the structure it would be worth so much and with the construction it would be worth so much less, that would be another question from that which is presented here. Your claim is not for depreciation of the value of the land by reason of the structure, but because the structure has prevented its appreciation. It is not for deterioration of value, but because the value has not advanced. Although the value has not advanced, it has not been proven by the evidence and there is no evidence tending to prove it did not advance by reason of the erection of this structure. *Non constat* that the structure was erected, there may have been many reasons that the value of the property did not advance, and the only affirmative evidence in the case is that immediately before the erection of the structure, the price was so much, and that for a period of some years afterwards the price was so much. There is no evidence of depreciation at all. There is no evidence of right of appreciation which depended upon the erection of the structure, and therefore I think you have not made out a case."

The judgment of the trial court was affirmed by both the appellate court (169 Ill. App. 449) and supreme court of Illinois (258 Ill. 133, L.R.A.—, —, 101 N. E. 247, Ann. Cas. 1914B, 473). The latter, in the course of its opinion, said (p. 134): "Numerous errors were assigned in the appellate court, but counsel for appellants stated in his brief that all of them were withdrawn except those raising the question of the correct rule for assessing damages to property not taken but affected by a public use, and this is the only question discussed in the briefs in this court. . . . [p. 135.] The undisputed evidence, therefore, was that the market value of appellants' property was not depreciated by the construction of the road. It is claimed, however, that this was the result of general benefits common to all property in the neighborhood served by the improvement, and that such benefits should not be considered in determining the damages; [592] that only special benefits, such as are a direct physical improvement to the property, like the draining of a wet, swampy tract of land by the improvement, or building a bridge across a stream running through the land, which enables the owner to enjoy it with greater advantage by reason of the improvement, should be considered in determining whether the property is damaged. Appellants contend that the benefits to their property by reason of the improvement which operated to prevent a decrease in its market value were general benefits; that there were no special benefits, but, on the contrary, the improvement injuriously affected the use of appellants' property by obstructing air and light, by noise and vibration, and by interference with access to their property, and they insist they are entitled to recover the damage thus resulting without any reference to the other benefits that may have resulted from the improvement. This question is not a new one in this state. Since the adoption of our present Constitution [1870] and the passage of the eminent domain act [1872] the question has been passed upon by this court a great many times. . . . In all three of these cases it was held the true measure of compensation for land not taken by the improvement was the difference between what the property would have sold for unaffected by the improvement, and what it would sell for as affected by it. . . . [p. 136.] The rule announced in those cases has, with one exception, been followed in subsequent cases, down to Metropolitan West Side Elev. R. Co. v. Stickney [1894] 150 Ill. 362, 26 L.R.A. 773, 37 N. E. 1098, . . . [in which] the court reviews all its previous decisions since the adoption of the Constitution in 1870 and sums up its conclusions in the following language: 'It therefore follows that every element arising from the construction and operation of the railroad or other public improvement which in an appreciable degree, capable of ascertainment [593] in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it. . . .' [p. 137.] Appellants insist this decision and others in line with it are wrong; that the rule adopted in this state is contrary to the weight of authority in other states; . . . also, that the rule is in conflict with Keithsburg & E. R. Co. v. Henry, 79 Ill. 290, and § 9 of the eminent domain act. It is quite true, the decisions in this state upon the question here under consideration are not in harmony with the

decisions of courts of last resort in some of our sister states, while they are in harmony with the decisions in some states. The conflict between the decisions in this state and the decisions of other states relied upon by appellants is not so much as to a rule of law as it is to the application of the rule. This court is in accord with the cases in other states holding that only special benefits are to be considered in making just compensation for land damaged by but not taken for a public use. The difference is principally as to what are general benefits and what are special benefits. Some courts hold that only those benefits are special which directly and physically operate upon the particular property in a manner different from and not shared in common by other property in the neighborhood, and which enable the owner to use it with greater advantage. All other benefits which increase the market value of the particular property in common with other property in the neighborhood are held to be general benefits. This view has not been adopted in this state. . . . [p. 139.] The only case in this state that is out of line with the Stickney Case and those previously and subsequently decided is Keithsburg & E. R. Co. v. Henry, supra, and that case has not been followed in any subsequent [594] decision. . . . [p. 141.] We are not disposed now to enter upon a discussion of the correctness of the rule adhered to for forty years, nor do we feel at liberty, even if we were so inclined, to overrule the large number of decisions that would have to be overruled to justify a reversal of this judgment. The judgment is in harmony with the law in this state, and is therefore affirmed."

The Illinois Constitution of 1870 [art. 2, § 13] provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law." The eminent domain act of 1872, chap. 47, Rev. Stat. (Ill.) 1912, pp. 1099, 1101, provides (§ 1): "That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed." (Sec. 9) "Said jury shall go upon the land sought to be taken or damaged, and after hearing the proof offered make their report in writing, so as to clearly set forth and show the compensation ascertained to each person thereto entitled. Provided, that no benefits or advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation in any case."

Counsel delimit plaintiffs' present position thus:

"Appellants withdraw all and every their assignments of error or parts thereof as will leave open upon this record this one question, and will save all their legal and constitutional rights claimed in respect thereto, *viz.:* Assuming that the evidence adduced on the trial and shown in this record tended inevitably and only to show that the property in question was worth as much after the railroad in question had been constructed as before [595] it was constructed, or as much with the railroad constructed as without it, that the cause should still have gone to the jury. Or, differently worded: That in considering the effect upon the premises in question from the railroad structure in question, the jury must exclude from consideration the enhancement in value of the property in question, if any, resulting from the facilities furnished by the improvement."

The suit is for loss in market value consequent upon erection and operation of the elevated road, and is now prosecuted upon the theory that the trial judge erred in not submitting questions of damage to the jury under positive instruction to exclude from market value subsequent to the construction such enhancement, if any, as resulted from facilities furnished by the improvement itself. It was, of course, necessary for the court to determine whether there was any evidence upon which such loss could be found. By merely viewing the property in 1909 the jury could not ascertain its market value either before or just after the road was built, and the only testimony relating thereto showed no change occurred. Neither could the jury tell without evidence what enhancement, if any, resulted from the improvement, and the record discloses none. In the circumstances we think the refusal to give positive direction to exclude from consideration something impossible of ascertainment was clearly right.

What we have said disposes of the essential point presented by the record, and it is unnecessary to consider the broad questions discussed in argument. It may not be contended upon any theory of compensation that the Constitution of the United States gave plaintiffs the right to an instruction not based on some evidence, or to damages without proof. The judgment of the court below is affirmed.

[596] Mr. Justice Day, dissenting:

I am unable to agree with the opinion of the court in this case. I think its im-

portance justifies a brief statement of the grounds upon which my dissent rests.

In this case there was testimony tending to show that the plaintiff's property suffered a real and substantial damage by the erection and maintenance of the elevated railroad, and that their property right of ingress and egress was peculiarly and particularly injured by the railroad structure. Such damage was equivalent to a taking of property for a public use, and required just compensation to be made for the injury sustained. Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378. There is no question of the real and substantial special injury to the plaintiffs' property, shown by the testimony, and undoubtedly developed by the view of the premises which the jury had under the direction of the court. In this attitude of the case, the jury was instructed that the plaintiff could not recover; the court proceeding upon the theory that there was no testimony tending to show that plaintiff's property would not sell for as much after the construction of the road as before. The necessary effect of this instruction permitted the jury to consider appreciation in value arising from the general advantage of the structure, not only to the plaintiff, but to others of the public, similarly situated.

In the supreme court of Illinois this instruction was sustained upon the theory that the damages to the property might be offset by benefits to the owner, although such benefits were shared by all others similarly situated.

This court has more than once held that to take private property for public use without adequate compensation is a deprivation of due process of law within the meaning of the 14th Amendment to the Federal Constitution. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 [597] U. S. 557, 565, 42 L. ed. 853, 857, 18 Sup. Ct. Rep. 445. It has also held that just compensation, in the constitutional sense, excludes taking into account the supposed benefits that the owner may receive in common with the public from the use to which his property is appropriated. Monongahela Nav. Co. v. United States, 148 U. S. 312, 326, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622.

Nor is it any answer to say that the proceedings in this case are in accordance with the laws of the state, in a proceeding in which the plaintiffs were allowed to appear and be heard, according to the rules of the local jurisdiction. This contention was made and met by this court in Chicago, B. & Q. R. Co. v. Chicago, supra, and this court has uniformly held that if the effect of the state's judgment was to permit the taking of property without due process of law, the form by which that result is accomplished is of no moment, and the mere form of the proceeding, even if accompanied by full opportunity to be heard, does not convert such process into due process of law, if the necessary result has been to deprive complainant of his property without just compensation. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. supra, at page 236, 41 L. ed. 984, 17 Sup. Ct. Rep. 581, and the cases therein cited; Fayerweather v. Ritch, 195 U. S. 276, 297, 49 L. ed. 193, 209, 25 Sup. Ct. Rep. 58. If the effect of the judgment of the state court has been to take the property of the citizen without compensation, no matter what form the procedure has taken, it is violative of the 14th Amendment to the Constitution. If this were not so, the state, by adopting forms of procedure and enforcing laws which operated to take private property without compensation, could deny the citizen the protection which the 14th Amendment was intended to give against all forms of state action.

If the jury were permitted to pay the plaintiffs for their special damage in general benefits enjoyed by the public as well as the plaintiffs, the result is inevitable that the plaintiffs' property was taken without compensation. In [598] my view, the rule was correctly summarized by Justice Cartwright in his dissenting opinion in this case. In my opinion, he tersely and correctly stated the case in the following words:

"In this case damage was claimed to property by the occupation of a public street with an elevated railroad. There were two classes of rights in the street; the one, the public right to use the street for travel and for that only; the other, the right of the property owner of ingress and egress, use in connection with his property and the appurtenant easements. If there was an obstruction to the public use for travel by the iron pillars, there could be no recovery by the owner for consequent damage; but if his right of access was impeded or interfered with, or his property rendered less valuable on account of noise, vibration, or other natural consequence of the construction and maintenance of the road, the damage resulting was special to that property. The thing would be a nuisance if there were no authority of law for its construction and operation, and whenever an act is done which, without statutory authority, would be a nuisance, the owner of property affected by it sustains a special and peculiar damage different from that sustained by the public in general, and may have his action for damages resulting from his individual

and distinct right. Rigney v. Chicago, 102 Ill. 64. In this case there was a direct physical disturbance of a right enjoyed in connection with the ownership of property, and if there was any damage by reason of the disturbance of the right it was special. Against any such damage general benefits to the public, although enhancing the value of the property in question in common with other property in the vicinity, could not be considered. To say that the only test is the market value of the property before and after the improvement, regardless of the causes affecting the value, necessarily charges the owner with benefits, which this court has repeatedly [599] held could not be done, and makes the owner contribute to a liquidation of special injuries his share of the general benefits derived from the construction and operation of the road."

As the effect of the judgment below was to permit the plaintiffs to be paid for valuable property rights in general benefits, in my opinion it necessarily follows that plaintiffs' property was taken without due process of law, and therefore in violation of the protection afforded by the 14th Amendment.

Mr. Justice McKenna, Mr. Justice Lamar, and Mr. Justice Pitney concur in this dissent.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased.

(See S. C. Reporter's ed. 599–604.)

Removal of causes — diverse citizenship — suit arising under Federal employers' liability act.

1. The removal from a state court to a Federal court, upon the sole ground of diversity of citizenship, of an action brought under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), is prohibited by the provisions both of such amendatory act and of the Judicial Code, § 28, that no such action brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Damages — under Federal employers' liability act — conscious suffering — pecuniary loss to beneficiary.

2. The recovery in an action brought by the personal representative of a deceased railway employee under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), may include both damages for the decedent's conscious pain and suffering during the period intervening between fatal injuries and death, and damages for the pecuniary loss sustained by the relative or next of kin for whose benefit the action is brought, in view of the provision of the amendatory act that any right of action given by the original act to a person suffering injury shall survive to the personal representative for the benefit of the same beneficiaries in whose behalf the right of action for death is given, although the amendment concludes with the clause, "but in such cases there shall be only one recovery for the same injury."

[For other cases, see Damages, VI. j, in Digest Sup. Ct. 1908.]

Error to state court — ground for reversal — following decision below — apportioning verdict.

3. A judgment under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), which includes a recovery both for the decedent's conscious pain and suffering and for the pecuniary loss sustained by the relatives or next of kin for whose benefit the action was brought will not be reversed by the Federal Supreme Court on writ of error to a state court because the jury was not required to specify in its verdict the amount awarded on account of each distinct liability, where the verdict seems in harmony with local practice and has been approved by the courts below.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Appeal and error — ground for reversal — instruction as to damages.

4. It is reversible error to instruct the jury that in fixing the damages in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), with reference to the pecuniary loss resulting from decedent's death to the relative or next of kin for whose benefit the action is brought, the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time, and the deceased's earning power and rate of wages should be taken into consideration, and that from the amount thus ascertained the personal expenses of the deceased should be deducted,

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NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

and the remainder, reduced to present value, should be the amount of recovery if the verdict should be for the plaintiff.

[For other cases, see Appeal and Error, VIII. m, 4, in Digest Sup. Ct. 1908.]

[No. 538.]

Argued April 22, 1915. Decided June 21, 1915.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Little River County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Reversed.

See same case below, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834.

The facts are stated in the opinion.

Mr. **James B. McDonough** argued the cause, and, with Messrs. Samuel W. Moore and Frank H. Moore, filed a brief for plaintiff in error:

The original act, whose purpose was to compensate certain designated beneficiaries for the pecuniary loss suffered by them through the death of an employee, omitted to make provision for the recovery of compensation where an injured employee died from some independent cause, so that his cause of action died with him. It was the purpose of § 9 to supply this deficiency.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, ante, 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814; Fulgham v. Midland Valley R. Co. 167 Fed. 660; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Garrett v. Louisville & N. R. Co. 235 U. S. 308, ante, 242, 35 Sup. Ct. Rep. 32; Walsh v. New York, N. H. & H. R. Co. 173 Fed. 494; Thomas v. Chicago & N. W. R. Co. 202 Fed. 769; Melzner v. Northern P. R. Co. 46 Mont. 162, 127 Pac. 146, 46 Mont. 277, 127 Pac. 1003; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

The personal representative has only one right of action, which is under § 1 in all cases except where the employee dies from some cause other than the injury, in which latter case his right of action is under § 9.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Garrett v. Louisville & N. R. Co. 235 U. S. 308, ante, 242, 35 Sup. Ct. Rep. 32; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; Dolson v. Lake Shore & M. S. R. Co. 128 Mich. 444, 87 N. W. 629; Hackett v. Louisville, St. L. & T. P. R. Co. 95 Ky. 236, 24 S. W. 871; Owensboro & N. R. Co. v. Barclay, 102 Ky. 16, 43 S. W. 177; McCafferty v. Pennsylvania R. Co. 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; Martin v. Missouri P. R. Co. 58 Kan. 475, 49 Pac. 605, 3 Am. Neg. Rep. 165.

The instruction regarding the measure of damages did not require the jury to state separately the amounts awarded respectively to the widow and child of the decedent, nor to state separately the amounts awarded under § 1 and § 9 of the act.

Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Louisville & N. R. Co. v. Stewart, 156 Ky. 550, 161 S. W. 557.

The instruction did not limit the child's right of recovery to its pecuniary loss during the years of its minority, and the widow's right of recovery to her pecuniary loss during her expectancy of life.

Tiffany, Death by Wrongful Act, 2d ed. p. 337; Baltimore & R. Turnp. Road v. State, 71 Md. 574, 18 Atl. 884; Rouse v. Detroit Electric R. Co. 128 Mich. 149, 87 N. W. 68; Duval v. Hunt, 34 Fla. 85, 15 So. 876, 13 Am. Neg. Cas. 848; Delahunt v. United Teleph. & Teleg. Co. 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515, 20 Am. Neg. Rep. 727; Atlanta & W. P. R. Co. v. Venable, 67 Ga. 697; McPherson v. St. Louis, I. M. & S. R. Co. 97 Mo. 253, 10 S. W. 846; Hoadley v. International Paper Co. 72 Vt. 79, 47 Atl. 169.

The instruction did not require the jury to limit the damages to such an amount as one of decedent's character and disposition might be expected to contribute to his wife and child.

Thornton, Federal Employers' Liability & Safety Appliance Acts, 2d ed. p. 182.

The supreme court of Arkansas erred in holding that the defendant was not entitled to remove the case to the Federal court, and in approving the action of the lower court in denying the defendant's petition for removal.

Van Brimmer v. Texas & P. R. Co. 190 Fed. 394.

chap. 143, Comp. Stat. 1913, § 8662), against the Kansas City Southern Railway Company in the circuit court, Little River county, Arkansas, alleging that the injury and death of Leslie Old (March 24, 1913) resulted from its negligence, and demanding $10,000 for pain and suffering endured by deceased and $15,000 pecuniary damage to the wife and young child. The company unsuccessfully sought to remove the case; there was trial to a jury and verdict for $25,000 without apportionment, a *remittitur* of $7,000, and a final unqualified judgment in favor of the administrator for $18,000, which the supreme court of Arkansas affirmed (112 Ark. 305, 167 S. W. 83). Three substantial assignments of error demand consideration.

[602] 1. The deceased and his administrator were citizens and residents of Arkansas. The railway company, a Missouri corporation, seasonably set up nonresidence and demanded removal of the cause to the United States district court. Its petition therefor was denied and this is now assigned as error.

The above-mentioned amendment of 1910 declares: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." Section 28, Judicial Code, effective January 1, 1912 [36 Stat. at L. 1095, chap. 231, Comp. Stat. 1913, § 1010], specifies causes removable from state courts by nonresident defendants and concludes: "Provided, That no case arising under an act entitled 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States." The language of both amendment and Judicial Code, we think, clearly inhibits removal of a cause arising under the act from a state court upon the sole ground of diversity of citizenship. The same conclusion has been announced frequently by lower Federal courts. Symonds v. St. Louis & S. E. R. Co. 192 Fed. 353, 356; Strauser v. Chicago, B. & Q. R. Co. 193 Fed. 293, 294; Saiek v. Pennsylvania R. Co. 193 Fed. 303; Lee v. Toledo, St. L. & W. R. Co. 193 Fed. 685, 686; Ullrich v. New York, N. H. & H. R. Co. 193 Fed. 768, 770; Hulac v. Chicago & N. W. R. Co. 194 Fed. 747, 749; McChesney v. Illinois C. R. Co. 197 Fed. 85, 87; De Atley v. Chesapeake & O. R. Co. 201 Fed. 591, 596; Kelly v. Chesapeake & O. R. Co. 201 Fed. 602, 605; Rice v. Boston & M. R. Co. 203 Fed. 580, 581; Teel v. Chesapeake & [603] O. R. Co. 47 L.R.A.(N.S.) 21, 123 C. C. A. 240, 204 Fed. 918, 921; Patton v. Cincinnati, N. O. & T. P. R. Co. 208 Fed. 29, 30; Eng v. Southern P. Co. 210 Fed. 92, 93; Burnett v. Spokane, P. & S. R. Co. 210 Fed. 94, 95. A different view expressed in Van Brimmer v. Texas & P. R. Co. 190 Fed. 394, decided October, 1911, cannot be accepted.

2. It is said the court below erred in approving the charge permitting recovery for pecuniary loss to widow and child and also for conscious pain and suffering endured by deceased in the brief period—less than two hours—between injury and his death. This point having been considered, the right to recover for both these reasons in one suit was recently sustained. St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, ante, 1160, 35 Sup. Ct. Rep. 704 [announced June 1, 1915].

It is further objected that as the declaration set up two distinct and independent liabilities springing from one wrong, but based upon different principles, the jury should have been directed to specify in their verdict the amount awarded, if any, in respect of each. This objection must be overruled. Of course, in causes arising under this statute trial courts should point out applicable principles with painstaking care and diligently exercise their full powers to prevent unjust results; but its language does not expressly require the jury to report what was assessed by them on account of each distinct liability, and in view of the prevailing contrary practice in similar proceedings we cannot say that a provision to that effect is necessarily implied. As the challenged verdict seems in harmony with local practice and has been approved by the courts below, the judgment thereon is not open to attack here upon the ground specified.

3. Complaint is also made of the following instruction—No. 10—given at the administrator's instance: "If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious [604] pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition of labor, the probable

increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff." The Arkansas supreme court expressly approved this upon authority of St. Louis, I. M. & S. R. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571. Recent opinions of this court have laid down the rule concerning the measure of pecuniary damages to beneficiaries which may be recovered under the act. A recovery therefor by the administrator is in trust for designated individuals, and must be based upon their actual pecuniary loss. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 68, 57 L. ed. 417, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 149, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 175, 57 L. ed. 785, 786, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; North Carolina R. Co. v. Zachary, 232 U. S. 248, 256, 257, 58 L. ed. 591, 594, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 629, ante, 392, 393, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814. Instruction No. 10 conflicts with the approved rule, and the probable result was materially to prejudice plaintiff in error's rights.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[605] EX PARTE: IN THE MATTER OF JAMES J. FLETCHER et al., Petitioners. [No. —, Orig.]

Motion for leave to file petition for Writ of Habeas Corpus.

Messrs. Henry E. Davis and James A. O'Shea for petitioners.

Mr. Solicitor General Davis for respondent.

February 1, 1915. Denied.

SOUTHERN EXPRESS COMPANY, Plaintiff in Error, v. EMIL J. STEHLI et al. [No. 148.]

Carriers—limiting liability—agreed value—Carmack amendment.

In Error to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Guilford County, in that state, against an express company for the full value of a lost interstate shipment, notwithstanding a stipulation limiting the carrier's liability to the agreed value.

See same case below, 160 N. C. 493, 76 S. E. 542.

Messrs. Robert C. Alston, T. W. Bickett, and T. H. Calvert for plaintiff in error.

No counsel appeared for defendants in error.

February 23, 1915. *Per Curiam:* Judgment reversed with costs, and case remanded for further proceedings upon the authority of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Seaboard Air Line R. Co. v. J. M. Pace Mule Co. 234 U. S. 751, 58 L. ed. 1571, 34 Sup. Ct. Rep. 775.

PETER H. ANDERSON et al., Plaintiffs in Error, v. NELS O. HULTBERG et al [No. 335.]

Error to state court—Federal question.

In Error to the Supreme Court of the state of Illinois to review a decree which affirmed a decree of the Circuit Court of Cook County, in that state, dismissing the cross bill in a creditors' suit.

See same case below, 252 Ill. 607, 97 N. E. 216.

Messrs. Axel Chytraus, John J. Healy, and E. Allen Frost for plaintiffs in error.

Messrs. John Barton Payne, Silas H. Strawn, Harris F. Williams, and James Hamilton Lewis for defendants in error.

February 23, 1915. *Per Curiam:* [606] Dismissed for the want of jurisdiction upon the authority of Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; see White Star Min. Co. v. Hultberg, 205 U. S. 540, 51 L. ed. 921, 27 Sup. Ct. Rep. 794; Anderson v. Swedish Evangelical Mission Covenant, 235 U. S. 692, ante, 428, 35 Sup. Ct. Rep. 206.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error, v. ELLA M. THORNTON, as Administratrix, etc. [No. 509.]

Master and servant—employers' liability—assumption of risk.

In Error to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Circuit Court of Abbeville County, in that state, in favor of plaintiff in an action brought under the Federal employers' liability act.

See same case below, 98 S. C. 348, 82 S. E. 433.

Messrs. J. J. Darlington and J. L. Glenn for plaintiff in error.

Mr. W. N. Graydon for defendant in error.

March 1, 1915. *Per Curiam:* Judgment reversed with costs, and cause remanded for further proceedings upon the authority of Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635.

People of the State of Illinois ex rel. John B. Gaskill, Plaintiffs in Error, v. Forest Home Cemetery Company of Chicago et al. [No. 168.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cook County, in that state, dismissing the petition for a writ of mandamus to compel a cemetery corporation to receive a body for burial.

See same case below, 258 Ill. 36, L.R.A. —, —, 101 N. E. 219, Ann. Cas. 1914B, 277.

Mr. George W. Wilbur for plaintiffs in error.

Mr. Walter D. Herrick for defendants in error.

March 8, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 249, 58 L. ed. 204, 205, 34 Sup. Ct. Rep. 90; Holden Land & Live Stock Co. v. Interstate Trading Co. 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661; (2) Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Consolidated Turnp. v. Norfolk & O. V. R. Co. 228 U. S. 596, 599, 600, 57 L. ed. 982-984, 33 Sup. Ct. Rep. 609; [607] Ennis Waterworks v. Ennis, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767.

George W. Caldwell et al., Plaintiffs in Error, v. Carl E. Bauer et al. [No. 171.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Indiana to review a decree which affirmed a decree of the Circuit Court of Lake County, in that state, enjoining the carrying out of contracts for the erection of a school building.

See same case below, 179 Ind. 146, 99 N. E. 117.

Messrs. William J. Whinery and A. C. Harris for plaintiffs in error.

Mr. John H. Gillett for defendants in error.

March 8, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 249, 58 L. ed. 204, 205, 34 Sup. Ct. Rep. 90; Holden Land & Live Stock Co. v. Interstate Trading Co. 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661; (2) Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 193, 53 L. ed. 963, 964, 29 Sup. Ct. Rep. 546; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 481, 56 L. ed. 1171, 1173, 32 Sup. Ct. Rep. 790; Bowe v. Scott, 233 U. S. 658, 663, 664, 58 L. ed. 1141, 1144, 1145, 34 Sup. Ct. Rep. 769; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, ante, 127, 35 Sup. Ct. Rep. 21.

Max G. Cohen, Appellant, v. United States. [No. 789.]

Habeas corpus—as substitute for writ of error.

Appeal from the District Court of the United States for the Western District of Washington to review a decree refusing relief by habeas corpus to one imprisoned under a conviction of subornation of perjury.

Mr. Thomas Mannix for appellant.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for appellee.

March 8, 1915. *Per Curiam:* Final order affirmed upon the authority of Kaizo v. Henry, 211 U. S. 146, 148, 53 L. ed. 125, 126, 29 Sup. Ct. Rep. 41; Harlan v. McGourin, 218 U. S. 442, 445, 448, 54 L. ed. 1101, 1104, 1105, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849; Glasgow v. Moyer, 225 U. S. 420, 428, 429, 56 L. ed. 1147, 1149, 1150, 32 Sup. Ct. Rep. 753; Henry v. Henkel, 235 U. S. 219, 229, ante, 203, 206, 35 Sup. Ct. Rep. 54. See Cohen v. United States, 235 U. S. 696, ante, 430, 35 Sup. Ct. Rep. 199.

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[608] Ex parte: In the Matter of Helen C. Sheckels, Petitioner. [No.—, Orig.]

Motion for leave to file petition for Writ of Mandamus.

Mr. John Raum for petitioner.

No counsel appeared for respondent

March 15, 1915. Denied.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error, v. L. M. RHODA, as Administrator of the Estate of Clarence Rhoda, deceased. [No. 201.]

Damages—for death—pecuniary benefit.

In Error to the Supreme Court of the State of Florida to review a judgment which affirmed a judgment of the Circuit Court of Santa Rosa County, in that state, in favor of plaintiff in an action under the Federal employers' liability act.

Mr. A. C. Blount for plaintiff in error.

Mr. W. H. Watson for defendant in error.

April 12, 1915. *Per Curiam:* Judgment reversed upon the authority of Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Garrett v. Louisville & N. R. Co. 235 U. S. 308, ante, 242, 35 Sup. Ct. Rep. 32.

EDWARD A. PETERS, Appellant, v. HENRY L. FERRIS and Hunt, Helm, Ferris & Co. [No. 731.]

Appeal—from district court—final decree.

Appeal from the District Court of the United States for the Eastern District of Wisconsin to review a decree which directed a witness in a patent interference proceeding to answer a cross interrogatory.

Mr. William G. Henderson for appellant.

Messrs. Philip C. Dyrenforth, Francis M. Phelps, and George A. Chritton for appellees.

April 12, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Covington v. First Nat. Bank, 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645; Heike v. United States, 217 U. S. 423, 54 L. ed. 821, 30 Sup. Ct. Rep. 539; United States v. Beatty, 232 U. S. 463, 58 L. ed. 686, 34 Sup. Ct. Rep. 392. See Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356.

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[609] C. L. CARLISLE, Plaintiff in ERROR, v. STATE OF SOUTH DAKOTA. [No. 249.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of South Dakota to review a judgment which affirmed a conviction of practising dentistry without a license, rendered by the Circuit Court of Minnehaha County, in that state.

See same case below, 30 S. D. 475, 139 N. W. 127.

Mr. Melvin Grigsby for plaintiff in error.

Messrs. Charles B. Bailey, Royal C. Johnson, and John H. Voorhees for defendant in error.

April 19, 1915. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Fay v. Crozer, 217 U. S. 455, 54 L. ed. 837, 30 Sup. Ct. Rep. 568; Hendricks v. United States, 223 U. S. 178, 184, 56 L. ed. 394, 396, 32 Sup. Ct. Rep. 313. See Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286.

F. B. CLARK, Trustee in Bankruptcy of the Smith Automobile Company, a Bankrupt, Appellant, v. CLAUDE HAMILTON. [No. 762.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the District Court for the District of Kansas, allowing a claim against a bankrupt estate.

See same case below, L.R.A.—, —, 133 C. C. A. 223, 217 Fed. 229.

Mr. D. R. Hite for appellant.

Mr. Charles M. Wilson for appellee.

April 19, 1915. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32; Blake v. Openhym, 216 U. S. 322, 54 L. ed. 498, 30 Sup. Ct. Rep. 309.

ERWIN R. BERGDOLL, Plaintiff in Error, v. FRANK A. HARRIGAN, Trustee, etc. [No. 751.]

Appeal—affirmance on motion.

In Error to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania in favor of a trustee in bankruptcy in a suit to recover an alleged preferential payment.

See same case below, 133 C. C. A. 615, 217 Fed. 943.

Messrs. Joseph Gilfillan and George S. Graham for plaintiff in error.

Mr. Joseph W. Catharine for defendant in error.

April 26, 1915. *Per Curiam:* Judgment affirmed with costs, upon the authority of rule 6, clause 5 (Micas v. Williams, 104 U. S. 556, 26 L. ed. 842; The Alaska, 130 U. S. 201, 32 L. ed. 923, 9 Sup. Ct. Rep. 461; Chanute v. Trader, 132 U. S. 210, 214, 33 L. ed. 345, 346, 10 Sup. Ct. Rep. 167; Northern [610] P. R. Co. v. Amato, 144 U. S. 465, 473, 36 L. ed. 506, 509, 12 Sup. Ct. Rep. 740), and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania.

Bruner Oil Company et al., Plaintiffs in Error, v. Deming Investment Company. [No. 252.]

Indian allotments—restrictions on alienation.

In Error to the Supreme Court of the State of Oklahoma to review a judgment which reversed a judgment of the District Court of Tulsa County, in that state, in favor of defendants in a suit to quiet title.

See same case below, 35 Okla. 395, 130 Pac. 1157.

Messrs. George S. Ramsey and Edgar A. de Meules for plaintiffs in error.

Mr. A. J. Biddison for defendant in error.

April 26, 1915. *Per Curiam:* Judgment affirmed with costs, upon the authority of Skelton v. Dill, 235 U. S. 206, ante, 198, 35 Sup. Ct. Rep. 60; Adkins v. Arnold, 235 U. S. 417, ante, 294, 35 Sup. Ct. Rep. 118.

Edward Roby, Plaintiff in Error, v. South Park Commissioners et al. [No. 355.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Illinois to review a decree which affirmed a decree of the Superior Court of Cook County, in that state, dismissing the cross bill in a suit attacking the title to land purchased by park commissioners.

See same case below, 252 Ill. 575, 97 N. E. 225.

Mr. Edward Roby for plaintiff in error.

Messrs. Robert Redfield, Charles L. Bartlett, and Chauncey W. Martyn for defendants in error.

May 3, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 416, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Washington v. Miller, 235 U. S. 422, 429, ante, 295, 299, 35 Sup. Ct. Rep. 119.

Bruce Neff, Plaintiff in Error, v. R. A. Jackson, Sheriff of Hillsboro County. [No. 254.]

Error to state court—frivolous Federal question.

In Error [611] to the Supreme Court of the State of Florida to review a judgment which reversed a judgment of the Circuit Court of Hillsboro County, in that state, discharging a prisoner on habeas corpus.

See same case below, 64 Fla. 326, 60 So. 350.

Messrs. H. A. Herbert and Benjamin Micou for plaintiff in error.

No counsel appeared for defendant in error.

May 10, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Ennis Waterworks v. Ennis, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767. See Hendrick v. Maryland, 235 U. S. 610, ante, 385, 35 Sup. Ct. Rep. 140.

State Savings & Commercial Bank, Plaintiff in Error, v. Alden Anderson et al. [No. 267.]

Constitutional law—due process of law—summary seizure of bank.

In Error to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of the City and County of San Francisco, in that state, in favor of defendant in a suit for redress because of the summary seizure of a bank by the state superintendent of banks.

See same case below, 165 Cal. 437, L.R.A. —, —, 132 Pac. 755.

Mr. Arthur Crane for plaintiff in error.

Mr. A. A. De Ligne for defendants in error.

May 10, 1915. *Per Curiam:* Judgment affirmed, with costs, upon the authority of Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

ARIZONA COPPER COMPANY, Ltd., Plaintiff in Error, v. STATE OF ARIZONA AT THE RELATION OF AND TO THE USE OF JOHN M. WEBSTER, Treasurer and Ex Officio Tax Collector in and for the County of Greenlee, State of Arizona. [No. 467.]

Error to state court—decision on non-Federal ground.

In Error to the Supreme Court of the State of Arizona to review a judgment which affirmed a judgment of the Superior Court of Greenlee County, in that state, in favor of a tax collector in a suit for delinquent taxes.

See same case below, 15 Ariz. 9, 137 Pac. 417.

Mr. [612] Walter Bennett for plaintiff in error.

Messrs. George J. Stoneman and Reese M. Ling for defendant in error.

June 1, 1915. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 58 L. ed. 204, 34 Sup. Ct. Rep. 90; Holden Land & Live Stock Co. v. Interstate Trading Co. 233 U. S. 536, 58 L. ed. 1083, 34 Sup. Ct. Rep. 661.

W. G. WELLES et al., Plaintiffs in Error, v. GEORGE E. BRYANT. [No. 812.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Florida to review a judgment which, in a second appeal, affirmed a judgment of the Circuit Court of De Soto County, in that state, in favor of plaintiff in a negligence action.

See same case below, on first appeal 65 Fla. 355, 61 So. 748, on second appeal—Fla.—, 66 So. 562.

Mr. Benjamin Micou entered his appearance for plaintiffs in error, but filed no brief.

Messrs. N. B. K. Pettingill and M. B. Macfarlane for defendant in error.

June 1, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Thomas v. Iowa, 209 U. S. 258, 52 L. ed. 782, 28 Sup. Ct. Rep. 487; Mallers v. Commercial Loan & T. Co. 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 53, ante, 127, 128, 35 Sup. Ct. Rep. 21.

AMERICAN WELL WORKS CO., Appellant, v. LAYNE & BOWLER CO. et al. [No. 329.]

Appeal—mode of review.

Appeal from the District Court of the United States for the Eastern District of Arkansas to review a judgment dismissing the complaint in an action of slander of title.

Mr. James P. Clarke entered his appearance for appellant, but filed no brief.

Messrs. J. M. Moore and Frank Andrews for appellees.

June 1, 1915. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of Bevins v. Ramsey, 11 How. 185, 13 L. ed. 657; Deland v. Platte County, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 82; Behn v. Campbell, 205 U. S. 403, 407, 51 L. ed. 857, 858, 27 Sup. Ct. Rep. 502.

T. U. VAUGHN, Plaintiff in Error, v. STATE OF SOUTH CAROLINA. [No. 310.]

Constitutional law—*ex post facto* laws changing punishment for crime.

In Error to the Supreme Court of the State of South Carolina to review a judgment which affirmed a conviction for rape, rendered by the Court of General Sessions for Greenville County, in that state.

See same case below, 95 S. C. 455, 79 S. E. 312.

Mr. Joseph A. McCullough for plaintiff in error.

Messrs. Thomas H. Peeples and Fred H. Dominick for defendant in error.

June 21, 1915. [613] *Per Curiam:* Judgment affirmed upon the authority of (1) Malloy v. South Carolina, 237 U. S. 180, ante, 905, 35 Sup. Ct. Rep. 507; (2) Overton v. Oklahoma, 235 U. S. 31, ante, 112, 35 Sup. Ct. Rep. 14; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 57 L. ed. 982, 33 Sup. Ct. Rep. 609; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80.

UNITED STATES EX REL. FREDERICK BROWN, Appellant, v. FREDERICK A. COOKE, Superintendent of the County Prison at Philadelphia. [No. 354.]

Appeal—from circuit court of appeals—habeas corpus.

Appeal from the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed an order of the District Court for the Eastern District of Pennsylvania, denying a petition for a writ of habeas corpus.

See same case below, 126 C. C. A. 429, 209 Fed. 607.

Messrs. Armond W. Scott and G. Edward Dickerson for appellant.

Messrs. Thomas H. Peeples and Fred H. Dominick for appellee.

June 21, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of § 241 of the Judicial Code (act March 3, 1911, chap. 231, 36 Stat. at L. 1157, Comp. Stat. 1913, § 1218); Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584; Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Kurtz v. Moffitt, 115 U. S. 487, 498, 29 L. ed. 458, 460, 6 Sup. Ct. Rep. 148.

CHARLES E. HOUSTON et al., Petitioners, v. UNITED STATES. [No. 725.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 133 C. C. A. 562, 217 Fed. 852.

Messrs. Samuel H. Piles, James B. Howe, Wickliffe B. Stratton, Alex, Britton, Evans Browne, and F. W. Clements for petitioners.

[614] The Solicitor General and Mr. Assistant Attorney General Wallace for respondent.

January 18, 1915. Denied.

ALASKA GASTINEAU MINING COMPANY, Petitioner, v. ALASKA TREADWELL GOLD MINING COMPANY et al. [No. 755.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 131 C. C. A. 24, 214 Fed. 718.

Messrs. K. R. Babbitt, Lewis P. Shackleford, and Albert Fink for petitioner.

Messrs. Curtis H. Lindley, Henry Eickhoff, and Harvey M. Friend for respondents.

January 18, 1915. Denied.

TRENTON OIL CLOTH & LINOLEUM COMPANY, Petitioner, v. HENRY W. MUNROE et al. [No. 761.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, on first appeal, 124 C. C. A. 362, 206 Fed. 456; on second appeal, 218 Fed. 370.

Mr. Russell Lord Tarbox for petitioner.

Mr. Sol M. Stroock for respondents.

January 18, 1915. Denied.

SUSIE A. TYRRELL, as Administratrix, etc., Petitioner, v. DISTRICT OF COLUMBIA. [No. 753.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Alexander Wolf and Levi H. David for petitioner.

Mr. Conrad H. Syme for respondent.

January 25, 1915. Granted.

CHARLES M. MCMAHON et al., Petitioners, v. UNITED STATES. [No. 705.]

Petition [615] for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. William E. Mason and James Scarlet for petitioners.

The Solicitor General for respondent.

January 25, 1915. Denied.

NORFOLK SAND & GRAVEL CORPORATION, Petitioner, v. OHIO LOCOMOTIVE CRANE COMPANY. [No. 747.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 133 C. C. A. 135, 217 Fed. 25.

Mr. Thomas W. Shelton for petitioner.

Mr. Wm. H. White, Jr., for respondent.

January 25, 1915. Denied.

FORD MOTOR COMPANY, Petitioner, v. DANIEL DONALDSON. [No. 752.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 218 Fed. 350.

Mr. William Butler for petitioner.

Mr. George F. Hickey for respondent.

January 25, 1915. Denied.

AKTIESSELSKABET INGRID, etc., Owner, etc., Petitioners, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY et al. [No. 767.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, L.R.A.—, —, 132 C. C. A. 316, 216 Fed. 72.

Messrs. J. Parker Kirlin and John M. Woolsey for petitioners.

Messrs. Robert Thorne, William H. Button, and Charles E. Miller for respondents.

January 25, 1915. Denied.

MAX SCHAEFFER, Trading as Max Schaeffer Company, Petitioner, v. OTIS A. MYGATT et al. [No. 770.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 218 Fed. 827.

Messrs. Philip C. Dyrenforth, John H. Lee, George A. Chritton, and Hillary C. Messimer for petitioner.

Mr. Howard Taylor for respondents.

[616] January 25, 1915. Denied.

MAX SCHAEFFER, Trading as Max Schaeffer Company, Petitioner, v. OTIS A. MYGATT et al. [No. 771.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 218 Fed. 827.

Messrs. Philip C. Dyrenforth, John H. Lee, George A. Chritton, and Hillary C. Messimer for petitioner.

Mr. Howard Taylor for respondents.

January 25, 1915. Denied.

GOSHEN MANUFACTURING COMPANY, Petitioner, v. HUBERT A. MYERS MANUFACTURING COMPANY et al. [No. 782.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Fred L. Chappell for petitioner.

No counsel appeared for respondents.

February 1, 1915. Granted.

UNITED STATES, Petitioner, v. NEW YORK & ORIENTAL STEAMSHIP COMPANY, Limited. [No. 785.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 132 C. C. A. 305, 216 Fed. 61.

Mr. Solicitor General Davis for petitioner.

Messrs. J. Parker Kirlin and John M. Woolsey for respondent.

February 1, 1915. Granted.

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[617] ALEXANDER ECCLES & COMPANY, Petitioners, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. [No. 744.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 129 C. C. A. 664, 213 Fed. 1020.

Messrs. Howard S. Harrington and Oscar R. Houston for petitioners.

Messrs. Henry L. Stone and Gregory L. Smith for respondent.

February 1, 1915. Denied.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, Petitioner, v. UNITED STATES. [No. 766.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Cecil H. Smith for petitioner.

Mr. Solicitor General Davis for respondent.

February 1, 1915. Denied.

AUGUSTUS C. BUZBY, etc., Petitioner, v. KEYSTONE OIL & MANUFACTURING COMPANY. [No. 781.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 219 Fed. 473.

Messrs. Alvin H. Culver, Wells M. Cook, and Edwin C. Brandenburg for petitioner.

Messrs. Francis W. Parker and Donald M. Carter for respondent.

February 1, 1915. Denied.

PACIFIC MAIL STEAMSHIP COMPANY, Petitioner, v. ED SCHMIDT. [No. 768.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. George A. Knight and Charles J. Heggerty for petitioner.

Mr. John L. McNab for respondent.

February 23, 1915. Granted.

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[618] LOUIS LEONHARDT & COMPANY, Petitioner, v. SOUTHERN RAILWAY COMPANY. [No. 763.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 133 C. C. A. 237, 217 Fed. 321.

Mr. George W. Pickle for petitioner.

Messrs. Claudian B. Northrop and Leon Jourolmon for respondent.

February 23, 1915. Denied.

CITY OF PHILADELPHIA, Petitioner, v. WELSBACH STREET LIGHTING COMPANY OF AMERICA. [No. 788.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 218 Fed. 721.

Messrs. E. W. Lank and Michael J. Ryan for petitioner.

No counsel appeared for respondent.

February 23, 1915. Denied.

BOSTON ELEVATED RAILWAY COMPANY, Petitioner, v. PAUL BOYNTON COMPANY. [No. 797.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 128 C. C. A. 338, 211 Fed. 812.

Messrs. Alex. Britton, Evans Browne, and F. W. Clements for petitioner.

Messrs. William R. Sears, Samuel J. Elder, and Hugh W. Ogden for respondent.

February 23, 1915. Denied.

CHARLES T. DUNBAR, Petitioner, v. ORLEANS-KENNER ELECTRIC RAILWAY COMPANY. [No. 798.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 218 Fed. 344.

Mr. H. Generes Dufour for petitioner.

Mr. T. M. Miller for respondent.

February 23, 1915. Denied.

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[619] CHARLES M. MCMAHON et al., Petitioners, v. UNITED STATES OF AMERICA. [No. 705.]

Amended petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Wm. E. Mason for petitioners.

Mr. Solicitor General Davis for respondent.

March 1, 1915. Denied.

ASHEPOO FERTILIZER COMPANY, Petitioner, v. W. H. TOWNSEND et al. [No. 783.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 128 C. C. A. 613, 212 Fed. 97.

Mr. George F. von Kolnitz for petitioner.

Mr. W. H. Townsend for respondents.

March 1, 1915. Denied.

ANDREW A. NICROSI, etc., et al., Petitioners, v. JOHN B. NICROSI et al. [No. 787.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 129 C. C. A. 666, 213 Fed. 1022.

Mr. William Henry White for petitioners.

Mr. John M. Chilton for respondents.

March 1, 1915. Denied.

A. Y. JAMESON, Petitioner, v. UNITED STATES FARM LAND COMPANY. [No. 802.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 127 C. C. A. 495, 210 Fed. 885.

Messrs. M. H. Boutelle and Charles B. Elliott for petitioner.

No counsel appeared for respondent.

March 1, 1915. Denied.

JAMES LANSBURGH et al., Petitioners, v. MYRON M. PARKER et al. [No. 807.]

Petition [620] for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 41 App. D. C. 549.

Messrs. Charles H. Merillat, Alexander Wolf, and Levi H. David for petitioners.

Messrs. John Ridout and J. J. Darlington for respondents.

March 1, 1915. Denied.

POCAHONTAS DISTILLING COMPANY, Incorporated, Petitioner, v. UNITED STATES. [No. 822.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 218 Fed. 782.

Messrs. John A. Lamb and Robert H. Talley for petitioner.

Mr. Solicitor General Davis for respondent.

March 1, 1915. Denied.

ALI GEGIOW et al., Petitioners, v. BYRON H. UHL, as Acting Commissioner of Immigration of the Port of New York. [No. 801.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Abram I. Elkus, Max J. Kohler, Ralph Barnett, and Morris Jablow for petitioners.

The Attorney General, The Solicitor General, and Mr. Assistant Attorney General Wallace for respondent.

March 8, 1915. Granted.

CECELIA LUKENS POOLER et al., Petitioners, v. JENNIE HYNE [No. 816]; and CECELIA LUKENS POOLER et al., Petitioners, v. SILAS HYNE [No. 817].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 129 C. C. A. 506, 213 Fed. 154.

Mr. Edward H. [621] Kubitz for petitioners.

Mr. G. V. Menzies for respondents.

March 8, 1915. Denied.

FRISCO LUMBER COMPANY, Petitioner, v. O. E. HODGE et al., etc. [No. 827.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 218 Fed. 778.

Mr. William T. Hutchings for petitioner.

No counsel appeared for respondents.

March 8, 1915. Denied.

NEW YORK, SUSQUEHANNA, & WESTERN R. R. Co., Petitioner, v. ANNIE THIERER [No. 834]; and NEW YORK, SUSQUEHANNA, & WESTERN R. R. Co., Petitioner, v. JOSEPH THIERER [No. 835].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, on first writ of error, 126 C. C. A. 242, 209 Fed. 316, 4 N. C. C. A. 718; on second writ of error, 221 Fed. 571.

Mr. Frederic B. Jennings for petitioner.

Mr. Abram J. Rose for respondents.

March 8, 1915. Denied.

HART STEEL COMPANY et al., Petitioners, v. RAILROAD SUPPLY COMPANY. [No. 825.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Frank F. Reed, Edward S. Rogers, and Frederick P. Fish for petitioners.

Messrs. Taylor E. Brown and C. C. Linthicum for respondent.

March 15, 1915. Granted.

CARRIE CUSHMAN et al., Petitioners, v. WARREN-SCHARF ASPHALT PAVING COMPANY. [No. 848.]

[622] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 220 Fed. 857.

Messrs. Marquis Eaton and Joseph H. Defrees for petitioners.

Mr. Morris M. Townley for respondent.

March 15, 1915. Denied.

W. S. TYLER COMPANY, Petitioner, v. LUDLOW-SAYLOR WIRE COMPANY. [No. 622.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 129 C. C. A. 12, 212 Fed. 156.

Mr. D. Anthony Usina, J. N. Cooke, and C. C. Linthicum for petitioner.

Mr. James P. Dawson for respondent.

March 22, 1915. Denied.

WILLIAM L. DAYTON, Trustee, etc., Petitioner, v. A. H. STANARD, Treasurer, etc., et al. [No. 880.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Harvey Riddell for petitioner.

No appearance for respondents.

April 12, 1915. Granted.

RAILROAD SUPPLY COMPANY, Petitioner, v. ELYRIA IRON & STEEL COMPANY. [No. 903.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Taylor E. Brown, Charles C. Linthicum, and Clarence E. Mehlhope for petitioner.

No appearance for respondent.

April 12, 1915. Granted.

AMERICAN BONDING COMPANY, of Baltimore, Maryland, Petitioner, v. ARTHUR H. BROWN, as Receiver, etc. [No. 794.]

Petition for a Writ of [623] Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 127 C. C. A. 406, 210 Fed. 844.

Messrs. C. B. Nolan, William Scallon, and Thomas J. Walsh for petitioner.

Mr. Milton S. Gunn for respondent.

April 12, 1915. Denied.

HEDWIG FICHTEL et al., etc., Petitioners, v. HESS-BRIGHT MANUFACTURING COMPANY et al. [No. 883.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 219 Fed. 722.

Messrs. Frederick P. Fish and William A. Redding for petitioners.

Mr. Robert Fletcher Rogers for respondents.

April 12, 1915. Denied.

TRUSSED CONCRETE STEEL COMPANY, Petitioner, v. THOMAS EWING, Commissioner of Patents. [No. 904.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 42 App. D. C. 179.

Messrs. Fred L. Chappell and William S. Hodges for petitioner.

No appearance for respondent.

April 12, 1915. Denied.

CONTINUOUS GLASS PRESS COMPANY, Petitioner, v. SCHMERTZ WIRE GLASS COMPANY. [No. 910.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 219 Fed. 199.

Messrs. Andrew C. Gray and A. B. Stoughton for petitioner.

Messrs. Arthur J. Baldwin and Drury W. Cooper for respondent.

April 12, 1915. Denied.

MILTON OCHS, Petitioner, v. COMMISSIONER OF PATENTS. [No. 875.]

Petition for a [624] Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 41 App. D. C. 519.

Mr. Frederick Beller for petitioner.

No appearance for respondent.

April 19, 1915. Denied.

MCKEE GLASS COMPANY, Petitioner, v. LIBBEY GLASS COMPANY. [No. 882.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 229 Fed. 672.

Messrs. Robert D. Totten and George E. Reynolds for petitioner.

Messrs. Thomas Patterson and Otto Raymond Barnett for respondent.

April 19, 1915. Denied.

NEW AMSTERDAM CASUALTY COMPANY, Petitioner, v. LUCY D. W. MAYS. [No. 887.]

Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

See same case below, on first appeal, 40 App. D. C. 249; on second appeal, 43 App. D. C. 84.

Messrs. Wade H. Ellis and R. Golden Donaldson for petitioner.

No appearance for respondent.

April 19, 1915. Denied.

CHARLES GEORGE ARBUTHNOT et al., Partners, etc., Petitioners, v. CENTRAL TRUST COMPANY OF LLINOIS, etc., et al. [No. 888]; A. H. O. DENNISTOUN et al., Partners, etc., Petitioners, v. CENTRAL TRUST COMPANY OF ILLINOIS, etc., et al. [No. 889]; and ARTHUR HENRY BRANDT et al., Partners, etc., Petitioners, v. CENTRAL TRUST COMPANY OF ILLINOIS, etc., et al. [No. 890].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 221 Fed. 16.

[625] Messrs. John M. Zane and Alfred T. Carbon for petitioners in Nos. 888 and 889.

Mr. Timothy J. Scofield for petitioners in No. 890.

Messrs. Levy Mayer, Isaac H. Mayer, and Wm. B. McIlvaine for respondents.

April 19, 1915. Denied.

JACK COLLINS, Petitioner, v. UNITED STATES. [No. 907.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 219 Fed. 670.

Messrs. William O. Beall and R. Emmett Stewart for petitioner.

No brief filed for respondent.

April 19, 1915. Denied.

WASHINGTON POST COMPANY et al., Petitioners, v. JAMES O'DONNELL. [No. 919.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 43 App. D. C.—.

Messrs. J. J. Darlington, Wilton J. Lambert, and Rudolph H. Yeatman for petitioners.

Messrs. D. W. Baker and Frank J. Hogan for respondent.

April 19, 1915. Denied.

PASCAL P. BEALS et al., Petitioners, v. PETER R. SLEIGHT, Trustees, etc., et al. [No. 920.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 219 Fed. 655.

Mr. Frederick S. Tyler for petitioners.

Messrs. Joseph H. Gilbert and Albert H. Harris for respondents.

April 19, 1915. Denied.

FURNESS, WITHY, & COMPANY, LTD., Petitioner, v. YANG-TSZE INSURANCE ASSOCIATION, LTD., et al. [No. 921.]

Petition for a Writ of Certiorari to the United [626] States Circuit Court of Appeals for the Second Circuit.

See same case below, 132 C. C. A. 201, 215 Fed. 859.

Messrs. Charles C. Burlingham and Norman B. Beecher for petitioner.

Mr. James K. Symmers for respondents.

April 19, 1915. Denied.

PREPAYMENT CAR SALES COMPANY, Petitioner, v. ORANGE COUNTY TRACTION COMPANY. [No. 881.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 221 Fed. 939.

Messrs. Martin W. Littleton and Samuel E. Darby for petitioner.

Messrs. Clarence P. Byrnes and Willard M. McEwen for respondent.

April 26, 1915. Denied.

HAMILTON INVESTMENT COMPANY, Appellant, v. IRVING L. ERNST, Trustee, etc. [No. 867.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 219 Fed. 353.

Messrs. Philip B. Adams and Henry J. Aaron for appellant.

Mr. Emanuel J. Myers for appellee.

April 26, 1915. Denied.

CITY OF CHICAGO, Petitioner, v. CHICAGO TRANSPORTATION COMPANY et al. [No. 893.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, L.R.A.—, —, 222 Fed. 238.

Messrs. John W. Beckwith, Charles M. Haft, and Samuel A. T. Watkins for petitioner.

No appearance for respondents.

April 26, 1915. Denied.

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[627] LOUIS TAPACK et al., Petitioners, v. UNITED STATES. [No. 896.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 220 Fed. 445.

Messrs. Merritt Lane and Robert Carey for petitioners.

No brief filed for respondent.

April 26, 1915. Denied.

JEFFERSON COUNTY, Tennessee, Petitioner, v. OAK GROVE CONSTRUCTION COMPANY. [No. 917.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 219 Fed. 858.

Messrs. G. W. Pickle and W. R. Turner for petitioner.

Mr. Leon Jourolmon for respondent.

April 26, 1915. Denied.

MEDLIN MILLING COMPANY, Petitioner, v. HALL-BAKER GRAIN COMPANY. [No. 918.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 133 C. C. A. 671, 218 Fed. 989.

Messrs. George Thompson and D. T. Bomar for petitioner.

Mr. J. W. Bailey for respondent.

April 26, 1915. Denied.

KNAUTH, NACHOD, & KUHNE, Petitioners, v. LATHAM & COMPANY et al. [No. 908.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Arthur von Briesen, Antonio Knauth, and Thomas M. Stevens for petitioners.

Messrs. Walker B. Spencer and Charles Payne Fenner for respondents.

April 26, 1915. Granted.

CHARLES T. SUDERMAN et al., etc., Petitioners, v. FREDERICK LEYLAND & COMPANY, LTD., [628] Claimant. [No. 894.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 129 C. C. A. 72, 212 Fed. 396.

Mr. James B. Stubbs for petitioners.

No counsel appeared for respondent.

May 3, 1915. Denied.

JOHN DENNETT, Jr., et al., Petitioners, v. WILLIAM H. SAWTELLE, as Judge, etc. [No. 924.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 221 Fed. 350.

Mr. W. M. Seabury for petitioners.

Mr. George J. Stoneman for respondent.

May 3, 1915. Denied.

FARMERS & MERCHANTS BANK, Phœnix, Petitioner, v. ARIZONA MUTUAL SAVINGS & LOAN ASSOCIATION et al. [No. 925.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 220 Fed. 1.

Mr. W. H. Stilwell for petitioner.

No counsel appeared for respondents.

May 3, 1915. Denied.

CITY OF NEW YORK, Petitioner, v. THIRD NATIONAL BANK OF JERSEY CITY. [No. 939.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 221 Fed. 175.

Messrs. Terence Farley and E. Crosby Kindleberger for petitioner.

Mr. L. Laflin Kellogg for respondent.

May 3, 1915. Denied.

OLAF LIE, Master of the Norwegian Steamship Selja, etc., Petitioner, v. SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, etc. [No. 928.]

Petition for a Writ of Certiorari to the United States [629] Circuit Court of Appeals for the Ninth Circuit.

Messrs. Edmund B. McClanahan and L. Russell Alden for petitioner.

Messrs. William Denman and E. J. McCutchen for respondent.

May 10, 1915. Granted.

PUGET SOUND ELECTRIC RAILWAY et al., Petitioners, v. NELLIE M. RININGER et al. [No. 934.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 220 Fed. 419.

Mr. James B. Howe for petitioners.

Mr. Livingston B. Stedman for respondents.

May 10, 1915. Denied.

ROY MONTGOMERY, Petitioner, v. UNITED STATES. [No. 935.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 219 Fed. 162.

Mr. Daniel W. O'Donoghue for petitioner.

The Attorney General, the Solicitor General, and Mr. Assistant Attorney General Wallace for respondent.

May 10, 1915. Denied.

SOUTHERN PACIFIC COMPANY et al., Petitioners, v. DARNELL-TAENZER LUMBER COMPANY. [No. 953.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 221 Fed. 890.

Messrs. Charles N. Burch, H. D. Minor, Robert Dunlap, T. J. Norton, Blewett Lee, H. A. Scandrett, and Fred H. Wood for petioners.

No counsel appeared for respondent.

May 10, 1915. Denied.

ELVARD L. MOSES, Petitioner, v. UNITED STATES. [No. 956.]

Petition for a Writ of [630] Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 221 Fed. 863.

Mr. Leslie A. Gilmore for petitioner.

The Attorney General, the Solicitor General, and Mr. Assistant Attorney General Wallace for respondent.

May 10, 1915. Denied.

UNITED STATES EX REL. EDWARD L. CHOTT, Plaintiff in Error, v. THOMAS EWING, Commissioner of Patents, et al. [No. 194.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 40 App. D. C. 591.

Mr. Joshua R. N. Potts for plaintiff in error.

No brief filed for defendant in error.

May 17, 1915. Denied.

ALBERT AMUNDSON, Petitioner, v. N. J. FOLSOM, as Trustee, etc. [No. 836.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 219 Fed. 122.

Mr. William C. Hughes for petitioner.

Messrs. Charles O. Bailey and John H. Voorhees for respondent.

May 17, 1915. Denied.

SANDUSKY PORTLAND CEMENT COMPANY, Petitioner, v. DIXON PURE ICE COMPANY. [No. 938.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 221 Fed. 200.

Messrs. Francis W. Parker, Donald M. Carter, and Edward H. Brewster for petitioner.

Mr. Clyde Smith for respondent.

May 17, 1915. Denied.

BERNARD M. L. ERNST, as Trustee, etc., Petitioner, v. FIDELITY & DEPOSIT COMPANY OF MARYLAND [631] et al. [No. 941.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 220 Fed. 780.

Messrs. John G. Johnson and Henry S. Dottenheim for petitioner.

Messrs. Frank H. Platt and George W. Field for respondents.

May 17, 1915. Denied.

TACOMA RAILWAY & POWER COMPANY, Petitioner, v. M. G. HENRY. [No. 943.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 219 Fed. 874.

Mr. James B. Howe for petitioner.

Mr. Merritt J. Gordon for respondent.

May 17, 1915. Denied.

EDWARD N. PUGH et al., Petitioners, v. VICTOR LOISEL, TRUSTEE, etc. [No. 948.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 219 Fed. 417.

Messrs. Edward N. Pugh and Charlton R. Beattie for petitioners.

Mr. Edwin T. Merrick for respondent.

May 17, 1915. Denied.

HERMAN W. VAN SENDEN, Petitioner, v. UNITED STATES. [No. 951.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Charles Poe for petitioner.

The Attorney General, the Solicitor General, and Mr. Assistant Attorney General Wallace for respondent.

May 17, 1915. Denied.

HANNIS TAYLOR, Administrator, etc., Petitioner, v. WILLIAM F. WHARTON, Administrator, [632] etc., et al. [No. 966.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 43 App. D. C. 104.

Messrs. Daniel W. Baker and Hannis Taylor for petitioner.

Messrs. Frederick DeC. Faust and Charles F. Wilson for respondent.

May 17, 1915. Denied.

CHARLES BENNER et al., Petitioners, v. NEW YORK CITY RAILWAYS COMPANY et al. [No. 969]; and CITY OF NEW YORK, Petitioner, v. NEW YORK CITY RAILWAYS COMPANY et al. [No. 970.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 132 C. C. A. 518, 216 Fed. 458.

Messrs. Benj. S. Catchings, Charles Benner, John R. Abney, Terence Farley, and E. Crosby Kindleberger for petitioners.

Messrs. Chase Mellen, Julien T. Davies, Matthew C. Fleming, Richard Reid Rogers, Morgan J. O'Brien, Brainard Tolles, and Charles E. Rushmore for respondents.

May 17, 1915. Denied.

JAMES A. WHITCOMB, Petitioner, v. GEORGE S. SCHULTZ. [No. 957.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 223 Fed. 268.

Messrs. Joseph M. Gazzam, Charles F. Carusi, and Walter B. Grant for petitioner.

Messrs. Abram J. Rose and Alfred C. Petté for respondent.

June 1, 1915. Denied.

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[633] CHESAPEAKE & OHIO RAILWAY CO., Petitioner, v. JEAN D. MCKELL, Adm'x, etc. [No. 968.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, on first writ of error, 99 C. C. A. 109, 175 Fed. 321, 20 Ann. Cas. 1097; on rehearing, 108 C. C. A. 141, 186 Fed. 39; on second writ of error, 126 C. C. A. 336, 209 Fed. 514; on third writ of error, 221 Fed. 934.

Messrs. Judson Harmon, Edward Colston, and F. B. Enslow for petitioner.

Messrs. John H. Holt and Murray Seasongood for respondent.

June 1, 1915. Denied.

SOUTHERN RAILWAY COMPANY, Petitioner, v. E. K. KOGER, Administrator, etc. [No. 976.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 219 Fed. 702.

Mr. L. E. Jeffries for petitioner.

Messrs. G. W. Pickle, W. R. Turner, and W. F. Kennerly for respondent.

June 1, 1915. Denied.

SHIPOWNERS & MERCHANTS TUG BOAT CO., etc., Petitioner, v. HAMMOND LUMBER COMPANY. [No. 978.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 218 Fed. 161.

Messrs. Edward J. McCutchen and A. Crawford Greene for petitioner.

Mr. William Denman for respondent.

June 1, 1915. Denied.

CLAUDE A. P. TURNER, Petitioner, v. JOHN L. DRUMM. [No. 979.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 219 Fed. 188.

Mr. Charles J. Williamson for petitioner.

Messrs. Amasa C. Paul and Edward Rector for respondent.

June 1, 1915. Denied.

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[634] PASCAL P. BEALS et al., Petitioners, v. THOMAS C. BURKE, Trustee, etc. [No. 988.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 221 Fed. 323.

Mr. Lucas P. Loving for petitioners.

Mr. Thomas C. Burke for respondent.

June 1, 1915. Denied.

FURNESS, WITHY, & COMPANY (Ltd.), Petitioner, v. YANG-TSZE INSURANCE ASSOCIATION (Ltd.) et al. [No. 921.]

Petition for a Writ of Certiorari.

See same case below, 132 C. C. A. 201, 215 Fed. 859.

Messrs. Charles C. Burlingham and Norman B. Beecher for petitioner.

Messrs. James K. Symmers and J. Parker Kirlin for respondents.

June 14, 1915. Order of April 19th, denying petition, vacated and set aside. Writ of certiorari granted.

CENTRAL TRUST COMPANY OF ILLINOIS et al., etc., Appellants, v. GEORGE LUEDERS & COMPANY et al. [No. 949.]

Petition for a Writ of Certiorari herein.

Messrs. Lessing Rosenthal, Charles H. Hamill, Judson Harmon, Edward Colston, A. W. Goldsmith, and George Hoadly for appellants.

Mr. Walter A. DeCamp for appellees.

June 14, 1915. Denied.

HILLS & COMPANY, Petitioner, v. JOSEPH HOOVER et al. [No. 963.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 127 C. C. A. 609, 211 Fed. 241.

Mr. Benno Loewy for petitioner.

Mr. William A. Carr for respondents.

June 14, 1915. Denied.

JAMES C. BLAIR, Trustee, etc., Petitioner, v. JAMES S. BRAILEY, Jr., et al., Receivers, etc. [No. 980.]

[635] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 221 Fed. 1.

Messrs. Alex. C. King, Clarence Brown, and Thomas H. Tracy for petitioner.

Messrs. Max Isaac and Millard Reese for respondents.

June 14, 1915. Denied.

HERMAN KRUEGEL et ux., Petitioners, v. STANDARD SAVINGS & LOAN ASSOCIATION et al. [No. 981.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 133 C. C. A. 671, 218 Fed. 988.

Mr. Herman Kruegel, petitioner, *pro se.*

No appearance for respondents.

June 14, 1915. Denied.

MORRIS FREUNDLICH et al., Petitioners, v. HARRY EISENBACH, Trustee, etc. [No. 982.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. David Steckler for petitioners.

Mr. Clayton J. Heermance for respondent.

June 14, 1915. Denied.

UNITED STATES OF AMERICA, Petitioner, v. JOHN H. PATTERSON et al. [No. 994.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 222 Fed. 599.

The Attorney General, the Solicitor General, and Mr. G. Carroll Todd, Assistant to the Attorney General, for petitioner.

Messrs. Lawrence Maxwell and John S. Miller for respondents.

June 14, 1915. Denied.

JOHN M. KUYKENDALL, Petitioner, v. WILLIAM STEWART TOD. [No. 1002.]

Petition for a [636] Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 219 Fed. 707.

Mr. William V. Hodges for petitioner.

Mr. Charles W. Burdick for respondent.

June 14, 1915. Denied.

SIROCCO ENGINEERING COMPANY, Petitioner, v. B. F. STURTEVANT COMPANY. [No. 1003.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 220 Fed. 137.

Messrs. Henry L. Stimson, Arthur C. Fraser, and Frederick P. Fish for petitioner.

Messrs. Benjamin Phillips and Omri F. Hibbard for respondent.

June 14, 1915. Denied.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Petitioner, v. MILDRED D. PRICE. [No. 1006.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 221 Fed. 848.

Mr. William S. Jenney for petitioner.

Mr. James D. Carpenter, Jr., for respondent.

June 14, 1915. Denied.

F. DREW CAMINETTI, Petitioner, v. UNITED STATES. [No. 1008.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 220 Fed. 545.

Messrs. Joseph W. Bailey, Marshall B. Woodworth, and Robert T. Devlin for petitioner.

No brief filed for respondent.

June 14, 1915. Denied.

June 21, 1915. Order of June 14, 1915, vacated and set aside, and a writ of certiorari granted.

MAURY I. DIGGS, Petitioner, v. UNITED STATES. [No. 1047.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Marshall B. Woodworth, Robert T. Devlin, and Joseph W. Bailey for petitioner.

No brief filed for respondent.

June 21, 1915. Granted.

UNITED STATES, Petitioner, v. M. H. PULASKI Co. et al. [No. 1033]; UNITED STATES, Petitioner, v. R. B. HENRY Co. et al. [No. 1034]; UNITED STATES, Petitioner, v. JAMES ELLIOTT & Co. et al. [No. 1035]; UNITED STATES, Petitioner, v. J. WILE SONS & Co. [No. 1036]; UNITED STATES, Petitioner, v. ROBERT MULLER & Co. [No. 1037]; UNITED STATES, Petitioner, v. WOOD & SELICK et al. [No. 1038]; UNITED STATES, Petitioner, v. E. LA MONTAGNE'S SONS [No. 1039]; UNITED STATES, Petitioner, v. ALBERT LORSCH & Co. [No. 1040]; UNITED STATES, Petitioner, v. CULLMAN BROS. et al. [No. 1041]; UNITED STATES, Petitioner, v. G. W. FABER INC. [No. 1042]; UNITED STATES, Petitioner, v. LOUIS MEYERS & SON [638] [No. 1043]; UNITED STATES, Petitioner, v. WILLIAM OPENHYM & SONS [No. 1044]; UNITED STATES, Petitioner, v. PARK & TILFORD [No. 1045]; and UNITED STATES, Petitioner, v. SELGAS & Co. [No. 1046].

Petition for Writs of Certiorari to the United States Court of Customs Appeals.

Mr. Solicitor General Davis for petitioner.

Messrs. B. A. Levett, Allan R. Brown, and Albert H. Washburn for respondents.

June 21, 1915. Granted.

DAN ULMER, Petitioner, v. UNITED STATES. [No. 942].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 219 Fed. 641.

Mr. Francis J. Wing for petitioner.

No brief filed for respondent.

June 21, 1915. Denied

JAMES J. FARMER, Petitioner, v. UNITED STATES. [No. 1004.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Benjamin C. Bachrach for petitioner.

The Solicitor General and Mr. Assistant Attorney General Wallace for respondent.

June 21, 1915. Denied.

WILLIAM J. HARTLEY, Petitioner, v. UNITED STATES. [No. 1019.]

Petition for a Writ of [639] Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Terence J. McManus for petitioner.

The Solicitor General and Mr. Assistant Attorney General Wallace for respondent.

June 21, 1915. Denied.

ALLESANDRO BOLOGNESI et al., Petitioners, v. CASSA VALORI et al. [No. 1007.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. A. S. Gilbert for petitioners.

Mr. Isidor F. Greene for respondents.

June 21, 1915. Denied.

ELICK LOWITZ, Petitioner, v. CHARLES H. KIMMERLE. [No. 1014.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 221 Fed. 857.

Mr. Charles M. Wilson for petitioner.

Mr. Harris F. Williams for respondent.

June 21, 1915. Denied.

EDWARD THORNTON ROBINSON et al., Petitioners, v. POSTAL LIFE INSURANCE COMPANY. [No. 1015.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 218 Fed. 347.

Messrs. Gilbert E. Roe and John T. McGovern for petitioners.

Mr. Crammond Kennedy for respondent.

June 21, 1915. Denied.

CHARLES A. OTIS et al., Petitioners, v. PITTSBURGH-WESTMORELAND COAL COMPANY. [No. 1020.]

Petition for a Writ of Certiorari to the United States [640] Circuit Court of Appeals for the Third Circuit.

See same case below, 220 Fed. 595.

Messrs. William B. Sanders and Arthur O. Fording for petitioners.

No counsel appeared for respondent.

June 21, 1915. Denied.

DANIEL A. FINLAYSON, Petitioner, v. A. H. BARROWS, as Executor, etc., et al. [No. 1023.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 221 Fed. 936.

Mr. Frederick T. Myers for petitioner.

No brief filed for respondents.

June 21, 1915. Denied.

AARON FIELDS et al., Petitioners, v. UNITED STATES. [No. 1024.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 221 Fed. 242.

Mr. S. H. Sutherland for petitioners.

The Solicitor General and Mr. Assistant Attorney General Wallace for respondent.

June 21, 1915. Denied.

UNITED STATES EX REL. JOHN W. DWIGGINS, Petitioner, v. THOMAS EWING, Commissioner of Patents. [No. 1025.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 43 App. D. C. 204.

Mr. Wm. S. Hodges for petitioner.

The Solicitor General and Mr. Assistant Attorney General Warren for respondent.

June 21, 1915. Denied.

ADAM MCARTHUR et al., Petitioners, v. CITIZENS BANK OF NORFOLK, VIRGINIA. [No. 1028.]

[641] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Fred Beall, Angus M. McLean, and J. A. MacLean, Jr., for petitioners.

Mr. R. W. Winston for respondent.

June 21, 1915. Denied.

FREDERICK W. FINLEY et al., Petitioners, v. HENRY D. HOTCHKISS, Trustee, etc. [No. 1030.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles P. Howland for petitioners.

Messrs. Abram I. Elkus and William A. Barber for respondent.

June 21, 1915. Denied.

D. G. FRITZLEN, Petitioner, v. BOATMEN'S BANK OF ST. LOUIS, MISSOURI [No. 1049]; and D. G. FRITZLEN et ux., Petitioners, v. BOATMEN'S BANK OF ST. LOUIS, MISSOURI [No. 1050].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 221 Fed. 145.

Messrs. D. R. Hite and Arthur A. Birney for petitioners.

Messrs. James S. Botsford and Buckner F. Deatherage for respondent.

June 21, 1915. Denied.

ELIZA K. SNEED, Plaintiff in Error, v. JOHN S. SNEED. [No. 131.]

In Error to the Superior Court of Cochise County, State of Arizona.

Mr. Allen R. English for plaintiff in error.

No counsel appeared for defendant in error.

January 14, 1915. Dismissed [642] with costs, pursuant to the Tenth Rule.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in error, v. SPOKANE COUNTY et al. [No. 306.]

In Error to the Supreme Court of the State of Washington.

See same case below, 75 Wash. 72, 134 Pac. 688.

Mr. B. B. Adams for plaintiff in error.

No counsel appeared for defendants in error.

January 28, 1915. Dismissed on motion of counsel for the plaintiff in error.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant, v. UNITED STATES et al. [No. 280.]

Appeal from the United States Commerce Court.

See same case below, 207 Fed. 591.

Messrs. Henry L. Stone and William A. Colston for appellant.

The Attorney General, the Solicitor General, and Mr. Charles W. Needham for appellees.

March 1, 1915. Decree reversed upon confession of error, and cause remanded to the District Court of the United States for the Western District of Kentucky for further proceedings in conformity to law, on motion of Solicitor General Davis for the United States.

UNITED STATES OF AMERICA EX REL. WILLIAM N. PRENDER, Plaintiff in Error, v. OLIVER P. NEWMAN et al., Commissioners, etc. [No. 297.]

In Error to the Court of Appeals of the District of Columbia.

See same case below, 41 App. D. C. 37.

Mr. C. C. Tucker for plaintiff in error.

No counsel appeared for defendants in error.

March 2, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

[643] NAMPA & MERIDIAN IRRIGATION DISTRICT, Plaintiff in Error, v. CITY OF NAMPA et al. [No. 186.]

In Error to the Supreme Court of the State of Idaho.

See same case below, on first appeal, 19 Idaho, 779, 115 Pac. 979; on second appeal, 23 Idaho, 422, 131 Pac. 8.

Mr. J. M. Thompson for plaintiff in error.

No counsel appeared for defendants in error.

March 5, 1915. Dismissed with costs on authority of counsel for the plaintiff in error.

HOLLAND CITY GAS COMPANY, Appellant, v. CITY OF HOLLAND. [No. 188.]

Appeal from the District Court of the United States for the Western District of Michigan.

Mr. Roger I. Wykes for appellant.

Mr. Arthur Van Duren for appellee.

March 9, 1915. Dismissed with costs, on authority of counsel for the appellant.

P. J. CARLIN CONSTRUCTION COMPANY, Plaintiff in Error, v. GUERINI STONE COMPANY. [No. 375.]

In Error to the District Court of the United States for Porto Rico.

Mr. Francis H. Dexter for plaintiff in error.

Mr. Edward S. Paine for defendant in error.

March 19, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

CHUN KIM, Appellant, v. SAMUEL W. BACKUS, Commissioner of Immigration, etc. [No. 536.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Wm. Hoff Cook for appellant.

The Attorney General, the Solicitor General, and Mr. Assistant Attorney General Wallace for appellee.

April 5, 1915. Dismissed with costs, pursuant to the Tenth Rule.

[644] STATE OF MONTANA EX REL. GENERAL ELECTRIC COMPANY, Plaintiff in Error, v. A. M. ALDERSON, Secretary of State of the State of Montana. [No. 535.]

In error to the Supreme Court of the State of Montana.

Mr. M. S. Gunn for plaintiff in error.

No appearance for defendant in error.

April 19, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

ELSIE DE WOLFE, Plaintiff in Error, v. CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK. [No. 328.]

In Error to the District Court of the United States for the Northern District of Illinois.

Messrs. W. Bourke Cockran and Colin C. H. Fyffe for plaintiff in error.

Mr. Levy Mayer for defendant in error.

April 21, 1915. Dismissed without costs to either party, per stipulation of counsel.

EMIGDIO TOLENTINO, Plaintiff in Error, v. UNITED STATES. [No. 940.]

In Error to the Supreme Court of the Philippine Islands.

No appearance for plaintiff in error.

The Attorney General and Mr. George Carroll Todd, Assistant to the Attorney General, for defendant in error.

April 26, 1915. Docketed and dismissed, on motion of Mr. Assistant to the Attorney General Todd, for the defendant in error.

MARION A. MORSE, Appellant, v. SIDNEY A. BROWN, Sheriff. [No. 265.]

Appeal from the District Court of the United States for the District of Connecticut.

Mr. Charles W. Comstock for appellant.

Mr. Charles B. Whittlesey for appellee.

May 4, 1915. Dismissed with costs, pursuant to the Tenth Rule.

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[645] ALICE R. THAYER, Appellant, v. CITY OF BOSTON et al. [No. 260.]

Appeal from the District Court of the United States for the District of Massachusetts.

See same case below, 206 Fed. 969.

Mr. Nathan Matthews for appellant.

Mr. John A. Sullivan for appellees.

May 5, 1915. Dismissed per stipulation.

LAS VEGAS RAILWAY & POWER COMPANY et al., Plaintiffs in Error, v. TRUST COMPANY OF ST. LOUIS COUNTY, Trustee. [No. 276.]

In Error to the Supreme Court of the State of New Mexico.

See same case below, 17 N. M. 286, 126 Pac. 1009.

Messrs. John D. W. Veeder, William B. Thompson, and Ford W. Thompson for plaintiffs in error.

Mr. Charles A. Spiess for defendant in error.

May 7, 1915. Dismissed with costs, pursuant to the Tenth Rule.

DULUTH & NORTHERN MINNESOTA RAILWAY COMPANY, Appellant, v. UNITED STATES. [No. 972.]

In Error to the District Court of the United States for the Northern District of Illinois.

No counsel appeared for appellant.

The Attorney General and the Solicitor General for appellee.

May 10, 1915. Docketed and dismissed, on motion of Mr. Solicitor General Davis for the appellee.

W. FRANK JORDAN, Plaintiff in Error, v. FIDELITY SAVINGS & TRUST COMPANY, Inc. [Nos. 312, 313.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Mr. Sigmund M. Brandt for plaintiff in error.

Mr. Frank S. Bright for defendant in error.

May 10, 1915. Dismissed, each party to pay its own costs in this court, per stipulation.

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[646] MOKE MAKAIWI et al., Plaintiffs in Error, v. TERRITORY OF HAWAII. [No 295.]

In Error to the Supreme Court of the Territory of Hawaii.

Mr. R. P. Quarles for plaintiffs in error.

Mr. C. R. Hemenway for defendant in error.

May 14, 1915. Dismissed with costs, pursuant to the Tenth Rule.

UNITED STATES, Plaintiff in Error, v. NATIONAL CREAMERY COMPANY. [No. 433.]

In Error to the District Court of the United States for the Western District of Missouri.

The Attorney General and the Solicitor General for plaintiff in error.

No counsel appeared for defendant in error.

May 17, 1915. Dismissed on motion of Mr. Solicitor General Davis for the plaintiff in error.

UNITED STATES, Petitioner, v. NEW YORK & ORIENTAL STEAMSHIP COMPANY, Limited. [No. 785.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 132 C. C. A. 305, 216 Fed. 61.

The Attorney General and the Solicitor General for petitioner.

Messrs. J. Parker Kirlin and John M. Woolsey for respondent.

May 17, 1915. Dismissed on motion of Mr. Solicitor General Davis for the petitioner.

WILLIE BETHUNE, Plaintiff in Error, v. STATE OF SOUTH CAROLINA. [No. 990.]

In Error to the Supreme Court of the State of South Carolina.

No counsel appeared for plaintiff in error.

Mr. Fred H. Dominick for defendant in error.

May 17, 1915. Docketed and dismissed with costs on motion of Mr. Fred H. Dominick for the defendant in error, and mandate granted.

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[647] HAMILTON INVESTMENT COMPANY, Appellant, v. IRVING L. ERNST, Trustee, etc. [No. 867.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 219 Fed. 353.

Messrs. Philip B. Adams and Henry J. Aaron for appellant.

Mr. Emanuel J. Myers for appellee.

June 1, 1915. Dismissed with costs, per stipulation.

MARTHA S. PAINTER et al., Plaintiffs in Error, v. UNITED STATES FIDELITY & GUARANTY COMPANY. [No. 531.]

In Error to the Court of Appeals of the State of Maryland.

Mr. Arthur L. Jackson for plaintiffs in error.

No counsel appeared for defendant in error.

June 14, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

MAIER-WATT REALTY COMPANY, Plaintiff in Error, v. QUAKER REALTY COMPANY, Limited. [No. 550.]

In Error to the Supreme Court of the State of Louisiana.

Mr. E. Howard M. Caleb for plaintiff in error.

Mr. Wm. Winans Wall for defendant in error.

June 14, 1915. Dismissed per stipulation, costs to be paid by the plaintiff in error.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. CLARA SHARP, Adm'x, etc. [No. 760.]

In Error to the Supreme Court of the State of Arkansas.

Messrs. E. B. Kinsworthy and Troy Pace for plaintiff in error.

No counsel appeared for defendant in error.

June 14, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

WILSON CYPRESS COMPANY, Appellant, v. ENRIQUE DEL POZO Y MARCOS et al. [No. 135.]

Motion to recall mandate and for leave to present a second petition for rehearing.

Mr. John C. Cooper for appellant.

Messrs. Joseph H. Jones, Wm. W. Dewhurst, and John C. Jones for appellees.

June 14, 1915. Denied.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1914.

IN MEMORIAM, HORACE HARMON LURTON.

On the reconvening of the court on October 12, 1914, the Chief Justice said:

"It gives me pain to say that since the court adjourned at the end of the last term it has come to pass that the nation may no longer enjoy the fruitful and beneficent results to arise from the continued enlightened and devoted discharge by Mr. Justice Lurton of his public duties. He died at Atlantic City on the 5th day of July. In addition to the sorrow which they share with their countrymen at so great a loss, the members of the court have suffered the pang caused by the severance of the close personal ties which bound them to Mr. Justice Lurton; ties the strength of which cannot be fully appreciated without understanding how completely his attainments and his lovable traits of personal character commanded the respect and drew to him the warm affection of those who had the privilege of being associated with him in the performance of his judicial duties."

The Bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol at 12 o'clock, Saturday, March 27, 1915.

On motion of Mr. Solicitor General Davis, Hon. William Howard Taft was elected Chairman and Mr. James D. Maher was elected Secretary.

On taking the chair, Mr. Taft said:

We meet today as members of this Bar, to express our sense of loss in the death of Mr. Justice Lurton. Few men have had the training and experience adapted to fit them for the great duties of this court which Horace Lurton had. He did not have an extended collegiate education, but he had, in the four years before his maturity, the discipline of the life of a soldier in an active compaign, and the self-knowledge as to his physical and moral courage that exposure to hardship and death in war gives one as a foundation of character.

His interest in history and in public affairs was wide, and his love of reading great. His earnestness of purpose supplied the motive for the self-education that made up for the lack of an academic curriculum. He had wide sympathies with his fellowmen. He was in every way a good fellow. No one appealed to his love of his kind without meeting a response.

He came to the Bar in 1867, and went into a most active practice in that period of judicial readjustment of estates, partnerships, and of all forms of business which was necessary before substantial recuperation of the South could take place. This period was a period of the greatest activity in the courts and among lawyers, and young Lurton was thrust into the current and showed himself capable of maintaining himself in the company of all the members of a most noteworthy Bar. After he had proved his mettle by a practice of eight years, he was called to act as a chancellor in the Clarksville district of Tennessee, and there he served for three years. This

judicial experience early in his career supplemented and perfected his knowledge of law acquired in the practice, by giving him a different standpoint and an intellectual self-respect in advancing and accepting propositions of law. I don't know any way by which the principles of jurisprudence can be more effectively instilled in the mind of a lawyer than by several years' judicial service before a partisan habit of thought and a spirit of advocacy have become fixed traits in his professional character. The joy of doing equity, the pleasure of righting wrong, the fascinating work of analyzing and weighing, with an even balance, the claims of contending litigants, and the pursuit of justice to its ultimate destination, without regard to parties, leave a deep impression upon the attitude of mind of a lawyer. It broadens his view of men and of society, restrains him from extreme views, softens his disposition to severity of criticism, and adds strength to his mode of stating his conclusions by keeping them in the positive and not extending them to the superlative. Such was the result in Justice Lurton's case.

After three years' work as a chancellor, he resumed the practice for another eight years, and took first rank in the Bar of his state. In that period he was called upon to exhibit that moral courage, that clearness of political thought, and that love of politics in its higher sense, for which he was admirably fitted. In the contest over the question of paying the state debt or repudiating part of it, he stood for the principle that it is just as necessary for the state to be honest as it is for the individuals that make the state to be honest. He and those who stood with him were for the time being in the minority, and it seemed as if all hope for them of political preferment, or of promotion to any office involving popular support, must be given up. Instead of this, however, the courage and adherence to principle that they had shown, won for them the secret admiration of their fellow citizens; and nearly every leader of the small and devoted so-called "sky blue" party, in spite of its overwhelming defeat, came to be recognized as a man to be honored and trusted. Of these, Horace Lurton was one of the most conspicuous.

Elected to the Supreme Court of the state, he found the court in a divided, and, one might say, almost chaotic condition. It was not doing team work. With that sense of responsibility that was always his, with that power of winning men to agreement with him, by his sense of fairness, his sweetness of disposition in argument, his keenness in catching and putting a point, he, more than any other member of that court, reformed its character; and as Associate and as Chief Justice he showed his constructive ability in molding into one body, a tribunal which had before seemed to be almost hydra-headed.

Then he was transferred to the Federal Bench as a Circuit Judge of the Sixth Circuit, whose chief duty was on the Circuit Court of Appeals. I was then on that court to welcome him to its membership, and for a full seven years we were associated as colleagues in a communion than which, as between men not of the same family, there is none closer, more mutually searching, and none more affectionate, more inspiring, and more valuable, if animated by the single purpose of doing justice and making its administration effective.

Mr. Justice Lurton had the faculty, in judicial conference, of first analyzing his own judicial processes, and then patiently helping his colleague to analyze his, and to lay them alongside of each other so as to find out with certainty where the differences, if any, lay. Step by step, in the frequently complicated and difficult issues which were presented in our court, he would carry its members along until he found the places of departure and fastened our consideration upon the crucial points. He had the strongest sense of loyalty to the whole court. He was charged with the feeling that if the court's voice was to be useful for anything but the decision of the particular case, dissenting opinions should be avoided. If possible concessions without sacrifice of principle could reach a common ground, he sank all pride of opinion in securing for the judgment the strength of unanimity.

For seventeen years he sat in the Circuit Court of Appeals of the Sixth Circuit, and though he had in that court distinguished colleagues, numbering three of the Justices of the Supreme Court, two of whom had been promoted from that circuit, and had able colleagues of the lower courts from time to time, the high authority accorded

to the judgments of the Court of Appeals of that circuit was in large measure due to his industry, his sense of responsibility for the court, his profound knowledge of the law, his wonderful power of reconciliation of differences in the conference room, and his statesmanlike forecast of the effect of the principles of the court's decisions.

I speak whereof I know. When, therefore, I came to a position in which it was my duty to select a Justice of the Supreme Court of the United States, I did not hesitate to depart from the ordinarily wise rule that prevents the appointment of a man after he is sixty to this Bench, by elevating Mr. Justice Lurton to this court. I consider that his work as a judge for more than a quarter of a century, seventeen years of it in the Federal jurisdiction, entitled the country to the benefit of his ripe, judicial judgment, which needed no training in this court to enable him to meet its varied and exceptional requirements.

No act of mine in the Presidency gave me more pleasure than nominating him to be a Justice of the Supreme Court. This was because it served the public good by broadening the field of judicial usefulness of a great jurist, it conferred upon a high-minded, earnest, self-sacrificing, and able public servant just reward and recognition for his work, and it gratified, more than I can say, my personal affection for the man.

Of the judgments which Mr. Justice Lurton rendered, on the Circuit Court of Appeals, and on the Supreme Court Bench, I shall make no comment, except to say that they reveal the mental processes of the man. What I have said of his eminent qualities as a Judge that he displayed in the conference room is confirmed in their clearness, force, and judicial fairness. You find no dodging of issues, no forcible suppression of formidable obstacles in reaching his conclusions. One lays down an opinion of his knowing how and why he reached the result, and this makes what he wrote in expressing the judgment of the court most useful as a precedent. His taste for public matters, his clear political perceptions, made his study and exposition of the Constitution a work of love, and enabled him to shine in that higher field of jurisprudence in which lies the chief work of this court,—the construction of our fundamental law.

Of his qualities as a friend and companion, of his loving relation to his wife and children, of his sincere devotion to the Episcopal communion, of the service he rendered as trustee to the University of the South, of his neighborly qualities shown by his relation to the community in which he lived, of the fondness that the members of the Bar felt toward him, and their confidence in his fairness, and his judicial indifference to their personality in the discharge of his duties, I shall not speak, except to say that in every one of these walks of his life, some revealing incident comes back to me and makes me profoundly grateful that for so many years I was permitted to enjoy the sweet companionship and the elevating friendship of Horace Lurton.

On motion of Mr. Jacob M. Dickinson, the Chair appointed a Committee on Resolutions:

COMMITTEE ON RESOLUTIONS.

Mr. Jacob M. Dickinson, Chairman; Mr. Judson Harmon; Mr. Edmund F. Trabue; Mr. John J. Vertrees; Mr. Edgar H. Farrar; Mr. S. S. Gregory; Mr. Francis Lynde Stetson; Mr. Henry W. Anderson; Mr. Lawrence Maxwell; Mr. William Marshall Bullitt; Mr. Charles T. Cates, Jr.; Mr. John W. Yerkes; Mr. Otto Kirchner; Mr. Frank B. Kellogg; Mr. Frederick W. Lehmann.

Mr. Jacob M. Dickinson, for the Committee, presented the following

RESOLUTIONS.

We, members of the Bar of the Supreme Court of the United States, moved by our high regard for the character and public services of Mr. Justice Horace H. Lurton, who departed this life on the 12th day of July, 1914, have met at Washington, this 27th day of March, 1915, for the purpose of discharging what we regard as a high public duty in honoring the memory and recording our estimate of one who as a man,

a citizen, a jurist, and a judge, has greatly honored our country, and adopt the following:

Horace Harmon Lurton was born on February 26th, 1844, in Newport, Kentucky. His early life was passed partly at Clarksville, Tennessee, and partly in the city of Chicago.

When the Civil War began, he was a student at the old University of Chicago. He at once returned to Tennessee, and at the age of sixteen joined the army of the Confederate States, enlisting in the Thirty-fifth Tennessee, of which he became sergeant major.

He was captured at Ford Donelson, and was imprisoned at Camp Chase, from which, after a brief confinement, he escaped. He re-enlisted in the Third Kentucky Cavalry, and while serving under Gen. John H. Morgan, during his raid in Ohio, was again captured in 1863 and imprisoned, where he was confined until early in 1865. At that time, on account of his health, and in response to a personal appeal made by his mother to President Lincoln, he was released on parole.

His collegiate education thus interrupted was never completed, but it was richly supplemented by constant study and copious reading.

He graduated in law at Cumberland University, Lebanon, Tennessee, in 1867. There he met Miss Frances Owen, who, in the same year, became his wife, and survives him. Their married life was an uninterrupted period of mutual love and comfort.

He entered upon the practice of his profession at Clarksville, Tennessee, and continued until 1875, when he became a Chancellor of Tennessee.

In 1878, he resigned and returned to the Bar. He was associated in partnership at various times with Gustavus A. Henry, William A. Quarles, James E. Bailey, and Charles G. Smith, who were among Tennessee's most distinguished lawyers. He was a recognized leader and enjoyed a large practice.

In 1886, he was elected as Judge of the Supreme Court of Tennessee, and served continuously until April, 1893, being Chief Justice the last four months of his service.

In that year he was appointed United States Circuit Judge by President Cleveland, and became a Judge of the Court of Appeals for the Sixth Circuit.

He became Professor of Constitutional Law at Vanderbilt University in 1898, and Dean of the Law School in 1905, which positions he held until 1910.

In 1899, he received the degree of doctor of civil laws from Sewanee University, and in 1912 the degree of doctor of laws from the University of Pennsylvania.

In December, 1909, he was appointed by President Taft to the Supreme Bench of the United States, and took his seat January 3, 1910, in which position he served until his death.

Upon his appointment to the Supreme Court of the United States he was sixty-five years of age, being the oldest man ever appointed to that court. There were sound reasons for such distinction. He had been upon the Bench thirty years, and had achieved as Chancellor a high reputation as an able, learned, conscientious, industrious, and impartial jurist, which was maintained, with increased prestige, throughout his long service on the Supreme Bench of Tennessee, and as United States Circuit Judge.

He came to the Supreme Court equipped with an experience and learning that few appointees to that court have had. His long service upon the Federal Bench especially qualified him to enter at once with full efficiency upon his duties.

President Taft had collaborated with him seven years in the Circuit Court of Appeals, and well knew his fitness for the high office for which he nominated him.

During a continuous service on the Bench, state and national, for a period of over thirty years, he decided almost every kind of case which human affairs could give rise to. His opinions, which are to be found in Pickle's Tennessee Reports, the Federal Reporter, and the Reports of the Supreme Court of the United States, are characterized by learning, conciseness, and lucidity, are convincing witnesses of his justice, wisdom, industry, and comprehensive grasp of legal principles, and constitute a great and enduring monument to his fame.

He was thoroughly grounded in the fundamental principles of the law, and always maintained a profound reverence for constitutional safeguards.

In an address made at a joint meeting of the Maryland and Virginia Bar Associa-

tions in 1910, he said: "The contention that the obligation of a constitution is to be disregarded if it stand in the way of that which is deemed of public advantage, or that a valid law, under the Constitution, is to be interpreted or modified so as to accomplish that which the executive administering it, or a court called upon to enforce it, shall deem to the public advantage, is destructive of the whole theory upon which our American Commonwealths have been founded, to say nothing of the constitutional relation of the Union and the states to each other. It is a substitution of men for a government of law. It is against this that I raise my warning voice."

He fully recognized the rights of persons and property, but did not hesitate to give full effect to constitutional legislation changing such rights.

He rendered no startling or sensational decisions. While this is true, he recognized fully the expanding and complex affairs of modern life and government, and the necessity for the application of old principles to changed conditions. However, he never, under this guise, gave sanction to judicial legislation. His attitude on this vital principle is well shown by his own utterance in the case of John D. Park & Son against Hartman, in which he said: "It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy,—principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law."

He was frank in expressing his views, and always courageous in the performance of duty. He was quick to see and comprehend the points of argument, and clear, direct, and forceful in stating his conclusions.

He had an amiable disposition and a charming personality, which endeared him to a large circle of warm friends.

His associates loved and honored him, and the members of the Bar who came before him entertained profound respect for his ability and efficiency as a judge, and hold his conduct toward them, which was always characterized by unfailing graciousness, attention, and patience, in most pleasing remembrance.

Both on and off the Bench he was affable and courteous without any appearance of seeking popularity. He was firm and impersonal in his rulings, without any touch of harshness. His manner was impressive and dignified without show of authority.

He bore a conspicuous part in drafting the new Federal Equity Rules, and went to England for the purpose of informing himself as to the changes there in equity practice and their effect.

He left to his family the rich legacy of a stainless and unquestioned life.

He early became a member of the Episcopal Church, was constant in church duty, and for a long time preceding, and at the time of his death, held the position of vestryman in that church. His religion was not merely a profession, but its principles were constantly illustrated in his daily life.

In politics he was a Democrat.

Although he was a strict party man, and believed that government should be administered through parties, and took a deep interest in politics and frequently was prominent and influential in political affairs, state and national, he never sought political office.

He and his colleague, Mr. Justice Harlan, twice during the Civil War were opposed in battle. Notwithstanding they had fought on opposite sides in support of conflicting views as to the Constitution, they were in substantial accord in their judicial utterances, on the fundamental principles of our government.

The fact that one who had borne arms against a government, and had been imprisoned by that government, subsequently, through its expressed will, sat in a tribunal which had final jurisdiction over the property, liberty, and lives of its people,

and the interpretation of its Constitution, is a tribute to the qualities that found such distinguished recognition. It bears, however, for our whole nation, for all time, and especially now, when the passions of a great war are manifesting themselves with fearful violence, a deeper lesson,—that of a great people subduing in so short a time their prejudices, and following the injunction of Mr. Lincoln, "with malice toward none; with charity for all," turning their backs with magnanimity upon the strife of the past, and doing those things which reunited our country in a common destiny, based upon a reconciliation, genuine and complete, and without example in history.

Respect for those in office, because they represent the sovereign power, is essential for stability of government. It is fortunate for a people to be served by those to whom honor is rendered, not only during incumbency of office, but after they have passed out of office, and out of life. The record of the lives of such men is the richest heritage and the highest inspiration that a people can possess.

This meeting is not to render grateful praise to one who can show appreciation to those who are present. It is not a perfunctory tribute to place, for we are met to solemnly record our estimate of the services of one who has passed beyond the sense of praise or censure.

Tried by the standards which constitute the just test of title to the esteem of his countrymen, we confidently say that Mr. Justice Lurton is worthy of lasting commemoration in the annals of the nation. Therefore,

Be it resolved, by the Bar of the Supreme Court of the United States, that in the death of Mr. Justice Horace H. Lurton, the Bar and the people of the United States have sustained a great loss; that we deeply sympathize with his family and friends in their bereavement; that a copy of these proceedings be sent to Mrs. Lurton, and that through the Attorney General, it be asked that they be spread upon the minutes of the Supreme Court of the United States.

REMARKS OF MR. JACOB M. DICKINSON.

Mr. Chairman:

Having known Mr. Justice Lurton for a period of over thirty years, as a practitioner at the Bar and as Chancellor, as a colleague upon the Supreme Bench of the Court of the State of Tennessee, and in his subsequent career, having known him intimately in all the relations of life there is much that I might say, and properly, upon an occasion of this sort; but I refrain from entering into such a wide field of reminiscence, especially in view of the very just estimate of his character that has been made by the Chairman, and all that will be said by other members of the Bar who are present. I therefore, Mr. Chairman, move the adoption of the Resolution.

REMARKS OF MR. FRANK B. KELLOGG.

Mr. Chairman:

I desire to second the motion for the adoption of the Resolution.

We come here today to testify to the esteem which we have for the memory of a great lawyer and a just judge. It is an ancient and noble custom of our profession which has come down to us through the generations.

Justice Lurton received the highest honor that can come to an American lawyer, in being called to a court which, during the formative period of constitutional government, exercised the most profound influence on the course of this great Republic. At no period of its existence of more than one hundred years did questions graver in importance or more far-reaching in their influence come before the court than the questions which were solved by that tribunal during his incumbency. Not during the age when Marshall was molding the Constitution and adding undying fame to his name were the questions of more importance to the people and to the generations to come than those passed upon by the deceased Justice. He occupied that Bench during a period in our history of great public agitation; of political, social, and economic evolution. During that period the court on which he sat exercised a wise

and balancing power. It set the limit to unwise and excessive governmental authority and to the abuses of private wealth. It stated anew those constitutional principles which the wisdom of ages has demonstrated to be for the protection of human liberty, and applied them to the complex conditions of modern economic life. It solved those delicate problems—ever present in our form of government—growing out of the conflict between Federal and state authority, and preserved unblemished the single power necessary to the preservation of the Union. More than all, it retained the respect and esteem of the American people, without which no authority can be permanently maintained.

There have been times when it seemed as though this people were drifting away from those established principles so often laid down by this court for the protection of liberty and property. But the sober judgment of the people always has, and I believe always will, bring them back to a realization that these everlasting principles of right and wrong are safer guides than the untried theories or the speculative philosophy of political opportunists.

We cannot show greater respect for his memory, or honor him more, than by preserving unsullied and undiminished the prerogatives of the great court of which he was a member; and the greatest service that we, as lawyers, can perform to the country, is to see that the foundations of its authority be not shaken. He added his name to the illustrious roll of the Justices of this tribunal, and we honor ourselves by honoring him.

REMARKS OF MR. EDMUND F. TRABUE.

When from a hundred million people only nine men are chosen for a single body, their greatness seems established; still Mr. Justice Lurton's selection as a Justice of this court was no surprise to his early friends, but apparently what they had always expected. His mental and moral qualities and material circumstances seemed to conspire to place him on this Bench. He had unusual intellect, with the highest moral and religious tendencies.

When he was born, the country was already stirred by passions which culminated in the great Wars of 1847 and 1861, and, although a mere youth, he unhesitatingly plunged into the mighty Civil War as a private soldier. Not only, therefore, was his young imagination stimulated by the most thrilling conditions, but his associations in the Army, the most democratic of experiences, taught him the intimate life of many classes, showed him the vanity of false standards, and created in him many generous and unselfish characteristics; and when he reached manhood he was the logical result of his antecedents. The initiative which had sufficed a Morgan cavalryman found the problems of the forensic battle easily within its powers.

Justice Lurton's traditions were of the old South, marked individuality and conscious superiority, intense personal responsibility, great heroism and disdain of danger; so, when the cause for which he fought was lost, his was a harder but richer task. His pride and energy craved success, his exigencies developed his natural powers, his hardships taught him self-restraint and contempt for self-indulgence, and contemplation of the issues just decided by the arbitrament of war instilled in him sense of responsibility,—great training for judicial duties, which his long career on the Bench was to make second nature in him.

His traditions and the exciting times when he came to the Bar produced in him a passion for individual liberty, and made him an ardent advocate of representative government as opposed to pure democracy.

He was a politician in the best sense. He was a careful student of public affairs and assisted in shaping political events in his own state, to the great benefit of its people; but he never had aspirations for office except for the Bench.

He spurned the mere possession of wealth, preferring the satisfaction of personal achievement well done, and in this just ambition he had the support of a wife, proud, noble, and courageous, whose thoughts were ever filled with his happiness and success to the end of his long and useful life.

Justice Lurton's affectionate nature, his loyalty, his just poise and excellent judg-

ment, made his domestic life beautiful and happy, and his friendships wide and lasting. It is reported that President Cleveland said that it seemed to him, every man, woman and child in Tennessee had requested Judge Lurton's appointment to the United States Circuit Bench.

In his recreation, in which it was sometimes my good fortune to share, Justice Lurton was as intense and earnest as in his work, but most companionable and delightful.

His career at the Bar was comparatively brief but notable, and rich in experience. Justice Lurton's long, arduous, and enthusiastic service on the Supreme Court of Tennessee, and the United States Circuit Court for the Sixth Circuit, admirably fitted him for the great work of this court, and he came here prepared for it and for every part of it. His work was everywhere marked by untiring industry, copious learning, and just and conscientious decision. The Circuit Court of Appeals, whence he came to this court, was a tribunal of unusual men; it produced a President of the United States, and three Justices of this court, before any of the other Courts of Appeals had furnished any, with a single exception.

It is an interesting reflection that Justice Lurton and Chief Justice White, privates in the Confederate Army, sat upon this Bench with Justices Harlan and Holmes, officers in the Federal Army,—a phenomenon for foreign students of our institutions to ponder.

Justice Lurton was consistently unostentatious and had that beautiful simplicity of demeanor on this august Bench which had always previously characterized him. His honors fitted him too well to swell his self-esteem. He had the self-confidence which comes from consciousness of understanding, and it made him courageous and original. His strength challenged the best endeavors of his brethren, thus multiplying the usefulness of both and making him an invaluable colleague. His death was a grievous loss to this court and to our country.

REMARKS OF MR. HENRY W. ANDERSON.

Mr. Chairman:

It is difficult to form an accurate and discriminating judgment of our friends. This is particularly true when death has but lately deprived us of their companionship, and judgment yields to the emotions and the sense of personal loss.

It was not my privilege to have known Justice Lurton personally until within the last six years of his life, but that brief acquaintance, ripened into friendship, was sufficient to inspire an affectionate appreciation of his lovable qualities as a man, and to increase my admiration for his character and attainments as a lawyer and judge.

While in his long experience upon the Bench, Justice Lurton was called upon to decide questions involving every branch of the law, he was perhaps at his best in developing and applying those principles of our equity jurisprudence which have stood the test of succeeding civilizations, and, being founded on natural justice and truth, are adequate to meet the changing needs of society. For this branch of law he was fitted by his innate love of justice and sound common sense; and his experience as Chancellor and Judge of the Court of Appeals of Tennessee, and afterwards as a judge of the Circuit Court of the United States, the greatest of our commercial courts, and the Circuit Court of Appeals, gave him unusual opportunities for the consideration and application of these principles, and the equally important limitations by which they are adapted to modern conditions. It may be doubted if within the same space in the whole body of our decisions there will be found more illuminating and helpful discussions of the principles of equity and of equity practice, than in the opinions of Mr. Justice Lurton.

It was this knowledge and experience which rendered his appointment as Associate Justice of the Supreme Court of the United States of peculiar value to the profession and the country at the time that it was made.

His work as a member of that court can hardly be measured by a mere study of his opinions. His service upon the court was brief, and for much of this time he was a severe sufferer from an illness which impaired his ability to labor and finally caused

his death. But even in this brief time and under adverse conditions, he rendered to the court and country services of a value difficult to estimate.

The country at large was then in a peculiar state of political and commercial unrest. It was not a time for training new and untried judges. The court was called upon to decide some of the most difficult questions which had been presented in its entire history, especially those relative to the construction and application of the so-called anti-trust laws, the decision of which would necessarily have a far-reaching effect on both the commercial and political development of this country. There was also a very general demand for some reformation in the rules of court and in judicial procedure by which the prompt disposition of litigation could be facilitated and the costs reduced. In the task of bringing about a successful solution of these problems, his sound knowledge of the law, broad judicial experience, mature statesmanship, and familiarity with the principles and rules of the Federal jurisprudence and practice were of a value to the court and country which finds no adequate expression in the opinions which he delivered or the records of the court.

Justice Lurton believed in the flexibility of the law and its proper application to changing conditions; that its principles were founded upon truth, were not the product of any time, and should be extended to meet any conditions which might arise in the progress of human society. But he also recognized the importance of restraining the courts to the discharge of their legitimate functions, and was quick to enforce constitutional and legislative limitations upon judicial action.

As a judge, he expressed in his own life and judicial career the thought of Burke that "judges are guided and governed by the eternal laws of justice to which we are subject. We may bite our chains as we will, but we shall be made to know ourselves and be taught that man is born to be governed by laws, and he that will substitute will in the place of it is an enemy to God."

In the Resolutions which have been presented, perhaps the most accurate estimate of, and greatest tribute to, the judicial character of Mr. Justice Lurton, is found in the short sentence, "He rendered no startling or sensational decisions." He was not a sensational man or judge. True judicial service is far removed from startling or sensational incidents, and therefore rarely receives just appreciation from the generation to which it is rendered. Such incidents belong to the hustings or in legislative halls where the materials for the temple of human progress are roughly shaped. The judges are the real builders of the temple, who finally, when the crowd has passed, shape the rough hewn materials into final form and lay them true to the foundations made by those who have gone before, to the end that the structure may endure and serve as a lasting shelter for the Ark of the Covenant of human liberty.

The real judge finds consolation for the want of dramatic incidents in the fact that his work is of lasting value to mankind. While many of those who have filled the world with their fame in their own generation have been forgotten and their names lost from the roll of history, the work of the great law-givers has survived. Even Napoleon, who could destroy in a generation the structure of civilization reared through the ages, was proud to boast in the face of fickle fortune, "I shall go down to posterity with the code in my hand."

We are very prone to call men great, and time and history are equally disposed to reverse the judgment. There are a few men in each generation who stand out preeminently above their fellows; soldiers, statesmen, judges, great thinkers who seem to have caught a spark of the divine fire, and to have been destined by their genius to expand the limits of human vision and open up new paths for the development of mankind.

But the opening of the pathway is but the beginning. Of equal, if not more, benefit to society, are those men who, by their clear common sense and judgment, their courage in defense of truth and rejection of error, however attractive, and their spirit of public responsibility and service, guide men in an orderly and conservative manner along the road of human progress.

To this class Justice Lurton belonged. He was a safe man, a man of character in the best and broadest sense of that word; a sound thinker who believed in the law as the spirit of reason; he recognized and defended the rights of property as essential

to human liberty and progress; he was inspired by love of country which led him to devote his life to its service, and a breadth of statesmanship which enabled him to concert his labors into a permanent contribution to the welfare of his people.

There is, at last, but one true standard of greatness, and that is service; service to one's country and to mankind, which, forgetful of self, is inspired by a spirit of love for and duty to our fellowmen.

Judged by this standard, Mr. Justice Lurton is entitled to a place among those whom men delight to honor and whose example they seek to emulate. As a boy, he answered the call of his native state and offered his life in her service and in defense of principles which he believed to be true. This ended, in common with the youth of the South, he fought the forces of adversity and overcame them, offering an example of the indomitable spirit of his race. His young manhood he gave to the judicial service of his state, and his maturer years to the nation, until his career was appropriately closed as a member of our highest court.

By a life thus devoted to the service of his country, an expounder of its laws and a defender of constitutional and representative government, his spirit and ideals are written in the permanent history of our time, and stand as a lasting inspiration to those who come after him.

While we mourn the loss of a friend, yet we may find comfort in the fact that of such men but little is taken away by death. Their spirit and work lives after them, and in the contemplation of their lives, we feel the force and truth of Webster's words: "How little is there of the great and good which can die! . . They live in all that perpetuates the remembrance of men on earth; in all the recorded proofs of their actions; in the offspring of their intellect; in the respect and homage of mankind. They live in their example; and they live and will live in the influence which their lives and efforts, their principles and opinions, exercise and will continue to exercise on the affairs of men."

REMARKS OF MR. WILLIAM C. FITTS.

Mr. Chairman and Gentlemen of the Bar:

I have been requested by the Bar of Clarksville, Tennessee, inasmuch as it is impossible for that Bar to have any representative present, to say something on this occasion; and the distinguished Secretary of the meeting has a telegram from that Bar to the same effect. Urged by these suggestions, I am caused to appear, where my diffidence would otherwise detain me, despite the intimate relationship which I was privileged to enjoy with Justice Lurton in my early youth. In view of these requests, I will add a few words of appreciation to those which are being so touchingly and worthily said with respect to him and his memory.

Mr. Chairman and Gentlemen of the Bar, if Waterloo was won at Rugby, then the place on the Supreme Court of Tennessee, the Judgeship of the Circuit Court of Appeals, and the illustrious position as Justice of the Supreme Court of the United States, were won at Clarksville. Justice Lurton practised law at Clarksville for nineteen years, including, of course, the two and one-half years during which he was Chancellor. Because this was long ago, it seems to have faded proportionately when considered in comparison with the balance of his career, but his was an active and a vigorous practice, in all the lines and along all the channels of the law.

How the Lurtons came to Clarksville, and the story of young Lurton's up-building there, is more interesting than any fiction. When he was sixteen years of age he was at school at old Douglas University in Chicago, and about the time of the battle of Bull Run, the strong pro-Southern sympathies he entertained caused what I believe was the only personal difficulty of his life. He left Chicago and made his way back to his father's house at Newport, Kentucky, leaving books and personal belongings in Chicago, returning to the South to find his father and mother and to tell them he was determined to go inside the Confederate lines, to join the Confederate Army. They said that if such was his conviction, from which he could not be deterred, that they would fall back as refugees, as it was then called, also coming within the Confederate lines that they might be near him; so they set out with the young man to

the southward, he to seek a Kentucky company of Confederate soldiers, and they to seek an asylum within the Confederate lines. It was thus, and by mere chance, that they hit upon Clarksville, the first place of considerable size and social prominence in a seceding State, he in the meantime having joined a company, then forming in Southern Kentucky. Thus he went as a private into the Confederate Army.

The young soldier was surrendered with Buckner at Fort Donelson, and was sent northward to a military prison. He escaped from prison by changing clothes with a boy in the prison yard, got on a train, and was so small and youthful in appearance that he successfully pretended to be a newsboy until he got as far as Louisville. He tried to reach Clarksville, and finding it impossible to do so, worked his way over into eastern Kentucky, where at that time he found the cavalry force of General John H. Morgan. He sold the watch his father had given him, and with the money bought an old horse and joined Morgan's raiders. He was in the raid around Cincinnati in 1863. About the time Morgan fell back across the Ohio River, young Lurton was captured the second time, and again carried off to prison. After about a year of confinement, he became so ill that his mother received a letter from the kind-hearted surgeon at the prison, saying that if she ever wanted to see her boy alive again, she had better come at once to where he was. Mrs. Lurton was a woman of that lovable and sterling character who drew everybody to her with love and affection. Instead of going to the prison where her son was so ill, she came out through eastern Tennessee and Virginia, and on to Washington, where, through the interposition of Tennesseeans of the Union turn of mind, she managed to see Abraham Lincoln, and he wrote for her, on an envelop,—"Give this good woman back her boy." She went to the prison in northern Ohio and brought the future Justice Lurton back to Clarksville on a cot, with the full expectation that he would be buried within two weeks. Instead of being so buried, he steadily recuperated, went about with his father who was a physician, lived in the open air for a few months, and recovered sufficiently so that in the fall of 1865, he was able to enter the law school at Lebanon. He stayed there until Christmas, and when he came back his father met him with the unfortunate information that he could not supply the money for a second term. As a result he served as clerk in his father's drug store, studying law at night, and went back to Lebanon Law School January 1, 1867. He graduated from the law school in June, 1867, immediately returned to Clarksville, and opened an office.

While at Lebanon he had meet and been charmed with that woman around whose strength and loveliness his whole future life was entwined. Although he had but barely started to obtain a foothold in his profession, he married Miss Fannie Owen in September, 1867. He thus threw himself upon a community in which he was a comparative stranger, to which his father and mother had come as refugees, and in which he could only win by superb character, courage, and ability.

Let us look at that community: As I have said, it would have been impossible to produce this man except from a community of strength and greatness. Clarksville, in the late 60's, throughout the 70's, and in the early 80's was the very "largest town of its size" in the world. It was the second dark tobacco market in the world, Louisville alone exceeding it. Its commerce and bank clearings were more than twice those of any other town of ten thousand inhabitants in the country. This was due to the fact that it was settled by Virginians, who planted black tobacco; the buyers from the world made Clarksville their headquarters, and it was the most potential place of its size to be found.

When young Lurton went to this Bar in 1867, he found there Gustavus A. Henry, "the eagle orator of Tennessee," whom Andrew Johnson had defeated for governor by less than two hundred votes. There too was James E. Bailey, into whose life Lurton was later to pass; and these two to constitute a great force in the state. There were also John F. House, William A. Quarles, recently returned from battlefields where he had made friends ready to extol his eloquence; also Merritt, Yancy, Daniel, Tyler, Polk Johnson, and Charles G. Smith, and others, making the strongest Bar that can be conceived of.

Horace Lurton started to practise law in 1867, and started alone, and although he had just taken the burden which marriage entails, made a living, and a good one from

the beginning. At the end of two years, Major Henry invited him to a partnership which lasted for eighteen months, after which time a partnership was formed with General Quarles, which lasted less than one year.

When trying a case in Stewart county, adjacent to the county in which Clarksville is located, Colonel Bailey, who subsequently became Senator, impressed with his ability, offered him a partnership. Judge Lurton said this was the happiest day of his life, except the day of his marriage. He accepted, he said afterwards, he feared, too gleefully. The result was he practised law with Colonel Bailey until Governor James D. Porter appointed him Chancellor in 1875, which judicial position he held until 1878.

In the meantime the unexpected had happened in the politics of Tennessee. Andrew Johnson, who had been elected to the United States Senate in that spectacular independent campaign of his, took his seat March 4, 1877, attended one short session of the Senate, and died in East Tennessee in July, 1877. A special session of the legislature was called and Clarksville went down to Nashville in full force, Judge Lurton at the head, with the result that Colonel Bailey was elected to the United States Senate. When thus elected, it became necessary for him to come to Washington December 1st, 1877. He desired to turn over his large practice to Judge Lurton. To this end, the latter resigned the Chancellorship, to take effect in January, 1878, and took over Senator Bailey's practice. He practised law under the name of Smith & Lurton, which firm he then organized, until he became an Associate Justice of the Supreme Court of Tennessee.

So I say that these nineteen years resulted in a well-laid foundation. This was the preparatory process that made the fruition of such a character possible; it was a life of usefulness, and in a community where everything contributed to produce the result which was afterward attained.

His career as a Judge is well known to all, and is the property of all; it is not alone the property of the people of Clarksville, but Clarksville can ever take just and glowing pride in this her illustrious, probably her most illustrious, son. When Judge Lurton left Clarksville in 1886, to be a Judge of the Supreme Court of Tennessee, he had spent nineteen years of his best manhood there. He was not quite forty-one years of age, but he was in every respect the first citizen of that superior community. Many a man would have rested awhile and gathered the fruit of such a life and such professional ability and character in such a community, but he had no desire on earth for worldly possessions, or wealth, or power, or fame, except as a lawyer, and in connection with the judicial career he had designed.

There is one incident I would like to call attention to, that has already been referred to partially by the distinguished Chairman of this meeting. When Judge Lurton was appointed by President Cleveland to the Circuit Court of Appeals of the United States, he received a hearty welcome from that Bench, with a beautiful letter from the then presiding Judge. As a result he felt impelled to go to Cincinnati to take the oath instead of taking it at Nashville. He went there and took the oath of office in the court room at Cincinnati, the distinguished Chairman of this meeting administering it. When he opened the Bible for Judge Lurton to lay his hands on it, the hand, as he was taking the oath of office, rested on the first chapter of Deuteronomy, where Jehovah is charging the Judges of Israel—and for that matter, the judges of all time—how to judge between man and man, and his hand rested on the passage where it says: "Hear *the causes* between your brethren, and judge righteously between *every* man and his brother, and the stranger *that is* with him.

"Ye shall not respect persons in judgment; *but* ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment *is* God's: and the cause that is too hard for you, bring *it* unto me, and I will hear it." Could there be any more significant injunction for the judges of that time and this time? In fact, it so impressed the great and good Judge who administered the oath that he took the very Bible on which the hand has rested and wrote a sweet memorial to the family and wife of Justice Lurton, and sent that Bible to them, and it is one of the most cherished mementoes of his life that they have unto this day. When this solemn ceremony was finished, a lank old countryman from northern Ohio who had witnessed

it from beyond the Bar, made his way to where Judges Taft and Lurton were standing, and taking the latter by the hand, said: "Judge they tell me you were about here with John Morgan in 1863—is that so?" Judge Lurton in his genial way said: "Yes, it is all true;" whereupon the old fellow said "Well, the War sure is over." Judge Lurton responded, yes it was over, and so far as he was concerned had been all over for a long time.

Mr. Chairman and gentlemen of the Bar, this life that we are contemplating was the life of a great lawyer before he was a great judge. Judge Lurton tried every kind of case at Clarksville. He was a great jury lawyer as well as a great chancery lawyer. It is true he made a magnificent record,—appointed Chancellor at thirty, resigning before quite thirty-three, elected by the people without opposition in the meantime. He was well prepared to be a great judge. I am fully aware that it has been said at Clarksville that Judge Lurton was ambitious, and that was true. But it was only the ambition of that proper sort which desired to be prepared for, and make the most of, the opportunities and endowments which had been given him. It was that kind of ambition that Ruskin describes as "willing and fulfilling the immediate task in order to be prepared for the occasion and equal to the occasion when it comes." It was only that kind of ambition.

One other thought: Judge Lurton's career it is true had its cap-stone, the crowning of the Corinthian column, when he became Justice of the Supreme Court of the United States; but so far as its strength and greatness were concerned, that had already been impressed upon the minds and hearts of all who knew him. He was possessed of that kind of disposition and intellect that could lead in counsel and not offend. He had a humor that was keen and unfailing, and he knew how to use it to great advantage; he was of a generous and sweet disposition, making no enemies. Probably no other man could have been the head and front of the extreme debt-paying party in Tennessee in 1883, and yet have been nominated for the Supreme Court by the bulk of the party which believed the other way in 1885.

So, in speaking for the people of Clarksville, and for the Clarksville Bar, and bringing as I do a heart full of love to this day's worship, I desire to say that when we contemplate his memory, when we contemplate his career, and look in imagination with minds and hearts to where he rests there in the beautiful wood near that city, in the burial ground they call "Greenwood," beside the graves of two lovely children who preceded him to the grave,—because this life with all its successes had its shadows as well as its sunshine,—we can say in the words of Junius, when he spoke of the elder Pitt: "This life and its usefulness makes a solid fabric, and will support the laurels that adorn it." And most of all it can be said of him by those who knew him best, that in his character is to be found that which in boyhood constituted him a filial son, that which at the doorway of youth showed him to have been a fearless soldier, that which in ripe manhood made him a transcendently great lawyer, and in yet riper manhood a very great judge. But most, and best of all, it can be said of him that he was at all times a fearless and unfaltering Christian. He walked the path of rectitude and lived a life of Christian manhood, never ashamed to confess Christ before men, and yet never with any cant or hypocrisy. He was the kind of Christian that shows to men there can be a manliness approaching at least unto the manliness of Christ.

REMARKS OF MR. WILLIAM MARSHALL BULLITT.

Mr. Chairman:

A life of industry and honor covering fifteen years in practice and thirty-two years on the bench; participating in the decision of about three thousand[1] cases, delivering six hundred and fifty opinions[2] (including eight dissents) scattered through one hun-

[1] Supreme Court of Tenn. 1–8 Pickle, 633 cases; Circuit Court of Appeals, 56 Fed. Rep., 174 Fed. Rep., about 1500 cases; Supreme Court, 217 U. S., 234 U. S., about 1000 cases.

[2] 168 opinions in 1–8 Pickle, Tenn., 395 opinions; 56 F. R., 174 F. R., excepting Vols. 88, 89, 93, 98, 138, 154, 160, 161, 162, 170, 172; 87 opinions in 217 U. S., 234 U. S., excepting Vols. 222 U. S. and 233 U. S.

dred and thirty-two volumes of our law reports; possessing the confidence and affection of the Bar until his death at seventy years of age, briefly summarizes the life and work of Mr. Justice Lurton.

Others have so aptly dealt with his character and personality that I shall confine myself to a brief review of his judicial career.

During the sixteen years (1893–1909) that he was a Circuit Judge of the United States, his opinions, besides covering the usual range of cases that fall to every court, disclosed certain distinctive lines of work; and his first opinion was delivered May 23d, 1893, in the very important litigation involving the validity of the Monon Railroad's guaranty of the Beattyville Railroad's bonds (Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contract Co. 57 Fed. 42), later decided by the Circuit Court of Appeals (Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433), which was affirmed on certiorari in Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, finally terminating in the leading case of Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827, which was the forerunner of Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, wherein Justice Lurton delivered the most vigorous dissent of his judicial career.

His first opinion in the Circuit Court of Appeals was delivered September 5th, 1893, in Scranton v. Wheeler, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 803, upholding the right of Congress, while improving navigation, to interfere without compensation with the rights of riparian owners on St. Mary's river,—a subject to which he returned twenty years later, re-stating and extending his views in the important case of United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667, where he sustained in the broadest way the paramount power of the Federal government under the "commerce clause" to improve navigable streams without making compensation to riparian owners for any interest in the water power of the river.

His knowledge of admiralty and patent law was extensive and accurate. Forty odd opinions in patent cases disclose a thorough grasp of the mechanical features and legal principles governing such widely variant inventions as those of windmills and waffle irons, ore crushers and button fasteners, cheese cutters and mining machinery. electrical distributors and beer filters, which with fifteen admiralty opinions illustrate his mastery of those two special branches with which most lawyers are unfamiliar,—subjects with which he had little opportunity to deal while on the Supreme Court.

The most important of his opinions was probably that in the Button Fastener Case (Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288), delivered in 1896 where it was held that the owner of a patented machine might sell it subject to the condition that it should be used only with certain nonpatented articles manufactured by the seller; the machine to be forfeited if used in connection with any other nonpatented article than the one specified. It at once became the leading case in the country on that subject, was followed generally, and was carried to its logical conclusion in Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364.

Twelve great railroad receiverships and foreclosures, mostly resulting from the panic of 1893, fell under his immediate control or observation. His opinions, over twenty in number,[3] dealing with a variety of difficult questions arising (1) in the settle-

[3] Tod v. Kentucky Union Land Co. 57 Fed. 47; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 268; Central Trust Co. v. East Tennessee V. & G. R. Co. 59 Fed. 523; Columbia Finance & T. Co. v. Kentucky Union R. Co. 9 C. C. A. 264, 22 U. S. App. 54, 60 Fed. 794; Lloyd v. Chesapeake, O. & S. W. R. Co. 65 Fed. 351; Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 168; Central T. Co. v. Richmond, N. L & B. R. Co. 41 L.R.A. 458, 15 C. C. A. 273, 31 U. S. App. 675, 68 Fed. 90; Burke v. Short, 24 C. C. A. 422, 47 U. S. App. 576, 79 Fed. 6; Central Trust Co. v. East Tennessee, V. & G. R. Co. 26 C. C. A. 30, 47 U. S. App. 663, 80 Fed. 624; Farmers' Loan & T. Co. v. Memphis & C. R. Co. 83 Fed. 870; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497; Columbus, S. & H. R. Co.'s Appeals, 48 C. C. A. 275, 109 Fed. 177; Gregg v. Mercantile Trust Co. 48 C. C. A. 318, 109 Fed. 220; St. Louis Merchants' Bridge Terminal R. Co. v. Continental Trust Co. 49 C. C. A.

ment of the priority of conflicting liens, and (2) in the numerous contests inevitable in the operation and disintegration of that class of properties, reveal his perfect familiarity with the problems and difficulties of corporate financing and reorganization.

A few of the railroad systems with the management or reorganization of which he particularly dealt were the E. T. V. & G. R. R., Chesapeake & Ohio S. W., Pere Marquette, C. H. & D., Toledo, St. Louis & Kansas City, Toledo, Columbus, & Hocking Valley, and the Wabash.

The insight thus gained with respect to the practical difficulties involved in railroad reorganization is reflected in his vigorous dissenting opinion in Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, in which he showed a common-sense appreciation of the practical problems necessarily arising in the reorganization of a great railroad property.

Another important branch of his work is found in the ten or twelve opinions which he delivered upon the validity of the franchises of a variety of public service corporations, including the street railway or telephone franchises in Detroit, Cincinnati, Louisville, Knoxville, and other cities, generally where there was a contest between the city and the company.[4]

His decisions in a number of trademark and copyright infringements and unfair competition cases are at once interesting and illustrative of his sound common sense. Paris Medicine Co. v. W. H. Hill Co. 42 C. C. A. 227, 102 Fed. 148; Courier Lithographing Co. v. Donaldson Lithographing Co. 44 C. C. A. 296, 104 Fed. 993; Computing Scale Co. v. Standard Computing Scale Co. 55 C. C. A. 459, 118 Fed. 965; Vacuum Oil Co. v. Climax Ref. Co. 56 C. C. A. 90, 120 Fed. 254; Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; Dennison Mfg. Co. v. Sharf Tag, Label & Box Co. 68 C. C. A. 263, 135 Fed. 625; Lowe Bros. Co. v. Toledo Varnish Co. 94 C. C. A. 83, 168 Fed. 627.

In the Adams Express Co. tax case (Sandford v. Poe, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546), also one of his early opinions, he sustained the method of taxing a corporation's intangible property within one state on the basis of the value of its total capital stock,—a new departure in corporate taxation,—which was affirmed in Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, by a bare majority of the Supreme Court.

He affirmed the conviction of Cassie Chadwick for violating the national banking act (Chadwick v. United States, 72 C. C. A. 343, 141 Fed. 225).

In five opinions[5] under the Sherman anti-trust law he early reached the precise result at which the Supreme Court finally arrived, two of his opinions being affirmed in Continental Wall Paper Co. v. Lewis Voight & Sons Co. 19 L.R.A.(N.S.) 143, 78 C. C. A. 567 (148 Fed. 939; s. c. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280); and the Dr. Miles Patent Medicine Case, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; 90 C. C. A. 579, 164 Fed. 803; s. c. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376); and there is no more apt summary of the purpose of the Sherman anti-trust law and the abuses it was intended to correct as ultimately worked out by the Supreme Court

529, 111 Fed. 669; Horn v. Pere Marquette R. Co. 151 Fed. 626; Central Trust Co. v. Cincinnati, H. & D. R. Co. 169 Fed. 466; Adelbert College v. Wabash R. Co. 96 C. C. A. 465, 171 Fed. 805, 17 Ann. Cas. 1204; Compton v. Jesup, 51 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 310.

[4] Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Morristown v. East Tennessee Teleph. Co. 53 C. C. A. 132, 115 Fed. 304; Louisville v. Cumberland Teleph. & Teleg. Co. 84 C. C. A. 151, 155 Fed. 725, 12 Ann. Cas. 550; Owensboro v. Cumberland Teleph. & Teleg. Co. 99 C. C. A. 1, 174 Fed. 739.

[5] Atlanta v. Chattanooga Foundry & Pipeworks, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; Continental Wall Paper Co. v. Lewis Voight & Sons Co. 19 L.R.A.(N.S.) 143, 78 C. C. A. 567, 148 Fed. 939; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Dr. Miles Medical Co. v. John D. Park & Sons Co. 90 C. C. A. 579, 164 Fed. 803; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721.

after twenty years of labor, than Judge Lurton's language ten years ago in the Wall Paper Trust Case: "The consumer at last is the only real victim. It is the consumer who makes up the public, which it is the object of the law to protect against undue exactions through illegal combinations in restraint of freedom of commerce and fair play in commercial transactions."

He rarely dissented; but twice in sixteen years on the Circuit Bench; while in his four years upon the Supreme Court he marked eight dissents, delivering two opinions, only one of which, however, was of any length (Northern P. R. Co. v. Boyd).[6]

He delivered eighty-seven opinions while a member of the Supreme Court. Three on the anti-trust law; three on public utility franchises; five on taxation; five sustaining and construing the Carmack Amendment; and five under the interstate commerce act embrace his most important work.

Although while on the Circuit Court of Appeals he delivered, so far as I recall, but one opinion dealing with railroad rates and the power of the Interstate Commerce Commission (Shinkle, W. & K. Co. v. Louisville & N. R. Co. 62 Fed. 690 [1894]), yet on the Supreme Court, he devoted a very considerable amount of his time to questions connected with the powers of the Interstate Commerce Commission and the regulation of railway rates. I refer to his opinions in Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Louisville & N. R. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 Sup. Ct. Rep. 263; and United States v. Baltimore & O. R. Co. 231 U. S. 274, 58 L. ed. 218, 34 Sup. Ct. Rep. 75.

His principal opinions were in United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507, holding that a unification of terminal facilities within a state under one management was in restraint of trade because, owing to the topographical conditions at St. Louis, it was possible for such a combination to exclude interstate railroads from access to the city's commerce and industries: in United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90, dissolving the combination between the anthracite coal roads and mining companies; in Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1915E, 875, involving the validity of a two million dollar judgment under the "full faith and credit" clause of the Constitution; in Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688, limiting the power of Congress to impose conditions on admission to statehood; and finally in Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364, wherein he followed and extended the doctrine of the Button Fastener Case, and held that the patentee had the power to impose as a restriction upon the use of his invention that it should be used only with certain specified unpatented articles, and that any dealer who should sell the patented article with knowledge that it was to be used with some other nonpatented article than the one specified was guilty of a contributory infringement of the patent; in short, that the patentee of a mimeograph had the right to stipulate that it should not be used with any other ink than that manufactured by the patentee, and that if a dealer should sell the mimeograph with knowledge that the purchaser was going to use it with any other ink, such dealer was guilty of a contributory infringement.

One has but to read the dissent of the Chief Justice, concurred in by Justices Hughes and Lamar, to see how strenuously Justice Lurton's opinion was opposed, and the far-reaching effects of his early opinion in the Button Fastener Case as crystallized in Henry v. A. B. Dick Co.

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[6] His dissenting opinions were 80 C. C. A. 425, 150 Fed. 689, 19 L.R.A.(N.S.) 857, 84 C. C. A. 537, 157 Fed. 33; 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822; 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614; 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E. 710; 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554; 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.

His last opinion was delivered June 22, 1914, in Louisiana v. McAdoo, 234 U. S. 627, 58 L. ed. 1506, 34 Sup. Ct. Rep. 938.

He was kindly and polite to the Bar, an attentive listener, a laborious worker, a conscientious and honest Judge to whom every lawyer was willing to submit his cause with the full consciousness that Justice Lurton carried into practice that principle which, more than twenty years ago, he laid down in affirming a life sentence in Tennessee's most celebrated criminal case (King v. State, 91 Tenn. 621, 20 S. W. 169), namely, that the decrees of law, to be respected, "must be impartial for all within its compass; the very lowest as feeling its care, and the very greatest as not exempted from its power."

In the language of the Episcopal service he loved so well, he has been gathered unto our fathers, having the testimony of a good conscience, in the communion of the catholic church, in the confidence of a certain faith, in the comfort of a reasonable, religious, and holy hope, in favor with Thee, our God, and in perfect charity with the world.

REMARKS OF MR. OTTO KIRCHNER.

Mr. Chairman and Gentlemen of the Bar:

The resolutions presented and the tributes that have fallen from the lips of my Brethren of the Bar, are so full; and, so far as mere words can make them, so adequate to the occasion, that little, if anything, remains for me to say. Yet I feel that I ought not to let this unusually large gathering disperse without giving my personal testimony to the high and affectionate regard in which Mr. Justice Lurton was held by the Bar of Michigan, and by her citizens generally. Counsel who appeared before him always received a patient and considerate hearing; and his opinions showed that every point in the case, had been carefully considered and squarely met. He never side-stepped or slurred over difficult questions in a case.

I am not able to realize that he is gone and that we may not look upon his face again. It seems only yesterday that I saw him in this room, in apparent good health with the promise of many days of usefulness before him. He loved his fellow men and has passed away at peace with the world, in the comforting assurance of that faith which is "the substance of things hoped for, the evidence of things not seen."

The resolutions were adopted, and, on motion of Mr. Solicitor General Davis, the meeting adjourned.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 14, 1915.

Present: The Chief Justice, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day, Mr. Justice Hughes, Mr. Justice Van Devanter, Mr. Justice Lamar, Mr. Justice Pitney, and Mr. Justice McReynolds.

Mr. Attorney General Gregory addressed the court as follows:

May it please your Honors:

In presenting the resolutions adopted by the memorable meeting of the Bar, held in this room on March 27, to do honor to the memory of Mr. Justice Horace Harmon Lurton, I might well be contented with the observation that the resolutions show such intimate acquaintance with his eventful career and such discriminating appreciation of his character and attainments as man and judge as to demand nothing more.

With respect to Justice Lurton, my lines were so cast that a measure of the personal appropriately attached, without which the part I am performing might in a sense be regarded somewhat in the light of one of the graceful functions belonging to the official station I hold. My personal acquaintance with Justice Lurton began when, as a youth, I attended college at Clarksville, Tennessee, where he, subsequent to his

service as Chancellor, was the ascendant light at an unusually strong Bar. After leaving college and moving West I next saw him some ten years later in Nashville presiding as Chief Justice of the Supreme Court of Tennessee. My presence on this occasion was almost accidental, but I recall with interest the fact that the attorney addressing the court was the distinguished gentleman who succeeded Justice Lurton upon this Bench and whose former official position I now hold.

Justice Lurton possessed a singular charm of candid affability. He took a lively interest in the aspirations and endeavors of younger men, particularly young lawyers. Whenever the opportunity offered, he encouraged them and gave them incentive to noble endeavors. I am one of the many who profited by his friendship.

That the men who strive are the men who succeed was eminently illustrated in the achievements of this life. He was denied the advantages of a completed college education. The hardships of the soldier, the privations of the prisoner, and the experience of the practitioner, quickened by a keen interest in public affairs and a studious disposition, were all utilized. The winds blew and the waters rolled to him knowledge and power, and the influences of the eventful times of his youth and early manhood so broadened him that he understood the varying phases of life and character, though he studied them to the end.

In the enchanted circle of home, around friendship's shrine, in the conflicts of the forum, in the temple of justice, in the sanctuaries of the living God, Justice Lurton was the same open, wholesome model of uplifting human character,—a Christian gentleman. As a man, he bound himself to us by the strongest and tenderest ties.

It was as a judge, who ripened and gathered strength from the period of his early Chancellorship, through service in the Supreme Court of Tennessee and the seventeen years of larger vision on the Circuit Court of Appeals, culminating in, and completed by, his brief but valuable work on the Supreme Court of the United States, that the deceased won his most enduring laurels.

When he went to the Court of Appeals of the Sixth Circuit he found it established in the confidence of the profession, and he contributed to the maintenance of its high standing. Coming to this court from a section so prolific in great judges, he fulfilled the measure of the expectation thus engendered.

Justice Lurton was appointed at a riper age than any other man ever elevated to this Bench. The deviation from what is generally a sound and acceptable rule was justified by the scope and length of his varied judicial experience and the richness of the results which had flowed therefrom.

While death claimed him sooner than could have been reasonably contemplated, his service here was singularly useful and beneficent. Aside from the invaluable work performed in connection with the preparation and adoption of the Equity Rules, Justice Lurton, in the four and one-half years he adorned this Bench, wrote the opinion of the court in ninety-eight cases, many of them involving issues of the gravest importance. Some of these opinions are destined to stand as leading authorities. He found himself constrained to dissent from the majority of the court in eighteen cases, and with respect to two of them filed dissenting opinions ably sustaining his views.

His style was admirable because of the clear and logical way in which he illuminated the subject in hand, each step in his reasoning following steadily after that which had gone before, with the rhythm and certainty of a soldier's tread, so that when the end was reached there was no element of uncertainty as to what he had decided or meant to decide. He systematized facts and decomposed them into their elements, applying to them the principles of law and equity with unfailing precision.

To his other great qualities Justice Lurton added powers of painstaking investigation, depth of research, and an accuracy in the use of our language that must ever make his opinions models of judicial composition. The loss of such an one may indeed be rightly regarded as a public calamity.

Actuated by these sentiments, sharing the spirit of these appropriate and appreciative Resolutions, I present them to the court, as I am bidden by the Bar to do, and request that a befitting order be entered, directing their perpetuation on the minutes of the court.

I now read the Resolutions:

We, members of the Bar of the Supreme Court of the United States, moved by our high regard for the character and public services of Mr. Justice Horace H. Lurton, who departed this life on the 12th day of July, 1914, have met at Washington, this twenty-seventh day of March, 1915, for the purpose of discharging what we regard as a high public duty in honoring the memory and recording our estimate of one who as a man, a citizen, a jurist, and a judge has greatly honored our country, and adopt the following:

Horace Harmon Lurton was born on February 26, 1844, in Newport, Kentucky. His early life was passed partly at Clarksville, Tennessee, and partly in the city of Chicago.

When the Civil War began he was a student at the old University of Chicago. He at once returned to Tennessee, and at the age of sixteen joined the army of the Confederate States, enlisting in the Thirty-fifth Tennessee, of which he became sergeant major.

He was captured at Fort Donelson and was imprisoned at Camp Chase, from which, after a brief confinement, he escaped. He re-enlisted in the Third Kentucky Cavalry, and while serving under General John H. Morgan, during his raid in Ohio, was again captured in 1863 and imprisoned, where he was confined until early in 1865. At that time, on account of his health, and in response to a personal appeal made by his mother to President Lincoln, he was released on parole.

His collegiate education thus interrupted was never completed, but it was richly supplemented by constant study and copious reading.

He graduated in law at Cumberland University, Lebanon, Tennessee, in 1867. There he met Miss Frances Owen, who, in the same year, became his wife, and survives him. Their married life was an uninterrupted period of mutual love and comfort.

He entered upon the practice of his profession at Clarksville, Tennessee, and continued until 1875, when he became a Chancellor of Tennessee.

In 1878 he resigned and returned to the Bar. He was associated in partnership at various times with Gustavus A. Henry, William A. Quarles, James E. Bailey, and Charles G. Smith, who were among Tennessee's most distinguished lawyers. He was a recognized leader and enjoyed a large practice.

In 1886 he was elected as Judge of the Supreme Court of Tennessee, and served continuously until April, 1893, being Chief Justice the last four months of his service.

In that year he was appointed United States Circuit Judge by President Cleveland, and became a Judge of the Court of Appeals for the Sixth Circuit.

He became professor of constitutional law at Vanderbilt University in 1898 and dean of the law school in 1905, which positions he held until 1910.

In 1899 he received the degree of doctor of civil laws from Sewanee University, and in 1912 the degree of doctor of laws from the University of Pennsylvania.

In December, 1909, he was appointed by President Taft to the Supreme Bench of the United States, and took his seat January 3, 1910, in which position he served until his death.

Upon his appointment to the Supreme Court of the United States he was sixty-five years of age, being the oldest man ever appointed to that Court. There were sound reasons for such distinction. He had been upon the Bench thirty years and had achieved as Chancellor a high reputation as an able, learned, conscientious, industrious, and impartial jurist, which was maintained, with increased prestige, throughout his long service on the Supreme Bench of Tennessee and as United States Circuit Judge.

He came to the Supreme Court equipped with an experience and learning that few appointees to that court have had. His long service upon the Federal Bench especially qualified him to enter at once with full efficiency upon his duties.

President Taft had collaborated with him seven years in the Circuit Court of Appeals and well knew his fitness for the high office for which he nominated him.

During a continuous service on the Bench, state and national, for a period of over thirty years, he decided almost every kind of case which human affairs could give rise to. His opinions, which are to be found in Pickle's Tennessee Reports, the Federal Reporter, and the Reports of the Supreme Court of the United States, are characterized by learning, conciseness, and lucidity, are convincing witnesses of his justice, wisdom,

industry, and comprehensive grasp of legal principles, and constitute a great and enduring monument to his fame.

He was thoroughly grounded in the fundamental principles of the law, and always maintained a profound reverence for constitutional safeguards.

In an address made at a joint meeting of the Maryland and Virginia Bar Associations in 1910 he said: "The contention that the obligation of a constitution is to be disregarded if it stands in the way of that which is deemed of public advantage, or that a valid law, under the Constitution is to be interpreted or modified so as to accomplish that which the executive administering it or a court called upon to enforce it shall deem to the public advantage, is destructive of the whole theory upon which our American Commonwealths have been founded, to say nothing of the constitutional relation of the Union and the states to each other. It is a substitution of men for a government of law. It is against this that I raise my warning voice."

He fully recognized the rights of persons and property, but did not hesitate to give full effect to constitutional legislation changing such rights.

He rendered no startling or sensational decisions. While this is true, he recognized fully the expanding and complex affairs of modern life and government, and the necessity for the application of old principles to changed conditions. However, he never under this guise gave sanction to judicial legislation. His attitude on this vital principle is well shown by his own utterance in the case of John D. Park & Son against Hartman, in which he said: "It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy,—principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law."

He was frank in expressing his views and always courageous in the performance of duty. He was quick to see and comprehend the points of argument, and clear, direct, and forceful in stating his conclusions.

He had an amiable disposition and a charming personality, which endeared him to a large circle of warm friends.

His associates loved and honored him, and the members of the bar who came before him entertained profound respect for his ability and efficiency as a judge, and hold his conduct toward them, which was always characterized by unfailing graciousness, attention, and patience, in most pleasing remembrance.

Both on and off the Bench he was affable and courteous, without any appearance of seeking popularity. He was firm and impersonal in his rulings, without any touch of harshness. His manner was impressive and dignified, without show of authority.

He bore a conspicuous part in drafting the new Federal Equity Rules, and went to England for the purpose of informing himself as to the changes there in equity practice and their effect.

He left to his family the rich legacy of a stainless and unquestioned life.

He early became a member of the Episcopal Church, was constant in church duty, and for a long time preceding and at the time of his death held the position of vestryman in that church. His religion was not merely a profession, but its principles were constantly illustrated in his daily life.

In politics he was a Democrat.

Although he was a strict party man and believed that government should be administered through parties, and took a deep interest in politics and frequently was prominent and influential in political affairs, state and national, he never sought political office.

He and his colleague, Mr. Justice Harlan, twice during the Civil War were opposed in battle. Notwithstanding they had fought on opposite sides in support of conflict-

ing views as to the Constitution, they were in substantial accord in their judicial utterances on the fundamental principles of our government.

The fact that one who had borne arms against a government and had been imprisoned by that government subsequently, through its expressed will, sat in a tribunal which had final jurisdiction over the property, liberty, and lives of its people, and the interpretation of its Constitution, is a tribute to the qualities that found such distinguished recognition. It bears, however, for our whole nation, for all time, and especially now, when the passions of a great war are manifesting themselves with fearful violence, a deeper lesson,—that of a great people subduing in so short a time their prejudices, and following the injunction of Mr. Lincoln, "with malice toward none, with charity for all," turning their backs with magnanimity upon the strife of the past, and doing those things which reunited our country in a common destiny, based upon a reconciliation, genuine and complete, and without example in history.

Respect for those in office, because they represent the sovereign power, is essential for stability of government. It is fortunate for a people to be served by those to whom honor is rendered, not only during incumbency of office, but after they have passed out of office and out of life. The record of the lives of such men is the richest heritage and the highest inspiration that a people can possess.

This meeting is not to render grateful praise to one who can show appreciation to those who are present. It is not a perfunctory tribute to place, for we are met to solemnly record our estimate of the services of one who has passed beyond the sense of praise or censure.

Tried by the standards which constitute the just test of title to the esteem of his countrymen, we confidently say that Mr. Justice Lurton is worthy of lasting commemoration in the annals of the nation. Therefore,

"*Be it resolved*, by the Bar of the Supreme Court of the United States, that in the death of Mr. Justice Horace H. Lurton, the Bar and the people of the United States have sustained a great loss; that we deeply sympathize with his family and friends in their bereavement; that a copy of these proceedings be sent to Mrs. Lurton; and that, through the Attorney General, it be asked that they be spread upon the minutes of the Supreme Court of the United States.

The Chief Justice responded:

Mr. Attorney General, the motion which you make gives us solace, since it affords us an opportunity, by putting of record the resolutions which you so appreciatively present, to become participants in the action of the Bar, and thus again to manifest our sense of sorrow at the death of Mr. Justice Lurton.

The attachment between Mr. Justice Lurton and a member of this court, resulting from prior association in judicial work in another forum, and between others, resulting from a personal friendship of long standing, came when he took his seat upon this Bench to unite him with all its members because of the resulting knowledge of his attainments and endearing character.

I asked one of my brethren not long since what was the mental quality of Mr. Justice Lurton which most impressed him. He said, "He was a lawyer, fully equipped by training and by experience to do the work which came to him to do." How terse and yet how comprehensive the analysis, since it embraced the developed powers of discrimination controlled by a trained and ripened intellect which enabled him intelligently to consider and clearly to understand the complex conditions and problems concerning which he was called upon as a Judge to act. Accurate as was the portrayal, the inadequacy of the likeness which results is manifest unless there be added to the picture the lineaments of the man,—his simplicity, his fidelity, his warmth of friendship, his tenderness to those he loved, all uniting with his intellectual qualities to make him what he was,—a lovable and true man, an able and conscientious lawyer, and an intelligent, courageous, and devoted Judge.

If there were time to review his public services, it would be unnecessary, since the mere mention of the landmarks of his career will bring out in bold relief his title to the admiration and respect of his countrymen. A practising lawyer, a Chancellor, a member of the Supreme Court of Tennessee, either as an associate member or its

chief justice, from 1886 to 1893, a United States Circuit Judge from 1893 until he became a Justice of this Court in 1910. Mark the progressive evolution of his career and the irresistible inference of duty faithfully done which it affords. And to add to this demonstration take into view the judgment of the Bar who practised before him and the reports of the several courts during his service. The responsibility which he thus so worthily met is indicated by considering the grave duties which have rested upon state courts of last resort and upon the Circuit Courts of the United States from the beginning, and the services which both have rendered to the security of life, liberty, and property, to the progress of our country, and to the perpetuation of our constitutional institutions. But that view does not give a full appreciation of the value of the work of Mr. Justice Lurton as a United States Circuit Judge. Bear in mind that when he became a Circuit Judge the Circuit Courts of Appeals had been relatively newly created and the necessity for their existence as well as their future usefulness was in some minds far from certain. The benefit, therefore, to the country, of the work of the Court of Appeals of the Sixth Circuit during his membership cannot be judged alone by the volume and character of the business which came before it and by the enlightened manner in which that business was disposed of, but by considering how its discharge of duty, co-operating in its full proportion with the work of the Courts of Appeals of other circuits, demonstrated the wisdom of having created those courts, and besides made certain how much the progress and development of our judicial institutions would be benefited by their continued existence.

I do not review the work of Mr. Justice Lurton on this Bench. It speaks for itself, since it demonstrates the benefit to the court and the country which arose and would have continued to result had it been given to him, as we had all hoped it would be, to devote his matured powers to the service of the country for a long period of time. But this was not to be vouchsafed. Illness came, and when its serious character was apparent, in company with that comrade, high courage, which had been with him all the days of his life, comforted by the care and tenderness of those he so much loved, and sustained by Christian faith and hope, he passed beyond our mortal vision. The unbidden thought which comes as to the fleeting result of all human effort, its perishability and the resulting despondency, is natural from such a loss, and the miasma of pessimism which they produce enveloped me as, with those of my brethren who could do so, we journeyed to Clarksville, Tennessee, where he began his active career after the Civil War, there to lay him to rest. But as I stood by the open grave, surrounded by the kindly faces of so many of the warm-hearted people of Clarksville, who had gathered to pay their tribute of respect and affection, and heard the plaintive melodies of the old hymns telling of Christian faith and hope, pessimism vanished, and I came to feel death is not forever, and good works do not perish, but remain. Yes; it was given to me to think, as the waving wheat field in sunshine and in rain conserves its energy in the grain which, long after the stem has been cut down and perished, pressed under the millstone, gives forth the nutriment of our material existence, why may we not believe that in the vast reservoir of Divine Providence the energy of our good deeds is conserved, so that they may continue when we have gone to aid and bless our country and our countrymen? What can better illustrate this truth than the work of the lawyer and the judge, since the rule of justice which solves the controversy of to-day becomes the rule of conduct preventing the arising of contention in the years to come? Can we doubt if we listen to the voices of Ulpian and Trebonian calling us through the turmoil and dust of ages to the regions where reason dominates and hence justice prevails? But so distant an example need not be sought. Who of us has not known controversies as to powers of government whose complexities and difficulties were so great that their solution threatened the destruction of our constitutional system either by the disregard of national power or the overthrow of local authority? Insoluble, indeed, they have seemed when from out the past the voice of Marshall spoke and order prevailed, and state and nation continued to move in harmony and majesty in their allotted orbits to the safety and blessing of our country and mankind.

Indeed, the truth of which I am speaking is illustrated in an episode in the life of Mr. Justice Lurton. We all recall that when he was in his youth a private in the

Southern Army he was a prisoner of war, confined, I believe, on Johnson's island, enduring the hardships of prison life, and suffering from the intense rigor of the northern winter climate, to which he was not habituated. The youth's health failed and the fear came that his end was not far off. His mother, learning of the situation, pleaded from person to person until she came into the presence of President Lincoln to state her sorrow, and out of the depths of her anguish to make her prayer for relief. Let us transport ourselves in imagination to the scene and listen to the mother's supplication and hear the answer from the lips of President Lincoln, springing from that well of compassion which was one of the supremest attributes of his nature: "Yes; let the mother have her boy." Ah! If it had been given to us to stand in reality where we have stood in fancy to-day, who of us would have thought when the storm of war which was then raging had ceased it would come to pass through the enduring power of the influence of the patriotism of our forefathers and of the wise institutions they had established that on the very dawn of peace one would seek in vain to find the erstwhile embattled armies, for they had vanished, leaving only a great host of devoted citizens seeking to serve their united country in peace with the devotion with which, as they had understood it, they had sought to serve it in war? And who of us would have thought that it would soon be seen that the giving of the youth to the mother was the giving to the country of an enlightened and faithful public servant who, when the storm of war had passed, having been freed from imprisonment himself, would yet seek by a devoted discharge of his public duties to imprison his countrymen by binding them with enduring ties of respect and affection for the institutions of our forefathers, and who would be found dedicating his life to such work when the voice of the Father called him from the highest judgment seat in the land to what we would fain believe was his reward eternal.

These thoughts, while they afford consolation for our loss, should stimulate our endeavors. In this latter aspect let us, both judge and lawyer, before we leave these hallowed precincts to-day,—hallowed because here justice is administered and here we each and all have avowed our fealty to the Constitution and our purpose to maintain it,—resolve to seek more devotedly to discharge the duties which are upon us, to the end that, following in the footsteps of our brother whose life we to-day recall and of all those noble souls who have gone before, we may live by our good works; yea, continue to live when we are gone.

The resolutions of the Bar and your remarks, Mr. Attorney General, will be spread upon the minutes, and any other tributes that may be received will be placed upon the files.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1914.

ORDER.

"In the month of August the Hon. James Clark McReynolds was appointed an Associate Justice of this court, to fill the vacancy caused by the death of Mr. Justice Lurton, and on the 3d day of September the oath of office required by § 1756 of the Revised Statutes was administered to Mr. McReynolds by the Chief Justice. The new Justice is present to-day, and before he takes his seat the clerk will read the commission, and will administer to him the oath pointed out by § 257 of the Judicial Code; that is, the judicial oath."

The clerk then read the commission, and Mr. McReynolds took the oath of office, and was escorted by the marshal to his seat on the Bench.

The Chief Justice continued:

"To enable the members of the court to pay their respects in a body to the President, as has been the usage from the beginning, the court will adjourn to-day without transacting business until the usual hour to-morrow. All motions, therefore, which are noticed for to-day, will stand over until to-morrow, when the call of the docket will be begun. Before adjourning to-day, however, applications for admission to the bar will be entertained, as well as any other formal motion which may be disposed of as a matter of course."

October 12, 1914.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1914.

ORDER.

Mr. Solicitor General Davis presented the Hon. Thomas Watt Gregory, Attorney General of the United States, and it was ordered that his commission be recorded.

October 12, 1914.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1914.

ORDER.

There having been an Associate Justice of this court appointed since the adjournment of the last term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Charles E. Hughes, Associate Justice.
For the Third Circuit, Mahlon Pitney, Associate Justice.
For the Fourth Circuit, Edward D. White, Chief Justice.
For the Fifth Circuit, Joseph R. Lamar, Associate Justice.
For the Sixth Circuit, William R. Day, Associate Justice.
For the Seventh Circuit, James C. McReynolds, Associate Justice.
For the Eighth Circuit, Willis Van Devanter, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

October 19, 1914.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1914.

IN MEMORIAM JOHN MONTGOMERY WRIGHT.

The Chief Justice said:

"Gentlemen of the Bar:

"It is my painful duty to announce that since we last met the marshal of the court, Major Wright, has died. This day twenty-seven years ago he entered upon the performance of his duties as marshal of this court, and from that time until a few hours ago, when he was called to his last account, with that modesty, simplicity, and honorable devotion to duty exhibited in so many instances by the children of that great school out of which he came,—the Military Academy of West Point,—he discharged the responsibilities resting upon him as the marshal of this court. In war and in peace he exemplified in his life a patient, simple, brave, single-minded, and devoted performance of public duty. Therefore, as a token of the affection we bore him and of the respect we had for him, we shall do nothing to-day but hear motions to admit and other motions, and adjourn until to-morrow morning."

January 4, 1915.

APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1914.

ORDER.

It is ordered by the court that Frank K. Green be, and he is hereby, appointed marshal of this court in the place of John Montgomery Wright, deceased.

January 5, 1915.

APPENDIX VII.

Supreme Court of the United States.

OCTOBER TERM, 1914.

ORDER.

The reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume,

It is therefore now here ordered that he publish an additional volume in this year, pursuant to § 226 of the Judicial Code, approved March 3, 1911.

June 1, 1915.

APPENDIX VIII.

Supreme Court of the United States.

OCTOBER TERM, 1914.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued to the next term.

June 21, 1915.